

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
Sheraton Cavalier Hotel at
Saskatoon, Saskatchewan

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Volume 83

Inquiry Proceedings



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Mr. Garrett Wilson, Q.C., **for** Mr. Serge Kujawa
and Mr. Jay Watson,
Mr. Rick Elson, Esq., **for** the Saskatoon Police Service
Mr. Aaron Fox, Q.C., **for** Mr. Eddie Karst
Mr. Bruce Gibson, Esq., **for** the RCMP
Mr. Eamon O'Keefe, Esq., **for** Mr. Larry Fisher
Mr. David Frayer, Q.C., **for** Minister of Justice
 (Canada), The Hon. Irwin Cotler
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 1:04 p.m.)

COMMISSIONER MacCALLUM: Good afternoon.

ALL COUNSEL: Good afternoon.

MR. HODSON: I would ask Mr. Caldwell to
come back to the stand, please.

COMMISSIONER MacCALLUM: Mr. Caldwell.

THOMAS DAVID ROBERTS CALDWELL, continued:

BY MR. HODSON:

Q Before we get started, Mr. Caldwell, I thought I
would do a brief recap of areas that we covered
two weeks ago when we finished your evidence and
give you an idea of where I intend to go today and
possibly tomorrow and just one housekeeping
matter. I understand from your counsel, Mr.
Caldwell, that on occasion you would find it
easier to look at the paper document as opposed to
the screen not only with your original files, but
in fact some of the transcripts, and I've advised
Ms. Knox that if you wish to have a paper copy as
we go along, that's quite fine. We of course will
keep it on the screen for the public and for
counsel. Okay?

A That would be fine, sir, thank you.

Q You let me know if you are having difficulty with



1 the screen. So again I'll just quickly go through
2 what we covered last time. We went through your
3 pre-charge involvement with the Saskatoon City
4 Police prior to the charge being laid against Mr.
5 Milgaard and we talked about the charge being
6 laid, we went through in great detail what
7 information you believe the police provided to you
8 as prosecutor, we went through your communications
9 with defence counsel, Mr. Tallis, we reviewed the
10 police theory I think we called it and Crown
11 theory of the offence in some detail looking at
12 some of the documents from the day, I asked you
13 your dealings with some of the witnesses and your
14 impressions of some of the key witnesses, we went
15 through parts of the preliminary hearing, we went
16 through I think all of your preparation notes for
17 both the prelim and trial, we went through your
18 opening address to the jury, parts of the trial
19 and we were just going through the closing
20 address, we weren't quite finished, so I think
21 that's what we covered last time, and there's just
22 one -- in going back over the transcript, I think,
23 Mr. Caldwell, we had talked about or I had asked
24 you a question about Marie Indyk and whether or
25 not she had testified at trial, she did at the



1 preliminary hearing, and I think I said I would
2 check that out and I have. I believe Mrs. Indyk
3 did testify at trial and she was called at the
4 request of Mr. Tallis and so there is a short
5 transcript for that. Does that --

6 A That's what -- that's correct, sir, we've
7 ascertained that in the mean time, if you will.

8 Q Okay. And so where I intend to go today, I'll
9 finish the jury address and then I want to go
10 back, Mr. Caldwell, and I'm going to walk through
11 parts of your examination of Ms. John and the
12 section 9(2) application, not all of it, but just
13 parts of it, and then I want to go and touch on a
14 couple of parts of Chief Justice Bence's charge to
15 the jury. I will then move on to your conviction
16 and your concluding report, I will ask you some
17 questions about the appeal, I will then move to
18 1970, '71 and any recollections you have about the
19 Larry Fisher charges and I'll ask you some
20 questions about how things were done at that time.
21 We'll then move to your dealings with the parole
22 board in the 1970s, then move into the early 1980s
23 and I'll have some questions regarding your
24 dealings with counsel and representatives of David
25 Milgaard; namely, Gary Young and Tony Merchant and



1 Peter Carlyle-Gordge. We'll then go to the
2 Section 690 involvement and your dealings with
3 Mr. Williams and Mr. Pearson, a bit on the Police
4 Commission review of files and then follow up, you
5 were interviewed on three occasions subsequent by
6 the RCMP in 1993, you were examined in a civil
7 proceeding and you testified at the Fisher trial,
8 so I'll have some questions about the transcript,
9 and so that's where I intend to go, Mr. Caldwell.

