

Commission of Inquiry
Into the Wrongful
Conviction of David Milgaard
before
THE HONOURABLE MR. JUSTICE
EDWARD P. MacCALLUM

Transcript of Proceedings
and
Testimony before the Commission
sitting at the
Radisson Hotel at
Saskatoon, Saskatchewan

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Volume 82

Inquiry Proceedings



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



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- BY MR. HODSON

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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

Before Mr. Hodson begins the business of the day,
I just have a few remarks.

On the subject of section 9 of
the Canada Evidence Act, the work of the
Commission will soon turn to the trial of David
Milgaard. The Supreme Court of Canada, in the
Milgaard reference, declared that the trial was
fair. That was also the position of the
Saskatchewan Court of Appeal from whose decision
leave to appeal was denied by the Supreme Court
of Canada. Deference to those decisions will not
prevent the Commission from examining the state
of the law as it was in 1969 and 1970 when the
preliminary and the trial took place.

Any lawyer, I think, who has
read the trial transcript, as I did for the first
time about a year and a half ago, will see that
the application of what has become known in the
criminal law as the Milgaard rules might well
have had a profound effect upon the jury's
verdict of guilt. Indeed, the problem occurs not
only to the legally trained. I invite you to



1 read an article, document ID 039137, which
2 appeared in *The Saskatoon StarPhoenix* on the 25th
3 of January, 1992. Let us do so together. Can we
4 have it on the large screen?

5 A Is the bottom edge --

6 MR. HODSON: We'll have to get the full
7 page, please.

8 *(Paused to read article)*

9 COMMISSIONER MacCALLUM: I see that the
10 speed readers are finished. Does anyone require
11 more time?

12 As I look over the lawyerly
13 faces before me, I recognize some who are true
14 experts in the criminal law. One counsel has
15 informed a witness that his experience in the
16 practice of criminal law is 30 years. Others I
17 know have practiced even longer.

18 There are some, though, myself
19 included, who cannot lay claim to any such degree
20 of specialization. We might feel the need to
21 improve our education about the sometimes vexing
22 problems of the Canada Evidence Act and its
23 application at trial. I do not wish to stifle
24 initiative, but I feel obliged, as the one
25 responsible for expenditure of public funds, to



1 head off needless expense on research of the law
2 by counsel present.

3 In view of what I perceived
4 last year might be a problem in the application
5 of section 9 of the Canada Evidence Act in the
6 Milgaard trial, I instructed members of
7 Commission staff to conduct research on the
8 subject. I do not mean to imply criticism today
9 of counsel, judge or jury in that trial; it would
10 be presumptuous at this stage to do so. Mr. John
11 Agioritis, notwithstanding his other more
12 pressing duties in the Commission, has managed to
13 produce a scholarly treatment of the subject in
14 draft form only. As time permits, the Commission
15 will approve and release the finished product
16 for, it is hoped, the sufficient instruction of
17 counsel in preparation for a systemic phase
18 inquiry with the help of an expert or experts in
19 criminal law. In the meantime, our taxing
20 officer has been instructed to cast a jaundiced
21 eye over legal accounts which seek to fund
22 research on this subject from Commission coffers.

23 As we take a much needed
24 two-week break from sittings, I ask you to ponder
25 one further matter. Mr. Caldwell and Mr. Tallis,



1 as you know, were prosecutor and defence counsel
2 respectively. Without setting any limits, at
3 least at present, upon the scope of their
4 examination as witnesses in this Inquiry, I want
5 you to exercise restraint in putting questions to
6 them which invite their opinions on section 9 of
7 the Canada Evidence Act or the probable effect
8 upon the trial of its application, or indeed upon
9 the jury system itself which produced the result
10 which so concerns us. As I said, we will see to
11 it that both legal research and impartial expert
12 evidence is made available to you.

13 As well, it might seem unfair
14 to tax the very counsel whose arguments in 1970
15 resulted in the Milgaard rules with a critique of
16 those arguments. For one thing, they are not
17 impartial. In the case of Mr. Tallis, recently
18 retired from the Saskatchewan Court of Appeal, a
19 debate on evidentiary matters might as well
20 appear unseemly if, for example, he were invited
21 to disagree with the position taken by his own
22 Court. In any case, both men, as barristers,
23 must have laid open the wisdom, or lack thereof,
24 of their work in the public domain. The record
25 speaks for itself as to the arguments put and the



1 rulings made. Please understand that these men
2 are not offered as experts for the purpose of
3 giving opinion evidence, so I suggest, with
4 respect, that trying to use them as such will not
5 advance the work of the Commission.

6 Mr. Hodson, would you care to
7 proceed.

8 MR. HODSON: Thank you, Mr. Commissioner.
9 I believe Ms. Knox had an issue she wished to
10 raise.

11 COMMISSIONER MacCALLUM: Yes.

12 MS. KNOX: Mr. Commissioner, I do have one
13 issue arising from today's reporting, and I
14 should confess at the outset, the only reporting
15 I've seen is the newspaper, I was delayed at my
16 office yesterday, I've seen no other media, but
17 in the newspaper report this morning, and again I
18 make this comment appreciating that it's
19 difficult for a reporter to capture in a short
20 story everything that goes on in the hearing
21 room, but I do have a concern about the stories
22 reflecting the fullness of the evidence.

23 Reference is made in the story
24 this morning to the fact that yesterday -- or on
25 Tuesday Mr. Caldwell received a police, from



1 police a lab report on evidence from the two rape
2 cases, and I'm reading directly:

3 "Caldwell said he didn't think it was
4 relevant and can't remember if he gave
5 it to the defence lawyer along with
6 other disclosure information."

7 And it's the last sentence that causes me concern
8 and for that reason I had it put up on Elmo so
9 that my comments will be, or the reason for my
10 comments will be visible. It states the lab
11 report has a wavy line drawn through it and the
12 word omit in the circle. Mr. Commissioner, there
13 are two other features of that lab report that
14 make it more than an exclusion by virtue of
15 printing the word omit. If you look to where the
16 blue circle is in the centre of the page, it
17 refers to two people who, and not to the Gail
18 Miller file, as all other reports that were
19 provided to him indicated they were in relation
20 to the Gail Miller murder, and at the top he made
21 a specific note that this was a different file,
22 indicating his mindset at the time that it was
23 unconnected to this particular case, and as I
24 indicate, there are two reasons for that, or
25 perhaps three. One is the name as it appears.



1 I've examined it thoroughly, nowhere is there any
2 indication of a file number that connects it to
3 Miller, there's no name that connects it to
4 Miller, there's nothing. It is headed in a way
5 different from all other lab reports if one takes
6 the time to pursue them and it does have the
7 notation that it was, in his mind, a different
8 file, and indeed it appears to be a different
9 file.

10 COMMISSIONER MacCALLUM: Thank you,
11 Ms. Knox.

12 MR. WOLCH: Mr. Commissioner, if I may
13 address you. I'm taken aback a bit by the last
14 comments of My Friend. I don't know what she's
15 asking the Commission to do. Obviously you'll --

16 COMMISSIONER MacCALLUM: Nothing I suppose.

17 MR. WOLCH: -- rule on what you hear here.
18 Many reports that I see in the press I would like
19 to argue about or say it didn't do this or didn't
20 do that, the media is faced with days of
21 evidence, they pick what they choose, they are
22 free to do it, but I don't see any purpose in
23 making a speech here to yourself, it's out of
24 your jurisdiction to tell the media what to take
25 as important or not, and if My Friend has a



1 problem with the media, she's free to go to the
2 reporters and tell them what she feels they
3 should be covering or not and they will have the
4 ultimate word, but I don't know the purpose of
5 addressing yourself and saying to the Commission
6 I'm not happy with today's report when My Friend
7 knows full well that it only puts the Commission
8 in an awkward position.

9 Thank you, sir.

10 COMMISSIONER MacCALLUM: Well, it is a
11 comment which does not cause me to make any
12 remarks about it, let's leave it at that.

13 **THOMAS DAVID ROBERTS CALDWELL, continued:**

14 **BY MR. HODSON:**

15 **Q** Good morning Mr. Caldwell.

16 **A** Good morning, sir.

17 **Q** If we could call up 267924.

18 COMMISSIONER MacCALLUM: Is it 924?

19 MR. HODSON: 924, yes.

20 COMMISSIONER MacCALLUM: Thank you.

21 **BY MR. HODSON:**

22 **Q** Yesterday we finished off going through many of
23 your notes. I now want to turn to the January
24 time period and the trial time frame and just for
25 the record identify a few documents. This would



1 be the indictment that you filed with the court on
2 January 9th, 1970; is that correct?

3 A Yes, sir.

4 Q And that would at the time require you to list the
5 witnesses that you intended to call?

6 A It would.

7 Q If we could then go to 006896 -- or 895, please.
8 Sorry, 896. And again we talked yesterday about
9 Mr. Rasmussen being the Trav-a-leer Motel
10 individual, this just confirms that he was served
11 with the subpoena; is that right? You recall
12 yesterday there was some doubt as to whether he
13 could be located. If we can just go to the next
14 page, 006895, just to confirm that Inspector
15 Roberts was subpoenaed by you for the trial. Do
16 you see that?

17 A Yes, I do, sir.

18 Q January 15th. And go to 006961, and this is the
19 actual subpoena that names Inspector Roberts, and
20 I believe you told us yesterday, Mr. Caldwell, and
21 please correct me if I'm wrong, that you did not
22 believe you needed to call Inspector Roberts for
23 your, for the Crown case, but that you would call
24 him as a Crown witness if Mr. Tallis wished you to
25 do so; right?



1 A That's my memory of it, sir.

2 Q And would that be, then, why you would subpoena
3 him for the trial?

4 A I can only assume that now, yes.

5 Q If we could then go to 006909.

6 Mr. Commissioner, this is the
7 jury list that was on the file, I would ask for an
8 order that it not be published or that the names
9 not be published for this document, or any
10 information regarding the names of either jurors
11 or anybody on the juror list.

12 COMMISSIONER MacCALLUM: Yes, I order that.

13 BY MR. HODSON:

14 Q And I simply put it up, there's another document
15 I'll refer to a bit later about the jury process.
16 Do you have a recollection regarding the jury
17 selection, Mr. Caldwell, was there anything
18 unusual about that process?

19 A I wouldn't say unusual, I believe it went fairly
20 expeditiously at the time.

21 Q Right. And I will turn up a document a bit later
22 that identifies the number of challenges,
23 etcetera, and I believe that it did, in fact, go
24 very quickly?

25 A That's right, yeah.



1 Q And if we could call up 006905, please. And I
2 believe, at the time, there was 11 men and one
3 woman on the jury; is that right?

4 A That's my recollection, sir.

5 Q And did that -- was there anything unusual about
6 that in 1970 as far as the make-up of a jury, or
7 --

8 A No, not in my view.

9 Q We then find a list here, and I think this is
10 January, this is a to-do list by trial, and I'll
11 just quickly go through some of these items. You
12 will see again --

13 MS. KNOX: If we can identify for the
14 witness, that is page 170, and it's number 1
15 file.

16 A Oh, thank you. I have that page, Mr. Hodson.

17 BY MR. HODSON:

18 Q Thank you. If we go down the page to Mary
19 Marcoux, we saw this yesterday about 'and re
20 Nichol John's statements', and would that be to
21 talk to her about Nichol John's statement --

22 A I can only assume that would be.

23 Q -- in the preliminary hearing room?

24 A Yeah.

25 Q The one we talked about where she said she wasn't



1 going to testify about nothing, that statement?

2 A No doubt.

3 Q That would be the statement?

4 A Yes, it would, sir. It wouldn't be about her.
5 The first part of the note is about her evidence,
6 as it were, and the second would be about that
7 statement.

8 Q And then we see a note number 4, if we could just
9 call that out, 'Cal' and 'Roberts, continuity Gail
10 Miller clothes', and then a checkmark. Do we take
11 it from that, then, this is where Mr. Tallis told
12 you you didn't need to call Roberts for
13 continuity?

14 A It must be, because I checked that and the next
15 three items and before the heading number 4 with
16 'Cal', I checked that, which means that I either
17 phoned him or talked to him in person about all
18 those --

19 Q Yeah.

20 A -- and received his agreement.

21 Q And it says 'okay', 'Cal says okay with Kleiv
22 only'. So I take it Mr. Tallis said Kleiv can
23 prove the coat?

24 A Yes.

25 Q And then, as well, it looks as though 'insanity et



1 al', and the answer 'no'; would you have raised
2 that with him?

3 A I would have, just so that I'd have some idea
4 where we may be going in the case.

5 Q And then again, if you could scroll down to 7
6 please, 'interview Cadrain, John, Wilson per notes
7 Monday p.m.'; would that be Monday night of the
8 trial?

9 A Yes, I believe so.

10 Q And then number 8, 'Emson, sources blood in
11 seminal fluid, sperm versus seminal fluid, pubic
12 and head hair by Kleiv, would be significant
13 difference between double and single edge'; would
14 these just be notes to follow with Kleiv?

15 A That's right.

16 Q And the next page, the top, 14 you've got a note
17 'reward offered, when, and claimed', and I presume
18 that's referring to the reward that was offered by
19 the Saskatoon Board of Police Commissioners?

20 A That's the one.

21 Q And would that be important in preparing for your
22 case?

23 A Not -- no, I don't think so, but somewhere it
24 would have come to light and I would want to find
25 out its present status, is how I would describe



1 that, sir.

2 Q And at that time, I mean, I think we have seen
3 evidence that it was at about a year later the
4 reward was granted?

5 A Yeah.

6 Q Do you recall in the course of your preparations
7 for trial, including completing the trial,
8 discussing the reward with any witnesses?

9 A Not, not in any sense in or through the trial. As
10 I think I mentioned, I felt Mr. Cadrain should
11 have that reward, and I think there is the -- a
12 date or two written down, Mr. Hodson, as time goes
13 on here.

14 Q Yeah. And was that something you would have --
15 did you reach that conclusion during -- before the
16 trial was completed?

17 A I wouldn't -- I don't know, but it in no way bore
18 on my dealings with Mr. Cadrain.

19 Q Okay. But is that something that you would have
20 thought in your preparations? I mean, I think you
21 identify that you would have been aware of the
22 reward, is that fair?

23 A I believe so. I think we saw a clipping
24 earlier --

25 Q Right.



1 A -- in this process.

2 Q And, again, my question was, in the course of your
3 preparations and in prosecuting Mr. Milgaard
4 through to the completion of the trial, had you
5 made conclusions about who you thought ought to
6 get the reward?

7 A I don't think, at that stage, I had or could have.

8 Q And do you have a recollection of Mr. Cadrain
9 raising the reward with you in your interviews
10 before and during the trial?

11 A I don't have, and I can't say that he did.

12 Q And then, again, 'dictate letter to Cal re
13 statements', we'll see some of those --

14 A Okay.

15 Q -- letters shortly. 'Put opening together, intro
16 remarks', etcetera. And then '19. Records', I'm
17 assuming that's criminal records for Wilson, John,
18 Cadrain, and Milgaard?

19 A That's right.

20 Q And we'll see some of those a bit later. And then
21 do you know what this reference is, 'Karst, April
22 5 a Saturday?'

23 A Evidently I needed or wanted to check with
24 Detective Karst as to whether April 5th was a
25 Saturday, which the reason for that escapes me at



1 the moment.

2 Q If you can just scroll down, please, to 22. And
3 22 looks like 'Karst to Regina', then there is
4 another note, 'Cal', presumably that's his phone
5 number?

6 A Yes.

7 Q And it says 'reward'; would you have discussed the
8 reward with Mr. Tallis?

9 A I must have. The '22. Arrange Karst trip to
10 Regina', and presumably that's Inspector Wood's
11 phone number there, I presume that's either Mr.
12 Tallis' probably home number. It says 'reward, 3
13 Regina witnesses, advised Cal 8:45 Sunday' --

14 Q Sorry, just on the reward.

15 A I'm sorry.

16 Q Is it something Mr. Tallis asked you, "who got the
17 reward?"

18 A He may well have, but it clearly hadn't been made
19 at that point, as I recall sir.

20 Q And even though it may not have been made, is it
21 something that Mr. Tallis may have inquired about,
22 for example, that he may wish to use at trial?

23 A The way the three headings are written I assume it
24 originated with me, because it's in my writing,
25 it's the first of three items. I can't see



1 anything that, that indicates that he raised it
2 with me, but that is conceivable.

3 Q And then a note, '3 Regina witnesses, advised Cal
4 8:45 Sunday, January 18', and I presume that would
5 be Melnyk, Lapchuk and Ute Frank?

6 A That's right.

7 Q And we'll see some more documents about that
8 shortly.

9 A Okay.

10 Q So would that be -- I guess that would be Sunday
11 morning or Sunday evening?

12 A Well it must have been the Sunday evening, because
13 that's when that happened, as I recall.

14 Q And so that would be the night before the trial
15 started?

16 A That's right.

17 Q And, again, there's some correspondence I'll show
18 you later.

19 A Okay.

20 Q And then 'nil in opening address re', and is that
21 you are telling him "lookit, I'm not going to
22 include that"?

23 A Oh yes, that's what that would be, because at that
24 point none of us had any, you know, sound
25 information on what that really was all about.



1 Q And then what is this comment, 'same day I heard'?

2 A Yeah, 'same day I heard' refers to when I advised
3 Cal, Sunday, January 18th.

4 Q So if I can summarize this, you would have heard
5 on January 18th, you would have phoned Mr. Tallis
6 on that day --

7 A Yeah.

8 Q -- about the witnesses, and you would have told
9 him that you are not going to put it in your
10 opening address?

11 A Yeah, that's right.

12 Q If we could then go to 007076. And these notes,
13 or presumably this note is for some -- this part
14 that went to --

15 COMMISSIONER MacCALLUM: Could I just --

16 MR. HODSON: Sure.

17 COMMISSIONER MacCALLUM: -- ask your
18 indulgence, please. Which three witnesses, three
19 key witnesses?

20 A Oh, no, the -- no, these would refer to the
21 so-called reenactment witnesses, Mr. Commissioner.

22 COMMISSIONER MacCALLUM: Oh.

23 A That's the three we're speaking of there.

24 COMMISSIONER MacCALLUM: All right.

25 A Yeah.



1 COMMISSIONER MacCALLUM: And they would not
2 be put in your opening address?

3 A That's what I'm --

4 COMMISSIONER MacCALLUM: That's what the
5 note is about? Okay.

6 A Yeah.

7 BY MR. HODSON:

8 Q And again, just the notes, it appears that these
9 are running notes, and some of the earlier notes
10 would have been prior to the trial, this note
11 presumably would have been on Sunday, January
12 18th?

13 A It actually was, and I phoned Mr. Tallis that
14 evening, and -- to avoid any, you know, delay in
15 doing that.

16 Q Right. And so let's just, just to skip back a
17 bit, go to 007076. This is a January 12th, 1970
18 letter, so this would be eight days prior to the
19 trial, commencement of the trial -- pardon me,
20 seven days, and that's number 4 in the top
21 right-hand corner?

22 A Yeah, I have that Mr. Hodson, thanks.

23 Q If we could just go through parts of this. In
24 this letter you are advising Mr. Tallis about a
25 new sketch to tender into evidence, and I believe



1 that was the photograph of part of a city map, as
2 we've seen many times?

3 A That's correct.

4 Q Go down to the next paragraph. You tell him that
5 the indictment -- you've copied, given him a copy
6 of the indictment, only one new witness in
7 addition to those that were called at the prelim,
8 Mr. MacLeod of the toxicology. You go on to talk
9 about that, and continuity, and next paragraph.
10 No, scroll up:

11 "At the moment there is only one witness
12 who was called at the preliminary
13 inquiry whom I do not intend to call at
14 the trial, that being Maria Indyk. The
15 evidence she gave at the preliminary
16 inquiry was different to that which she
17 had given in her statement to the
18 police, in which she said that she saw
19 one female and one male when she was
20 waiting to get into the church, while at
21 the preliminary inquiry she spoke of
22 seeing two females. I would supply you
23 with a copy of her statement but I find
24 that in some manner all but the first
25 page of this statement have been



1 misplaced and I have been unable to find
2 the remainder of the statement either in
3 my material, nor can the remainder of it
4 be located at the police department. If
5 any whom --"

6 A I think that should read 'if and when'.

7 Q "If and when I locate either the original
8 or a copy of her statement I will
9 forward a copy of the complete statement
10 to you. In the meantime, however, I
11 have had Mrs. Indyk subpoenaed and she
12 has been advised to stand by until
13 further notice, so that she will be
14 available should you wish her to be
15 called and, no doubt, we can discuss
16 this in the near future."

17 And just a couple points on that, Mr. Caldwell.

18 A Uh-huh.

19 Q In this Inquiry I've only got the one page of her
20 statement as well so it appears, back in 1970,
21 that's all that you had?

22 A That's right.

23 Q Secondly, it appears that you made the decision
24 not call her, I take it, at trial?

25 A I assume so, from the way this reads.



1 Q And would it be fair to conclude, from that, that
2 you didn't think she had evidence of value --

3 A Umm.

4 Q -- or --

5 A Yeah. It was, I guess, a combination of no first
6 page of the statement. Whatever she had testified
7 at the preliminary inquiry, I don't think I could
8 essentially understand it, in a word.

9 Q I see. And so you weren't going to call it, but
10 you told Mr. Tallis "I've subpoenaed her and, if
11 you wish, I will call her"?

12 A Yes.

13 Q Is that fair?

14 A Absolutely.

15 Q And would there be an advantage, again if Mr.
16 Tallis wanted that evidence before the jury, would
17 there be an advantage to a defence to have the
18 Crown call the witness?

19 A Well if I simply called her, and the next order of
20 business he could cross-examine her --

21 Q Yes.

22 A -- and suggest that 'it really happened in A, B, C
23 way', whatever that was, that's an advantage in a
24 sense.

25 Q And second -- we touched on this yesterday with



1 respect to, I think, Mr. Roberts -- the second
2 thing would be that in some cases, if it was the
3 only evidence that was called by the defence, it
4 might require Mr. Tallis --

5 A Yes.

6 Q -- to go first?

7 A That was a definite consideration, and I -- I feel
8 that I wanted not to put him in that position, to
9 state it awkwardly. In other words, by doing it
10 this way, it would -- it would preserve his right
11 to address the jury last, the way I -- my
12 understanding of the law was.

13 Q But why, why didn't you just say "if you want her
14 evidence you call her"?

15 A Well, because that would trigger the other, that
16 would force him to go first before the jury. If
17 he called her he is calling a defence.

18 Q That's right.

19 A Yeah.

20 Q And would that not be an advantage to you?

21 A Well, no, but I wouldn't want to put him in that
22 position --

23 Q Why not?

24 A -- for that very trifling reason. By calling one
25 fairly brief witness, to put him in a position



1 where he would have to address the jury first, I
2 simply didn't feel there was any need to do that.

3 Q Right. You could have, Mr. Caldwell?

4 A Oh yeah, certainly could have, yeah.

5 Q And I don't mean to be critical in asking the
6 question.

7 A No, no.

8 Q I'm just trying to understand what prompted you to
9 do what you did.

10 A That's what I think happened, sir.

11 Q You then go down, and you say:

12 "I have also had Mrs. Shirley Wilson of
13 Regina subpoenaed and I have also
14 advised her to stand by and await
15 further notice. I am not sure whether I
16 will call her as part of my case or not,
17 but perhaps we can also discuss this
18 before the trial or once it gets under
19 way on about January 19th."

20 And I think Mrs. Wilson was one that at the
21 prelim, we saw evidence earlier from you and the
22 documents that you did not intend to call her as
23 a witness for the prelim, but you called her at
24 Mr. Tallis' request; correct?

25 A Yes.



1 Q And I believe -- I don't believe Mrs. Wilson ended
2 up testifying at the trial, but I believe you had
3 her available, is that correct?

4 A I would have to look at the transcript.

5 Q That's fine.

6 A Okay.

7 Q I think that's what the transcript reflects.

8 A Okay, yes, very good.

9 Q Then we go on:

10 "As I advised you, my file indicates
11 that among other materials I did forward
12 you the statements of Mr. and Mrs.
13 Danchuk with my letter of September
14 19th, 1969."

15 So I take it there might have been an issue there
16 where Mr. Tallis was requesting that?

17 A Yeah, or may have misplaced it or something.

18 Q And then you say, scroll down:

19 "As you will further recall, and as I
20 advised you during the preliminary
21 inquiry, Mrs. Cadrain, the mother of
22 Albert Cadrain, appeared in my office
23 one morning during the preliminary
24 inquiry with a paper bag containing a
25 pair of trousers, apparently eaten by



1 acid, which I believe to be the ones
2 worn by Ron Wilson when the group left
3 Regina and changed, by him, at Cadrain's
4 house after the group of three persons
5 reached Cadrain's house on the morning
6 of January 31st. It is not my
7 intention, at this time, to tender the
8 trousers as an exhibit, however, they
9 are in my office and available at any
10 time should you wish them for any
11 purpose at the trial."

12 Now that's fairly self explanatory, Mr. Caldwell,
13 I take it that's what happened?

14 A Yeah, that is, sir.

15 Q And we looked, yesterday, at that document or the
16 note where you were worried that -- I shouldn't
17 say 'worried', or maybe you were worried -- that
18 you and your secretary may have to be witnesses
19 for continuity of that?

20 A That's the same episode, sir.

21 Q So I take it that you had these pants, you did
22 not -- and you believed them to be Mr. Wilson's?

23 A That's correct.

24 Q And you decided that they were not of probative
25 value for the trial, you didn't see a need to put



1 them in?

2 A That's the, what it boiled down to, really.

3 Q And you are telling Mr. Wilson "they are here, you
4 can look at them, and you can do whatever you wish
5 with them"?

6 A Yeah, absolutely.

7 Q And if Mr. Tallis had asked you to put the pants
8 in either through Ron Wilson or someone else,
9 other witness, would you have done so?

10 A Certainly.

11 Q Do you recall any discussion with him about the
12 pants?

13 A I don't, Mr. Hodson, at this point.

14 Q Okay. If we can then finish off the letter:

15 "I, at the moment, do not have any
16 further new witnesses whom I intend to
17 call at the trial except as mentioned
18 above, however, should I plan such
19 action I will notify you as soon as I
20 have discovered any such witness or
21 witnesses and will advise you of what I
22 expect them to say, if called. I trust
23 that this will be satisfactory."

24 If we can then go to 009372, and I don't know
25 what -- this is a handwritten note, I don't know



1 that you need to see the original on this, I'm
2 not sure what folder this is from.

3 A Okay.

4 Q But this is your handwriting?

5 A Yes. Can I just have a quick look here?

6 Q Sure. I think we -- it is in a different folder.
7 Ms. Knox, do you know where that is?

8 MS. KNOX: I believe I do.

9 A Oh, thanks very much.

10 MS. KNOX: For the record, it is in folder
11 number 3 of the --

12 BY MR. HODSON:

13 Q So folder number 3, and it's got the number, well
14 it's got 95. And this is a two-page document; --

15 A Right.

16 Q -- is that correct?

17 A That's correct, and it's the same numbering
18 that --

19 Q So this is January 14th, 1970?

20 A That's right, sir.

21 Q And it appears to be notes of yours either with a
22 meeting or a call with Paynter; is that right?

23 A That's right.

24 Q And this, let's just quickly go through it, I
25 think this deals with the secretor issue. And



1 would this be Mr. Paynter explaining things to
2 you?