10 If we could go to 141905,
11 please, this is your address to the jury, and if
12 we can go to page 141941 and you'll recall, Mr.
13 Caldwell, when I was asking you about this address
14 to the jury, this is the transcript of what you
15 said in your closing remarks. Do you want to have
16 a paper copy of that, Ms. Knox?

17 A I think if it's convenient, sir, I would like to
18 try that.

19 Q It's certainly -- if you would like, Mr. Caldwell,
20 and if you go to page 36 on that document.

21 A Very good.

22 Q And I want to again in going through your address
23 to the jury have you elaborate and get a sense of
24 what it was you were saying and in some cases the
25 reasons for that.



1 A I just need to --

2 Q Page 36 at the top.

3 A Yeah, I think we --

4 MS. KNOX: The copy I just gave to him is
5 his copy from his file. Perhaps for purposes of
6 this you could look, try working with the screen
7 until I locate the --

8 A I'll do that, thank you.

9 BY MR. HODSON

10 Q There's not a lot that I have to go through, so
11 let me know if that's a problem.

12 A All right, sir.

13 Q If we just go down to the bottom, this is where we
14 left off last day, and you talk here about, and
15 again I think you told us that you are trying to
16 anticipate what Mr. Tallis might say to the jury
17 and you are saying here that based on some of the
18 cross-examination, you are saying that your friend
19 may intend to suggest the improbability of anybody
20 exposing themselves long enough to have sexual
21 intercourse in these conditions, and then if you
22 can scroll down, and I think Mr. Tallis had asked
23 some questions of witnesses about that and there's
24 a couple of things I want to ask you about. What
25 you end up saying here, you say:



1 "... I submit to you, that it is beyond
2 dispute that somebody did indeed have
3 intercourse with that girl in that back
4 alley, without her consent, and in that
5 freezing weather ..."

6 So pause there. I take it that what you are
7 saying is that somebody had to have had
8 intercourse and raped and killed this woman in
9 the alley in that weather and that's what you are
10 saying to the jury that's proof enough that it
11 could happen?

12 A I would think so, sir, yes.

13 Q And then you go on to say:

14 "... and probably when she was
15 unconscious or dead, and it is idle to
16 suggest that nobody would force a girl
17 to undress in that weather to gratify
18 his sexual urges because you have the
19 evidence right before you, I submit,
20 that is exactly what he did ..."

21 And I think either we went through it with you or
22 with Dr. Emson. Was it the Crown theory, again
23 as stated here, that the intercourse took place
24 when Ms. Miller was either unconscious or dead,
25 was that based on Mr. Emson's examination of Gail



1 Miller?

2 A I would think it would include both the latter,
3 Mr. Hodson, as I recall his evidence was that
4 there were no wounds, if you will, to the external
5 genitalia, if I remember his -- and that would be
6 one of the possibilities, as would unconscious,
7 and -- yeah, unconscious or dead are the two
8 categories there. Does that --

9 Q Yes, and would it be fair to say that that theory
10 would explain then why there was not physical
11 damage?

12 A It would be consistent with that.

13 Q If we can go to the next page, I want to talk here
14 about the car, or the use of a car theory, and I
15 will just read over parts of this and ask you a
16 question. You say:

17 "Now again, I ... anticipate the things
18 that my learned friend may raise, and I
19 don't know if he may suggest to you the
20 possibility that the victim was driven
21 there by car, unloaded from the car in
22 this spot or what, but I think
23 Lieutenant Penkala cleared that up for
24 us. He said that, his evidence is from
25 what he saw in the snow the victim and



1 the killer could have walked or run to
2 the place where the body ended up, along
3 the travelled portion of the two lanes."

4 Talking about the tire tracks, etcetera. And I
5 take it from this, Mr. Caldwell, and I would like
6 your comment, that the Crown's theory was that
7 the car was not involved in the offence; is that
8 a fair read of your address to the jury?

9 A That is, and the car in my mind was always the
10 Wilson vehicle, sir.

11 Q Right. So the Wilson vehicle, and we've gone
12 through that last time about where it was and
13 about the version of events where Mr. Milgaard and
14 Mr. Wilson left the vehicle, and so that was
15 the -- the Wilson vehicle was near the scene, that
16 was the Crown theory?

17 A That's correct.

18 Q And am I correct to say that if the car was
19 involved, in other words, that Gail Miller was in
20 the Wilson car at any time, then that would cause
21 Mr. Wilson and/or Ms. John to be either
22 accomplices or suspects; is that fair?

23 A I think suspects at least, if not accomplices.

24 Q Right. And so again when you are putting this to
25 the jury, did you consider saying, well, who



1 knows, maybe Gail Miller was in the back seat of
2 the car and that's when her coat was removed and
3 the top of her uniform taken off and then she fled
4 the car, would it be fair to say the problem with
5 that theory is that the evidence -- first of all,
6 the evidence of Wilson and John didn't support
7 that, but secondly, Wilson and/or John would
8 either have to be in the car or -- and then
9 therefore be aware of the offence, or out of the
10 car at the same time and not be aware of it. Do
11 you understand my question?

12 A I hope so, sir. I had no evidence that Gail
13 Miller was in the Wilson vehicle of any
14 description from anywhere, so that simply --
15 there's no way I could, you know, put a foundation
16 under that because I had no evidence to that
17 effect.

18 Q Okay. But you didn't have any evidence about how
19 Miss Miller's coat may have been taken off and put
20 back on, the fact that you didn't have any
21 evidence did not preclude you from advancing a
22 theory as to what might have happened or what
23 might be inferred from the circumstantial
24 evidence?

25 A That's right, it was -- the evidence about the



1 clothing I thought was very clear and what I
2 called unexplained at the end of the trial and it
3 could be explained in some fashion or another
4 involving a second vehicle. I, in my view, had no
5 evidence of the second vehicle.

6 Q No, let's just talk about the one, the Wilson
7 vehicle.

8 A Very good.

9 Q Let me put it this way. We've heard evidence at
10 the inquiry and we've certainly read and we'll
11 hear more about people who have, after the fact,
12 looked back and said a number of the circumstances
13 and the evidence at the time certainly would
14 suggest that a car might be involved, and let me
15 just go through a couple of those. One, the fact
16 that it's 40 below and it being outside for a
17 lengthy period of time might be unusual and people
18 might want to be inside. Secondly, the state of
19 Gail Miller's clothing with her coat being removed
20 and then put back on some have suggested is more
21 consistent with the fact that she was in a
22 vehicle, had her coat removed, took her uniform
23 top off, was raped, had the coat put back on and
24 then fled the vehicle, and you understand that
25 being a theory that has been advanced --



1 A Yes.

2 Q -- subsequently?

3 A Yes, sir, I do.

4 Q And, again, some others indicating that based on
5 what, where the car might have been in that back
6 alley, that the -- and where the sweater and the
7 boot were buried and where the purse was found,
8 might suggest that part of the attack might have
9 taken place in the car; and you understand people
10 have said that subsequent?

11 A Yes, Mr. Hodson.

12 Q And I guess my question at the time, Mr. Caldwell,
13 whether you can tell us whether that was something
14 that was in your mind or whether it was a theory,
15 and it appears from what you say to the jury there
16 was nothing put forward even as a possibility that
17 it might have happened in the car, and I'm
18 wondering what may have prompted that?

19 A Well, if I said that, it would be based on what I
20 understood the evidence to be at that point. In
21 short, there was nothing put forward, etcetera, in
22 the manner you just described, sir.

23 Q Would one of the concerns be that if part of this
24 offence took place in the car, again as I stated
25 earlier, that either John, Nichol John or Ron



1 Wilson, might be considered accomplices?

2 A That could be.

3 Q And, again, we touched on this last week or two
4 weeks ago, I don't want to go through it in
5 detail, but I think you told us that that might
6 mean a caution to the jury about their evidence as
7 accomplices?