3 A It would, sir.

4 Q And it's, 'A "secretor" is a person that has his
5 blood antigens or blood grouping substances in his
6 other body fluids, perspiration, seminal fluid,
7 saliva, tears. About 80% of people are secretors.
8 This means you should be able to find out their
9 blood groupings from these bodily fluids.' And
10 then 'P', I presume, is Paynter?

11 A Right.

12 Q 'Checked the 2 frozen lumps, found one', and we've
13 got 'I1', and that was the exhibit label we have
14 seen on that vial?

15 A Uh-huh.

16 Q So 'found one to contain spermatozoa and since it
17 was a clear, pale yellowish liquid when thawed
18 made no attempt to examine it for blood as such.
19 At this time he did proceed to check it' -- if you
20 could scroll right down to the bottom -- 'he did
21 proceed to check it to see if he could find any
22 blood group antigens in it. He found A antigens
23 in the liquid which would indicate the fluid was
24 probably from a group A person who would be a
25 secretor. At a later date he examined the same



1 sample in which he had found seminal fluid, this
2 time examining for the presence of blood, and got
3 a positive presumptive test for blood in the
4 sample. The presence of blood as such in the
5 sample would account for the presence of antigens
6 in the seminal fluid of a non-secretor and, since
7 he found A antigens only, it indicates the blood
8 would be from a group A person. Because of the
9 presence of A antigens it cannot be Gail Miller's
10 blood which is type O.'

11 A Yeah.

12 Q Now would that be your understanding then, at the
13 time Mr. Caldwell, of what and how -- or let me
14 back up -- of what it was that Mr. Paynter had
15 done with the sample?

16 A Yes, that would -- wanting to understand it in
17 that interview with him.

18 Q And if I can put it this way, and you tell me if
19 you agree, but as far as the case against Mr.
20 Milgaard was concerned, at the time you believed
21 him to be a non-secretor and, therefore, that was
22 not an explanation as to why the -- why his A
23 antigens would be in the semen; correct?

24 A I believe that's correct, sir, yeah.

25 Q Yeah. And so we know in the frozen semen, if it



1 is to be the Crown's position or theory or
2 evidence that the frozen semen came from the
3 person who raped and murdered Gail Miller, that
4 that would be step 1; step 2 would be to say 'look
5 at the physical characteristics to see if we can
6 link that frozen semen to Mr. Milgaard'; correct?
7 That would be --

8 A I assume so.

9 Q Yeah. And the fact that there are A antigens in
10 that frozen semen, you then go look at Mr.
11 Milgaard, and according to Mr. Paynter's tests --
12 and there's some issue over that at the time and
13 subsequent -- but you believed that that showed
14 that Mr. Milgaard was type A and a non-secretor?

15 A Yes, which, again, I felt was evidence in his
16 favour.

17 Q Okay. Let me carry on.

18 A Okay.

19 Q You then, or the police then, or Mr. Paynter then
20 looked for another reason to explain why or how
21 the semen of an A non-secretor might have A
22 antigens in it and discovered that there was blood
23 in the semen; correct?

24 A I --

25 Q Is that --



1 A I'm sorry, I believe that's correct, sir.

2 Q Right. And the fact that there was blood in the
3 semen, the blood contains antigens, correct?

4 A Evidently so, yes.

5 Q And that that might explain why A antigens were
6 found?

7 A Yeah.

8 Q And I think the next step would be to say, okay,
9 well it could have come from a A non-secretor --

10 A Uh-huh.

11 Q -- because the antigens in the semen are explained
12 by blood; right?

13 A Right.

14 Q And then the next step would be to try and
15 establish some way that -- explanation, if I could
16 call it that, for there to be blood in the semen,
17 and I think that's where Dr. Emson gave evidence
18 about the ways in which blood from a young male
19 might find its way into semen, a cut for example?

20 A Yeah, I think that's correct, sir.

21 Q Right. So is that a fair summary of what you
22 would have understood and what you did at the
23 time?

24 A Yes.

25 Q Sorry, I can't promise that I won't bring up



1 'secretor' again, Mr. Caldwell.

2 A That's fine.

3 Q If we could go to 007079. And, again, this is
4 page 1, I'm not sure if this is in folder 1, and
5 this is a note.

6 A Umm, thank you.

7 MS. KNOX: It's in folder 1, yes.

8 BY MR. HODSON:

9 Q So this is in your folder 1, page 1, and it's a
10 note at the top, it appears that it's a half-page
11 note, I think you are looking at?

12 A That's right.

13 Q And it appears to be written on a piece of paper
14 that related to 'supply witnesses with copies of
15 the preliminary evidence', but the note states 'N.
16 John's statement that she saw it and doesn't know
17 why he didn't kill her heard by M. Marcoux, A.
18 Cadrain, Mrs. Miller'?

19 A That's correct.

20 Q And this is your handwriting?

21 A Yes.

22 Q Would it have been made back in 1969-1970?

23 A I would think so. The -- I think this is the
24 piece of paper which I resorted to to get the
25 accurate wording written down before that escaped



1 me, and it very likely, I think, was in my binder
2 at that time, sir, and I --

3 Q And you saw -- we saw another note, are you able
4 to tell us that -- I think you told us you know
5 you wrote it down right away?

6 A Yeah, correct.

7 Q Are you able to tell us where you wrote it or
8 which of these?

9 A Well this looks like the likelier candidate for
10 'right away' to me now, Mr. Hodson.

11 Q All right. The fact that it's on a note that
12 talks about copies of their preliminary evidence,
13 does that make any --

14 A That --

15 Q -- sense?

16 A Yeah, that would be almost a form thing, typed
17 out, and when I wanted to get this written down I
18 ended up simply tearing it off above the typed
19 line 7 there.

20 Q Okay. If we could then go to 007074, please. And
21 this is your January 15th letter, this is the
22 Thursday, the trial started on the Monday?

23 A Okay. I have that. Pardon me.

24 Q And document number 6, if we call out the first
25 two paragraphs, I think this is where we get into



1 Maurice Cerato. You say:

2 "Further to my telephone call last
3 night, as mentioned Nichol John's father
4 called Detective Karst here, Monday
5 night, January 12th, and told him that a
6 youth in Regina had approached him as to
7 having evidently received a pair of
8 pants with blood on them, from Milgaard,
9 some time ago."

10 And you go on to describe that:

11 "... Karst advised me of this on Tuesday
12 ...",

13 the 13th:

14 "... and I had him go to Regina
15 Wednesday, the 14th, where he located
16 this youth, one Maurice Cerato ... and
17 obtained the pants in question from him
18 and took them to Cpl. McDonald at the
19 Crime Detection Laboratory.

20 Detective Karst took a
21 statement from Cerato concerning this
22 and I enclose a photostatic copy and a
23 typed copy, since the photostat is
24 somewhat hard to read.

25 I had Detective Karst subpoena



1 Cerato and I will have him up and
2 interview him, I hope, early next week,
3 perhaps around January 20th. I

4 I have asked Cpl. Molchanko and
5 S/Sgt. Payntor to examine the pants both
6 as to rips or tears and for any traces
7 of blood (the pants having been
8 drycleaned and washed since) and I will
9 let you know the results of their
10 examinations as soon as they are known
11 to me.

12 Depending on the results of the
13 examinations and on my interview with
14 Cerato, I may call him as a crown
15 witness at the trial and probably at a
16 later stage of the crown's case."

17 And then just on the note, if we can go to the
18 left-hand side, can you tell us what that note
19 says?

20 A Yeah. It says 'told C', for Cal in this instance,
21 'on or about Thursday 22nd I didn't intend to call
22 in view of Molchanko's report'.

23 Q Right, and I don't think we need to go to Cerato's
24 statement or Molchanko's report, --

25 A Okay, sir.



1 Q -- but basically that lab report indicated they
2 couldn't find any identifiable blood on those
3 pants; is that --

4 A That's my recollection.

5 Q And so is it fair to conclude from this that you
6 found out about this potential witness on the
7 12th, advised Mr. Tallis on the 14th after you got
8 a statement, got a lab report, and then concluded
9 that you wouldn't call him?

10 A It looks like I advised him on Thursday the 22nd.
11 I think all the rest of that is correct, sir.

12 Q Right. And scroll down:

13 "As I advised you earlier, to save
14 having to call one or two additional
15 witnesses from Regina, I propose to have
16 Dr. Emson take a blood sample from
17 Wilson when Wilson is up here for the
18 trial and to have him personally group
19 the blood and testify as to Wilson's
20 blood group at the trial. You will
21 recall that evidence was given in the
22 Preliminary Inquiry that his blood group
23 is B."

24 And I think, if I can pause there, I think the --
25 your proof for Wilson's blood group, that was



1 done in Regina I think by Sergeant Juno and then,
2 an RCMP officer, and I believe Mr. Tallis ended
3 up admitting Mr. Wilson's blood type to avoid Dr.
4 Emson having to take the blood sample; does that
5 sound correct?

6 A Yes. I can't recall, but I wouldn't be surprised,
7 sir.

8 Q Next page. I think that's what the documents
9 reflect?

10 A Okay, well, I'm sure that's right.

11 Q And then:

12 "If Albert Cadrain's father is called as
13 a prospective juror I will stand him
14 aside."

15 And in fact his father, Mr. Cadrain was on the
16 jurors list, just for the record.

17 A Okay, thank you.

18 Q And then:

19 "I believe I have given you copies of
20 all the laboratory reports I have
21 received except one, and I enclose a
22 copy of that report which is one I
23 received in November of 1969. It covers
24 an examination of samples taken from the
25 parka or coat supposedly worn by Nichol



1 John, on the trip to Saskatoon ..."
2 and the fibre. Now this letter says that you
3 have given:

4 "... copies of all the laboratory
5 reports I have received ..."

6 You will recall, yesterday, I asked you about
7 that lab report that was in the lab reports you
8 received that referred to (V1)- and (V2)-----; do
9 you recall that?

10 A Oh yeah, yes, I wouldn't be speaking in that sense
11 in this. In other words, these would be lab
12 reports that appeared to me to bear directly on
13 the trial.

14 Q I see.

15 A Yeah, the way I read that, Mr. Hodson.

16 Q So does this letter assist you in telling the
17 Commission whether or not the (V1)-, (V2)----- lab
18 report that you received from the police and
19 marked different file, omit, whether or not you
20 gave that to Mr. Tallis?

21 A It doesn't indicate in this letter in itself that
22 I did give it to him.

23 Q Well, it does say I've given you copies of all the
24 laboratory reports I have received.

25 A Oh, yeah.



1 Q And that was the point. Does that assist you, and
2 if it doesn't that's fine.

3 A I still can't say, sir, whether that went or not.
4 I'm sorry, it may have gone, I think I -- it's
5 certainly attached to the lab reports which I used
6 and it may not have gone based on the discussion
7 about wrong -- wrong file or whatever.

8 Q And then you say:

9 "I have a good idea of the order in
10 which I hope to call the witnesses and
11 will pass this onto you when we get
12 together, hopefully on or before
13 Saturday of this week, to go over some
14 points concerning the trial and I trust
15 that this will be satisfactory."

16 So it appears you contemplated meeting with
17 Mr. Tallis and going over the order of witnesses?

18 A Yes, sir.

19 Q If we could then call up 007078 which is page 2 in
20 your folder, and this is your handwriting is it?

21 A Yes, it is.

22 Q And sent to Tallis, and I think this is just a
23 list of the statements that you had sent him and
24 the dates?

25 A That's correct.



1 Q And we've seen these already, the Cadrain
2 statements, the John statements -- just scroll
3 down. Go back to the full page, please. And
4 again the September 9th letter we touched on --
5 full page, please -- and paragraph, or number 4,
6 the January 9th, '70 letter which has the
7 indictment and the big sketch; is that correct?

8 A That's right.

9 Q And then if we can go to 007072, and this is
10 number 8 in the top right-hand corner?

11 A I have that, sir.

12 Q And it goes statements to go to Cal, that would be
13 January 17th, so that would be a couple of days
14 before the trial starts?

15 A Evidently so.

16 Q And I think this is pretty self-explanatory, 'have
17 copy now, have original - get copied, made no --'

18 A No statement.

19 Q No statement?

20 A Yeah.

21 Q And 'lost'?

22 A Yeah. That appears to have an entry in each --
23 one column for each one of those witnesses which I
24 would hope it would have.

25 Q Then if we can go to 007073, which is document



1 number 7 in the top right-hand corner, and this
2 appears to be -- have you got that?

3 A Yes, sir.

4 Q It appears to be a meeting that you have with
5 Mr. Tallis on Saturday, January 17th which would
6 be two days before the trial started; is that
7 right?

8 A That's right.

9 Q And it looks like it says went over?

10 A That's right.

11 Q And let's just go through this. Number 1, N.
12 John, do you know what that would have been?

13 A Just we went over something to do with Nichol
14 John, unless there's --

15 Q Let --

16 A Good go ahead, sir.

17 Q I was just going to say, at this point before the
18 trial, both you and Mr. Tallis obviously knew at
19 the preliminary hearing she did not repeat the
20 incriminating parts of her statement?

21 A That's right.

22 Q And would you and Mr. Tallis have discussed
23 Ms. John's evidence at trial and specifically how
24 you might put her May 24th statement to her if
25 she --



1 COMMISSIONER MacCALLUM: Did you mean to
2 say discussed her evidence at the preliminary?

3 MR. HODSON: I'm sorry?

4 COMMISSIONER MacCALLUM: Did you mean to
5 say would you and Mr. Tallis have discussed the
6 evidence at the preliminary?

7 BY MR. HODSON:

8 Q Yes, the fact that at the preliminary Ms. John did
9 not repeat the incriminating parts of her May 24th
10 statement at the preliminary hearing, so obviously
11 you and Mr. Tallis would both know that there's an
12 issue with Nichol John as to what she was going to
13 say at trial; is that fair?

14 A That's right.

15 Q And I think you told us yesterday, and maybe I'll
16 ask you again, on this date before the trial, what
17 did you think Nichol John was going to say when
18 she testified before the jury?

19 A Well, I don't know if I could put it in terms
20 of -- I guess I thought that she would give the
21 post-polygraph statement which at that point I
22 felt was accurate, to put it awkwardly.

23 Q And why did you think she was going to say it at
24 the trial when she hadn't said it at the prelim?

25 A Well, just -- I just felt that it was correct and



1 that she may or should, you know, recite it at the
2 trial in that form.

3 Q Why did you think it was correct?

4 A Based on the sequence of events of Mr. --
5 Inspector Roberts doing the polygraph on Wilson,
6 John talking with Wilson after at some point, and
7 then being before Inspector Roberts and
8 remembering or -- pardon me, being shown the
9 uniform, remembering seeing the offence take
10 place.

11 Q Was it your belief at the time, and let's just
12 talk a few days before the trial, that Nichol
13 John's May 24th, 1969 statement was truthful?

14 A Is that the --

15 Q Yes, it is.

16 A Yes, it was my belief that it was.

17 Q And you knew at that time that, number 1, she
18 hadn't repeated the information, at least the
19 incriminating information in that statement to you
20 in three interviews?

21 A Right.

22 Q And secondly, she had not repeated that before the
23 preliminary hearing; correct?

24 A That's correct, sir.

25 Q And third, I think you told us yesterday that she



1 had said to three people in the witness waiting
2 room around the time of the prelim that she had
3 seen the murder and she wondered why Mr. Milgaard
4 hadn't killed her because she saw the murder and
5 that she wasn't going to say nothing in court, or
6 words to that effect?

7 A That's correct, and what I took out of that is in
8 fact she had seen the murder, that she didn't know
9 why she herself wasn't killed as a witness, as it
10 were, and that she was not going to say nothing.
11 Now, that again to me reinforced that she knew
12 the, if you will, the true story of what had
13 happened there.

14 Q And at that time, and again we're talking, you
15 know, right before the start of the trial, did you
16 have any doubts, Mr. Caldwell, about Nichol John's
17 May 24th -- the version of events in the May 24th
18 statement?

19 A No. I felt that that, brief as it was, was the
20 accurate account of the matter.

21 Q And what was your thinking at the time as to why
22 Nichol John would not repeat that to you in an
23 interview or repeat that in evidence at the
24 preliminary hearing?

25 A One thought could be that if she repeated it to me



1 it would possibly reinforce methods for me being
2 sure that it got into the prelim or trial evidence
3 would be one reason. In other words, the more
4 often she repeated it in any setting, the more
5 likely it was that she could be in a position of
6 not avoiding giving it in evidence at the prelim
7 or trial.

8 Q So, for example, we know at trial, which we'll get
9 to in a moment, that you in fact put her May 24th
10 statement to her as an inconsistent statement?

11 A That's right.

12 Q And so the more time she said it, the more
13 opportunity you had to put it to her at trial as
14 being a previous inconsistency?

15 A I may not have thought that, Mr. Hodson, but that
16 would make sense as well.

17 Q And was there any reason, and I'll deal with this
18 in more detail later, at the trial I believe that
19 your application under section 9(2) of the Canada
20 Evidence Act was to put to Nichol John her May
21 24th statement; correct?

22 COMMISSIONER MacCALLUM: Can I just
23 interrupt for a second, please. I didn't get an
24 answer, if he gave one, to the first part of your
25 question, did you discuss with Mr. Tallis her



1 evidence at the preliminary, which she did not
2 repeat.

3 MR. HODSON: Yeah, I can come back to that,
4 Mr. Commissioner, before I --

5 COMMISSIONER MacCALLUM: I don't think he
6 answered, that's all.

7 A That goes back to that simple N. John line, Mr.
8 Hodson, does it at the top?

9 MR. HODSON: Yes.

10 A Okay. It shows that I discussed N. John, had to
11 be her evidence -- pardon me, with Mr. Tallis, and
12 I would assume that it would include the
13 possibility or likelihood of having to use the
14 section 9(2) procedure, but I didn't detail, but
15 that would make sense in that setting in my view.

16 COMMISSIONER MacCALLUM: Okay, thanks.

17 BY MR. HODSON:

18 Q And just back again at trial, you tendered the May
19 24th, 1969 statement in an effort to -- as an
20 inconsistent statement to, I think, question the
21 credibility of Nichol John's evidence that she
22 didn't recall certain events; is that fair?

23 A Yes, I tried to follow the new 9(2) procedure and
24 that would be --

25 Q And -- I'm sorry?



1 A Yeah, that would be the reason, sir.

2 Q And was there any reason or did you consider using
3 the statement that Nichol John made in the hearing
4 room to Mrs. Miller, Albert Cadrain and Mary
5 Marcoux as another inconsistent statement the same
6 way you used the May 24th statement?

7 A I don't know that I considered that. I think we
8 may have discussed it and felt that we didn't have
9 a way to get it into evidence. For one thing, it
10 was verbal and I feel that we discussed that,
11 didn't know how we could use it even was the
12 bottom line in my memory, but --

13 Q And I don't, particularly in light of the
14 Commissioner's remarks this morning, I don't wish
15 to get into sort of a review of a bunch of legal
16 issues, but did you consider, under section 9(1)
17 of the Canada Evidence Act, certainly as a hostile
18 witness, would that not have allowed you to put a
19 prior statement?

20 A Well, I don't -- I know that section exists and
21 the difficulty with 9(1) had been that if a
22 witness was, in effect, polite and nice to
23 counsel, they could virtually say anything because
24 it kind of depended on their demeanour and
25 appearance. 9(2) I believe was enacted to get



1 around that hurdle. Now, I don't know that
2 9(1) -- I don't know how we could have done that.
3 I suppose we could have called one of those
4 civilians or two or three of them to say on day X
5 she said the following.

6 Q Let me back up. I'm simply looking for what you
7 would have thought of at the time, I'm not asking
8 for an analysis today of the sections, but if we
9 go back at the time, and do you have any
10 recollection of -- I think you said earlier in
11 fairness that you considered how you might get her
12 utterance in the hearing room in his evidence; is
13 that fair?

14 A Yeah, that's right.

15 Q And as far as a specific recollection of the
16 detailed analysis of law that you did at the time,
17 are you able to recall that today?

18 A No, sir.

19 Q And if we go through just some of the options you
20 might have considered at the time then, did you
21 look at, under 9(2), having the statement, or the
22 statement she said, whether there might be an
23 argument that it was reduced in writing because
24 you wrote it down, for example?

25 A I don't think I ever considered that.



1 Q Would it be fair to conclude, Mr. Caldwell, that
2 you and Mr. Perras, or whoever would have looked
3 at this issue, and that if you felt that you could
4 get her statement in the preliminary hearing room
5 in as evidence, that you would have done so?

6 A Yeah, in a proper fashion, certainly.

7 Q And can we conclude from the fact that it was not
8 raised with her at the trial, it would be one of
9 two reasons, one, you didn't consider it, or two,
10 you did and you concluded you couldn't; is that
11 fair?

12 A Yeah, one or the other, Mr. Hodson.

13 Q And are you able to tell us which one it was?

14 A I don't think so. The one option that has just
15 been mentioned I would have thought would call for
16 me to testify to get it in, that would be one way
17 of doing it, and I thought that was out of the
18 question.

19 Q Fair enough. And again we may come back to that
20 when we get into the trial transcripts. So again,
21 let's just go back to the note, and I think you
22 said yes, it's likely you and Mr. Tallis would
23 have talked about Nichol John and the possible
24 9(2); is that right?

25 A I'm sure that's right, sir.



1 Q And in fact we'll see in the transcript we know at
2 trial when this issue came up and Chief Justice
3 Bence asked for submissions from counsel about how
4 this section ought to work and be applied, that
5 you and Mr. Tallis had, I believe, a similar view
6 on the law and how it should be applied and, in
7 particular, whether the jury ought to be in or out
8 of the room when Ms. John is cross-examined
9 regarding the giving of the earlier statement; is
10 that fair?

11 A Yes, we did have a very similar view, both felt
12 the jury should be out, Mr. Tallis and myself, and
13 he made a submission, I made a brief submission
14 and the Chief Justice felt that it must be done
15 the other way around because of his reading of the
16 law.

17 Q And as it turned out, and we'll see a bit later,
18 the Court of Appeal disagreed with Chief Justice
19 Bence on that point; in fact, confirmed the
20 position that you and Mr. Tallis took; is that
21 correct?

22 A Yeah, that's right.

23 Q And is it something -- do you think this legal
24 issue might be something you and Mr. Tallis
25 discussed and agreed upon in advance of the trial?



1 A I don't think we did. I think we simply got to
2 that point and the judge asked us both our views
3 and it happened that they were similar.

4 Q Right. And then go back to the statement, the
5 second point is statement, 'boy who brought Gail
6 Miller home that a.m.' That would be Dennis
7 Elliott?

8 A I assume so.

9 Q And you had already given that to him?

10 A Yeah.

11 Q So would this just be a discussion about that?

12 A Maybe bring it to his attention that I had given
13 him that statement.

14 Q The across the street man, who I presume is who
15 Mr. Elliott saw in the car?

16 A Yeah, I assume so.

17 Q The night he dropped Gail Miller off?

18 A Yes.

19 Q And statements, other Crown witnesses, and then
20 'Beauchamp situation explained.'

21 A Okay.

22 Q Do you know what that --

23 A I think, Mr. Hodson, it was what essentially we
24 went over here yesterday.

25 Q With the wallet?



1 A Yeah, I believe so.

2 Q And then 'other junk from Wilson's car,' and I
3 think none of that was put in at trial; is that
4 right?

5 A That's right.

6 Q And then possible admissions of fact and
7 dispensing with witnesses on account of, and then
8 you've got Grant, Shaw, Mackie, Pyra, Flemming,
9 Brand, Oleksyn, McDonald and Edmondson. So I take
10 it you would have looked at whether you could get
11 some admissions from Mr. Tallis on behalf of Mr.
12 Milgaard to avoid calling evidence?

13 A That's right.

14 Q And then if we can go to 007071 -- actually,
15 sorry, if we can just go back, if we can go to
16 00690 -- 006915, that's document 161.

17 A Just give me a minute, sir, to find that.

18 MS. KNOX: RCMP page number 161.

19 A Thank you. I have that, Mr. Hodson.

20 BY MR. HODSON:

21 Q And this is Sunday p.m., which I'm going to
22 suggest is the Sunday, January 18th, being the
23 night before the trial; is that fair?

24 A I believe so.

25 Q And Madelane was your secretary at the time?



1 A That's right.

2 Q And then if we can go through 1, 'please type belt
3 - which has two opening - address witnesses on it:
4 leave letter, and do 2 - next.' So I take it that
5 was your opening address you were getting done?

6 A Yes.

7 Q And then number 2, please type subpoenas?

8 A Returnable.

9 Q Go back to the main page, 'please type subpoenas
10 returnable Friday, January 23rd for -' and then we
11 have Melnyk, Lapchuk and Ute Frank; is that right?

12 A That's right.

13 Q Can you tell us, and again we'll go through the
14 documents, do you have a recollection of how the
15 Melnyk, Lapchuk and Frank statements came about?

16 A The first I heard of them was when one or more
17 Saskatoon police officers went down to, in effect,
18 give Wilson and/or John a lift to Saskatoon to be
19 sure they were there the night before the trial
20 and not missing in some fashion. Now, I think
21 this is all -- whoever that was, and I think it's
22 recorded somewhere, advised me that one or more of
23 Wilson or John had claimed that they knew someone
24 who had seen the accused reenacting the murder, to
25 put it very roughly, and that's how it came to my



1 attention, and then I -- I think we've seen I
2 phoned Mr. Tallis with what I knew then about the
3 matter and one of the police officers went back
4 down to take -- pardon me, interview these
5 witnesses within a day or two at my request. I
6 got statements from them. When I got the
7 statements I'm sure they went from me to
8 Mr. Tallis and I had arranged I believe to have
9 them show up here roughly the first weekend of the
10 trial. This is the first I knew about the
11 so-called reenactment evidence of course.

12 Q And you had them show up the first weekend for
13 what purpose?

14 A Well, to interview them. I'm not firm on that
15 date, it may have been after that.

16 COMMISSIONER MacCALLUM: The day you first
17 heard was --

18 A Was this Sunday evening, Mr. Commissioner, the
19 night before the trial started.

20 COMMISSIONER MacCALLUM: Thank you.

21 BY MR. HODSON:

22 Q And so would you have called Mr. Tallis that
23 Sunday night do you think?

24 A I'm sure I did.

25 Q And so at that time you would have had -- it would



1 appear you have the three names and their
2 addresses to allow you to get subpoenas; is that
3 correct?

4 A I had that, I had written it in the middle of this
5 page.

6 Q Now, we know from the statements, which I'll turn
7 to in a moment, they were given on January 19th,
8 which would be the Monday, the first day of the
9 trial.

10 A Okay.

11 Q And so then I think you said you had officers go
12 get statements and you advised Mr. Tallis and that
13 you arranged to have them brought in for the
14 weekend; is that right?

15 A Yeah. I'm not -- the when is a little --

16 Q The subpoenas are returnable for Friday.

17 A Okay.

18 Q That would be the first Friday of the trial.

19 A So that's no doubt when it was, sir.

20 Q And then you would have brought them in to
21 interview them I take it after the police got the
22 statement, you would have interviewed them?

23 A Yes, I did that.

24 Q And do you recall whether you advised Mr. Tallis
25 or allowed him to interview the witnesses as well?



1 A Well, I certainly advised him. Without seeing
2 some more notes I can't recall whether he himself
3 interviewed them. In other words --

4 Q Okay, I'll go to some documents that may assist
5 you.

6 A Okay.

7 Q And was this evidence, the information we've
8 heard -- well, we've heard evidence from all of
9 the so-called hotel reenactment witnesses, but was
10 this information and this evidence significant at
11 the time, Mr. Caldwell?

12 A Well, I was absolutely, you know, struck by it. I
13 had never run into anything like that, and all the
14 more so the night before the trial was to
15 commence. It really -- I was taken aback by it,
16 but I made a point of phoning Mr. Tallis with what
17 I then knew and tried to follow it in an orderly
18 manner.

19 Q Do you recall Mr. Tallis' reaction?

20 A No, I don't.

21 Q Then go to 006904, and we'll maybe just skip
22 around a bit here on dates because I'm not sure
23 when these notes are from, this is 171, and try
24 and deal with the motel reenactment witnesses.

25 A I have that page, sir.



1 Q And this is a to-do and, I'm sorry, I don't know
2 the date. Are you able to tell from where this
3 document is in your file as to when the date may
4 be?

5 A It's stapled to I think one of the documents we
6 went over yesterday which is 169 and 170, but --

7 Q And what are the dates on those?

8 A Well, I'm looking for that. I don't at a glance
9 see a date there, sir.

10 Q Okay.

11 A Oh, I'm sorry, two-thirds of the way down, 169 --

12 Q Maybe we could just call up --

13 A Yeah.

14 MS. KNOX: 006906.

15 BY MR. HODSON:

16 Q 006906.

17 A Yeah, I see there, Mr. Hodson, advise Cal 8:45
18 Sunday, January 18th about the three Regina
19 witnesses, so --

20 Q So the to-do note 171 would have been after that I
21 take it?

22 A I would assume so.

23 Q Thank you. If we can go back to 006904 --

24 A No, I'm sorry, it had to be after because it's
25 talking about Melnyk and Lapchuk.



1 Q Yes. So the earlier document was the note you
2 told us where you phoned Mr. Tallis the Sunday
3 night?

4 A Sorry, which page did you want to answer?

5 Q No, just if you could listen.

6 A Yeah.

7 Q The previous note was that you phoned Mr. Tallis
8 on the Sunday night?

9 A Right.

10 Q And advised him of this information you had?

11 A Yeah.

12 Q And this note would be after that; is that
13 correct?

14 A That's -- yes, it would be.

15 Q And so likely the first week of trial, does that
16 sound logical?

17 A It does.

18 Q And it says phone Pirogoff, and Pirogoff was a
19 prosecutor in Regina; is that right?

20 A That's right.

21 Q And did you know Mr. Pirogoff?

22 A I knew him, yes.

23 Q And it says, 'Melnik - trial, Regina, Wednesday 28
24 and Thursday 29. Lapchuk - plea, Monday 26 -
25 forgery and uttering'?



1 A That's right.

2 Q And I recall that there's some reference,
3 certainly in the trial transcript, that both
4 Mr. Melnyk and Lapchuk were facing criminal
5 proceedings in Regina around or after the time
6 they were testifying; is that correct?

7 A That's right, and this would be my response to
8 finding out what that's all about in terms of
9 dates and charges.

10 Q I see. And why -- what would you be trying to
11 find out?

12 A Well, for one thing, I would want to have them
13 testify in Saskatoon and not be failing to show up
14 in Regina for their charges or appearances or
15 whatever they were.

16 Q And do you think you would have been made aware
17 from either the Saskatoon police or from Melnyk
18 and Lapchuk that they had outstanding court
19 matters?

20 A One or the other. I think it would be the two
21 fellows, Melnyk and Lapchuk.

22 Q And so I think you said one of the reasons would
23 be to check what dates they were in court; is that
24 right?

25 A Yeah, to avoid them not showing up either in



1 Saskatoon or Regina because of the other
2 engagement, as it were.

3 Q Do you recall whether you would have had a
4 discussion with Mr. Pirogoff about the charges
5 against Melnyk and Lapchuk and the evidence and
6 the cases against them?

7 A I'm sure I did not do that, simply the bare-bones
8 dates and names of the charges.

9 Q There has been a suggestion, which I will go to
10 later on, Mr. Caldwell, in various documents,
11 either specifically suggesting or implying that
12 you arranged to have, with Mr. Pirogoff or another
13 prosecutor, that Melnyk and Lapchuk be given
14 favourable treatment in their charges in exchange
15 for testifying at David Milgaard's trial. Did
16 that happen?

17 A Not in any way, shape or form, sir.

18 Q And specifically did you ask Mr. Pirogoff, another
19 Crown solicitor, to ask the court that Melnyk and
20 Lapchuk get better treatment than they otherwise
21 would in exchange for them testifying at the David
22 Milgaard trial?

23 A Not at all.

24 Q And would that be appropriate, sir?

25 A That would be outrageous.



1 Q If we can then go to 007071, and again I apologize
2 for jumping around, but there are a number of
3 documents around this date.

4 A I have that, sir.

5 Q And I'll come back to Melnyk, Lapchuk and Frank in
6 a moment, but this is the Monday of trial. Can
7 you just read what's at the top? Is that --

8 A It says 'records ex file,' meaning from file, and,
9 '* D. Elliott.'

10 Q Right. And so again to Mr. Tallis as requested, I
11 presume that was from the Saturday meeting?

12 A I presume.

13 Q And you gave him copies of the statements that
14 were listed in your notes, and then if you can
15 scroll down, you also enclose copies of Mr.
16 Pratt's statement, of Aylesbury, whom you do not
17 intend to call?

18 A That's right.

19 Q Who was the elevator agent.

20 'Dennis Elliott, whom I likewise do not
21 intend to call."

22 Two statements, and:

23 "Mrs. Marie Indyk whom, as you will
24 recall, we left to be discussed as the
25 trial progresses, as to whether I will



1 call her or make her available for
2 yourself, if desired, or just what the
3 situation will be."

4 And then you say:

5 "The statement from Adelaine Nyczai,
6 which you wanted has, as I informed you,
7 been lost and no statements were taken
8 from these six witnesses."

9 And then I think you say wrong on Hounjet, you
10 have it there, and:

11 "The enclosed statement from Mrs. Indyk
12 is to the best of my knowledge only part
13 of the statement she gave and I have
14 been unable to find the remaining pages
15 ..."

16 So I think that covers what we had discussed in
17 the notes?

18 A I feel so, sir.

19 Q If we can go to 006914, and this is document 62 --
20 actually, sorry, 006913.

21 A Do you have a number in the corner, sir?

22 Q Yeah, 163.

23 A Okay, I have that.

24 Q Actually, no, sorry, I'll come back to that.

25 A Okay.



1 Q Just to carry on again with the Melnyk, Lapchuk,
2 and Frank matter, if we could call up 267926.

3 A Do you have a corner number?

4 Q I do, but I don't think you will need to see it.

5 A Okay.

6 Q This is just the indictment, and it looks like the
7 name names of Melnyk and Lapchuk were added, is
8 that right, if you can call that out please?

9 A Yes, they are added there in handwriting.

10 Q And I'll go through the documents if you wish, Mr.
11 Caldwell, but I'm wondering if you are able to
12 answer, in the absence of looking at specific
13 documents, as to why Ute Frank was not called as a
14 witness?

15 A Yes, very definitely. I interviewed her very
16 carefully at or about the time I interviewed
17 Melnyk and Lapchuk, and I constructed a sort of a
18 guide sheet of about three-quarters of a page of
19 what I would want to ask her, and she absolutely
20 stopped the interview and made it very clear she
21 wasn't testifying no matter what happened, and I,
22 I didn't feel I could call her under those
23 circumstance, to have her go that far in the trial
24 and simply stop.

25 Q If you could call up 006298. And again, I don't



1 think you need to bring up the original, --

2 A Okay.

3 Q -- you may if you wish; would this be the guide
4 sheet you talked about?

5 A That -- that's it.

6 Q And these would be your notes of what you would
7 ask her if you called her as a witness?

8 A Yes.

9 Q And you concluded that she either would not or did
10 not have anything to say?

11 A She, as we went through this process we got to
12 roughly the, obviously the point that's shown
13 there, and she wouldn't --

14 COMMISSIONER MacCALLUM: Could you just --

15 A I'm sorry.

16 COMMISSIONER MacCALLUM: Just mark it on
17 the screen with your fingers?

18 BY MR. HODSON:

19 Q If you want your handwritten document, Mr.
20 Caldwell, your counsel can provide it, but I don't
21 think --

22 A I would. Thanks very much.

23 Q Maybe we could just go through this, just some of
24 the details.

25 A Sure. Do you want me to do it, sir, just --



1 Q Well, I don't think we need to go through the
2 whole document.

3 A Okay.

4 Q Could you just identify where she stopped talking,
5 I think?

6 A Umm, well I got as far as the bottom:

7 "- T.H.C. started in room -
8 - needle, then mouth",
9 which was into the hotel room episode, and she
10 simply was not going to (a) testify (b) continue
11 being interviewed by me in describing this event,
12 and I didn't feel, in law, that it was -- there
13 was an obligation on me to call her in that
14 factual situation.

15 Q Right. In the absence of looking at a specific
16 document, which I will get to, I will go through
17 all the documents, --

18 A Sure.

19 Q -- are you able to recall whether or not you
20 advised Mr. Tallis of this or allowed Mr. Tallis
21 to interview her?

22 A I do not recall either of those things, sir.

23 Q Now this document would indicate as well, I think,
24 Hoppy, Debbie Hall, Bob Harris, Gary Silljer, and
25 I will refer to some of the other statements as



1 being people who were in the room at the time?

2 A That's my understanding.

3 Q Do you have a recollection, Mr. Caldwell, that
4 when you interviewed Lapchuk, Melnyk and Ms. Frank
5 and got their statements, that the statements
6 referred to other people being present when the
7 so-called reenactment took place, and specifically
8 Deborah Hall and Bob Harris?

9 A I noticed this Ute Frank statement, about the
10 fourth line from the bottom refers to.

11 "- shortly after Debbie left."

12 And:

13 "- D. ...",

14 being Debbie:

15 " ...didn't come back".

16 I'm sorry, what did you --

17 Q Okay, no, that's fine.

18 A Yeah.

19 Q "- shortly after Debbie left.

20 - D. didn't come back".

21 A Yeah.

22 Q My question was a general question, and we'll go
23 through the statements, --

24 A Okay.

25 Q -- but do you have a recollection of whether or



1 not either the police or you thought that, in
2 addition to Ute Frank, Craig Melnyk and George
3 Lapchuk, other people may have witnessed Mr.
4 Milgaard's actions in the motel room?

5 A Well, just based on the statements of these three,
6 I would have -- that would have been indicated,
7 although I should really look at them before I say
8 that.

9 Q In fairness, and I'll go through them, --

10 A Okay.

11 Q -- I believe what the statements may suggest is
12 that Deborah Hall may have been there and may have
13 witnessed the same events that Melnyk, Lapchuk and
14 Frank witnessed?

15 A That may --

16 Q I appreciate that there may be one or two of them
17 that said she left, but --

18 A Okay.

19 Q -- do you recall any efforts to try and locate
20 Deborah Hall or anybody else who may have been in
21 the room?

22 A Not at this point, I don't, Mr. Hodson. If --
23 this may come up in other documents, I would be,
24 try to be --

25 Q And I guess, just generally, if there was an



1 incident -- let's just back up.

2 A Okay.

3 Q If there was an incident where Mr. Milgaard
4 reenacted a crime in the motel room and you were
5 calling witnesses to say 'here's what happened in
6 the motel room' would, as a general rule, you try
7 to get all the people who witnessed that to come
8 and testify?

9 A Well I guess, in the overall best of worlds, you
10 would. This came to my attention the night before
11 the trial started, and I was able to interview
12 three of them, in effect, during the trial, and
13 call the two. And I don't think, practically, it
14 would have allowed a run -- or to try and find the
15 others, and I don't believe, sir, that I did that.

16 Q And that was my question, whether you have any
17 recollection of whether the police or you would
18 have made efforts to try and find Deborah Hall?

19 A I can't say at this time.

20 Q And would you have provided the statements, I
21 think there's records showing you did, to Mr.
22 Tallis?

23 A Undoubtedly.

24 Q And do you recall Mr. Tallis asking you if the
25 police could locate Deborah Hall?



1 A I don't recall that.

2 Q Or Bob Harris?

3 A No, sir.

4 Q Okay. This might be an appropriate spot to break,
5 Mr. Commissioner.

6 COMMISSIONER MacCALLUM: Mr. Caldwell?

7 A Yes sir.

8 COMMISSIONER MacCALLUM: What did you
9 understand by "T.H.C.", just for the record?

10 A It's the name of an illicit drug, as far as I
11 knew, sir.

12 COMMISSIONER MacCALLUM: Okay, thank you.

13 A And that's about all.

14 COMMISSIONER MacCALLUM: Thank you.

15 (Adjourned at 10:27 a.m.)

16 (Reconvened at 10:49 a.m.)

17 BY MR. HODSON:

18 Q If we could just call up 007070. Mr. Caldwell, at
19 the break we were trying to get a chronology of
20 what happened with the motel reenactment
21 witnesses. I have a letter by you wrote to Mr.
22 Tallis on January 21 which would be, I believe,
23 the Wednesday of the trial, and as well I have a
24 page of notes that I'll refer that I think may
25 assist.



1 A Very good.

2 Q And we'll call up the first two paragraph, it
3 says:

4 "You will recall me advising you, on
5 Sunday, January 18th, that I had learned
6 that day of an alleged incident in
7 Regina, in which Milgaard was supposed
8 to have stated in front of witnesses
9 that he had stabbed or killed the nurse
10 in Saskatoon.

11 I had Detective Karst go to
12 Regina on January 19th to interview the
13 people supposedly involved in this
14 incident, and on January 20th I received
15 three statements taken by Detective
16 Karst, from these people, Craig Alfred
17 Melnyk, George Nick Lapchuk and Ute
18 Maria Frank, and I now enclose a copy of
19 each of these statements for your file."

20 So from here, this would confirm the call on
21 Sunday, and that on the Wednesday you would have
22 sent copies of the statements; is that correct?

23 A Yes.

24 Q Next paragraph:

25 "I intend to arrange, somehow, to



1 interview these witnesses in the very
2 near future and depending on the results
3 of these interviews, as I mentioned to
4 you earlier, I may well attempt to lead
5 evidence in the present trial from one
6 or more of these three witnesses as to
7 the admissions allegedly made by
8 Milgaard in their presence."

9 And then it just goes on to talk about the
10 Hounjet statement, so that would be accurate, is
11 that correct?

12 A That would be the most accurate.

13 Q And then 007069, which is number 11 in the top
14 right-hand corner.

15 A Okay. I have that, sir.

16 Q And this is your handwritten note, is it?

17 A It is.

18 Q 'Re new witnesses Lapchuk - Melnyk - Frank:
19 Number 1. Sunday, January 18, Saskatoon Police
20 learned for first time of an alleged admission by
21 Milgaard in Regina to killing nurse in Saskatoon';
22 is that correct?

23 A That's right.

24 Q '2. Same date they advised me and same date I
25 advised T', Tallis, 'by telephone of what I knew



1 of this and that depending on interview I might
2 call them'?

3 A That's correct.

4 Q 'Number 3. Same date I arranged for investigator
5 to go to Regina, Monday, January 19th, and
6 interview these persons'; is that correct?

7 A Correct.

8 Q '4. This done, Monday, January 19 and on Tuesday,
9 January 20, I received three statements from these
10 persons'; is that correct?

11 A Right.

12 Q 'Wednesday, January 21 I delivered copies of all
13 three statements to Tallis and advised I would
14 interview them ASAP and may call evidence from one
15 or more at the trial'; is that correct?

16 A Correct.

17 Q 'Number 6. Had two to Saskatoon Friday, January
18 23 and interviewed and advised Tallis January 24th
19 I would plan on calling these two late in Crown's
20 case'; is that correct?

21 A That's all correct, sir.

22 Q And would those two, would that have been Melnyk
23 and Lapchuk?

24 A That must have been.

25 Q And I think you told us at some point, though, you



1 did meet and interview Ute Frank?

2 A I did.

3 Q Go to 006912. Again, I don't know that you need
4 the paper copy --

5 A Okay, sir.

6 Q -- for this, it's just a telex. This is January
7 20th, '70, the second day of the trial, and to the
8 RCMP Regina, 'urgently requested a record for
9 Albert Cadrain of Regina in Milgaard case', and so
10 I take it you were looking for his record for
11 anything in Regina; is that right?

12 A Umm, I think 'Albert Cadrain of Regina' would be
13 for his record, if he had one, wherever it was,
14 Mr. Hodson. That's sort of a geographical
15 reference --

16 Q I see.

17 A -- I think.

18 Q So you are looking if he had offences in Regina?

19 A Well if he had offences anywhere, I would want to
20 know, I think I wasn't limiting it to Regina by
21 the way that's --

22 Q Why would you put -- and I'm sorry, this is
23 actually from the city police, --

24 A Yeah.

25 Q -- but it says "of Regina"; do you know why that



1 would be?

2 A Umm, no I don't, because he was indeed of
3 Saskatoon.

4 Q Right.

5 A Yeah.

6 Q If we call up 006911, and this is the reply:
7 "Cadrain unable to associate subject
8 with FPS file here, RCMP CIS Regina";
9 what's 'FPS' mean?

10 A Fingerprint search.

11 Q I see. And then, if we could, 006907, and that's
12 just a note.

13 A Okay.

14 Q Number 168A is just a small note there. Do you
15 know what this is, it's got 'Tuesday Melnyk',
16 Lapchuk, Frank and phone numbers, 'Wilson
17 Wednesday', and 'Karst'; do you know what that
18 related to?

19 A Umm, I don't know what that -- it looks like 'next
20 door', that third line.

21 Q Okay. Do you -- are you able to tell us what that
22 is?

23 A Oh, thank you. It looks as if it is an
24 arrangement, a proposal that I see Melnyk and
25 Lapchuk Tuesday, those are two phone numbers for



1 them, and Frank is underneath that with a phone
2 number, and 'Wilson Wednesday', and then Karst's
3 phone number is on there, so --

4 Q Do you know what that is, Mr. Caldwell?

5 A No, in a word, I don't.

6 Q 006910, please. And this is a note of yours
7 January 23rd, 1970, is that correct, and that's
8 number 166?

9 A Yes it is.

10 Q And we saw from your earlier note that that was
11 the, that's a Friday, and that was the Friday that
12 you had arranged to subpoena Melnyk and Lapchuk to
13 come to Saskatoon?

14 A Or -- I accept that, sir.

15 Q And it's got -- would these be notes of a meeting
16 with them or after a meeting?

17 A Yeah.

18 Q Do you know?

19 A Umm, it -- it appears that way at -- you know, on
20 the face of it.

21 Q And so would this be fair, Craig Melnyk, that he's
22 got a trial for armed robbery?

23 A Yeah.

24 Q And Lapchuk is entering a plea on the 26th; is
25 that an accurate reading?



1 A That's right.

2 Q And do you know what this note is here, something
3 'hearing day'?

4 A 'George', it almost looks like -- oh, 'mileage'.

5 Q Oh.

6 A I know what that is. Someone, I think, drove one
7 or more of them up.

8 Q Okay.

9 A One day mileage would be paid to that person.

10 Q Okay. And this is 'criminal records for above two
11 and' --

12 A 'And Milgaard', it says.

13 Q 'And Milgaard'?

14 A Yeah.

15 Q Okay. If we could go to 006903, number 172 in the
16 top right.

17 A Okay.

18 Q It looks as though you've asked the police to get
19 a criminal record for Melnyk, Lapchuk and Frank;
20 is that correct?

21 A Just give me a second, sir. That's how it looks.

22 Q And then 006901.

23 A Thanks.

24 Q 174. This would appear to be the reply back from
25 the RCMP, and it has Melnyk's record and Lapchuk's



1 record, and no record for Frank; is that correct?

2 A That's correct.

3 Q Could you then go to 155218, please. And this is
4 the statement of George Lapchuk, and we have been
5 through this statement a number of times, this
6 would have been the statement that Mr. Karst
7 provided and gave to you; is that correct?

8 A It would have, sir. Oh, thank you.

9 Q And I just want to refer, again I had asked
10 earlier about, you will see here it says:

11 "David and ..."

12 I -- or:

13 "David and 2 girls Ute Frank and Debbie
14 Hall were there."

15 And then it goes on to describe -- do you see
16 that, Debbie Hall?

17 A I do.

18 Q And then if we can call up 009136, this is Craig
19 Melnyk's statement.

20 A Would you -- maybe I'll get that, sir. Thanks.

21 Q And it says here, again Mr. Melnyk identifies the
22 girl on the chair:

23 "... Debbie Hall, I think she's in
24 Vancouver now."

25 Do you see that?



1 A Just -- is that on the first page somewhere?

2 Q Yes, it is.

3 A Okay. Yeah, I see that, Mr. Hodson.

4 Q And then as well 054372, which is Ute Frank's
5 statement.

6 A Do we -- thank you, I have that here.

7 Q And this one is not very legible but I think you
8 can see there, as well, that Ute Frank identifies
9 Bob Harris, Gary Silljer, Melnyk, Lapchuk, and
10 then:

11 "... Debbie Hall was ...",
12 I can't read that very well, I think --

13 A Umm, "was", looks like, "also there" to me.

14 Q Yeah:

15 "... was also there"?

16 A Yeah.

17 Q So I believe you had told us earlier in a note
18 that Ute Frank, in your guide sheet, had told
19 you -- or in your interview had told you that
20 Debbie Hall had left at some point?

21 A Oh, that, I assume that --

22 Q Right.

23 A Yes.

24 Q So I think, would you agree, in looking at those
25 three statements, Mr. Caldwell, that there is a



1 suggestion in the statements that Debbie Hall and
2 possibly Bob Harris may have also observed Mr.
3 Milgaard in the motel room?

4 A Yes.

5 Q Do you recall whether efforts were made to locate
6 Deborah Hall?

7 A I don't off -- at this point, Mr. Hodson.

8 Q And what about Bob Harris?

9 A Same with him.

10 Q And if, if Deborah Hall had been available and had
11 a different version of events, would you have
12 called her?

13 A I -- I, yeah, I suppose I would have. This,
14 incidentally, I have 277584 for that, I don't know
15 --

16 Q For what?

17 A For this statement we're looking at, at the bottom
18 left corner -- or right corner, I'm sorry.

19 Q It may be just a different version.

20 A Yeah, I think it is.

21 MS. KNOX: Just, Mr. Commissioner, for the
22 record I found, in other files, the original of
23 the statement of Ute Frank, which is the number
24 that Mr. Caldwell is referring to as opposed to
25 the photocopy that we've been working with, and I



1 made a colour photocopy of the original, but it
2 does exist in a different file with that file
3 number.

4 COMMISSIONER MacCALLUM: Thank you.

5 BY MR. HODSON:

6 Q If we could call up 047622, please. This is a
7 transcript --

8 A Hall.

9 Q -- of Deborah Hall testifying at the Supreme Court
10 of Canada, we've heard Mrs. -- or Ms. Hall testify
11 before this Commission, I simply just wish to
12 identify what she told the Supreme Court of
13 Canada, her version of what she saw in the motel
14 room, and her take on that. If we could go to
15 047632. And this is being examined by Mr. Wolch:

16 "Q Okay. And what was David doing when
17 they made those comments?

18 A Well, he was in the process of jumping
19 around on the bed, being a fool and
20 playing with a pillow, kind of
21 punching it up and things at the time
22 he was asked."

23 Next page.

24 A I think that was 'coked', sir, if I'm not wrong;
25 is that not right, that word?



1 Q "... at the time he was ...',

2 "... at the time me was ...',

3 I'm sorry, what?

4 A I read it as 'coked', C-O-K-E-D, but I may be
5 wrong, it may be 'asked'.

6 Q Okay, 'at the time he was coked', thank you. And
7 then the next page she is asked:

8 "Q Tell us exactly what he said to the best
9 of your memory.

10 A He responded to the question while he
11 was -- and he was actually bouncing on
12 the bed too and punching up this
13 pillow. He said, "Yeah, sure. I
14 stabbed her and fucked her brains out,
15 that's a really good -- you know, it's
16 a really good time for me."

17 Q He made a comment -- take your time.
18 Don't worry about it. Just take your
19 time.

20 A I think -- it was very -- it was a
21 crude remark and it was sarcastically
22 said.

23 Q And after the remark was made what, if
24 anything, did you do?

25 A I couldn't understand why they even



1 asked him that. My thoughts were what
2 an asshole. Like, it was kind of a
3 silly, crude thing to say about
4 something. He just kind of leaned
5 back on the bed with this pillow
6 behind his back and just sort of
7 smirked about it and that was it."

8 And then, again, if we could go to -- I'm not
9 sure I can find the reference. In any event, Ms.
10 Hall testified before the Supreme Court, and
11 certainly before the Inquiry, to the effect that
12 she thought she viewed it as a joke, or words to
13 that effect; do you recall --

14 A I think I was there for that, yes.

15 Q Yes.

16 A Yeah.

17 Q And again, I'm sorry, I can't put my reference on
18 that transcript, but certainly the effect of her
19 evidence before the Commission was that that's
20 what she observed, but she didn't take it as
21 seriously as others, or as a joke, --

22 A Uh-huh.

23 Q -- or as a crude remark.

24 A Yeah.

25 Q Do you recall that being her take on the matters?



1 A I'm sure that's right, sir.

2 Q If, in 1970, you had been aware and had had a
3 statement from Deborah Hall that -- where she
4 recounted what she observed in the hearing -- in
5 the motel room as reflected in her evidence before
6 the Supreme Court of Canada, would you have called
7 that evidence before the Court?

8 A Well there -- in this situation I had two
9 witnesses who were prepared to and did testify,
10 Melnyk and Lapchuk, Ute Frank who declined at the,
11 if you will, at the trial, there were other
12 people, clearly, in the motel room. I wouldn't
13 have felt it my duty to, you know, pursue them
14 through thick and thin, to round them up, find
15 what they had to say. There is a -- I think it
16 wasn't with any big motives on my part, and I
17 think there is a point at which you are not
18 required to, you know, keep calling witnesses
19 about one episode.

20 Q If you had been aware of Ms. Hall's version of
21 events in the motel room at the time, in January
22 1970, would you have called her as a witness at
23 the trial?

24 A At this point, sir, I don't know.

25 COMMISSIONER MacCALLUM: Just a moment now.



1 A Yeah.

2 COMMISSIONER MacCALLUM: Which one was it,
3 sir, that -- who, in the interview, declined to
4 go any further?

5 A That was Ute Frank, Mr. Commissioner.

6 COMMISSIONER MacCALLUM: Oh, all right,
7 that's -- all right.

8 A Yeah.

9 COMMISSIONER MacCALLUM: All right. I
10 thought you maybe said Hall there. All right,
11 sorry. You had Melnyk and Lapchuk.

12 A Yeah.

13 COMMISSIONER MacCALLUM: So again, and you
14 didn't feel any obligation to call her, or to
15 look for her; is that it?