8 A That could well be, sir.

9 Q And, again, I take it that that would be something
10 that you would want to avoid; is that fair?

11 A Devoid?

12 Q Avoid having Wilson and John's evidence, have the
13 judge say to the jury "be careful about the
14 evidence of Wilson and John because they are
15 accomplices"?

16 A Yeah. I don't think I could or would want to
17 avoid it, because I would think that would be
18 improper if it were -- if there were any grounds
19 for it, Mr. Hodson. So I would have no problem
20 with the judge warning them in that fashion,
21 warning -- pardon me -- the jury in that fashion,
22 which apparently he did.

23 Q Not as -- but as accomplices as opposed to being
24 people of questionable character?

25 A Well those are two different categories. I, if



1 the judge felt it proper to say, "By the way, they
2 may be accomplices based on (a), (b), and (c), and
3 if so you have got to discount their evidence", I
4 would have no difficulty with that.

5 Q Okay. If you could go to the next page, please,
6 and down at the bottom I just want to go through
7 you deal or talk to the jury about the left
8 hand/right hand issue, and just to clarify or to
9 repeat what we heard last time we were together,
10 that Dr. Emson's evidence was that the wounds
11 appeared to be -- appeared to go a certain
12 direction that were more likely from a
13 right-handed, someone holding the knife in the
14 right hand, I think was more or less what his
15 evidence was?

16 A Yes.

17 Q Do you recall that being the case?

18 A Yes, sir.

19 Q And you knew David Milgaard was left-handed; is
20 that correct?

21 A I assume I did, sir.

22 Q At the time?

23 A Yeah, yeah.

24 Q I think that's a fair reading of -- we'll go
25 through this.



1 A Okay.

2 Q This may assist you. You say:

3 "Now there is also a matter that I
4 suggest may be raised by my learned
5 friend that I want to deal with. The
6 suggestion of the various Crown
7 witnesses that they knew ... caused by a
8 right-handed individual."

9 Maybe there is a problem in the transcription:

10 "If you had paid careful attention to
11 the evidence, and I'm sure you did, you
12 noticed that Penkala agreed that the
13 knife wounds were inflicted by a person
14 who used his right hand. He made a
15 distinction there, to the difference
16 between being right-handed and using
17 your right hand, and if you look at the
18 photographs I think you will see that
19 there are slashes running down the neck
20 diagonally towards the centre from
21 either side ..."

22 And then if you can just scroll down:

23 "And you remember that Dr. Emson, when
24 he was asked specifically ... by my
25 learned friend, said there could be no



1 certainty about the left-handedness or
2 right-handedness of the killer, but he
3 would say he used the right hand."

4 And scroll down to the bottom. You say:

5 "I suggest that you use a great deal of
6 caution before coming to a conclusion as
7 to the handedness of the killer".

8 So I take it, from that, that you addressed that
9 squarely with the jury, that Mr. Milgaard was
10 left-handed, the evidence of Penkala and Dr.
11 Emson suggested that the person who stabbed Gail
12 Miller, at least some of the stab marks, likely
13 used the right hand?

14 A Right.

15 Q And what you are saying to the jury is not "so
16 what", but pretty close to that, saying that "that
17 doesn't mean it can't be Mr. Milgaard"; is that
18 fair?

19 A That's how I read it now, sir.

20 Q Then if we can scroll down, and I won't go through
21 these, but when we went through your notes you had
22 a whole section there, a page about honest
23 witnesses being honestly mistaken and talking
24 about details, and you identify Mrs. Gerse, and on
25 the next page the cars; is that what you were



1 talking about the other day?

2 A I believe so, sir.

3 Q And if we can go to two pages forward, please,
4 down at the bottom you say:

5 "Now there is the other category ...",
6 so we can pause there. You've talked about I
7 think the Danchuks, and you may have talked about
8 Rasmussen and certainly Helen Gerse, about people
9 making honest mistakes on details. You say:

10 "Now there is the other category,
11 including the main Crown witnesses, you
12 are going to have to look carefully at
13 their credibility. I do suggest to you,
14 and leave it with you, that you may well
15 find that the only one of them and ...
16 major Crown witnesses, Wilson, Nichol
17 John, Cadrain, who I submit ... lacking
18 credibility is Nichol John, and I
19 suggest that even in her case only that
20 part of her evidence ... the central and
21 most important part."

22 Now, again there may be some transcription
23 problems there, but again would you be telling
24 the jury "lookit, some of my witnesses may have
25 credibility issues"?



1 A Absolutely, that that would be open to them, they
2 would have to assess her and all the other
3 witnesses as well, of course.

4 Q And Nichol John, and we'll hear a bit more about
5 her later, but what you are saying is she's likely
6 the one that has the most problems with
7 credibility, --

8 A I --

9 Q -- but only that part where she says she can't
10 recall; is that fair?

11 A I think, yeah, I started with the major three
12 Crown witnesses, of which she's one, Mr. Hodson.

13 Q Okay.

14 A And that's how I read it now.

15 Q And then, if we can carry on, you say:

16 "Now in this trial there has been
17 evidence of two separate voluntary
18 admissions by Milgaard concerning the
19 events in Saskatoon on January 31st,
20 1969. The first to Wilson in Calgary,
21 at the bus depot at the time Wilson was
22 not under the effects of drugs or
23 intoxicants."

24 And then scroll down. You go on to talk about
25 what the evidence was and you say:



1 "Now this, I submit, obviously can only
2 refer to the episode in which Gail
3 Miller was killed and Gail Miller's
4 purse was put in the trash can, and I
5 suggest that it would be ridiculous to
6 even suggest this could speak to any
7 other incident, there's no way that
8 could be a coincidence."

9 So, again, what you are saying is Ron Wilson's
10 evidence about David Milgaard's admission in
11 Calgary had to relate to Gail Miller; is that
12 fair?

13 A That's right, sir.

14 Q And then, so again you started off talking about
15 two voluntary admissions by Milgaard, so the one
16 is the statement to Ron Wilson. Then we go to the
17 next page and you talk about Melnyk and Lapchuk
18 and their evidence, we've been through that many
19 times, I won't go through it.

20 A Uh-huh.

21 Q And then you say:

22 "Quite apart from that, we have
23 independent evidence of this, through
24 the youths from Regina, Melnyk and
25 Lapchuk. Like Ron Wilson these are not



1 choir boys and the Crown is not putting
2 them forth as an example of the
3 all-American boy, but they are the
4 people who happened to have been
5 involved in these events".

6 And I take it that would have been your position
7 at the time, again similar with the other Crown
8 witnesses, you take them as you get them?

9 A That's right.

10 Q And go on to the next page, please. And then,
11 again, you go through the evidence, and then you
12 talk about Lapchuk's evidence, there was a direct
13 quote. And can you tell us, Mr. Caldwell, we may
14 have touched on this last day, what was your
15 impression of the evidence of Melnyk and Lapchuk
16 at the trial as far as credibility; would it be
17 fair to say -- let's take a step back, before you
18 called them?

19 A Uh-huh.

20 Q I think, as you said here, "they are not choir
21 boys, they have records"; did you have concerns
22 about their credibility?

23 A No, I -- as you know, we -- I found out about them
24 very late in the day, if you will, the day before
25 the trial, I had them both up to Saskatoon as well



1 as Ute Frank, interviewed all three of them. In
2 the case of Melnyk and Lapchuk I believe I
3 interviewed them together and warned them that I
4 didn't want them leaning, if you will, in either
5 direction, whether they disliked the guy, loved
6 him, they had to be truthful in their evidence,
7 and they -- the Ute Frank is another topic. But
8 the two of them, when they testified, I thought
9 essentially repeated what they'd told me, and
10 stood up to cross-examination, including their
11 Regina criminal problems, etcetera, in a very, I
12 thought, presentable fashion, Mr. Hodson.

13 Q What is it; did you find it unusual that -- and
14 let's just talk about Melnyk and Lapchuk being --

15 A Yeah.

16 Q Let's start off, I think you would have known at
17 the time that they'd been in trouble with the law;
18 is that correct?

19 A I had found that out early in my dealings with
20 them.

21 Q And that they have been, in one way or another,
22 associated with a motorcycle gang; do you remember
23 if you were aware about that?