16 A Or her or the other two or three people in the
17 room in view of what I had, as it were.

18 COMMISSIONER MacCALLUM: Okay.

19 BY MR. HODSON:

20 Q Putting aside, Mr. Caldwell, and I appreciate your
21 comment about efforts to locate, and we in fact
22 heard evidence and saw in the statement that
23 Ms. Hall was in Vancouver or Montreal or somewhere
24 else at the time. Putting that aside for the
25 moment, and I'm not suggesting that you ought to



1 have gone and found her in asking the next
2 question --

3 A Okay.

4 Q Do you understand that?

5 A Yes, sir.

6 Q If you had been aware at the time, if Deborah Hall
7 had been with Craig Melnyk when Mr. Karst went to
8 see him and said here's my take on events, here's
9 what I saw, and in fact what I saw was a bit more
10 specific than what the others saw --

11 A Yeah.

12 Q -- but I viewed it differently --

13 A Yeah.

14 Q -- would you have called her?

15 A In that scenario I would have.

16 Q And why is that?

17 A Well, because that's -- that proposed set of facts
18 was a lot more clear and crisp, if you will, than
19 what I had from her about Hall at the time of
20 the -- when this was all first revealed to me.

21 Q And the other fellow who was mentioned there, Bob
22 Harris, and again I think his evidence before the
23 Commission was to the effect that he observed the
24 event, and I can't remember if he described it the
25 same or identical as others, I think perhaps



1 slightly different, that his view was it was a
2 joke?

3 A Okay.

4 Q And we've heard other evidence from some of the
5 people there that Mr. Harris was not there at the
6 time and, if he was, he was in no condition to see
7 anything. Putting aside those issues, if at the
8 time you had been aware of or had Mr. Harris and
9 had his version of events in the motel room,
10 putting aside any obligation on your part to go
11 find them, if you had it would you have called him
12 as a witness?

13 A Yes, I think I would.

14 Q Now if we can call up 006913, this is a letter,
15 January 19th, 1970, and it talks about Mr. Roberts
16 and his accounts, but down at the bottom there's a
17 note here that says Bob Harris, 408 - 33rd Street
18 East?

19 A That would be with George Harris.

20 Q With George Harris, works with J. McKillop in
21 Regina. Do you know what that note refers to?

22 A Only that I must have written it on or after
23 January 19th. No, this is -- I think this is, in
24 effect, a copy of my file copy of that letter
25 which is why I would put that date on it and --



1 Q Is it fair to say that the note is unrelated to
2 the letter, just might have been a piece of paper
3 you put the note on?

4 A I'm sure that's right.

5 Q And would you have had some information about
6 where Bob Harris was at the time do you know?

7 A I wouldn't have written it unless someone told me
8 that, in effect.

9 Q Do you have any recollection of contacting Bob
10 Harris or trying to locate him at the time of
11 trial?

12 A I don't, Mr. Hodson. Mr. Hodson, I see now that
13 this is originally, an original signature by
14 Mr. Boyd, a letter to me, I think I -- so it would
15 be on my file in the normal course of events.

16 Q Right. So this is something you received, had on
17 your file and you jotted this note down about
18 Harris, and I think you said it would be unrelated
19 to the letter?

20 A That's correct.

21 Q If we could call up 007128, please, and again, Mr.
22 Commissioner, I would ask for an order that this
23 document not be published, nor any of the
24 contents. It contains, it's number 194, and it
25 contains the list of jurors and Mr. Caldwell's



1 notes.

2 Commissioner MacCALLUM: Very well, a
3 publication ban then.

4 BY MR. HODSON:

5 Q And it appears --

6 A I've found that document, sir. It's part of a
7 larger one as you realize.

8 MS. KNOX: For the benefit of counsel,
9 since I've located the original of that copy,
10 it's in the prosecution file number 2.

11 COMMISSIONER MacCALLUM: Thank you.

12 A Thanks.

13 BY MR. HODSON:

14 Q And it's the second page of your trial notes I
15 believe.

16 A Yes, sir, that's right.

17 Q And would these be your notes regarding the
18 selection of the jury?

19 A That's right, sir.

20 Q And again I don't want to go through any names,
21 but just tell us, maybe we can, the headings at
22 the top, it says call S.A.'s first. Can you tell
23 us what that --

24 A It says call stand asides first is what that
25 stands for.



1 Q And M and H are for Mahar and Hudson who I
2 understand were two other jury trials going on at
3 the time?

4 A That's correct.

5 Q And so where we see that note, that would indicate
6 that that juror was called for that --

7 A That's how I believe --

8 Q Right?

9 A Yeah, that's right.

10 Q And then you have a column that says called or
11 stand aside?

12 A That's correct.

13 Q And then by whom?

14 A By whom, and I believe Chief Justice Bence
15 suggested to me that I use all my stand asides
16 first, as it were, there is something in print
17 about that, but it was normal to stand people
18 aside if you wanted to, you know, not have them on
19 the jury, so -- and then the column 'by' indicates
20 it would be either me or the defence in this case.

21 Q And if we could just scroll down, the right-hand
22 side would be the juror number?

23 A That's right.

24 Q Scroll down, please. And it looks like the 12th
25 juror -- there's 26 names that I counted, assume



1 for the moment my counting is correct, that those
2 were the number of jurors that went through before
3 the 12 were selected?

4 A Would you give me that again, Mr. Hodson?

5 Q Well, go back to the full page.

6 A Okay.

7 Q This would be the juror numbers that you select
8 and I presume that the names that we go through
9 until we get to number 12 are the jurors that were
10 considered, the people that were considered?

11 A Yeah, that's correct.

12 Q And assume that I'm correct in counting 26 names
13 where I've circled there, you would have gone
14 through 26 perspective jurors before you selected
15 the 12; is that correct?

16 A That's right.

17 Q That's a correct reading of your note?

18 A It is.

19 Q And we're done with that document. I want to go
20 now just to one issue, Mr. Caldwell, that was
21 dealt with in Mr. Ron Wilson's evidence before the
22 Commission. I'm wondering if we're able to call
23 up some transcript and if we can go to -- is it by
24 page number or date?

25 MS. ISABELLE: Page.



1 BY MR. HODSON:

2 Q I think it's page number 5856, and this is -- this
3 is when I was questioning Mr. Wilson, and this
4 relates to the length of time, and just to give a
5 quick background, I don't propose to go through
6 the statements and the documents of Mr. Wilson,
7 we've been through them on more than one occasion,
8 but it deals with this issue of Mr. Wilson's
9 evidence, Mr. Caldwell, in his statement, what he
10 told the police, what he said in his statement,
11 what he said at the preliminary hearing, what he
12 said at trial regarding the length of time that
13 Mr. Milgaard was away from the vehicle on the
14 morning of the murder. Do you understand that
15 being an issue that has been discussed from time
16 to time in this Inquiry?

17 A Yes, sir.

18 Q And we went through with Mr. Wilson the apparent
19 differences between the time frames, number 1,
20 when he was away from the vehicle and got back,
21 and secondly, when Mr. Milgaard got back after
22 Wilson got back, and thirdly, the total time that
23 Mr. Milgaard was away, and as I say, we've been
24 through that before, I don't propose to go through
25 that. And I was questioning Mr. Wilson, if you



1 can go to page 5858, and this is a reference that
2 I am reading from Mr. Tallis' cross-examination at
3 the trial when he's talking about the fact that
4 Wilson, Mr. Wilson changed the length of blocks
5 that he went from two and a half to four, and then
6 if we can go to page 5859 and at the bottom and I
7 ask him, right here:

8 "Q And you recall, Mr. Wilson, at the trial
9 being challenged by Mr. Tallis about
10 what you had said at the preliminary
11 hearing being different than what you
12 said at trial?

13 A Yes I do.

14 Q And I -- did you stick to your story at
15 trial as opposed to what you said at the
16 prelim?

17 A I believe I did.

18 Q And why is that?

19 A Because they wanted an extended time
20 period so they got to.

21 Q And who are you referring to?

22 A Mr. Caldwell."

23 And then if you can go ahead to page 6002, and
24 this is me asking the question of Mr. Wilson:

25 "Q Did the prosecutor Mr. Caldwell do



1 anything at all to cause you to lie at
2 trial?

3 A Just suggesting to me about the length
4 of time that we were separated.

5 Q And is that what you told us yesterday
6 about the discussion you had with him?

7 A Yes."

8 I think that related to a discussion in a hotel
9 room where words to the effect -- to stretch the
10 time. Do you recall hearing that evidence, that
11 suggestion, and I just want to go through a few
12 more before I ask the question, but you are aware
13 of Mr. Wilson saying in this Inquiry, and indeed
14 on a number of previous occasions, alleging that
15 you told him to stretch the time in his evidence
16 about how long Mr. Milgaard is away from the
17 vehicle. Do you recall hearing that?

18 A Yes, I do.

19 Q And then if we can just go to 6639, and this is a
20 reference of some questions about what Mr. Wilson
21 says to the authors Rossmo and Boyd, and this is
22 an interview I think that was, or a transcript of
23 an interview where -- and Wilson confirmed this I
24 think at the hearing:

25 "Did you deal much with (inaudible)



1 Caldwell, the prosecutor." Wilson,
2 "Yup." Boyd, "What was your impression
3 of him?" Wilson, "Very difficult,
4 demanding, he made sure he got what he
5 wanted." Boyd, "In terms of?" Wilson,
6 "In terms of especially at the trial
7 when I changed the time", it says
8 "(inaudible)" or "from the",
9 "preliminary". Boyd, "Oh, he wanted you
10 to get more time?" Wilson, "Okay, put
11 it in such a way ... 'are you sure?' and
12 'make sure you are sure it wasn't longer
13 than you already said to begin with.'
14 Boyd, "You said it was longer?" Wilson,
15 "Well, he insinuated he wanted to make
16 sure I said it was longer, that's what
17 it seemed to me, so I said it was longer
18 at the trial. I think, because he was
19 very definite on that point and they
20 were going over the transcripts,"?

21 And then page 7473 -- I'm sorry, this is maybe
22 Ms. Knox questioning, I'm not sure, I can't tell
23 from the -- in any event, the question is:

24 "Q Okay. So when you say that Mr. Caldwell
25 told you to stretch your time, and



1 you've used that language here, I'm
2 going to suggest to you that what he
3 said to you was are you sure about the
4 time, he asked you, as prosecutors want
5 to do when there's conflicts, to think
6 about it and to be sure about how long
7 you were away and how long he was away,
8 and you simply said what was your
9 original estimate, which was the 15
10 minutes.

11 A Yes."

12 And then it goes on in the transcript where
13 Ms. Knox questions Mr. Wilson, and I don't
14 propose to go through all of that, and he may
15 have, in effect, I think said that he didn't
16 stretch the time, but in any event, regardless of
17 what Mr. Wilson had said from time to time, Mr.
18 Caldwell, you are aware that one suggestion or
19 allegation that he has made and others have made
20 about his evidence is that prior to his evidence
21 at trial you told him to stretch the truth and
22 indeed to lie at trial. You are aware of that
23 allegation having been made?

24 A Yes, sir.

25 Q Did you do so?



1 A No.

2 Q Did you have -- would you have had a meeting with
3 Mr. Wilson before the trial to discuss his
4 evidence?

5 A The evidence of Mr. Wilson, sir, I think was that
6 I appeared in his hotel room with the preliminary
7 hearing transcript the evening before he was to
8 testify. I can't say that didn't happen, and if
9 that did happen it wouldn't be unusual. Now, I --
10 in no shape, way or form did I try to influence
11 the length of time he estimated Milgaard to be
12 away from the vehicle and, for what it's worth, I
13 think he later recanted it in the same testimony,
14 if I'm not mistaken, sir, but it did not happen.

15 Q If we could go to 007084, please, and I just want
16 to identify it, this is -- it's about a 43 page
17 document which I believe are your -- I'm not going
18 to show him any of this.

19 MS. KNOX: Okay.

20 BY MR. HODSON:

21 Q Just to read the first page, Mr. Caldwell. This
22 is your, I think your handwritten and typed notes
23 of your opening address; is that correct?

24 A That's right, sir.

25 Q And I actually have the transcript of what you



1 actually said in the opening address and I will
2 refer to that.

3 A Okay.

4 Q But if we can just go through, if we can go to the
5 second page, we'll see that some of this is typed,
6 and actually if we can go to the last page,
7 007125 -- 7124, we'll see at the end, 'thank you,
8 stopped here.' And then actually the next page we
9 see 'not given in my opening,' and it looks like
10 this relates to Shirley Wilson. It looks like you
11 would have organized your opening address based on
12 witnesses or evidence, S.W. being Shirley Wilson;
13 is that --

14 A I assume so.

15 Q And if you look at some of the other pages, and
16 again I don't propose to go through them, but the
17 name of the witness, there's a letter and a page
18 number, so it looks as though you would have
19 organized that in that fashion?

20 A I believe so, sir.

21 Q If you can then call up 210858 --

22 A Did I cause that?

23 COMMISSIONER MacCALLUM: No, I think it was
24 me that time.

25 A What a relief.



1 COMMISSIONER MacCALLUM: You were giving me
2 a heart attack before and now I finished it off.

3 A Oh, oh.

4 COMMISSIONER MacCALLUM: Okay, thanks.

5 BY MR. HODSON:

6 Q Are you both okay?

7 A I think in my case we need a second opinion, sir.

8 Q 210858 is the transcript from the trial, and if we
9 can go to 210862 --

10 A Okay, fine.

11 Q And this is the typed transcript, Mr. Caldwell, of
12 the -- I think it's the official transcript of the
13 trial that has your opening address, and I will go
14 through parts of this, but I think if you are okay
15 with following on the screen -- if you would like
16 a paper copy, it doesn't have your notes on it.
17 Are you fine following on the screen?

18 A Yeah.

19 Q And if we can just go down to the bottom, and I
20 want to go through parts of the jury opening
21 remarks, and we'll see here this is where it
22 starts. Before we get into the document, can you
23 tell us just generally, what was your practice at
24 the time as to what it was you would say to the
25 jury in your opening address?



1 A Well, I would give them an outline of the evidence
2 as I believed it would be called in the trial.
3 That would be based on what was said in the
4 preliminary hearing and of course a couple of
5 cautions by everyone that that might not be the
6 evidence as it came out. If I could say, Mr.
7 Hodson, this one that, is it 7084, the reason it's
8 in my handwriting is that from there on I would
9 dictate every evening the typed part which appears
10 after it in sequence as the days went on, so I had
11 to hand write that, but the rest was typed by my
12 secretary of the day.

13 Q Okay. I'm not sure if that follows, Mr. Caldwell.
14 Are these not your remarks that you would have
15 read at the start of the trial before any evidence
16 was heard?

17 A Yes.

18 Q These --

19 A Oh, I'm sorry, I've got -- yeah, I'm happy to go
20 with this.

21 Q Yes. I'll show you a bit later your trial notes.

22 A Yeah, okay. Thank you, sir.

23 Q I believe these are your opening remarks that you
24 prepared and read with some modifications at the
25 trial?



1 A Yup.

2 Q And if you want to take a look at it just to
3 satisfy yourself, please do so.

4 A Do we have it in print form or not? If we don't,
5 I'm very pleased to go ahead with this.

6 Q It's 239.

7 MS. KNOX: I don't have it here with me,
8 it's at the office.

9 A I'm happy to proceed on that basis.

10 BY MR. HODSON:

11 Q I can tell you, Mr. Caldwell, that although I
12 haven't read them both, certainly they appear to
13 be similar.

14 A Good, I'm relieved already.

15 Q If we go to 210862, then, so again, what would be
16 your objective or what was your practice, you told
17 us just an outline of the case; is that --

18 A Yeah, and I think some brief excursions into the
19 way they would have to apply the law at some
20 stage, but mainly factual.

21 Q And I think what you tell the jury:

22 "... at this stage of the trial, to
23 outline the evidence that the Crown
24 expects --"

25 Next page,



1 "-- to call to prove its case; and I
2 don't think it hurts to emphasize again
3 that what I am going to say now is only
4 an outline of what I expect the evidence
5 will be and you of course as His
6 Lordship has said must be guided only by
7 the evidence that comes out here in
8 court."

9 So I think that's what you told us?

10 A Correct, yeah.

11 Q And would this be again, we talked the other day
12 about Crown theory, and is that -- the Crown would
13 have a case that you were trying to prove; is that
14 fair?

15 A That's right.

16 Q And you would sit down ahead of time, here's what
17 we think happened?

18 A Correct.

19 Q Here's the evidence we're going to call to
20 establish what we think happened?

21 A Right.

22 Q And I think that that will then establish the
23 guilt of the accused; is that right?

24 A That's right, sir.

25 Q And in putting forward the case there may be some



1 loose ends, in other words, some things that you
2 haven't quite figured out or can't be figured out
3 that are possibly, well, the Crown says it's A or
4 B, you decide, it doesn't matter which one it is
5 as far as we're concerned, things of that nature?

6 A Yes.

7 Q Going into the trial you would have -- have a
8 theory and a case that you were seeking to prove;
9 is that fair?

10 A Yes.

11 Q And the opening address to the jury would be your
12 attempt to outline that for the jury, again
13 subject to whatever rules and limitations existed
14 for jury addresses at the time?

15 A That's right, sir.

16 Q Now if we can go to page 210865, and it looks like
17 you started off with, talk about the next three --
18 I think actually you were calling Mary Marcoux and
19 Ms. Nyczai, but then the next three Crown
20 witnesses will be three of the major Crown
21 witnesses at the trial, and then you go on to
22 describe John, Cadrain and Wilson, and I think
23 you've told us that those -- maybe go to the next
24 page, and -- full page, please -- and right there
25 you talk about those people. So you would have



1 told the jury the Crown's major three witnesses
2 are Wilson, John and Cadrain; is that fair?

3 A Yes.

4 Q Go to the next page. And here's where you've
5 outlined for the jury what you would think Wilson
6 would say at trial; is that right?

7 A Correct. That's right, sir.

8 Q And that would be based on, first of all, the
9 statements that you received from the police;
10 correct?

11 A Yes.

12 Q Secondly, what he said at the preliminary hearing?

13 A Yes.

14 Q And third, what you would have determined from an
15 interview with him?

16 A Yes.

17 Q And in fact if in the interview a witness, whether
18 it be Mr. Wilson or someone else, would have said
19 you know what, I think I made a mistake or my
20 story is different or is going to be different at
21 trial, then that would be something you would set
22 out in the opening address; is that right?

23 A I would assume so, sir, but --

24 Q And I take it what you are trying to do here is to
25 the jury, here's what I think the witnesses are



1 going to say?

2 A That's right, that was emphasized.

3 Q And there would be a risk, sir, that if you -- not
4 intentionally, but if you said to the jury here's
5 what I think the witness is going to say and the
6 witness said something completely different, then
7 that might be a problem; is that fair?

8 A Yeah, that's not unheard of happening, and I would
9 think you would want to mention it somewhere in
10 the closing or words to that effect.

11 Q And I don't propose to go through this, it does
12 talk about Wilson's state of events. If we can go
13 to the next page, and he does talk about getting
14 back to the car, "... when he left her she was now
15 in a hysterical state," that's Nichol John,
16 crying, and shortly after the accused returned to
17 the car and got in the car, upon which Nichol John
18 moved away from the accused Milgaard and toward
19 Wilson.

20 "He will testify that Milgaard was
21 breathing heavily at this time upon
22 re-entering the car as if he had been
23 running and that when he was in the car
24 Milgaard stated to the two of them in
25 the car words to the effect that he had



1 fixed her or words to that effect; and
2 that Wilson replied "You what?" and that
3 that was the end of that conversation,
4 there was nothing further said."

5 And then scroll down, you tell the jury:

6 "Now Wilson will testify that two men
7 came along and helped them get unstuck
8 from the place where they were stuck;
9 and I might say that the identity of
10 these men has never been ascertained
11 despite inquiries, and of course Wilson
12 does not know who they were, being
13 strangers in Saskatoon. Anyway I expect
14 him to say that two men did come along
15 and help them get free ..."

16 And I think that was based on what Wilson had
17 told you previously?

18 A Yes.

19 Q And the next page, again talking about Wilson, you
20 tell the jury while they are,

21 "... at Cadrain's that he Wilson
22 observed blood on the front of
23 Milgaard's pants and of course when I
24 say blood naturally what he thought to
25 be or took to be blood; it's not a



1 question of analyzing or anything of
2 this sort. He will testify that
3 Milgaard changed his entire outfit."

4 So again, you would have told them about that
5 piece of incriminating information coming from
6 Mr. Wilson?

7 A Yes.

8 Q And then to page 210871, again this is outlining
9 Wilson's evidence, and you tell the jury:

10 "... while they were at the service
11 station Milgaard did some cleaning out
12 of the interior of the car and that when
13 the car was fixed they went back to
14 Cadrain's ..."

15 And would the cleaning out of the car, I think
16 you told us the other day that that might be
17 inferred to be items related to Gail Miller?

18 A Something incriminating, and only might be
19 inferred to be. I wouldn't think anyone would
20 place great weight on it.

21 Q But the reason you would have called that
22 evidence, Mr. Caldwell, would be to suggest that
23 Mr. Milgaard had made efforts to clean the car?

24 A Yeah, that's right.

25 Q And something related to the -- you would be



1 asking the jury to infer that that was related to
2 cleaning out something from the car related to the
3 murder of Gail Miller; is that fair?

4 A Yup.

5 Q And if we scroll down, you talk about, here about
6 Wilson saying that Milgaard was driving too fast
7 for the road, and again I think we talked
8 yesterday that, or the day before that this would
9 be part of the Crown's theory, that he was anxious
10 to leave the city?

11 A Yes.

12 Q And again, seeking to have the jury infer that he
13 was trying to get away because he had committed
14 the murder; is that fair?

15 A Yes.

16 Q And then also talks about Nichol John would scream
17 every once in a while for no apparent reason, and
18 this is Wilson's evidence, and I take it you would
19 be saying to the jury or asking the jury to infer
20 from that that she was upset because either she
21 had seen or she had known Mr. Milgaard had been
22 involved in a murder?

23 A Yes.

24 Q And if we can scroll down, and then you talk about
25 the compact, this is again you are saying what



1 Wilson is going to say about Wilson and John,
2 Milgaard and Cadrain,

3 "... and upon the girl locating the
4 compact she asked if anyone in the car
5 knew whose it was or words to that
6 effect, upon which the accused Milgaard
7 grabbed it from her, threw it out of the
8 car window without answering the
9 question or commenting on it."

10 So I take it there, Mr. Caldwell, the theory was
11 that that was, even though you never found the
12 compact, you would be asking the jury to infer
13 that that was Gail Miller's compact?

14 A Right.

15 Q And that Mr. Milgaard was throwing it out of the
16 vehicle because it was incriminating; is that
17 fair?

18 A Correct.

19 Q And then next you tell the jury that:

20 "Now Wilson will testify that while they
21 were in Calgary - Milgaard took him
22 aside or was alone with him and told him
23 about an incident that happened in
24 Saskatoon, Milgaard telling Wilson words
25 to the effect that he had hit a girl or



1 he had got a girl, or words to that
2 effect - and that he thought she would
3 be okay; and that he had put her purse
4 in a trash can."

5 And I take from that, sir, that you were asking
6 the jury to infer that Mr. Milgaard was
7 describing to Ron Wilson in Calgary his encounter
8 with Gail Miller on the previous morning?

9 A That's right, sir.

10 Q And then down at the bottom you go to:

11 "The next Crown witness will be the girl
12 Nichol John, the other person who
13 accompanied Milgaard and Wilson on this
14 trip ..."

15 If we go to the next page you say:

16 "Now I expect her to describe being
17 invited by Milgaard and Wilson to
18 accompanied them on the trip; to
19 describe leaving Regina and the trip to
20 Saskatoon, during which she I expect
21 will testify saw two knives in the car
22 of different descriptions to one
23 another, one of them which was simply
24 loose in the car and one of them in
25 possession of the accused; one being a



1 bone handled hunting type knife and the
2 other a type paring knife with a maroon
3 handle."

4 And I should pause there, I didn't turn it up on
5 the, your remarks about Mr. Wilson, but you told
6 the jury as well about Mr. Wilson's -- that Mr.
7 Wilson will testify about seeing a knife as well.

8 A I'm sure I did, sir.

9 Q And then carrying on, you say:

10 "I expect her to testify that they
11 reached Saskatoon, stopped the girl,
12 asked for directions, got stuck a couple
13 of times and generally to give her
14 version of the sequence of events on the
15 way to Saskatoon and in Saskatoon and
16 throughout the trip to Calgary, Banff
17 and eventually back to Regina."

18 And then you go on to the next witness, Mr.
19 Cadrain.

20 A Okay.

21 Q So you have two paragraphs about Nichol John and
22 no mention, other than the knife, of any of the
23 incriminating evidence that you expected her -- or
24 that was in her statement --

25 A Uh-huh.



1 Q -- and that she might have said at trial. And I'm
2 wondering, Mr. Caldwell, can you tell us why you
3 wouldn't have told the jury about your expectation
4 about what she would testify, namely that she had
5 witnessed the murder?

6 A Well I think, in view of my three interviews of
7 her before the trial started and, in effect,
8 their, you know, failure, if you want to look at
9 it that way, I would have been very reluctant to
10 put in the evidence that she, in effect, didn't
11 give, because she very well may not give it in the
12 trial. It would be awkward if I said "she is
13 going to say these five or seven things", if she
14 didn't say it then I would be, you know, I would
15 feel that that was regrettable that that was out
16 there before the jury before it was in evidence.

17 Q And so just let's probe this for a minute. Was
18 your concern that you might inflame -- well,
19 'inflame' is perhaps the wrong word, well maybe
20 it's the right word -- the jury at this time by
21 saying you are going to have evidence of a witness
22 who witnessed the murder when you weren't sure
23 that she was going to say that?

24 A Well, yeah, that's -- I wasn't sure she was going
25 to say it, I -- you know, I had the expectation



1 she would, but I couldn't tell that. Now if I put
2 it in there, it creates an awkward situation if
3 and when she doesn't testify to it, and it could,
4 you know, it could magnify into a really serious
5 problem.

6 Q Well, what, and would that be a problem for you or
7 a problem for the defence?

8 A Well, for the whole case, I would think. It would
9 be a problem for me because I would, I'd have put
10 it in a little incautiously; Mr. Tallis would have
11 to look at that and see if he felt it was a, you
12 know, a major difficulty; and I would think the
13 judge might eventually end up being very concerned
14 about it. So it looks like I took the presumed
15 safe way on this matter.

16 Q And, again, if you would have said something to
17 the effect that "I expect that Nichol John, who
18 has given a statement, will testify as follows",
19 what -- and talked about the eyewitness of the
20 murder, and the evidence came out during the trial
21 exactly as it did, would that have been a problem?

22 A Well it -- that would not have been a problem.
23 But I had no way of, you know, relying or
24 predicting that at this point, Mr. Hodson. It may
25 well have not come out was my --



1 Q Let's go through the scenarios.

2 A Okay.

3 Q You say nothing in your opening address about it,
4 if at trial she testifies let's say exactly in
5 accordance with her May 24th post-polygraph
6 statement --

7 A Uh-huh.

8 Q -- and says she witnessed the murder, etcetera, --

9 A Yeah.

10 Q -- in that scenario, from the Crown's perspective,
11 there -- would there be any downside to the fact
12 that you didn't mention it in your opening
13 address?

14 A I can't see any.

15 Q Yeah. And another scenario is that she did
16 exactly as she did in trial and you get the
17 statement before the jury on the issue of
18 credibility; is that correct?

19 A Umm, yes, that's --

20 Q And, in that situation, the fact that you have
21 mentioned nothing in your opening; would that have
22 any impact on the Crown's position?