24 A I don't remember that. It wouldn't surprise me
25 but --



1 Q And, as a prosecutor, would you have dealt with
2 people like this before, people who are on the
3 wrong side of the law, --

4 A Yeah, you --

5 Q -- as witnesses?

6 A Yes, absolutely, because every one of these cases
7 has its own unique facts, and in some of them it
8 was essential to get the evidence as truthfully as
9 possible of people who were less-than-commendable
10 citizens. I had bumped into it before, of course,
11 never on this degree of short notice.

12 Q Was there reluctance on the part of people of this
13 nature, criminals, bikers, to testify against a
14 friend?

15 A Well, again, I don't know about the biker part, I
16 -- the way I dealt with these two young fellows is
17 to I think in effect say "we've got to have this
18 go in, I don't want you leaning against him or for
19 him, but -- based on friendship or any of that,
20 anything of that sort". And I believed it was a
21 genuine occurrence and they, they did show up, did
22 testify, were cross-examined, and of course this
23 was at trial, not prelim, because of the way the
24 facts came up.

25 Q We heard Mr. Pringle cross-examine Ron Wilson



1 earlier in the Inquiry about the stature of an
2 informant or a rat in the prison system --

3 A Uh-huh.

4 Q -- and amongst biker friends and I think, I stand
5 to be corrected, I think Mr. Wilson said that he
6 and Melnyk and perhaps Lapchuk were at least
7 associated in some way with the Apollo bike gang
8 at the time. And I'm just wondering, Mr.
9 Caldwell, whether that had been something that
10 concerned you one way or the other on their
11 credibility?

12 A Yeah. I'm not sure, sir, that I was here for the
13 cross-examination, number 1. But if they were
14 bikers, that was simply a part of the facts that
15 they brought to me as witnesses, in other words I
16 wouldn't not call them because of that, I wouldn't
17 --

18 Q Let me put it a different way, and some have
19 suggested that it would be unusual for a person
20 like Melnyk or Lapchuk to testify against a friend
21 or an acquaintance or to testify against anybody,
22 because it would not be, in their circle of
23 friends, a good thing to do. In other words,
24 their culture at the time was not to help the
25 police and not to, if I can use the word, "rat" on



1 a friend, and we have seen that and heard that
2 from some witnesses. And my question, Mr.
3 Caldwell, in that case were you concerned that
4 Melnyk and Lapchuk might just say "lookit, I don't
5 remember anything" --

6 A Well --

7 Q -- to help so that they wouldn't have to inform on
8 somebody?

9 A -- I can understand people not wishing to inform.
10 Neither of them did in fact take that approach
11 with me, saying "I don't remember anything,
12 period". And just a very slight digression, Ute
13 Frank did do that with me as one of those three
14 witnesses, sir.

15 Q Saying, what, "I'm not prepared to" --

16 A She simply -- I don't know that we went into her,
17 but I got up all ready to examine her in the
18 trial, and there are notes on everyone's file
19 indicating that she got to a certain point where
20 she simply was not going to go any further talking
21 to me, and I -- from that, of course, I knew she
22 wouldn't testify.

23 Q That's -- let me pick up on that.

24 A Okay.

25 Q So Ute Frank, are you telling us that you believe



1 that she did have some evidence to tell, that she
2 just was not prepared to give it to you or to tell
3 you?

4 A I did, sir, and she made a come-back at the time
5 of one of the later Supreme Court hearings and, by
6 that time, was anxious to testify. That, of
7 course, I wasn't involved with personally.

8 Q Let's go back at the time.

9 A Okay.

10 Q So, of the three you interviewed, Ute Frank, you
11 believe she did not want to testify and therefore
12 deliberately didn't tell you --

13 A Yeah.

14 Q Didn't give you a recollection or didn't give you
15 any story that you could use at trial?

16 A That's right, sir.

17 Q I should have used "version of events"?

18 A But there is a page of my so-called interview, you
19 know, preparation notes that abruptly stops. I'm
20 sure it's on everyone's file. That was the
21 episode I'm talking about.

22 Q And so, in the case of Lapchuk and Melnyk, is it
23 fair to say they did not take the same approach as
24 Ute Frank?

25 A No, they did not, they -- I think they gave me the



1 impression they understood they had to do this and
2 they went ahead and did it.

3 Q And what if they would have said to you "lookit,
4 we were stoned, I don't remember anything, and
5 something like that could have happened but I
6 don't -- I'm not going to say anything"?

7 A Well I'd be in a position there where I might have
8 no what I would call credible witnesses to the
9 so-called reenactment, I would have to assess
10 that, then. I might have decided to -- that it
11 was, you know, fit to be abandoned at that point.

12 Q Okay. Did you find it unusual that these two
13 individuals would give you evidence against one of
14 their friends, damaging evidence against one of
15 their friends?

16 A It was unusual, and as was the way the thing came
17 to light, yeah.

18 Q Now, again, it's been suggested by some that the
19 reason they did so is because they had other
20 criminal charges outstanding in Regina and that,
21 by assisting the Crown in the David Milgaard
22 prosecution, they would somehow get favourable
23 treatment elsewhere; you've heard that suggestion
24 being made?

25 A That's -- I have.



1 Q And I think last day, when we touched on that, you
2 said that did not happen; is that fair?

3 A That's right.

4 Q And so again, just back to the question that has
5 been asked in the past as to why Melnyk and
6 Lapchuk would testify against a friend, and as --
7 given their walk of life at the time, give
8 incriminating evidence. Your take on it at the
9 time was that it was credible; is that fair?

10 A Absolutely.

11 Q And I think, maybe we can just touch on it on the
12 next page, I think you actually say that it might
13 even be more credible than otherwise because of
14 their criminal record. If I could just draw your
15 attention to the top you say:

16 "And lady and gentlemen, again, this
17 frankness of admission on the part of
18 both of these youths not only does not
19 detract from their credibility, that
20 they have criminal records, I submit
21 that it increases their credibility.
22 The fact that they admit things damaging
23 to themselves without any quibbling, I
24 submit makes them more believable
25 witnesses. And their evidence bears the



1 hallmark of genuine evidence, and that
2 is that they show like the ... the
3 differences you would expect between two
4 people describing the same set of
5 events, of the sort I have already
6 mentioned, they have a slightly
7 different recollection of the news story
8 but that ... one of them says the pillow
9 episode happened on the bed, the other
10 one says it happened on the floor and
11 the description of the words used by the
12 accused, while the meaning is certainly
13 the same, were different one from the
14 other."

15 A Right.

16 Q And then you say:

17 "Now that has to indicate to you that
18 they didn't cook this story up or get
19 together on it for some purpose of doing
20 the accused harm."

21 And then:

22 "Where I suspect witnesses is when they
23 walk into court and are clear: this is
24 what was said and ... word for word;
25 this is what was done, and we hear a pat



1 story. This is the hallmark of phony
2 evidence when you come in here with word
3 for word from that I suggest that you
4 may conclude that they did not cook a
5 story up to do any damage to the accused
6 here."

7 And I take it Mr. Caldwell, and I think we saw
8 this in the transcript and we'll certainly hear
9 it from Mr. Tallis when he testifies, the
10 previous criminal record of Melnyk and Lapchuk
11 and pending charges was a matter that was raised
12 with them in their evidence; is that correct?

13 A I'm sure it was. I believe I was the one who
14 marshaled that, but it was sorted -- assembled in
15 Saskatoon in fairly short order, and it may have
16 included charges as well as convictions, but it
17 was what anyone would call a criminal record.

18 Q Then you go on to talk about the fact that these
19 people were stoned and you say:

20 "... and I suspect that my learned
21 friend may invite you to conclude that
22 the accused ..."

23 or let me back up. I think you talk about the
24 fact that Mr. Milgaard was alleged to have been
25 stoned and you say:



1 "... and I suspect that my learned
2 friend may invite you to conclude that
3 the accused did not know what he was
4 saying at the time, and I have something
5 to say on that issue. And you will be
6 pleased to know that we're getting to
7 the end of what I have to say."