23 A Well I would think that I was safer to do it this
24 way in that second scenario as well.

25 Q Yeah.



1 A Maybe I'm --

2 Q Yeah. And the third way is -- oh, I'm sorry?

3 COMMISSIONER MacCALLUM: Sorry, I just want
4 to get point 2.

5 BY MR. HODSON:

6 Q The second one would be exactly what happened at
7 trial, that in other words if you had made the
8 statement in your opening address that "here's
9 what she's gonna say", and at trial she doesn't
10 adopt this statement, but the statement goes
11 before the jury on the credibility issue?

12 A Uh-huh. It would have probably been necessary for
13 me to address that and say "I had a wrong view of
14 the evidence when we came in here", or words to
15 that effect.

16 Q Okay. What --

17 A And it would have put, you know, defence counsel
18 and the judge in an awkward or -- position as
19 well, I would have thought.

20 Q And a third scenario would be where the opening
21 address, you refer to the fact that Nichol John is
22 going to testify about witnessing the murder, and
23 that at trial she does not adopt her statement,
24 and the judge does not allow the statement to go
25 before the jury, or any of its contents, and in



1 that scenario I take it, sir, you would have had a
2 problem?

3 A Yeah, and I'd have to address it and try not to
4 say anything, you know, that would trigger a --
5 the case having to be redone or anything like
6 that.

7 Q Would it be fair to say at this time, at the time
8 of your opening, that you were pretty sure that
9 she wasn't going to repeat the May 24th statement
10 in her evidence?

11 A I -- I clearly, by the way I did this, I was, I
12 was apprehensive that she might not.

13 Q Yeah. "Pretty sure" is probably a bad legal
14 word, --

15 A Yeah.

16 Q -- but more likely than not that she wasn't going
17 to repeat her statement, or --

18 A Umm.

19 Q -- can you give us any indication of what you
20 thought at the time?

21 A Well the fact that I left out the details means,
22 to me, that I wasn't confident that she was going
23 to give the post-polygraph statement. I hope --
24 does that answer you, sir?

25 Q Yes.



1 A Yeah, okay.

2 Q If we can go to the next page, we then talk about
3 Albert Cadrain, and again you summarize here that
4 Mr. Cadrain will talk about seeing blood when he
5 changed clothes at Cadrain's house.

6 A Uh-huh.

7 Q And then go to page 210876. And then you tell the
8 jury about Cadrain's evidence. I'm skipping parts
9 here, Mr. Caldwell, --

10 A Yeah.

11 Q -- the transcript is in for what it is.

12 A Okay.

13 Q I'm just simply going over certain parts of this
14 with you.

15 A That's fine, sir. It says:

16 "Now you will remember that this would
17 be the first time Cadrain had been back
18 to Saskatoon after leaving. And that
19 upon arriving home and hearing of the
20 murder of Gail Miller he went the next
21 day to the Saskatoon Police - that would
22 be the Sunday afternoon - to report what
23 he knew of the incident after so to
24 speak putting two and two together.

25 Now I expect him to testify



1 that at one time in Calgary Milgaard who
2 was alone with Cadrain told Cadrain
3 words to the effect that he Milgaard was
4 a member of the Maffia, that he had a
5 gun in the back seat of the car and that
6 Cadrain should go and kill those two
7 off; however, Cadrain did not take this
8 seriously."

9 A Uh-huh.

10 Q So that would be your understanding of what
11 Cadrain was going to say at the trial?

12 A That's right, in a very, you know, compact form.

13 Q Just -- just back on Nichol John's statement, we
14 have talked -- I think you said that you were --
15 that it was a real, let's say it was a real
16 possibility that Nichol John would not adopt her
17 May 24th statement; is that a fair --

18 A Yes it is.

19 Q -- characterization? And, at that time, would you
20 have looked at section 9(2) and come up with a
21 plan, then, to at least then put the statement to
22 her utilizing section 9(2) of the *Canada Evidence*
23 Act?

24 A Yes. I believe Mr. Perras and I had gone through
25 the two or three different considerations, things



1 that could develop if that happened, and made
2 handwritten notes which I believe are in his
3 writing, I'm -- I had forgotten, Mr. Hodson, that
4 I left that information out, and I'm -- not about
5 the 9(2) but the --

6 Q Yes.

7 A And I'm glad I did leave it out because I can't
8 see any way that I could go wrong with that.

9 Q Would it be fair to say, sir, that if Nichol John
10 did not repeat the contents of her May 24th
11 statement, --

12 A Uh-huh.

13 Q -- that you would want to get her statement before
14 the jury in some form?

15 A In a legal form.

16 Q Yes.

17 A Yeah.

18 Q And why was that?

19 A Well because (a) I believed it to be true, based
20 on what we have been talking about here for the
21 last two or three days, I believed that was the
22 accurate version. She did -- was interviewed by
23 Inspector Roberts who showed her the uniform,
24 based on that she made -- in effect said that
25 she'd seen the murder. As I recall, I believe



1 Inspector Roberts' view was that she was being
2 truthful, but I hope I'm not misstating that.

3 So I had, in her case,
4 scientific, a policeman mind you, but a polygraph
5 operator who had some way of measuring these
6 things who, as I recall, thought she was being
7 truthful. But I hope I'm not --

8 Q Sorry, did you, --

9 A Yeah.

10 Q Are you talking about Nichol John being
11 polygraphed?

12 A No, no, definitely that she wasn't.

13 Q Okay.

14 A But during that sequence of events she ended up
15 before Roberts and being shown the uniform,
16 etcetera, is what I was --

17 Q So, again, you wished to have that statement. And
18 obviously you would agree, sir, that that
19 statement was certainly, if seen by the jury for
20 whatever purpose, was not favourable to Mr.
21 Milgaard; is that correct?

22 A No, that's correct.

23 Q Because in that statement she said "I saw David
24 grab the girl and stab her", or words to that
25 effect?



1 A Yeah, that's right. But you could only -- that,
2 if it happened, had to be done based on legal --

3 Q And I appreciate that, Mr. Caldwell.

4 A Yeah, yeah.

5 Q And let me preface my remarks with, I mean, these
6 issues that were raised by the Court, dealt with
7 by the Court, went to the Court of Appeal, and
8 were dealt with by the Court of Appeal.

9 A Yeah.

10 Q So I think we're on the same page, here, that the
11 process that was applied was -- was reviewed by
12 the courts.

13 A Yeah.

14 Q And so I'm trying to question you a bit about what
15 options you had and some of the reasons you did
16 some of the things that the Crown did.

17 A Certainly.

18 Q All right. So if we go back with the statement,
19 and I think you said if she did not repeat it in
20 her evidence that you would want, in a legal way,
21 to get that before the jury; is that fair?

22 A Only if it could be done that way.

23 Q Yeah, in a legal way.

24 A Right.

25 Q And you would agree, sir, that that -- number 1,



1 you are saying 'I believe that to be the truth'?

2 A Right.

3 Q Secondly, you would agree that that statement
4 supported the Crown's case that Mr. Milgaard had
5 committed the murder?

6 A Right.

7 Q And three, that if the jury saw it in a legal way
8 in whatever form, that it would likely have an
9 impact on them?

10 A Correct.

11 Q And, fourth, did you consider whether the jury
12 might consider why Ms. John wasn't sort of
13 adopting or repeating this statement in Court?

14 A Well, they might. They can, they can come to
15 conclusions on their own on things that aren't --

16 Q But would one -- certainly you told us that your
17 view was that she was scared of Mr. Milgaard and
18 that's why she wasn't repeating it?

19 A Yeah.

20 Q And that it was true?

21 A That's correct.

22 Q And was that something you thought the jurors
23 might also conclude?

24 A Well, I'm not sure I thought it, but I'm -- I'm --
25 it's one of the things they could have concluded



1 simply on the way the trial went altogether.

2 Q And so if we go back, again when you are
3 confronted with the fact that she testifies, she
4 does not adopt the statement, you then go into the
5 section 9(2) process to try and get the statement,
6 in a legal way, before the jury; correct?

7 A Umm, yeah, only in the -- under the 9(2) heading,
8 of course.

9 Q Under the 9(2).

10 A Yes.

11 Q And so let me suggest that there might be two
12 scenarios. The first would be where you put the
13 statement to her under section 9(2) as an
14 inconsistent statement and she ends up, in the
15 course of your examination, adopting the
16 statement; that's one scenario?

17 A Okay. All right.

18 Q That would be one?

19 A Yeah, it could be.

20 Q So you would go through with the idea under 9(2),
21 in fact -- and I don't want to get into debating
22 the objectives -- but one of the objectives of
23 9(2) with a witness is to say "lookit, you said
24 something before, you are saying something
25 different now, I'm questioning your credibility",



1 and in some cases the witness might say "okay, you
2 are right, what I said before is true --"

3 A Yeah.

4 Q "-- I now adopt it"; that's a possible outcome?

5 A Yeah, that's been known to happen on some rare
6 occasions, sir, but --

7 Q And in that situation you would have got your
8 evidence in the sense of what you expected to be
9 the truth, and that Ms. John would have, in that
10 scenario, adopted the statement and testified
11 saying "yes I saw this"; correct?

12 A Yes, that's right.

13 Q And, in that scenario, Mr. Tallis would then be
14 entitled to cross-examine her on her evidence?

15 A Ab --

16 Q In other words, the statement in the form of
17 evidence; correct?

18 A Absolutely, on anything he wished.

19 Q Right. And he could challenge the credibility of
20 that evidence, and her recollection, and her
21 eyewitness, etcetera?

22 A I would certainly expect so.

23 Q And then the second scenario, sir, would be where
24 you take the statements to cross -- or to question
25 her under section 9(2) in a legal way, and she



1 does not adopt it, which is I think what happened
2 at trial, in which case you would be asking the
3 Court, in a legal way, to have the statement
4 before the jury on the issue not -- on the issue
5 of credibility?

6 A Yeah.

7 Q Not on the truthfulness of the statement, but on
8 Nichol John's credibility?

9 A That -- that was how I understood it worked.

10 Q Correct.

11 A I think the judge stressed that when he dealt with
12 it.

13 Q And in fact, to be a bit more specific, not just
14 generally on Nichol John's credibility but the
15 credibility of her statement "I don't recall the
16 certain segment of events"?

17 A That would be part of it.

18 Q And would it be fair to say that, and I think this
19 is borne out in your closing address, the argument
20 would be "don't believe her when she says I don't
21 recall, she does recall"; correct?

22 A I believe I argued that.

23 Q And if the jury were to say 'okay, we don't
24 believe Nichol John when she says "I don't
25 recall", she must have recalled something'; that



1 would be a conclusion, right?

2 A Would be one that was open to them, --

3 Q Yeah.

4 A -- sure.

5 Q And that's where her statement would be saying
6 'this must be what she recalled then'?

7 A Umm, 'this must', yeah, they may well decide 'this
8 must be what she saw and is now recalling or
9 admitting'.

10 Q And in a legal way, Mr. Caldwell, that was what
11 your, the Crown, position was; that 'lookit, when
12 she says "I don't recall" about witnessing the
13 murder, don't believe her', --

14 A Yeah.

15 Q -- 'she's not being truthful'. And I think you
16 told us you thought she was scared of Mr.
17 Milgaard, and that's why she was lying in her
18 evidence; --

19 A Yes.

20 Q -- is that correct?

21 A Yes.

22 Q And your position was 'don't believe that, take
23 this previous statement, use it in a legal way to
24 conclude that she is lying when she says "I don't
25 recall", and that the truth is really what's in



1 the statement'?

2 A Uh-huh. That --

3 Q In a legal way?

4 A Yeah.

5 Q And the net result of that, Mr. Caldwell, is that
6 Ms. John's statement, the May 24th statement, was
7 not examined upon; was it? And --

8 A That's the -- is that --

9 Q In other words Mr. Tallis -- well, and we'll hear
10 from Mr. Tallis --

11 A Yeah, yeah.

12 Q -- but certainly -- and maybe that's not a fair
13 question for you, sir, other than to say that, at
14 trial, would it be fair to say that there was not
15 a cross-examination or a testing of Ms. John's May
16 24th statement?

17 A And this is the one I was working on at the
18 time, --

19 Q Yes.

20 A -- is it?

21 Q Yes.

22 A If Mr. Tallis did not -- do you mean in the trial
23 proper, sir.

24 Q Yes.

25 A Okay. I assume that's correct, I --



1 Q And that will be a question that --

2 A I can't -- okay.

3 Q -- I think in fairness, Mr. Caldwell, I will put
4 to Mr. Tallis --

5 A Yeah.

6 Q -- but that appears to be what happened at trial;
7 is that fair?

8 A Yeah. Just give me the bare bones of that again,
9 sir?

10 Q Sure. Just that Nichol John's May 24th statement,
11 the incriminating statement, --

12 A Right.

13 Q -- was put before the jury not on proof of its
14 contents, but only to be considered by the jury in
15 assessing whether or not Nichol John was credible
16 when she said "I don't recall --"

17 A That's right.

18 Q "-- certain things"?

19 A That's right.

20 Q And that -- and, again, I think this is a question
21 for Mr. Tallis, but that I believe, at trial, that
22 Nichol John was not cross-examined?

23 A Yeah.

24 Q And, in fact, I'm not sure how she could be when
25 she wasn't repeating it in Court?



1 A That, Mr. Hodson, that's the one question I don't
2 know. I assume that Mr., if Mr. Tallis did not
3 cross-examine her, that would be readily evident
4 from the transcript, etcetera.

5 Q Yeah. And I mean, if we think about it, you
6 couldn't very well either examine or cross-examine
7 her and say "well tell me what you saw when you
8 saw him stabbing her" when her evidence before the
9 Court is "I don't recall that"; right?

10 A Yeah.

11 Q So that would deprive, that would deprive both
12 Crown and defence from examining that witness with
13 respect to the contents of that statement; --

14 A Yeah.

15 Q -- maybe that's a better way to put it.

16 A I would think that's right. You would still be
17 open to cross-examine her on what she saw
18 otherwise, of course.

19 Q Right. This is probably a good spot to break for
20 lunch, Mr. Commissioner.

21 *(Adjourned at 11:54 a.m.)*

22 *(Reconvened at 1:32 p.m.)*

23 BY MR. HODSON:

24 Q When we broke we were dealing with your opening
25 remarks to the jury, 210858. If we could call



1 that up, please, and go to 210876. And there is a
2 paper copy if you wish to have it.

3 A Oh, thanks.

4 Q And when we left off I had talked to you, Mr.
5 Caldwell, about Mr. Cadrain's evidence, and then I
6 asked -- no, I don't need, back to the full page,
7 please -- I had asked you about Mr. Cadrain's
8 evidence -- or, pardon me -- your remarks to the
9 jury about Mr. Cadrain, and then I asked you some
10 questions about Nichol John and the section 9(2).
11 So I just want to go back to the jury address, and
12 then if we could go ahead to page 210879, just
13 highlight some of the other remarks you made:

14 "Now the next Crown witness will be a
15 man named Henry George Diewald, the
16 caretaker at St. Mary's Church. Now
17 this is located on the northeast corner
18 of 20th Street and Avenue "O". It's
19 just a block west of Westwood Funeral
20 Chapel and it is located in the same
21 position on its block as Westwood is on
22 its block. Diewald will testify that he
23 left the church rectory, which is north
24 of the church, at around seven a.m. that
25 morning to walk to the church and unlock



1 it ...",

2 and it goes on to talk about looking down the
3 alley. And I take it, Mr. Caldwell, that this
4 would have been your theory that -- or pardon
5 me -- the Crown's theory that Mr. Diewold was
6 looking down the T of the alley between Avenue N
7 and Avenue O and then, in fact, saw the vehicle
8 in which Mr. Milgaard was in; is that correct?

9 A That, that appears to be so, sir.

10 Q And then if you can scroll down, please. You then
11 tell the jury:

12 "... the next several Crown witnesses
13 are persons who had something to do with
14 Milgaard and his companions ..."

15 after the time of:

16 "... the murder and they are mainly
17 witnesses who had something to do with
18 the group as a result of various car
19 trouble ...",

20 and then you talk about -- scroll down, please:

21 "The first of these is a man by the name
22 of Rasmussen. Now he was working at the
23 time at the Trav-a-leer Motel ...",

24 and if we can go to the next page --

25 A Okay.



1 Q -- and just pick it up here, you again talk about
2 the time, you say:

3 "Now, you may notice that if both the
4 Crown witnesses Nyczai and Rasmussen are
5 correct in their times that the deceased
6 was at her residence at around a quarter
7 to seven a.m. and the party of three
8 including Milgaard were at the motel by
9 seven thirty the same morning,
10 three-quarters of an hour later, leaving
11 a period of three-quarters of an hour in
12 which the Crown suggests that the
13 deceased left her home, walked on her
14 way to catch the bus to the place where
15 she was killed, that the murder took
16 place, Milgaard and his party left the
17 vicinity, drove out to the Trav-a-leer
18 located on 22nd Street and Circle Drive.
19 However, this is the sequence of events
20 as the Crown believes them to exist and
21 it may be that when you've heard all the
22 evidence you may come to the conclusion
23 that the events did happen in this
24 sequence and that perhaps one or both of
25 Ms. Nyczai and/or Rasmussen are slightly



1 out on their times or conversely of
2 course you may decide that all the
3 things did happen in this space of
4 time."

5 So it appears in your opening address to the jury
6 you are saying "here's the window, quarter to
7 7:00 to 7:30, is when the murder took place"?

8 A Yes.

9 Q And the one book end, if I can call it that, on
10 the front end would be Ms. Nyczai, who said "I
11 last saw Gail Miller alive at about that time,
12 6:45, so she couldn't have been killed before
13 then"?

14 A Uh-huh.

15 Q Correct?

16 A Yes, sir.

17 Q And Mr. Rasmussen, you say, saw Mr. Milgaard at
18 7:30 at the Trav-a-leer Motel, and so that was
19 from that point on Mr. Milgaard was elsewhere and
20 could not have committed the murder; is that fair?

21 A Yes.

22 Q And so whatever time it took to get from Avenue O
23 to the Trav-a-leer Motel, that would really be the
24 end time for your time frame; is that correct?

25 A The -- yes.



1 Q Next page. Then you go on to talk about the
2 Danchuks, who will testify about seeing them that
3 morning, and then the next page. And the only
4 reference I think you have about what the Danchuks
5 observed, or there:

6 "I expect Danchuk to testify that he
7 noticed a tear in the seat of the pants
8 that the accused Milgaard was wearing at
9 the time."

10 Would there be a reason, and I don't think it's
11 in here, that you wouldn't say in your opening
12 remarks that they did not observe blood?

13 A Not that I can think of, Mr. Hodson.

14 Q And then the next page is 27, again you are
15 talking about the Danchuks, telling the jury what
16 you expect. Call out that portion, please. And
17 you say that you:

18 "... expect her ...",
19 being Mrs. Danchuk:
20 "... to testify that she and the girl
21 who lived next door left for work ...",
22 and then:

23 "... recalls the accused as being
24 wearing a toque on this occasion."

25 And would it be fair to say that that reference



1 to the toque is part of the Crown's theory that
2 what was found by Mrs. Gerse may have, or was,
3 Mr. Milgaard's toque with blood on it?

4 A You could infer that, sir.

5 Q Then skip ahead to 210886. And, again, you are
6 talking about the tow truck evidence, the service
7 station evidence, and we've touched on this
8 before, but you are telling the jury here about
9 Mr. Milgaard cleaning items out of the car,
10 putting them in the garbage can at the station:

11 "... and Davis did not check what these
12 were ..."

13 Davis is the service station fellow. And I take
14 it sir, this is what you told us yesterday, that
15 would be part of the Crown theory, that this may
16 have been when Mr. Milgaard was disposing of
17 items from the vehicle that might be related to
18 the Gail Miller murder?

19 A Yes, sir.

20 Q Now next page, please. If we can call out about
21 line 20 or line 15, you say:

22 "Now one of the pieces of evidence you
23 will be hearing which certainly in the
24 Crown's case goes unexplained is that
25 the body had its arms in a black cloth



1 coat, which had some puncture marks
2 through it which I think you may decide
3 would correspond with the puncture marks
4 in the body itself; but that the uniform
5 dress was rolled down and when it was
6 stretched out and flattened out these
7 puncture marks were not in the dress and
8 this is simply something which is
9 unexplained but that's one of the things
10 that Kleiv and possibly Parker and some
11 of the other witnesses will mention to
12 you and that was the situation found
13 indicating a stabbing through the coat
14 and into the body at a time when the
15 dress was actually rolled down and at a
16 time when the deceased must have been
17 out of the coat and the top of her
18 uniform somehow taken down and the coat
19 replaced. I just mention that because
20 you will be hearing evidence of that."

21 And I think that's what you told us the other
22 day, that this was something that the Crown
23 really couldn't explain?

24 A That's right, sir.

25 Q Next page. Again, here you talk about Mr. Penkala



1 finding the knife blade, and then at the bottom:

2 "Now he will testify that on February
3 the 4th - you will remember that the
4 occurrence was on the 31st of January
5 but the search kept on and that as part
6 of a continuing search of that area he
7 located two frozen lumps of a yellow
8 substance with hair frozen into them,
9 that he retained these, and you will
10 hear evidence later that one of these
11 lumps contained human male spermatazoa,
12 a constituent of human male seminal
13 fluid. Now, Lieut. Penkala will
14 describe receiving those items from
15 other officers ...",

16 and it goes on to talk about continuity. So you
17 would have told the jury about the male seminal
18 fluid found by the body?

19 A That's right.

20 Q Next page. At the bottom you are talking about
21 McCorriston's evidence about February 3rd finding,
22 following a garbage truck and finding a purse in
23 the back alley near where the murder took place,
24 is that correct?

25 A Yes.



1 Q And you had already told the jury that Mr. Wilson
2 was going to testify that he heard, in Calgary Mr.
3 Milgaard said that he had stabbed a girl or jabbed
4 a girl and grabbed her purse and put it in a
5 garbage can?

6 A All right, sir.

7 Q And would that be to tie McCorriston's evidence
8 in?

9 A Umm, yes.

10 Q Would that be the Crown's theory, that McCorriston
11 found a purse in the garbage, and Wilson said Mr.
12 Milgaard had admitted to putting a purse in a
13 garbage can after jabbing a girl?

14 A That's right.

15 Q And then the next page, next page please, 893.
16 And here you talk about the wallet and you say:
17 "I expect Giles to say that he took Sgt.
18 Mackie to the place where he found the
19 wallet - which location by the way Sgt.
20 Mackie says was immediately in front of
21 326 "O" South, which is a few houses
22 north of Cadrain's house at 334 - and
23 that when they got there the policeman
24 Mackie himself found some of the papers
25 ..."



1 Now we've seen a couple of references in the
2 notes to confusion, or something, between where
3 Beauchamp says he found the wallet and where
4 Mackie says Beauchamp found the wallet and where
5 he saw the papers; do you know that?

6 A I know that that seemed to exist.

7 Q And it seems to be that -- please correct me if
8 I'm wrong -- that Mr. Beauchamp found the wallet
9 in a spot that may not have corresponded where --
10 with where Mr. Mackie thought he found it?

11 A That could be the case, sir.

12 Q And, here, you tell the jury that:

13 "... by the way Sgt. Mackie says was
14 immediately in front of 326 "O" South
15 ..."

16 It wasn't Mackie who found the wallet, he found
17 hospitalization cards, didn't he? I think that
18 was the evidence.

19 A I expect that was, Mr. Hodson.

20 Q And I'm wondering, do you recall any issue with
21 whether or not the wallet may have been found
22 across the street from Cadrain's, as opposed to
23 two houses down?

24 A It seems to me there was some mention of a skating
25 hut and a wallet near or under it, but frankly at



1 this point, I would have to be reminded of that.

2 Q And as far as the Crown's theory was concerned, I
3 believe that we will see in the closing address,
4 certainly, that when Mr. Milgaard was at the
5 Cadrain house and took the car out for what I
6 think was termed 'an unexplained drive around the
7 block', that this is when he would have disposed
8 of Gail Miller's items, including the wallet?

9 A That would be my understanding.

10 Q And would it be fair to say the fact that the
11 wallet was found within a few houses of Cadrain's
12 house was evidence that supported that theory?

13 A I would say so.

14 Q Page 210895, again you talk about Helen Gerse and
15 the toque right next door to Cadrain's, and go to
16 the next page, talk about a toque sitting on top
17 of the snow in front of her house, noticing there
18 was blood, etcetera, and I take it, sir, that the
19 Crown's theory was that this was Mr. Milgaard's
20 toque and that he disposed of it either when he
21 drove around at Cadrain's house or when he was
22 there?

23 A I take it that's so, Mr. Hodson.

24 Q 210898, this is talking about Dr. Emson and his
25 evidence and you say:



1 "He will testify that he found numerous
2 spermatozoa in the vagina of the
3 deceased. He will give his opinion that
4 from what he saw he would estimate
5 sexual intercourse took place within
6 approximately twelve hours preceding the
7 examination - and as you know these
8 approximations are only that but I
9 stress the words "before the
10 examination" as opposed to before the
11 death of the deceased, so you might bear
12 that in mind in due course. He will
13 testify that he found no signs by way of
14 injuries to the genitalia of the
15 deceased, the sexual organs, which would
16 indicate sexual intercourse against her
17 will during life but I expect him to
18 testify that in his opinion intercourse
19 could have taken place while the
20 deceased was unconscious or even after
21 death from the absence of injuries to
22 the genitalia."

23 If I can pause there. Was that a piece of
24 evidence that was somewhat unusual, Mr. Caldwell,
25 the fact that there appeared to be no physical



1 signs of forced intercourse on Gail Miller?

2 A I would think it could be characterized that way,
3 sir.

4 Q And that in fact if it was, if rape was committed
5 as part of the murder, and I think your theory was
6 that she had fought the attacker; correct?

7 A I'm sure.

8 Q And that if she fought the attacker, one would
9 presume she also fought the rape?

10 A Yeah. I would, if there's such a thing as
11 conventional rape cases, I would have, I think it
12 would have been a common finding that there had
13 been injuries to the genitalia. That certainly
14 was not the case here as we know.

15 Q And I think you went back to Dr. Emson and said
16 what are some explanations, and I believe his
17 explanations, at least in your notes and his
18 evidence, were that it could have been while she
19 was unconscious?

20 A That's one of them, yeah.

21 Q Or after she was dead?

22 A That's right.

23 Q Did you ever consider or look at whether that may
24 have been that there was not -- there was not
25 sexual intercourse as part of the attack on her



1 that morning?

2 A I don't believe so, Mr. Hodson. At that point it
3 appeared to be, if you will, all one attack by one
4 person as far as the Crown assessed the case.

5 Q But whether or not the Crown ever considered
6 whether the spermatozoa found when Dr. Emson did
7 the autopsy, whether that may have been from prior
8 to the incident?

9 A You mean the previous evening or something?

10 Q Yes.

11 A I think there was some attempt to determine
12 whether she had had intercourse willingly within a
13 reasonable time period before. I can't come up,
14 with the short notice, with names, etcetera. I
15 think someone tried to determine that.

16 Q There's some evidence of that.

17 A Okay.

18 Q So would it be fair to say the Crown theory was
19 that she was raped as part of the murder and that
20 the fact that there was no physical signs of
21 forced intercourse, that it must have been either
22 that she didn't fight it or she was unconscious or
23 she was deceased; is that fair?

24 A Yeah, and that's based on what we learned, if you
25 will, from Dr. Emson, among other things.



1 Q You go on to say that Dr. Emson:

2 "... will also explain that human blood
3 as such - and I say that as opposed to
4 constituent parts of human blood - that
5 the human blood as such can get into
6 seminal fluid and spermatozoa of the
7 male person from his own body, that is
8 for a variety of reasons including
9 injuries to the genitalia, disease of
10 the genitalia, and sometimes apparently
11 without any apparent cause; and again
12 this is speaking of blood as such as
13 opposed to a constituent."

14 So if I can pause there, it looks like you told
15 the jury at the opening -- and I don't know that
16 you've identified the secretor issue yet, but you
17 are telling them that Dr. Emson is going to
18 testify that in males human blood can get into
19 their semen in a variety of ways?

20 A That is how I take that.

21 Q And would it be fair to say, sir, that you had
22 to -- I shouldn't say had to, you desired to put
23 before the jury an explanation as to why David
24 Milgaard's blood might be in his semen, because
25 you thought he was a non-secretor?



1 A I think that's fair to say.

2 Q And if we can scroll down to the bottom, and then
3 you talk here about, here's where we hear about
4 Paynter, and:

5 "... that he found human seminal fluid
6 in one of those two frozen lumps, which
7 I told you about located by Lieut.
8 Penkala, but no seminal fluid in the
9 other lump; that he also found human
10 seminal fluid on the panties taken from
11 the deceased -"

12 And then go down here, it says:

13 "Now, he will testify that he found the
14 accused Milgaard's blood to be type "A"
15 and further that he examined this toque
16 which Mrs. Gerse found and that it had
17 human blood of an indeterminate group on
18 it. Now I think that Staff Paynter will
19 explain to you that depending on the
20 sample they are given it is sometimes
21 possible to say that a stain is human
22 blood and it is sometimes possible to go
23 on further and say it's type "A" or type
24 "B" or whatever the case may be;"

25 And then you go on to talk about that, and then



1 down at the bottom:

2 "He will also testify that he received
3 saliva samples given by the accused and
4 tested them and found that no antigens
5 of blood group "A" or "B" were to be
6 found in the samples. Now, Lady and
7 Gentlemen, I do want to pause here to
8 explain briefly one of the more
9 complicated aspects of the evidence
10 which I think though will be clearly set
11 out before you in evidence by Staff
12 Sergeant Paynter. Now, when Staff
13 Paynter testifies I expect him to
14 explain to you some of the techniques
15 involved in blood grouping ..."

16 Etcetera, and then here on line 4:

17 "... and I expect him to testify that
18 there are people known as secretors and
19 that this class of people which is a
20 very large class - about eighty percent
21 I believe of the population - is that
22 they are persons who have their blood
23 antigens or blood grouping substances
24 secreted by their bodies into their
25 other bodily fluids - perspiration,



1 seminal fluid, saliva or tears - and
2 when you have a sample of one of these
3 items from a secretor that, all things
4 being equal, you should be able to find
5 out the blood group of that person from
6 the examination of a sample if it's
7 sufficient of one of these fluids. Now,
8 I expect him to testify that when he
9 initially checked the two frozen lumps I
10 mentioned and found one to contain
11 spermatozoa - and when this thing was
12 melted by the way it was - clear pale
13 yellowish fluid - he found it contained
14 spermatozoa but he made no attempt to
15 examine it for the actual presence of
16 blood as such. And I stress that as I
17 did with Dr. Emson's evidence because
18 you will be hearing about blood as such
19 as opposed to the constituents of blood,
20 being these antigen which are parts of
21 blood. However, that he did go ahead
22 and check on this first occasion a
23 sample to see if he could find any blood
24 group antigens in it and he did find "A"
25 antigens in the liquid."



1 And again he says:

2 "Now this would indicate at that stage -
3 and I stress at that stage of the
4 proceedings that the fluid was probably
5 from a group "A" person who was a
6 secretor - found "A" antigens that
7 should be a secretor of group "A"."

8 And if I can pause there, and I think at that
9 time, as we've heard, Mr. Caldwell, you thought
10 Mr. Milgaard was a non-secretor?

11 A That's how I recall it, sir, I think that's
12 correct.

13 Q If he would have had evidence at the time, in
14 1970, the same evidence that I think when Mr.
15 Milgaard was checked in the early 1990s it was
16 determined that he was an A secretor, if that test
17 had been verified in 1970; in other words, if -- I
18 think what Mr. Paynter said, when he tested he
19 couldn't see the antigens in the saliva of Mr.
20 Milgaard, it didn't mean he wasn't a secretor, he
21 just didn't have them in that sample. If the
22 testing had been done -- and might I say properly
23 might be too strong a word -- but if another test
24 had been done that confirmed that Mr. Milgaard was
25 an A secretor, presumably you would have put that



1 before the court?

2 A If I had it at that time, Mr. Hodson.

3 Q And that would have been -- would that have been
4 helpful to the Crown's case against Mr. Milgaard?

5 A Only in the sense of making him part of a possible
6 donor group as opposed to not part of it the way I
7 understood it at this time.

8 Q But let's just take a look at this.

9 A Okay.

10 Q What you did at the time was saying, well, the
11 frozen lump indicates it has A antigens and your
12 first reaction was, or maybe -- or the lab people
13 was it must be from a secretor. If you would have
14 known at that time, as we know now, that Mr.
15 Milgaard was a secretor, would that not have given
16 you the ability to say lookit, this is consistent
17 with him?

18 A Yes, it would.

19 Q And in fact I can't recall the percentages, I
20 think that it may be 40 percent, or some
21 percentage of people are A secretors?

22 A Uh-huh.

23 Q Correct?

24 A Yes.

25 Q And so if you would have had that evidence at the



1 time, would that not have been helpful to the
2 Crown case?

3 A It would in the sense that, as I see that
4 evidence, it would make him a possible source of
5 the fluid, if you will.

6 Q And in fact I guess at this time the frozen semen
7 and the physical evidence of the blood could do
8 one of two things, one, it could eliminate a
9 suspect, that's one possibility?

10 A That's correct.

11 Q Or two, not eliminate a suspect?

12 A That's how I understood it.

13 Q Yeah. It couldn't be saying, well, this must be
14 him, at that time there was no DNA known to
15 scientists; is that fair?

16 A That's my understanding, sir.

17 Q And, for example, if Mr. Milgaard had been blood
18 type B, I think we've heard from some police
19 officers that that would have eliminated him as
20 the donor of the semen?

21 A I would assume that would be the case, Mr. Hodson,
22 with my limited knowledge of science.

23 Q And certainly if the scientific evidence or
24 opinion at the time had been that the frozen semen
25 was from a group A secretor and that the antigens



1 in the semen could only be there from a secretor
2 as opposed to be from blood -- do you follow?

3 A I hope so.

4 Q Okay. So that in other words, there's A antigens
5 in there, but the advice of either Emson or
6 Paynter is that it must be from an A secretor, and
7 you concluded conclusively that Mr. Milgaard was
8 not an A secretor, that might also be something
9 that mind tend to eliminate him?

10 A Oh, certainly, yeah.

11 Q Now, we talked about this a bit earlier, about the
12 evidence that -- just when we talked about
13 Dr. Emson that you put forward about explaining
14 how it is that, and I think you've agreed with
15 this, that you had to have some evidence to
16 support -- let me back up. In order that Mr.
17 Milgaard would not be eliminated as the donor of
18 the semen, and at the time I think you were under
19 the mistaken assumption that he was a
20 non-secretor, you had to have some evidence that
21 would tend to show how his blood might get in his
22 semen; correct?

23 A I would believe that to be.

24 Q Because -- sorry, I didn't mean to cut you off.

25 A I believe that to be so, Mr. Hodson.



1 Q Because you had Paynter who was saying lookit, and
2 this is where you talk here about the later stage
3 of the testing, he first says there's A antigens,
4 and I think then Mr. Penkala says, okay, but Mr.
5 Milgaard is not a secretor --

6 A Uh-huh.

7 Q -- how else could they get in there. Paynter goes
8 back and tests and says okay, well, there's blood
9 in here, or I think what's blood, he said it could
10 be leafy vegetables or something, or leather, but
11 he says I think there's blood in the semen, and if
12 there's blood in the semen, blood has antigens and
13 therefore the reason I found A antigens in the
14 semen might be from Mr. Milgaard's blood and so
15 that it could be from a non-secretor.

16 A Yeah.

17 Q And --

18 A Go ahead, sir.

19 Q And then you went to try and get some evidence to
20 explain how, to put before the jury to explain how
21 it might be that Mr. Milgaard's blood could be in
22 his semen because you thought you needed to get
23 his antigens in the sample?

24 A That -- I can't honestly confirm that totally,
25 but --



1 Q I'm going to suggest that that's certainly what
2 the documents suggest.

3 A Okay, sir.

4 Q And the question I have is we've heard from
5 Mr. Emson in this Inquiry, he gave evidence at the
6 trial that, I think words to the effect that it
7 was, I think, quite common, or words to that
8 effect, for a young male to have blood in his
9 semen?

10 A Uh-huh.

11 Q And I may have overstated that, but he certainly
12 said that was -- that was an explanation. He in
13 the early '90s backed off of that a bit and I
14 think he told this Inquiry that he was wrong, that
15 it was really quite uncommon for there to be blood
16 in the semen. Do you remember hearing that
17 evidence?

18 A I -- I don't remember, but I'm sure that he said
19 it, sir. I was there when he testified in the
20 Inquiry.

21 Q And did you on this issue of trying to sort out,
22 for lack of a better word, how the frozen lumps of
23 snow that Mr. Penkala found either were neutral to
24 or didn't eliminate Mr. Milgaard, was that
25 something that you left to the police and Dr.



1 Emson or is that something that you participated
2 in trying to sort out?

3 A No, I wanted it so-called sorted out for my own
4 benefit and everyone else's. I would have to rely
5 on the police and Dr. Emson to do that because I
6 knew virtually nothing about those areas and I of
7 course didn't want to set up any false evidence of
8 any description. I just had to essentially stand
9 back from that and say please help me with this.

10 Q Okay. That is all for the opening remarks. I
11 do have just a couple of documents just to
12 identify for the record, if we could call up
13 007127, and you do not need to get the paper I
14 don't think for this, Mr. Caldwell. And these are
15 your trial notes and I think there are 109 pages
16 of your notes of trial. Actually, if you want to
17 look at the originals just to confirm, that's
18 quite fine.

19 A If you would like me, I will.

20 Q I think your counsel has them. I simply want you
21 to confirm that these are your handwritten trial
22 notes.

23 A These are my --

24 Q I think you've got the wrong document. 195,
25 please. Is it 195?



1 A Yeah, I do, I have 195, but the -- I just want to
2 be careful, sir, about those RCMP numbers in the
3 upper right-hand corner. I have evidently not
4 numbered them as I went through them, so if their
5 math is correct, starting at the end, in my case
6 here it starts at 104 in their numbering system
7 and goes to 195, including that cover sheet that
8 you are looking at there, sir.

9 Q Right. And those would be your notes you took
10 during the trial?

11 A Yeah.

12 Q And maybe I will just go to a couple of pages and
13 have you explain what it is and how you took your
14 notes. If you can go to 007131, and this would be
15 Thor Kleiv, and I take it these would be your
16 notes that you would use to question him in chief?

17 A That's right.

18 Q And then you would do -- what we will see in this
19 are your guide notes, what you used to question in
20 chief?

21 A That's right, sir.

22 Q And then we would also see notes for, your notes
23 of Mr. Tallis' cross-examination; is that fair?

24 A No doubt, yeah.

25 Q And then actually if you can turn to the next



1 page, please, and this is 007132, and actually go
2 to the next page.

3 A 133?

4 Q Yeah. 133 is your notes for Ronald Wilson. The
5 previous page, that I'll go back to, was actually,
6 is on the back page of the previous page; is that
7 right? You've got a photocopy. Perhaps if you
8 get the original.

9 A Thank you.

10 Q Let's put them up side by side, please, 007132 on
11 the left, 133 on the right.

12 A Yeah, the 132 is indeed on the back of 131, Mr.
13 Hodson.

14 Q Okay. So I think you said your practice was to
15 use a binder type --

16 A Yeah.

17 Q -- with foolscap in. So are we correct that these
18 questions on the left would have been notes you
19 made for when you were examining Ron Wilson; is
20 that fair?

21 A It looks like it at a glance.

22 Q And on the left it says, 'W lied on two questions
23 to R.' I'm assuming that's Wilson lied on two
24 questions to Roberts. One, 'Was was he
25 withholding any evidence? No.' And then, '(that



1 Nickey had seen it happen).' And two, 'Was he
2 protecting anyone? No.' And you've got '(Nichol
3 John).' Is that what your notes are?

4 A That's what they are.

5 Q Can you explain what that refers to?

6 A Well, it's across the page, as it were, from my
7 notes for examining Wilson in chief. It may have
8 been a reminder to me that that's the evidence as
9 I understood it and make sure that I don't miss
10 that could be one reason.

11 Q Would we be correct in saying that this is what
12 Roberts had told you, Inspector Roberts had told
13 you about the two questions that Wilson had lied
14 on in the lie detector?

15 A Yeah, that would be where. I would have to get it
16 from there, sir.

17 Q So from this, according to this note, was he
18 withholding any evidence and was he protecting
19 anyone, and Wilson answered no to both of those,
20 and Roberts concluded he was lying or being --

21 A That's how I read that.

22 Q And withholding any evidence, would this bracket
23 be your inference or your conclusion about what he
24 was withholding?

25 A Well, it says that Nickey had seen it happen and I



1 assume I may have gotten that from Mr. Roberts; in
2 fact, I assume I did, and the same, sir, with the
3 answer to number 2 there in brackets, but --

4 Q And then to page 007127, it looks like -- I'm
5 sorry, to 007135.

6 A I have that, sir.

7 Q And these would be your notes to assist you in
8 examining Nichol John in chief?

9 A That's right.

10 Q And I see, maybe just call this part out, and
11 would the check marks mean that you asked the
12 question and you checked it off?

13 A As I look at it now, I believe that's right.

14 Q So if we go in order here, 'stuck in U-turn, stuck
15 again in alley behind funeral home, Ron and
16 Milgaard out for help,' and then you've got 'on
17 and stuck at Danchuk's, to motel for the map'?

18 A Yeah, meaning, I take it, moved on and got stuck
19 at Danchuk's.

20 Q Right. And you have, 'vice versa in trial, motel
21 first'?

22 A Yes.

23 Q And I think at the prelim, I looked at that, and
24 at the prelim Nichol John I think got them mixed
25 up and said that she went to the Danchuks first



1 and then the motel. Is that what this --

2 A No doubt that's what it means.

3 Q And there's no notes here, Mr. Caldwell, about
4 asking her whether she witnessed a murder,
5 etcetera, and the transcript speaks for itself as
6 to what you did ask her, and I think it was what
7 happened next and then on she went, so I don't
8 think you ever asked her those questions, and I
9 guess from these notes do we take it that you had
10 not intended to ask her that or can you help us
11 out?

12 A Well, I had intended to ask her the evidence
13 concerning her allegedly seeing the murder taking
14 place. Is that what you mean, sir?

15 Q Well, would you have simply asked her what
16 happened next? I'm just wondering why there isn't
17 a note in here that says ask her whether she saw
18 David get out of the car and grab -- I know you
19 can't lead her, but something to ask more specific
20 questions about that?

21 A Well, I'll just see if I can find something that
22 would help here.

23 Q Sure.

24 A The -- about a third of the way down the page I
25 have, 'to S'toon, stopped girl.'



1 Q Call that out, please. Yes?

2 A Yeah, and 20s, presumably her age, 'stopped girl -
3 instructions,' which would be asking for
4 instructions. 'Stuck in U-turn, stuck again in
5 alley behind funeral home, R and Milgaard out for
6 help, on and stuck,' and then '(Danchuk's), to
7 motel for map, to Cadrain's, R & D changed.' So I
8 think what, the instant you are asking about is of
9 course in that time frame.

10 Q Let me just be a bit more specific. In her
11 statement when she goes through she talks about
12 stopping the girl, getting stuck in the alley,
13 Wilson and Milgaard out for help, and in her
14 statement before she talks about going to the
15 motel or to Danchuks, she talks about seeing David
16 Milgaard grab a girl and stab her.

17 A Well, that would come in, to me, clearly right
18 before 'to Cadrain's.' Just give me a minute.

19 Q Sure.

20 A 'On and stuck (Danchuks), to motel for map, to
21 Cadrain's,' the part that was so significant would
22 be right under the underlined 'in alley behind
23 funeral home' that I just, I think, read to you,
24 sir.

25 Q Yeah. And my question, Mr. Caldwell, is whether,



1 and again the transcript of your examination of
2 Nichol John is before the Commission and it speaks
3 for itself. In these notes my question is whether
4 or not these notes can tell us anything as to what
5 you were thinking going into the examination and
6 whether you were even going to ask her those
7 questions.

8 A Oh, I don't think the notes indicate that as I may
9 have done on other things. I certainly intended
10 to ask her the questions and in my mind I would
11 know where it would be in that process, Mr.
12 Hodson, if that makes any sense at all.

13 Q Yeah. I'm just trying to find out if there was a
14 reason you wouldn't have put in here sort of so
15 that you could check it off, those points in her
16 statement, in her May 24th statement.

17 A Not that I can see. I knew where it belonged and
18 in this instance I didn't do my usual routine of
19 line by line and checking it when it was done, but
20 it will be, I'm sure, easily ascertainable where
21 it happened in the evidence of course.

22 Q Okay.

23 A So I'm sorry I can't help you.

24 Q No, that's fine. We're done with that document.
25 If we could go to, just to identify it, 007258,



1 and that's document 82, and I think these are Mr.
2 Ullrich's notes. Maybe your counsel can give you
3 a copy of that. I'm just wondering if you can
4 take a look at that and tell me what those are?

5 A That's what they are, my red pencil note at the
6 top, Ullrich notes of evidence at trial.

7 Q And it's my understanding that Elmer Ullrich
8 attended the entire trial with you and sat at the
9 prosecutor's table?

10 A Not at the table, but in the audience.

11 Q Oh, I see, I'm sorry.

12 A Yeah.

13 Q And he took notes of the proceedings?

14 A Yeah, absolute -- it says evidence at trial. I
15 assume he took both cross and in chief, sir, which
16 we could readily find out, but that was at my
17 request.

18 Q Next if we can go to 007311, please, and I
19 understand that these would have been your notes,
20 typed notes that you prepared to assist you in
21 making the closing address to the jury?

22 A That's right, sir.

23 Q And you had earlier mentioned when we were looking
24 at, I think it's your opening remarks, that you
25 would have dictated them every day after trial.



1 Was that maybe the closing remarks you were --

2 A That's what I should have said.

3 Q And so I don't propose to go through these, we'll
4 go through parts of the transcript, but I take it
5 you would prepare a draft and we see in some cases
6 you amended and revised?

7 A I expect that happened. I see some underlining
8 and some additions in pen to what had been typed,
9 so --

10 Q I just want to call up this first part in your
11 notes. On page 1, Mr. Caldwell, if you take a
12 look on the screen, or if you want to look at the
13 document, and this is sort of the starting part
14 where you talk about Gail Miller and it says:

15 "It must be inferred that she set off on
16 foot for the bus line on 20th Street, on
17 either Avenues P. or O., and the crown
18 suggests, on the evidence, down Avenue
19 O., proceeding southward on the west
20 side of Avenue O."

21 Now, I think when we get to the actual transcript
22 of what you said, I think you moved that a block
23 over to N and O and I'm just wondering, is this O
24 and P perhaps in error?

25 A I think it's just a sheer error, sir.



1 Q Okay. If we could then go to 141905, please --

2 A In the --

3 Q This -- no, this is just the transcript.

4 A In?

5 Q No, it's not in any of your files.

6 A Okay, very good.

7 Q And this is your address to the jury, Mr.

8 Caldwell, that was prepared, I think, sometime
9 after the fact by a court reporter?

10 A Yeah, C.V. Reporting.

11 Q Right. And if you go to the next page, and I'll
12 just go through parts of this with you, and again
13 this is the start of your address to the jury,
14 and, again, you will see the evidence is she left
15 6:35, 6:45 in the morning.

16 "It must be inferred that she set off on
17 foot for the bus line on 20th down
18 either Avenues P --",

19 and you say:

20 "-- excuse me, Avenues O or Avenue N,
21 one or the other. She had to go south
22 from her residence, and the Crown
23 suggests on the evidence that it was
24 down Avenue N proceeding southward ...";

25 is that --



1 A That was my best understanding of it.

2 Q So Avenue P looks like it was just a mistake?

3 A Completely.

4 Q And so the Crown theory then was that I think you
5 are saying that she either went down Avenue O or
6 Avenue N, but that you suggest or the Crown
7 suggests, on the evidence, that it was down Avenue
8 N?

9 A That's.

10 Q Is that --

11 A That's right, sir.

12 Q And then you say:

13 "There is now, Milgaard, Wilson and
14 Nichol John, the Crown suggests, driving
15 southward on that same avenue ...",
16 which would be Avenue N:

17 "... overtook her somewhere in the block
18 between 21st and 20th Street, likely
19 early in that block, I suggest to you
20 the north end somewhere, and stopped and
21 asked her directions."

22 Now when I asked this yesterday, Mr. Caldwell,
23 but did you -- here the Crown theory is that she
24 was stopped for directions in the 200 block of
25 Avenue N, is that fair, that's the block between



1 20th and 21st Street?

2 A That would be my understanding.

3 Q And then you go on, and I'll go through this with
4 you, --

5 A Okay.

6 Q -- but you talk about the car going down, getting
7 stuck doing an U-turn, getting out to push, and
8 then Mr. Milgaard and Mr. Wilson going out to look
9 for help. Did it occur to you or what did you
10 make of the fact that Gail Miller, I think on any
11 viewing of the scene, would -- would be at 20th
12 Street by the time Mr. Wilson and Mr. Milgaard
13 would have left the car, if I can call it that?

14 A I -- I don't think that I computed or calculated
15 that. She was going south along the west side of
16 that avenue that -- and they stopped, and the
17 exchange about asking directions took place, and
18 as I recall the car continued and U-turned at some
19 point and got stuck, putting it very broadly.

20 I -- I -- you can certainly, it would certainly be
21 sensible to think that, all other things, you
22 know, ignored, that she could have got to 20th
23 Street. That certainly was open to her, if this
24 episode hadn't intervened, which I believe it did.

25 Q Yeah. And, in fairness, I think that may well



1 have been raised by -- before the jury, or could
2 have been raised, is that --

3 A That could have been as -- the case.

4 Q Well, we'll carry on, we'll see some other
5 references.

6 A Sure.

7 Q And then again you talk about asking for
8 directions and that, according to Wilson, Milgaard
9 called her a stupid bitch; is that correct?

10 A That's right.

11 Q And, again, would that be sort of part of the
12 Crown theory, that he was, Mr. Milgaard was upset
13 at her or --

14 A Yeah, the, the inquiry was as to whether she knew
15 where Peace Hill was on the evidence, and I think
16 it was known that there was no such place, there
17 was a Pleasant Hill. And the answer -- that
18 triggered the explanation, the exclamation by Mr.
19 Milgaard, the stupid bitch comment.

20 Q Yeah.

21 A Which to me, of course, would be the beginning of
22 anger and possible retribution.

23 Q Okay. And so then we go down.

24 "Now, at this point ...",

25 and I want to talk about this because I think



1 we've identified that in -- that Wilson and John
2 had the vehicle stuck at different places; is
3 that fair?

4 A I will accept that if --

5 Q Yeah, and -- well, let's go through this --

6 A Okay.

7 Q -- and I think you will see?

8 A Okay.

9 Q You say:

10 "Now, at this point there is a
11 disagreement between the witnesses
12 Wilson and Nichol John as to what
13 happened to the car, ..."

14 A Okay.

15 Q "... and that is something, lady and
16 gentlemen, that you are going to have to
17 sort out, whether you accept one
18 version, accept the other, or possibly
19 accept a combination of the two. But
20 Wilson says they continued south to the
21 intersection of N and 20th and you
22 remember he ... marked the residence
23 there, as to where they had ... he later
24 ... it to be that intersection and the
25 name he did not know at the time but he



1 learned the name later. At that, he
2 says they turned in the intersection and
3 made what I would call three-quarters of
4 a U-turn, ending up facing eastward, as
5 I understand it, and that it was at this
6 point, with the car facing eastward,
7 that he and Milgaard left the car, going
8 in opposite directions looking for help,
9 with Milgaard, as I understood the
10 evidence, going back in the direction of
11 the girl and Wilson going in another
12 direction."

13 And:

14 "The Crown suggests this other direction
15 was either east or west on 20th Street
16 ..."

17 So, according to Wilson's version, he says
18 Milgaard would have gone back towards the girl.
19 And my earlier question, Mr. Caldwell; would she
20 not have already been at 20th Street, or the bus
21 stop, or whatever?

22 A Well that would -- I'm sorry -- that would
23 certainly be arguable. I don't know that I turned
24 my attention to it in view of what I thought were
25 fairly well-established facts, but that's service



1 certainly arguable, Mr. Hodson.

2 Q Well if --

3 A If she, for instance, had continued on to 20th
4 Street and got on the bus, this whole thing
5 presumably wouldn't have occurred, among -- an
6 extreme example.

7 Q But did you ever look at that and say, 'okay, can
8 -- does Wilson and John's version of events make
9 sense'? In other words if both of their versions,
10 one Wilson says they are stuck at the intersection
11 of what I think is 20th, --

12 A Right.

13 Q -- Nichol John says they actually come back a bit
14 further and get stuck going up the incline of the
15 alley, --

16 A Uh-huh.

17 Q -- and we have seen the map on many occasions, but
18 if a look at that map and a look at where Gail
19 Miller would have been, if it was Gail Miller they
20 were talking to on that street, that by the time,
21 under either scenario, whether it's Wilson's or
22 Johns', by the time Mr. Milgaard leaves the car to
23 go look for help, under either scenario, I suspect
24 that we will hear others say that she had to be on
25 20th Street?



1 A Well I don't know, without being facetious, if she
2 simply kept walking at the same pace, if she
3 stopped, if he ran, are all variables.

4 Q That's right. No, and that's what I am trying to
5 get at, Mr. Caldwell, --

6 A Oh, okay.

7 Q -- is what -- and maybe I can put it to you this
8 way. It has been suggested by others, and we have
9 seen it in various materials, that it was, I think
10 it's been put as strongly as being impossible --

11 A Yeah.

12 Q -- that Gail Miller would be anywhere but at the
13 bus stop on 20th Street, a busy street, and
14 therefore there's no way this story could ever be
15 true --

16 A Okay.

17 Q -- because when Mr. Milgaard went to look for her
18 she'd be at the bus stop. Now, sorry, this is
19 what people have said later --

20 A Okay.

21 Q -- looking back, and I'm trying to get your
22 evidence, sir, as to whether it's something you
23 thought about at the time, whether -- if you can't
24 recall that, whether looking back you can help us
25 understand what other things may have been in the



1 minds of the police or the prosecutor as to
2 possible explanations?

3 A Well if -- to go back just one notch, sir, I
4 didn't attach any, you know, grave significance to
5 the difference in John and Wilson's estimates of
6 how and where the car had ended up. I didn't
7 think, essentially, anything turned on that for
8 the usual reasons of two different people
9 remembering one state of affairs.

10 Now I can -- certainly, there is
11 a -- had she kept on at the same pace, she could
12 have reached 20th Street and somehow or other left
13 by bus or foot, there is no -- and that discounts
14 even running as a possibility. I -- I don't know
15 that I came up with any -- certainly nothing that
16 made me think it couldn't happen this way, as it
17 were, the --

18 Q The --

19 A -- the Crown's --

20 Q I'm sorry?

21 A Yeah, the way the Crown said in its opening.

22 Q What if a police officer would have come in to you
23 just prior to the trial and said, "lookit, I went
24 at the north end of that block in the 200 block of
25 Avenue N --"



1 A Uh-huh.

2 Q "-- where Gail Miller was, according to the Crown
3 theory, asked for directions, and I had my partner
4 drive the car and sort of reenact and do exactly
5 what Ron Wilson said and exactly what Nichol John
6 had said happened with the vehicle, --"

7 A Yeah.

8 Q "-- and by the time my partner's car stopped and
9 they got out to go get directions I was on 20th
10 Street at the bus stop by a minute". For example,
11 let's assume that, --

12 A Okay.

13 Q -- what would you have done with that type of
14 information?

15 A Well it would be a -- I don't know that, even if I
16 totally believed their honesty and time and
17 measurements, etcetera, if I could then say,
18 "based on that, I disbelieve the Crown witnesses
19 that I had".

20 I think there, as you know,
21 there was a very, I guess, scientific examination
22 done by Mr. -- the gentleman who does crime scenes
23 who originally was from Saskatoon, and there was a
24 short film made about that I believe, --

25 Q Yes.



1 A -- in which they talked to me at one point and
2 purported to show that this could not have
3 happened in the way --

4 Q Yes.

5 A -- the Crown thought.

6 Q And earlier, Mr. Caldwell, when I said "some
7 people have said that", that was one of the things
8 I was referring to.

9 A Yeah, okay. Well that, I knew of that, --

10 Q Yes?

11 A -- I knew of that, not theory, but that opinion.
12 There may have been different ones that I didn't
13 hear about. The evidence that I had to work with,
14 which I of course believed to be true subject to
15 all the usual vagaries, --

16 Q Yes?

17 A -- is that the episode happened the way it did.

18 Q Yeah. And, again, I just -- and I appreciate that
19 Mr. Caldwell.

20 A Yeah.

21 Q I'm just trying to understand what you, as a
22 prosecutor, whether you considered this, and I
23 think you are -- correct me if I'm wrong -- you
24 are saying you don't have a recollection of
25 whether this was considered or not?



1 A I'm sure that's the case, Mr. Hodson.

2 Q And I'm trying to say, if it would have been, can
3 we try and figure out what you might have done
4 with it. And so let's just go back --

5 A Okay.

6 Q -- to the scenario where you are presented with
7 something by the police or you come up with it on
8 your own --

9 A Okay.

10 Q -- and say "this just doesn't sit, fit quite
11 right, because by the time Mr. Milgaard got out of
12 the car, unless Gail Miller stopped and went back
13 the other way", which I think you've said is a
14 possibility, --

15 A Uh-huh, yup.

16 Q -- "if she continued on to the bus stop then, by
17 the time Mr. Milgaard got out, she'd be on 20th
18 Street, and that if he went back the other way he
19 wouldn't have -- wouldn't have seen her".

20 A Yeah.

21 Q And I'm wondering if that's something, would you
22 just say, "well that's something for the jury to
23 deal with, let Mr. Tallis raise it if that's an
24 issue", --

25 A Okay.



1 Q -- or help us understand what you would have done
2 with that?

3 A Number 1, I don't believe I considered it. Now,
4 going on to the other possibilities, I would be re
5 -- I would be, let's say, I think reluctant to
6 substitute the hypothetical situation done by two
7 or three policeman, however capable, or civilians
8 which would indicate this thing couldn't happen.
9 In one form or another of course, Mr. Hodson, it
10 did happen, and clearly not the way we thought it
11 did or I thought it did at the time, but that was
12 the evidence I had to work with at that time. It
13 would be very difficult, I would think, if -- just
14 to -- but what I would do there I'm not sure.

15 Q But would it be something, Mr. Caldwell, that you
16 would say "fine, that's a point much like the
17 coat"?

18 A Uh-huh.

19 Q "It's unexplained, let the jury decide, and if the
20 jury or if Mr. Tallis raises it, if the jury
21 raises it, it may well be a factor that causes
22 them not to believe the evidence of either Nichol
23 John or Ron Wilson"; is that correct?

24 A That would be a fair way of dealing with it. I
25 don't recall if I did that but that will be clear.



1 Q And that -- and maybe you've answered this when
2 you talked about the police officers -- as a
3 prosecutor, though -- and, again, just assume that
4 this fact is brought to your attention either on
5 your own or elsewhere that the timing of this
6 thing, if you presume that Gail Miller continues
7 to walk --

8 A Uh-huh.

9 Q -- to 20th Street, that she's going to be there by
10 the time that Mr. Milgaard goes to look out -- if
11 we presume that that's brought to your attention,
12 as a prosecutor, would you at the time have said
13 "well, that's fine, that's -- those are the facts
14 and that will be something for the jury to deal
15 with"?

16 A Well --

17 Q As opposed to "I'd better not run the charge"?

18 A Yeah. It wouldn't be the latter, and if that were
19 put into evidence it would be legitimate to say
20 "that is something the jury will be able to deal
21 with because they have now heard another theory
22 based on the evidence", as I would put it.

23 Q Okay.

24 A Umm --

25 Q No, that's fine.



1 A Yeah, thank you, sir.

2 Q In we can just go on to finish up, here, this is
3 again your comments on Wilson's evidence that he
4 came back to the car and you talk about him,
5 Milgaard, making the statement that he had fixed
6 her. Then you go on to say:

7 "Now according to Nichol John the car
8 got to what we, I submit, must presume
9 to be this intersection, ...",

10 I think you are probably referring to a map:

11 "... made a U-turn, became stuck, got
12 unstuck again, went over to the garage
13 in the opposite direction the girl was
14 going, and I would suggest this is
15 somewhere along here facing north on the
16 ... of N, and then made a turn into an
17 alley behind what she now knows to be
18 the funeral home as I understand her to
19 say, that she recognizes the street, but
20 at that time she didn't know it to be a
21 funeral home -- now it is clear that
22 this is the funeral home 1402-20th
23 Street, Westward Funeral Chapel -- and
24 became stuck on an incline going into
25 the alley.



1 Now, whichever version of that
2 episode which you choose to accept, lady
3 and gentlemen -- and as I have said
4 already, you may accept something by way
5 of a compromise -- but assuming you
6 accept one or the other, I suggest that
7 it is absolutely inescapable that that
8 car was stuck in the very block from
9 which they had stopped the girl for
10 directions and stuck in a position which
11 would put her approaching the car at a
12 time when Milgaard left the car looking
13 for help."

14 And I guess that's the comment that I was just
15 referring to earlier.

16 A Okay.

17 Q That you put the car:

18 "... in a position which would put her
19 approaching the car at a time when
20 Milgaard left the car looking for help."

21 A Now there is a third thing, there, I could have
22 said, which is "you may dis --", you know, "not
23 accept either of these pieces of evidence", of
24 course.

25 Q And would that be something that you would expect



1 Mr. Tallis to raise or would you?

2 A Well, I wouldn't, I wouldn't. He might well raise
3 it, I might raise it without it being a negative
4 reflection on anyone, I would think, if I had done
5 that. Because you can obviously take one of the
6 theories, another of the theories, and a third,
7 being 'I simply don't accept any of that timing
8 and' --

9 Q Right.

10 A -- 'evidence'.

11 Q Maybe, just scroll down, I think here's where you
12 finish off saying:

13 "Either way, I am submitting to you that
14 it has to be that that car was stuck in
15 the same vicinity as that girl who was
16 walking south whom they stopped and
17 asked for directions and whom, of
18 course, I'm suggesting to you must have
19 been Gail Miller."

20 A Yeah.

21 Q And was it the Crown's position then, lookit, we
22 don't know exactly where the vehicle was, --

23 A Yeah.

24 Q -- but by one or both it was in the vicinity?

25 A That would be the best I could put it, Mr. Hodson.



1 And that, in my view, was based on the evidence
2 that went in at the trial.

3 Q And then if we can go to the next page, please.
4 And then it says:

5 "... the Crown suggests that you may
6 well infer that this attack on the
7 deceased, which the Crown says was made
8 by the accused Milgaard and him alone,
9 began as an attempted purse snatch."

10 And so, here, you are telling the jury that,
11 lookit, our Crown theory is that he did this and
12 he did this alone?

13 A That's right.

14 Q And was that -- was there any reason for that, Mr.
15 Caldwell?

16 A Well, because there was no evidence that he had
17 any assistance or -- in and with that happening.

18 Q Were you concerned that if Mr. Wilson or Ms. John
19 were part of the offence, i.e. part of the purse
20 snatch, that Chief Justice Bence might have to
21 caution the jury that, as accomplices, Wilson and
22 John's evidence ought to be afforded less weight?

23 A That, that could be, and I'm -- I'm -- first of
24 all, the evidence that I or we had was that the
25 accused, Mr. Milgaard, did that act on his own



1 and -- oh, yes, I know there have been discussions
2 earlier of possible accomplices. If, indeed,
3 there was evidence to support it -- and I guess I
4 stress that -- the Chief Justice may well have
5 said, "but you take Wilson and John's evidence
6 carefully because in my view they are, one or both
7 are accomplices".

8 Now I didn't think Mr. Hodson,
9 with deference, that there was any evidence of
10 that, certainly at this juncture. I know, I
11 realize there were discussions earlier that we've
12 gone over before.

13 Q Sure.

14 A Does that --

15 Q Yes, that's fine.

16 A Okay.

17 Q And then you say:

18 "The Crown invites you to infer that
19 this attempt was met ...",
20 or sorry, so it began as an attempted purse
21 snatch, so the Crown theory was that the purse
22 snatching was the start of the crime?

23 A Right.

24 Q And:

25 "The Crown invites you to infer that



1 this attempt was met with resistance on
2 the part of the deceased, after which
3 the accused produced the knife which
4 Wilson said he had in his, the
5 accused's, possession between Regina and
6 Saskatoon, and commenced to menace the
7 girl with the knife, and either leading
8 her or chasing her westward in the alley
9 behind the funeral home, turning the
10 corner and going northward in the
11 north-south of the T-alley where he
12 finally attacked and killed her at the
13 place where the body was found, where
14 the snow was trampled and where her last
15 desperate struggle took place, of
16 course, bare-handed against the accused
17 and his knife, and that point, you will
18 recall ..."

19 and he goes on to P-1.

20 A Okay.

21 Q So that would be --

22 A That would be the Crown's theory and, of course,
23 part of what I am saying there would depend on
24 inference by the jury.

25 Q Right.



1 A Yeah.

2 Q Which, in a case of circumstantial evidence, is
3 the --

4 A Is the only way to do it if --

5 Q Okay.

6 A And as -- there's certainly strict rules about
7 applying that but many murders, of course, there
8 is no eyewitness because the one and only witness
9 is deceased, so that would be the way I meant
10 that, Mr. Hodson.

11 Q And then you carry on:

12 "Now from the finding of the spermatozoa
13 in her vagina and on her panties, as
14 well as on the frozen lump in the snow
15 in the area where the body was found,
16 which, of course, contained human
17 spermatozoa the crown invites you to
18 infer that what started out as a simple
19 matter of a purse snatch turned into a
20 wilful murder and a rape on the person
21 of the deceased as she was either
22 unconscious or dead at the time, and you
23 will recall the evidence by Dr. Emson,
24 testifying on that part of it."

25 A Yeah.



1 Q So was that the Crown theory, that the rape took
2 place while she was either unconscious or dead?

3 A Well, I've said here:

4 "-- turned into a wilful murder and a
5 rape on the person of the deceased as
6 she was either unconscious or dead --",
7 so that was the Crown theory at that juncture.

8 Q And if we can scroll down:

9 "Now the Crown's theory of the offence
10 is that Milgaard then took the purse of
11 the deceased, searching through it
12 hurriedly as he went back towards the
13 car behind the funeral home, heading
14 south again or in this alley, or at the
15 intersection here, if you prefer this
16 may have taken place, and throwing out
17 the items of obviously no value, the
18 scissors, the comb ...",

19 etcetera, and then scroll down, and:

20 "... deposited that purse in the trash
21 can behind 1414-20th Street West. And
22 at this point then returning to the car,
23 whether the car is in the alley behind
24 the funeral home or at the intersection,
25 whichever you believe, with the wallet



1 and the cosmetic bag out of sight on his
2 person, either in pockets or under his
3 coat, to await a chance for a more
4 leisurely search of this item at a safer
5 distance from the scene of the murder."

6 A Yeah.

7 Q And if I can pause there, the Crown theory would
8 be that after the rape and murder he would have
9 grabbed the purse, thrown out the items of no
10 value, taken out the wallet and the compact, put
11 the purse in the garbage can, and take the wallet
12 and compact in his coat so he could check it
13 later?

14 A That would be the Crown theory.

15 Mr. Hodson, just as a matter of
16 interest, I did mention both possible locales of
17 the car being stuck just in that paragraph.

18 Q Oh, right, yes.

19 A Yeah.

20 Q I'm sorry, and I may have --

21 A No, no, you did mention that, but I --

22 Q Right.

23 A Yeah.

24 Q So that you are saying in either case?

25 A Whichever they choose, if either.



1 Q And --

2 A It's --

3 Q Yeah, and then you go on to talk about the
4 throwing of the knife handle, and if you could
5 scroll down to the bottom. You say:

6 "Now the Crown also suggests that the
7 figure which Mr. Dieward, the caretaker
8 at St. Mary's Church, saw pass in front
9 of the vehicle's headlights twice at
10 approximately 7:00 to 7:10 a.m. that
11 morning, may well have been the accused
12 passing in front of the car which was
13 stalled -- according to Nichol John's
14 evidence, just at the entrance to the
15 alley, but which Dieward estimated to be
16 stopped approximately at the
17 intersection of the alleys. he said
18 there was a vehicle there and he could
19 see the headlights --",

20 etcetera. Now I note there, when you talk about
21 Dieward, my read of that, and you say "it may
22 well have been the accused passing", are you a
23 little less --

24 A Well as I, without quoting the evidence, as I
25 recall this is he is on Avenue O, as I understand



1 it, the vehicle is, as I understand it, east of
2 the north-south T alley, and the headlights are
3 facing Mr. Diewold, and I think there was clear
4 evidence that there was something like ice fog or
5 mist very heavily that -- which is why I --

6 Q But might I suggest there might have been two, two
7 concerns to the Crown theory with Mr. Diewold's
8 evidence, one is that -- and I think he placed the
9 vehicle right at the T, --

10 A That --

11 Q -- right at the T of the alley --

12 A Yeah.

13 Q -- as opposed to further down where Nichol John
14 said at the incline?

15 A Okay.

16 Q Right?

17 A Yes.

18 Q Correct? And secondly he said, well you say 7:00
19 to 7:10, that if that was the vehicle Mr. Diewold
20 saw, then that might be getting -- and that was
21 Mr. Milgaard's vehicle -- that might be getting a
22 little tight for the time frame --

23 A Yeah.

24 Q -- when Mr. Milgaard was seen by Mr. Rasmussen?

25 A I would think it would be the former, the question



1 of location. And again, sir, I was reluctant to
2 urge on anyone the precision of estimates of time
3 by people under these conditions, without being
4 facetious.

5 Q No, and I appreciate that.

6 A Yeah.

7 Q And my question is, though, and it may have just
8 been the choice of words you used at the time, but
9 in describing some of the other theories of the
10 Crown you are saying "the Crown theory is that
11 this happened"?

12 A Yeah.

13 Q When we get to Mr. Diewold you say that "at
14 approximately 7:00 to 7:10 that morning the person
15 he saw pass in front of the vehicle may well have
16 been the accused"?

17 A Yeah.

18 Q As opposed to "the Crown theory is that he saw Mr.
19 Milgaard pass in front of the vehicle". And I'm
20 just wondering, maybe there is no significance in
21 those words, but I'm wondering whether the Crown
22 theory on Mr. Diewold might have been somewhat
23 less than certainty that that's what he saw?

24 A Oh, well that's, yeah, I would ascribe to that,
25 because I didn't think there was any, you know,



1 precision in what he could have seen from there,
2 with no reflection on him, simply because of the
3 weather and physical conditions. And I think that
4 may well have been -- Mr. Milgaard, of course, was
5 the -- if you will, a better interpretation for
6 him, Mr. Milgaard, than urging that it was, when
7 the evidence didn't, you know, firmly put -- put
8 that to be the case.

9 Q If we can go to the next page, please. Umm, no,
10 actually, sorry, the -- back one previous. And
11 then you go on to talk about, you say:

12 "Now when we look ... it doesn't look
13 like ...",

14 you must be pointing to the map:

15 "... like such a distance; here is the
16 scene, here is St. Mary's Church ...",
17 and you are talking about the Trav-a-leer Motel:

18 "... two blocks up this way and straight
19 up 22nd, brings you to the Travaleer
20 Motel ..."

21 So I take it what you were showing is how the
22 Milgaard vehicle got up, from the murder scene up
23 two blocks to 22nd Street and then up 22nd to the
24 Trav-a-leer?

25 A In accordance with the evidence as I understand it



1 to be.

2 Q Yes. And then:

3 "Now the Crown suggests that was the
4 next order of business, that is where
5 Mr. Rasmussen said they were sometime
6 shortly after 7:00 a.m. and obtained a
7 map."

8 And I guess I'm just back to my question on
9 Mr. Diewold. If it was 7:10 a.m. that he may
10 have seen Mr. Milgaard pass in front of the
11 vehicle, I'm not sure that that fits as well with
12 Mr. Rasmussen, does it?

13 A Umm, well presumably it should have been ten
14 minutes later, is that the thought, or --

15 Q No, I'm -- my suggestion, my question is in the
16 Crown theory to the jury you have Mr. Diewold, who
17 sees a vehicle in the alley where the body was
18 found, 7:00 to 7:10 a.m., and Mr. Rasmussen who
19 you say saw Mr. Milgaard shortly after 7:00?

20 A Yes.

21 Q And if -- and I appreciate your point on the
22 precision of time --

23 A Okay, very good.

24 Q -- but if they were both correct on the time, Mr.
25 Milgaard can't be in both places?



1 A If they were --

2 Q Okay.

3 A -- both correct, he couldn't be.

4 Q And so my question is back on how does the Henry
5 Diewolf sighting fit in with Mr. Rasmussen's
6 evidence in the Crown theory?

7 A Did I -- did I -- I don't think I urged that the
8 person Mr. Diewolf saw was David Milgaard; did I?

9 Q You said 'it may well have been'?

10 A 'It may well have been', but --

11 Q And my question before was were you a bit less
12 than certain on that, in presenting it to the
13 jury, because of your concern that, if they
14 accepted that Mr. Diewolf for certain saw Mr.
15 Milgaard at 7:00 to 7:10, then it might well be
16 that that couldn't have been Mr. Milgaard because
17 he was at the Trav-a-leer Motel?

18 A I don't think it was that, sir, I think it was all
19 based on how difficult I thought Mr. Diewolf's
20 view of the matter was, and he -- that's why I put
21 it at such a low a state that it may have been Mr.
22 Milgaard, certainly didn't urge that it was --

23 Q Okay.

24 A -- because that didn't -- the -- there is no
25 evidence of that, in a word.



1 MS. KNOX: Mr. Commissioner, if I could, I
2 don't have the transcript in front of me, but
3 somewhere I recall seeing a notation that
4 Mr. Rasmussen's evidence was that it could have
5 been as late as 7:30 that he got to the motel. I
6 recognize that the Crown here is saying 7:00 but
7 I think the evidence perhaps put the time frame
8 broader than he actually reflected in his closing
9 address to the jury.

10 MR. HODSON: I think the evidence was
11 'could have been as late as 7:30' and we'll see,
12 in Mr. Bence's charge to the jury, he said 7:10.

13 A Okay, well that's, I'm glad that point was raised,
14 and perhaps in due course we can find it.

15 BY MR. HODSON:

16 Q We'll look at it.

17 A Yeah.

18 Q In his charge to the jury he says between 6:45 and
19 7:10 a.m.

20 A Okay.

21 Q And there is evidence on Mr. Rasmussen, it's
22 anywhere from shortly after 7:00, and I think when
23 he was examined by Mr. Tallis it was as late as
24 7:30.

25 A Okay.



1 Q But here, these are your words, "shortly after
2 7:00 a.m."?

3 A That's true.

4 Q If we can then scroll down to the Cadraains. Then
5 you go on to describe that:

6 "... Milgaard initially went alone from
7 the car to Cadrain's, or else after he
8 came out of Cadrain's with his suitcase,
9 that he looked through the wallet, threw
10 it away, as he approached ... -- as the
11 case may be -- ... Cadrain's house."

12 And then you talk about the wallet being found.
13 So part of the Crown theory was is that's how the
14 wallet got down street from Cadrain's; correct?

15 A That's -- that's right.

16 Q And then the next page, you again talk about the
17 toque, the blood-stained toque:

18 "... invites you to infer that on his
19 way into Cadrain's he discarded ... the
20 bloodstained toque right next door at
21 330 -- ... Mrs. Gerse's house and right
22 next door to Cadrain's -- having used it
23 to wipe the blood from ... his clothes."

24 So, again, that would be part of the Crown
25 theory?



1 A That's right, Mr. Hodson.

2 Q And then down here:

3 "You remember that he used the bathroom
4 when he was in Danchuk's and this, of
5 course, would be the ideal opportunity
6 to dispose of any blood on him."

7 A Yeah.

8 Q And would that be your theory about the Danchuks
9 and how that might fit in?

10 A Yes, that -- that -- I'm not saying that it did
11 happen but I said it gave him an opportunity to
12 dispose of it.

13 Q Now in fairness, and I'll show this to you later,
14 --

15 A Okay.

16 Q -- in the instructions to the jury or the charge
17 to the jury Chief Justice Bence, I think,
18 corrected this point and indicated that I think
19 his view of the evidenced was that he went and got
20 a glass of water instead of going into the
21 bathroom.

22 A Okay.

23 Q And I'll get to that later, and I'm not sure what
24 the record shows on that point, but in his charge
25 to the jury he addresses that.



1 A Very good.

2 Q Scroll down. Go to the next page, 141916, and
3 then you talk about changing the bloody clothes
4 and saying:

5 "So during which trip he undoubtedly
6 disposes of that bloody jacket and pants
7 in some manner or another because, you
8 will recall that there is no evidence of
9 either of those items ever being seen
10 again by anyone."

11 Now if we can scroll down, it looks here that you
12 then turn to anticipating something about what
13 Mr. Tallis might say and you say:

14 "And I think he may suggest to you that
15 Cadrain and Wilson were mistaken or
16 lying, as the case may be, when they say
17 they saw blood on Milgaard's clothing at
18 the Cadrain house, on the basis that
19 none of the witnesses who saw Milgaard
20 after they left the vicinity of the
21 murder and before they arrived at
22 Cadrain's have testified that they saw
23 blood, and I would like to examine that
24 proposition with you now if I might."

25 Then you go on to talk about Mr. Rasmussen only



1 having a short time to take a look at the
2 Milgaards -- and then scroll down. I don't
3 propose to go through all of this, but you are
4 pointing out that one explanation as to why the
5 Danchuks maybe didn't see blood is that they
6 weren't looking specifically for it. Do you see
7 that?

8 A Where is that now, Mr. Hodson?

9 Q If you could scroll down, it says:

10 "My learned friend asked Walter, "You
11 had an opportunity to see the front?"
12 Referring to Milgaard's clothing, and he
13 replied, "Yes."

14 And maybe go on to the next page.

15 A Yeah, there's a comment, I presume Mr. Danchuk, I
16 never really looked that close, if I'm reading
17 that correctly, carrying over from the last page.

18 Q If we can just maybe go down to the bottom of page
19 13, this might better summarize it.

20 A Okay.

21 Q "Now let me suggest, lady and gentlemen,
22 that there is -- the simply statement,
23 "I didn't see any blood" can mean very
24 different things depending on the
25 surrounding circumstances. It is one



1 thing to say, "I took a careful look at
2 the clothing for blood and I didn't see
3 blood." In that case there is very
4 strong evidence that there was no blood.
5 Now it is quite another thing, I
6 suggest, to say, "I didn't see blood,
7 but I never really looked that close",
8 or "I didn't see blood but I wasn't
9 paying that much attention to the
10 clothes." What I am suggesting about
11 the Danchuks' evidence is that while
12 their evidence clearly is that they did
13 not see any blood, you may well conclude
14 that they did not direct their attention
15 closely to the accused and his
16 companions, and you may very well
17 conclude from the evidence of Cadrain
18 and Ron Wilson, that the blood was
19 actually on Milgaard's clothing when he
20 was at Danchuk's, and that the Danchuks
21 simply did not notice it."

22 A Yeah, I see that.

23 Q So that would be your position or your explanation
24 as to why the Danchuks didn't see any blood?

25 A Yeah. Just asking them to, you know, consider all



1 those two or three different approaches.

2 MR. HODSON: Mr. Commissioner, I'm not
3 sure, what I might suggest is if we instead of
4 taking a break, if we go to, and I'm not going to
5 get done with Mr. Caldwell, but maybe go for
6 another 10, 15 minutes, until three o'clock, and
7 call it a day, or do you want to have a break?

8 COMMISSIONER MacCALLUM: I think I would
9 like a break. I don't know about anybody else.

10 MR. HODSON: That's fine.

11 COMMISSIONER MacCALLUM: We'll come back at
12 three.

13 (*Adjourned at 2:48 p.m.*)

14 (*Reconvened at 3:02 p.m.*)

15 BY MR. HODSON:

16 Q I'll go back to 141919 of the address to the jury,
17 just at the bottom there. So this is just
18 carrying on with your address to the jury, Mr.
19 Caldwell, and here you tell the jury:

20 "Now the Crown suggests there are other
21 things which happened that day which
22 logically point to the accused of the
23 killer of the young woman. There is the
24 fact that Cadrain said that Milgaard
25 wanted to go to Edmonton right way when



1 he showed up at Cadrain's house, and
2 that the accused, according to Cadrain,
3 was anxious to have the car radio fixed
4 at the second Texaco station by having
5 the aerial put on ... this might
6 indicate to you an anxiety to listen to
7 the news broadcast."

8 So again, we've heard about this, but Mr.
9 Milgaard's behaviour that day in Saskatoon, the
10 Crown was saying lookit, that suggests he was
11 trying to get away from something; is that fair?

12 A You can certainly make those inferences.

13 Q And then scroll down:

14 "A further point of evidence which the
15 Crown suggests points squarely at the
16 accused and him only as the person who
17 attacked and killed the girl was this
18 episode with the cosmetic bag and
19 compact case which occurred in Wilson's
20 car not long after they left Saskatoon.
21 Now the evidence is clear, they didn't
22 belong to Nichol John, the only female
23 in the party. Ron Wilson testified that
24 they were not in his car when the party
25 reached Saskatoon that same morning.



1 Now, upon the girl, Nichol John, holding
2 up this compact and asking whose it was,
3 there was no reply, but the accused who,
4 if you remember, was driving the car at
5 this stage, snatched the item and threw
6 it out the car window without comment.
7 Now I think, lady and gentlemen that
8 this must be a classic example of
9 actions speaking louder than words. For
10 the accused, driving a car on an open
11 highway -- that a person would have
12 taken his attention off his driving long
13 enough to reach and grab the item, throw
14 it out the window right then, may
15 indicate to you that he regarded it as
16 pressing business to get rid of that
17 cosmetic bag, and right now. No
18 explanation, no nothing."

19 So I take it the cosmetic bag again was part of
20 the Crown theory that linked Mr. Milgaard -- I
21 think the Crown's position was that it was Nichol
22 John's cosmetic bag even though it wasn't found,
23 that was the inference?

24 A Yes, sir.

25 Q And you referenced the fact that it wasn't there



1 the morning of the murder when Mr. Wilson looked?

2 A Yes.

3 Q And that Mr. Milgaard's conduct and throwing it
4 out suggested that he wanted to get rid of it; is
5 that fair?

6 A That's right.

7 Q Was the cosmetic bag a significant piece of
8 evidence, Mr. Caldwell, if you recall at the time?

9 A Umm, well, I think it was just one more unusual
10 piece of evidence that could be read the way I was
11 asking him to do it or another way, but to me it's
12 some indication of guilty behaviour, especially
13 when it was, in effect, identified as Miss Gail
14 Miller's bag as I recall it.

15 Q Okay. I'm sorry, by --

16 A Yeah, if I have it correct, I think the cosmetic
17 bag was identified with the purse, but I may be
18 wrong in that, sir.

19 Q I think there was a cosmetic bag found in the
20 purse in a garbage can which was not the one that
21 was thrown out.

22 A Okay.

23 Q In fact, if we go onto this next paragraph, you
24 say:

25 "Now you remember that Nichol John said



1 that the items she found in the glove
2 compartment was a cosmetic bag
3 containing a face powder compact, eye
4 shadow and a tube of lipstick. Now I
5 suggest that it is absolutely clear that
6 this cosmetic bag must have belonged to
7 Gail Miller and must have been taken
8 from her purse by Milgaard, because, you
9 will recall the evidence of Nichol John,
10 it wasn't hers, she had not seen it
11 before. The evidence of Wilson, who
12 owned the car and should be in a
13 position to know, said he knew nothing
14 of the cosmetic bag and contents and it
15 was not in his car when they left
16 Regina. And the evidence of Albert
17 Cadrain that he had never seen the items
18 before. Now, these three and Milgaard,
19 remember, were the only occupants of
20 that car."

21 So again I think the position of the Crown was
22 that by inference it must have been hers based on
23 those facts suggested there; is that correct?

24 A That's correct.

25 Q And then you anticipate what Mr. Tallis is going



1 to say:

2 "I expect my learned friend may suggest
3 to you that since the items found in the
4 car by Nichol John included some
5 duplication -- which they did -- with
6 the items found from the purse ..."

7 And then you go on to describe in a fair bit of
8 detail, which I will not do -- maybe go to the
9 full page -- about the various items of make-up
10 in the purse, and I think the point that you are
11 trying to make here to the jury is that inside
12 Gail Miller's purse that was found in the garbage
13 can there was lots of duplication; in other
14 words, she carried more than one, I think, tube
15 of lipstick, etcetera, and that that was your
16 explanation that she could have had more than one
17 cosmetic bag because she had more than one of
18 other pieces of make-up. Is that a fair summary?

19 A It is, sir.

20 Q Next page, and in fact you point out here:

21 "... bear in mind that there was no
22 duplication between the compact with its
23 powder, the one in the car, and the
24 items found in the purse, so what I am
25 suggesting is that it cannot be argued



1 that the fact that there is duplication
2 between the stuff found in the car and
3 the stuff found in the purse rules out
4 the purse as the source of the items
5 found in the car."

6 And again, you just ask the jury to keep that in
7 mind.

8 A That was another part of my, the Crown's theory,
9 if you will.

10 Q And if we can go ahead to page 141925, please, you
11 go on to talk about some credibility issues, you
12 say:

13 "Now His Lordship will be telling you
14 what effect Ron Wilson's ready admission
15 of his criminal convictions and
16 Cadrain's of his one conviction ... for
17 vagrancy at Regina, at the end of the
18 trip, should have when you are assessing
19 their credibility. Suffice it for me to
20 say that it is obviously perfectly
21 possible for persons with criminal
22 records to be honest and truthful
23 witnesses; as it is equally possible for
24 persons without such records to be
25 dishonest witnesses. And it would only



1 be if a person with such a record, if
2 asked about his convictions denied them
3 under oath and they were proven, that
4 they would detract from his
5 credibility."

6 You go on to say:

7 "Now in the case of the witnesses Wilson
8 and Cadrain I have no hesitancy in
9 asking you to accept the evidence they
10 gave on the stand. In the case of
11 Nichol John, I submit there are
12 compelling reasons to accept the first
13 part of her evidence about leaving
14 Regina and coming to Saskatoon, indeed,
15 all the evidence up to and including the
16 point where they stopped and spoke to
17 the girl, and the last part of her
18 evidence right after they left the
19 vicinity after the body was found and
20 including the evidence of going to a
21 motel, to Danchuk's, to Cadraings's, the
22 cosmetic case episode and so forth. But
23 I want you to consider very carefully my
24 contention that when she was examined as
25 to the events from the time just after



1 they stopped the girl and asked for
2 directions up until they arrived at the
3 motel -- and this, of course, is the
4 heart of the whole episode -- that Miss
5 John, in my submission, was telling you
6 less than the truth as she knew it to be
7 for that full part of her evidence.

8 Now in assessing her
9 credibility as to this part of the
10 episode you are entitled to take into
11 account the answers she gave, after
12 being declared adverse, to the questions
13 concerning the statement she gave
14 Sergeant Raymond Mackie on May 24th,
15 1969. You will recall the kind of very
16 unsatisfactory evidence she gave then,
17 before being declared adverse, and
18 certainly after being declared adverse
19 being unable to remember some things at
20 all. She had the accused get back in
21 the car when at that ... he had never
22 left it. That's her evidence. She
23 didn't know how they got unstuck twice
24 and so on, and the particularly
25 incredible suggestion that she, last



1 week, here in this courtroom, could not
2 remember whether the accused had called
3 the girl "the stupid bitch" after he
4 spoke to her. She could not remember
5 whether she had seen Dave in the alley
6 taking hold of the girl he spoke to; or
7 could not remember whether she had seen
8 him grab her purse; could not remember
9 whether she had seen the girl grab for
10 her purse again; could not remember
11 whether she had seen the accused reach
12 into his pocket and pull out the knife;
13 or whether she had seen him stabbing
14 with the knife; and whether she had seen
15 him taking her around the corner of the
16 alley.

17 Now I invite you -- in fact,
18 she never even remembered telling
19 Sergeant Mackie that she seemed to
20 recall running down the street and the
21 next thing she knew she was in her seat,
22 back in the car. Now, one of the ... of
23 the jury system is that you are entitled
24 to come together and use your common
25 sense and experience in the world to



1 decide things, and I ask you to decide
2 whether a person, if they had seen such
3 events as she evidently once said, could
4 ever forget them. It seems to me that
5 they would be engraved on her mind.

6 Now His Lordship has already
7 told you the only use to which you can
8 put the answers to those questions, and
9 he will undoubtedly be repeating that
10 you can only use the answers she gave me
11 to those questions to assess her
12 credibility, or truthfulness. That is
13 the use I ask you to put those questions
14 and answers to, and I suggest you will
15 be driven to the conclusion that when
16 she was giving her evidence here in
17 chief, she was not telling the truth,
18 the whole truth and nothing but the
19 truth about this vital part of the whole
20 incident, while she could recall in
21 detail events happening both before and
22 after that vital scene of the episode.

23 Now I suspect my learned friend
24 will suggest --"

25 Let me just pause there. So that is your



1 summation on the Nichol John evidence that I've
2 read, Mr. Caldwell, that that would be a fair --
3 and that's the Crown position you put to the jury
4 of Nichol John?

5 A Absolutely.

6 Q And I think it's clear from that that you are
7 telling the jury don't believe Nichol John about
8 she's saying she can't remember the vital parts of
9 the episode?

10 A That's -- yes, that's right.

11 Q And the inference is if that -- if you find that
12 she's not telling the truth when she says I can't
13 recall, that the version of events would be the
14 version in her statement; is that fair, being the
15 post-polygraph statement?

16 A Yes. It was limited to credibility and I noticed
17 that in the initial part of dealing with her, I
18 didn't go into the heart of that statement as it
19 were.

20 Q Right.

21 A And -- but it would be -- I'm urging him to take
22 her performance on that 9(2) as evidence that they
23 shouldn't, you know, rely on her for --

24 Q Right. Let me put it this way --

25 A I'm sorry.



1 Q -- what you are saying, Mr. Caldwell, is don't
2 believe her, jury, when she says she can't
3 remember; she can remember, it's engraved in her
4 mind, the inference being then she must remember
5 that which she had put in her statement; is
6 that --

7 A That's certainly how I see it.

8 Q And then you talk about Ron Wilson:

9 "Now I suspect my learned friend will
10 suggest that there are parts of the
11 evidence of Ron Wilson that you should
12 not believe and I want to make some
13 observations about that and I am sure
14 His Lordship will be telling you the
15 proper use which you can make of the
16 admissions by Wilson of his criminal
17 record in assessing his credibility.
18 But briefly, I suggest that the frank
19 admission of all the convictions that my
20 learned friend asked him about, indeed,
21 supports his credibility rather than
22 detracting from it since he told the
23 truth when asked about the convictions,
24 and I want to go on and say that if it
25 should be suggested that Wilson, for



1 some unknown reason, is out to get his
2 friend Milgaard, I would certainly think
3 that he could have done a more
4 workmanlike job of that in his
5 testimony, if that were his intention.
6 Wilson, for instance, says that
7 Milgaard's remarks upon arriving at the
8 car were "I fixed her", or something to
9 that effect. It seems to me that surely
10 if Wilson was out to get Milgaard and
11 frame him, he could have quoted the
12 accused as saying he stabbed or killed
13 the girl, which certainly would have
14 been more damning language on the part
15 of Wilson as against the accused. Then
16 there is the matter of the accused
17 volunteering the information to Wilson
18 in the bus depot in Calgary ... that he
19 had a girl, or got a girl in Saskatoon,
20 that he had put a purse in the trash can
21 and he thought she would be all right.
22 Now again, it would seem to me that
23 Wilson would have made this a lot worse
24 if this were a matter of him ... trying
25 to get the accused. But the really



1 fascinating thing about that statement
2 came when His Lordship asked Wilson
3 whether he ... followed this submission
4 by Milgaard up by questioning him about
5 it. And do you remember what Wilson
6 said here? He said to His Lordship, "I
7 didn't believe him." Now it certainly
8 seems to me that is not the testimony of
9 a person ... on shifting the blame to an
10 innocent party. If such were the case
11 you would quite expect Wilson to say,
12 "it's a thing he would do." But what
13 was his reply? -- "I didn't believe
14 him."

15 There are certainly no signs of
16 hard feelings between Milgaard and
17 Wilson; they left Regina together and
18 even returned to Wilson's house for a
19 few days after the trip and, evidently,
20 still as friends. I submit to you that
21 by his demeanour in the witness stand,
22 Wilson showed no animosity towards the
23 accused and I feel that when you review
24 his evidence against the other facts
25 which are now proven to you



1 independently of his evidence, you may
2 very well conclude that he gave a very
3 fair and accurate account of what he
4 knew ... this whole situation. I don't
5 think the fact that he said ... whether
6 he was testifying on the ... January
7 '69, that it was two or two and a half
8 blocks, and now he thinks that it was
9 five blocks and four minutes ... six
10 minutes. I don't think these kinds of
11 things are going to be such as to
12 influence you to decide that you cannot
13 believe anything he said here."

14 If I can pause there. It sounds, Mr. Caldwell,
15 were you anticipating Mr. Tallis' argument that
16 Mr. Wilson was lying and trying to frame Milgaard
17 or can you explain what would have prompted these
18 remarks?

19 A It would be in the anticipation that Mr. Tallis
20 might very well do that as being a promising
21 attack on Wilson who, you know, had to be somehow
22 discredited, I would say, in the process. I
23 suspect that I saw that coming not through
24 anything that happened with Mr. Tallis, but just
25 through my knowledge of his abilities.



1 Q Then you go on to say, "Now Wilson stood up --
2 scroll down, please.

3 "Now Wilson stood up to a very thorough
4 and capable cross-examination by my
5 learned friend. During this he readily
6 admitted, as I said -- which would be
7 evident anyway -- that at first he had
8 withheld what he knew of this episode
9 from the investigators during the
10 earlier stages of the investigation,
11 that being, you remember, when he was
12 interviewed by Inspector Ruddell, in
13 Regina. He admitted he told Ruddell
14 that nobody in the car had anything to
15 do with the murder. He said that he did
16 not give Inspector Ruddell everything he
17 knew."

18 If I can pause there. So it appears, Mr.
19 Caldwell, that you in fact raised with the jury
20 Ron Wilson's first statement to Inspector Riddell
21 where he denied everything?

22 A I did that, sir, that's what that is.

23 Q Right. And can you explain why you would have put
24 that before the jury?

25 A Well, because I felt that Wilson was untruthful



1 with Inspector Riddell and as the investigation
2 went on became, by increments, more truthful. The
3 second -- the first city police statement I would
4 have thought was untruthful, the post-polygraph
5 statement I thought was truthful, and I -- I'm
6 just reviewing that because the statement he gave
7 Inspector Riddell just absolutely couldn't be
8 correct based on known facts I would say.

9 Q Do you recall, Mr. Caldwell, I think when we were,
10 when Ron Wilson was testifying, accusations made
11 against you by Ron Wilson and others that you had
12 not provided Inspector Riddell's statement to
13 Mr. Tallis? Do you remember hearing about that?

14 A I believe I do.

15 Q And I will call them up at a later point, but --
16 and I think we've seen evidence that you gave the
17 statement to Mr. Tallis and it appears that you
18 also raised the statements before the jury; is
19 that --

20 A Yeah, that's right. In one of those letters it's
21 clearly set out that I sent the Riddell
22 statements.

23 Q And were you trying to, at this point, or was your
24 effort to anticipate that Mr. Tallis may bring up
25 the first statement and trying to say to the jury



1 here's the Crown theory, the first statement where
2 he denied it he was covering up or he wasn't
3 giving everything?

4 A Yeah. By this stage, Mr. Hodson, it would be
5 clear that Mr. Tallis would be going last because
6 he didn't call evidence, so I was trying to
7 anticipate things he very well may say that would
8 be good arguments and you don't get a chance, as
9 it were, to come back and correct those after the
10 defence addressed, all things being equal, so
11 that's what I was trying to do.

12 Q And you say again that Wilson:
13 "He said he did not give Inspector
14 Ruddell everything he knew. He said he
15 continued this attitude when later
16 interviewed by Detective Karst, in fact,
17 he persisted in that attitude until May
18 22nd or 3rd when, according to the
19 evidence, he had this long interview
20 with the policeman at the Cavalier Hotel
21 in Saskatoon."

22 I presume that's Roberts?

23 A That's right.

24 Q "He said he continued to deny that any
25 of his party were in any way to blame



1 for the death till he came to Saskatoon,
2 telling part of the true story for the
3 first time ever on May 22nd, in Regina,
4 as I recall his evidence, and the rest
5 of it in Saskatoon on the 23rd or 24th
6 and you will remember that was the time
7 he was interviewed by the policeman in
8 the Cavalier."

9 A That's what I was -- I didn't have -- that's the
10 sequence I was referring to, Mr. Hodson, but not
11 that --

12 Q Right. So you were putting forward to the jury
13 saying lookit, initially he gave a statement to
14 Inspector Riddell of the RCMP where he denied that
15 Mr. Milgaard was involved, and then after some
16 lengthy interviews with the police he gave what
17 you believed to be the truthful statement?

18 A That's correct.

19 Q You then say:

20 "Now my learned friend was kind enough
21 to treat us to some very interesting
22 evidence about the effects of various
23 drugs these youths apparently had taken,
24 L.S.D., and so on. But I ask you to
25 remember that the sworn and



1 uncontradicted evidence is that neither
2 Wilson or Nichol John was under the
3 effects of L.S.D., drugs, or anything of
4 this sort, during that trip to
5 Saskatoon, while they were in Saskatoon,
6 and nor was Ron Wilson under the effects
7 of any of these things when Milgaard
8 made the admission of this in Calgary,
9 nor was he under the affects of these
10 things when he finally gave his first
11 truthful account of the matter to the
12 police around May 22nd and 23rd, and
13 that is sworn evidence."

14 And I think Mr. Tallis had in fact asked
15 Mr. Wilson about those questions?

16 A Yes, I think so, sir, yes.

17 Q And then you go on to say:

18 "Now if Wilson were out to get Milgaard,
19 I must say I would have expected him to
20 say there was blood on the shirt, as
21 well as the pants, in order to
22 strengthen what Albert Cadrain said, but
23 no, Wilson only testified to seeing the
24 blood on the pants. In other evidence
25 Wilson was asked when he noticed the rip



1 in the accused's pants and he said he
2 was not sure if he saw them ripped at
3 his place in Regina, before the trip, or
4 for the first time at Cadrain's. He
5 certainly had an opportunity at that
6 time to say that they had not been
7 ripped prior to reaching Saskatoon and
8 thereby leaving you with the suggestion
9 that they were ripped in Saskatoon, and
10 thereby pointing at Milgaard as the
11 person involved in the attack on Gail
12 Miller."

13 And then down at the bottom -- and I take it,
14 there, what you are saying, Mr. Caldwell, that,
15 lookit, if Mr. Wilson was going to frame him he
16 could have said a lot worse things; is that --

17 A Yeah, he could have done a much more thorough and
18 adequate job of framing him, sir, with the same
19 thing.

20 Q And then he goes on, or you go on to talk about
21 evidence from the Regina City Police Department.
22 Pardon me. You say:

23 "Now my learned friend ...",
24 being Mr. Tallis:

25 "... has also brought out some



1 interesting evidence about what the
2 Regina City Police Department offers to
3 prospective informants in drug cases and
4 has gone into the business of Nichol
5 John being kept in the cell the night
6 before she gave the statement to Raymond
7 Mackie. I suppose he may suggest that
8 as a result of this unchivalrous
9 treatment that the statement she gave on
10 the 24th may have been obtained by
11 duress, or whatever he ... Now I think
12 we should pause right here and say ...",
13 and then you go on to talk about the work of the
14 police investigation. So it appears you would
15 have addressed this issue to the jury about
16 Nichol John being in the police cells --

17 A Yeah.

18 Q -- and her statement being under duress?

19 A That's right.

20 Q And you are trying to discount that as a
21 possibility?

22 A That's right. I'm sure there was evidence that
23 she was in the cells, in effect, at her own
24 request and for her own protection, if I haven't
25 got that transposed somehow. I'm sure that was a



1 --

2 Q But certainly by this remark, and it comes from
3 you, --

4 A Yeah.

5 Q -- the question of whether Nichol John being in
6 the jail cells was done to have her statement
7 under duress --

8 A Yeah.

9 Q -- was a matter that at least was raised by you
10 before the jury?

11 A It was. This is what I am telling 'em, yeah,
12 that's correct.

13 Q And then you go on to talk, to the bottom of the
14 page, about Albert Cadrain's trip to Regina, and I
15 don't propose to go through that, I think it
16 tracks the evidence. And the next page. And
17 then, again, you go back to Wilson, saying:

18 "Now you recall, I think I have already
19 mentioned another ... thing and this is
20 that Wilson said he deliberately held
21 back a lot of what he knew about the
22 murder when the policemen initially saw
23 him and only telling the true story
24 fully for the first time on May 22nd or
25 23rd, and this is getting on towards



1 four months after the murder."

2 And so, again, you've brought up, again, the fact
3 that Mr. Wilson had initially -- well, you say he
4 held back a lot of information on his first
5 statement; is that fair?

6 A That's right.

7 Q If we can go to the next page. You go on, and I
8 won't go through this in detail, but Dr. Emson's
9 evidence about intercourse having taken place, and
10 I think you say here that:

11 "... it would put it back somewhere in
12 the vicinity of 8:00 or 9:00 that
13 morning ..."

14 and I think that, sort of a very general -- I
15 think Dr. Emson's evidence was a range that
16 included that time frame.

17 A Yeah.

18 Q And then goes on to say that:

19 "... coincides very closely ... with the
20 Crown's position that this event
21 happened between roughly 7:00 and 8:00
22 in the morning."

23 Then you go on -- I'm sorry?

24 A Go ahead, but I agree with what you said about the
25 times there.



1 Q Yeah. And you say:

2 "Now you recall, from the absence of
3 injuries to the vagina, Dr. Emson gave
4 his opinion that intercourse against her
5 will could have taken place after the
6 deceased was either unconscious or dead,
7 since, of course, either would cause, as
8 he testified, relaxation of this part of
9 the body.

10 Now you may ask yourselves how
11 does the Crown suggest these three
12 different locations of spermatozoa can
13 be reconciled, that is, the vagina, on
14 the panties and in the snow. The Crown
15 suggests that when you look at that
16 scene shown in photographs 2, 3, and 4,
17 and see from it what I submit must have
18 been a desperate struggle put up for her
19 life by the victim, that it is quite
20 possible that the person who raped her
21 achieved penetration, ejaculated into
22 the body of the deceased; that some of
23 the seminal fluid got on the panties,
24 where it was later found ... at the
25 laboratory; that other seminal fluid



1 drained from the body on to the snow
2 where it froze into one of these lumps
3 that was collected by Penkala. Now
4 remember that Corporal Molchanko found
5 human pubic hair in that same lump that
6 had contained the spermatozoa, and that
7 strengthens what I have to say on that."

8 So I take it, sir, that you are trying to explain
9 to the jury how it is that semen was found in
10 those three locations?

11 A That's right.

12 Q And that's the Crown's theory about that?

13 A That's correct, sir.

14 Q Next page. And you say:

15 "... it is clearly a possibility that
16 this is how, the explanation of how the
17 frozen lump of material came to be
18 there, and you don't need to have expert
19 evidence on ... you know it from your
20 common sense and your experience in the
21 world ..."

22 Then you go on to tell the jury about:

23 "... the spermatozoa in the body was
24 blood stained and Staff Sergeant Paynter
25 found "A" antigens in the vial which



1 contained the lump and he tested, later,
2 the same sample for the presence of
3 human blood and got a reaction
4 indicating the presence of either blood
5 or those two other extracts he
6 mentioned, mainly leafy vegetables or
7 leather, and that his evidence was
8 finally to the effect that he could not
9 say definitely if the person whose
10 seminal fluid he examined was a secretor
11 or was not a secretor.

12 The evidence of Dr. Emson, as I
13 said, was that the spermatozoa in the
14 body was blood stained and that there
15 are a number of ways in which blood can
16 get into the spermatozoa within the male
17 person and all of this, I submit, while
18 it does not have the effect of
19 identifying Milgaard alone as the source
20 of that spermatozoa, certainly had the
21 effect of not eliminating him either,
22 and that is the effect I ask you to give
23 it. I am not saying it could only be
24 him, I am saying that it certainly has
25 the effect of not eliminating him, he is



1 one of the thousands."

2 A Yeah.

3 Q And would that be the Crown's position, then, on
4 the secretor issue which we've spent a fair bit of
5 time on?

6 A That's right, sir. And earlier this afternoon, I
7 haven't got that final situation into my mind, but
8 clearly it didn't identify him, didn't eliminate
9 him, is where we end up based on the evidence.

10 Q Right. And I think you said it doesn't eliminate:
11 "... him, he is one of the thousands."

12 A Right.

13 Q And I think that may have been evidence from
14 either --

15 A Either Paynter or Emson, I think.

16 Q Paynter or Emson? And then again, just scroll
17 down, you say:

18 "I ask you to remember now that he does
19 not have to a secretor to get "A"
20 antigens in to his spermatozoa if the
21 antigens are found there as a result of
22 whole blood being in his spermatozoa for
23 the kinds of reasons that Dr. Emson
24 mentioned."

25 And are you, here, anticipating an argument from



1 defence that the fact that he is a non-secretor
2 eliminates him?

3 A I would have thought so, sir.

4 Q And if we can go to the next page, and I think you
5 say again to the jury:

6 "So I leave that phase of the matter by
7 stressing again that while this part of
8 the evidence does not, of itself,
9 identify the accused, it most certainly
10 does not eliminate him."

11 And if I can pause there. If Paynter's test of
12 Mr. Milgaard's saliva had been the same as the
13 test that was conducted in the early '90s that
14 identified him as an A secretor, would it be fair
15 to say that the Crown's position at the trial of
16 Mr. Milgaard would have been stronger --

17 A That's --

18 Q -- on this point?

19 A Yeah, that's the only way I could see that.

20 Q And then scroll down. You go on:

21 "Now there is one puzzling aspect of
22 this case, and I suspect my learned
23 friend will go into it, and that is the
24 situation whereby the stabbing in the
25 back must have taken place at a time



1 when the deceased had her coat on and
2 the top of her dress down because, you
3 remember, there were no holes in the
4 dress. And the Crown has no eye
5 witnesses as to how this took place, but
6 from the facts that are proven before
7 you, I think His Lordship will be
8 telling you that you are entitled to
9 infer how it took place. I am going to
10 suggest the possible solution to you.
11 That is, that when the accused led or
12 forced the girl westward at the top of
13 the "T" shaped alley behind the funeral
14 home, or perhaps when he turned north at
15 the trunk of the "T", he may have forced
16 her at knife point and under threats of
17 stabbing to remove her coat and sweater
18 and pull the top of her uniform down, or
19 more likely, I suggest he did this
20 himself because the middle button has
21 been yanked off and disappeared, the
22 zipper of the dress was sprung, yanked
23 this way while zipped, and the brassiere
24 strap is broken. Now after all this was
25 done it is suggested that the deceased



1 may have decided to make a run for her
2 life, grabbed her coat around her, got
3 her arms through and was running, only
4 to be pursued and stabbed in the back,
5 with the struggle to her death taking
6 place in the trampled area where the
7 body was found. The fact that the
8 sweater was found inside out supports my
9 theory, I suggest, because ... you
10 believe ladies undress voluntarily, roll
11 the sweater inside out, buried it in
12 that manner. I had told you already
13 that ..." --

14 did I misread that?

15 A I just, I think it says:

16 "... you believe ladies undress
17 voluntarily, roll the sweater inside out
18 ..."

19 Q "... buried it in that manner."

20 A Yeah. That doesn't make a whole lot of sense to
21 me, but I'm sure I said it anyway, sir.

22 Q It may have been that what you meant is that it
23 would not be unusual for, if the lady dressed
24 voluntarily, that she'd roll the sweater inside
25 out; is that possible?



1 A I would think so. And Mr. Hodson, if we wish, in
2 due course we can check my own notes on that.

3 Q Okay. I can maybe do that.

4 A Okay.

5 Q It says here:

6 "I had told you already what the Crown
7 suggests as to how the sweater and the
8 boot got buried and it could be the boot
9 came off during this same violent
10 struggle."

11 A Yeah.

12 Q So that would have been your explanation about the
13 coat and the uniform?

14 A Yes.

15 Q I see it's 3:30, Mr. Commissioner. I'm not done,
16 or close to done, this part of the closing address
17 so I suspect it's appropriate to adjourn.

18 COMMISSIONER MacCALLUM: And we adjourn now
19 until October the 24th, 1:00 p.m., Sheraton
20 Cavalier, Top of the Inn. Thank you.

21 MR. HODSON: Thank you.

22 (Adjourned at 3:31 p.m.)

23

24

25



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We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,
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Karen Hinz, CSR

Official Queen's Bench Court Reporter

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Donald G. Meyer, RPR, CSR

Official Queen's Bench Court Reporter



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