8 And carry on, and you say:

9 "Now in law, the fact that a person is
10 intoxicated on liquor, and I mean
11 intoxicated, does not prevent his
12 statement being given in evidence, it
13 only goes to the weight of his
14 statement."

15 And then you say:

16 "Now it is notorious that a person who
17 is intoxicated often says truthful
18 things that they wouldn't say when they
19 are sober ... you have the expression
20 the truth will ...",

21 I think it should be come:

22 "... out when one is intoxicated and it
23 seems to me that the same argument can
24 apply to people that are stoned, that
25 the inhibitions are released, that is



1 the time when ...",
2 and then you carry on to talk about how the fact
3 that Mr. Milgaard was allegedly stoned at the
4 time he made these statements may mean they are
5 more truthful than if he would have said them
6 when he were not stoned; is that fair?

7 A Yes. Just, Mr. Hodson, that expression, "the
8 truth will out" was current in my time, saying,
9 you know, "the truth will out", as it were,
10 will --

11 Q So that's not a typo, so "the truth will out"?

12 A Yeah.

13 Q So is it fair to say that the fact that Mr.
14 Milgaard was stoned, at least according to Melnyk
15 and Lapchuk, at the time he made the comments and
16 did the actions about the murder, you are saying
17 that might be considered by the jury to be
18 suggestive that it's more truthful than if he
19 would have done it when he was not stoned or
20 sober; is that fair?

21 A That could be open to them, sir.

22 Q And, if Mr. Milgaard would have testified, I take
23 it you would have examined him or cross-examined
24 him in some detail on the motel reenactment?

25 A I would have thought so.



1 Q And can you give us any idea, I take it you would
2 have tried to elicit from him whether he said
3 those things, why he said them, etcetera?

4 A Yeah. If he had testified, of course it would
5 have followed all of this, all of the Crown's case
6 including the recital by Melnyk and Lapchuk of
7 what they saw in the reenactment. So at that
8 point I would want him to, you know, explain it,
9 in effect "if that's not true why did you say
10 that", there would be -- you could approach him
11 and try to, you know, try to prove that he did in
12 fact say it and mean it.

13 Q I see. And so the fact that he did not testify,
14 which was his right, you are then saying to the
15 jury "well lookit, here are some explanations you
16 might hear from defence counsel about this
17 incident, but in the absence" -- and I know you
18 can't say that to the jury, --

19 A No.

20 Q -- but "in the absence of him not explaining it
21 I'm asking you to think that because he was stoned
22 means it's more truthful"; is that fair?

23 A That was one thing they could decide, sir.

24 The other thing you just
25 mentioned, the fact that it did end up that no



1 defence evidence was called and I in some sense
2 was, in this address, attempting to cover things
3 that I thought might come up after my address was
4 over, in other words when Mr. Tallis went on, so
5 it was -- at this point we knew that there would,
6 of course, not be defence evidence called.

7 Q And I suppose there could be one of two possible
8 explanations to the motel room reenactment, one
9 would be that it didn't happen, that could be a
10 position by the defence?

11 A Absolutely.

12 Q And I take it you would then, if Mr. Milgaard had
13 said that, you would have cross-examined him on
14 that and challenged him about that?

15 A That's right, sir.

16 Q And then, secondly, another position, and maybe
17 there are more, were that if it was said it was
18 taken out of context or it was a joke?

19 A And he would have to advance that, in my opinion,
20 and see how he did with it, if you will.

21 Q And again, I don't want to go through it, but I
22 think the evidence of Melnyk and Lapchuk, they
23 talked about what they heard and observed, I don't
24 know if they were ever directly asked the question
25 "did you think he was joking", I don't believe



1 they were asked that directly; would that have --
2 at least on your part, would that have been a
3 reason for that?

4 A Umm, that I had not asked him "did you believe he
5 was joking"?

6 Q Yeah, I believe you asked what the impression was,
7 and again I don't want to get into --

8 A Okay.

9 Q -- trying to interpret the evidence, --

10 A Yeah.

11 Q -- but I don't think the specific question was
12 asked of them "was he just joking around"?

13 A Well first of all, sir, I would have expected that
14 question, if it came, to have come from defence
15 counsel after hearing what I believed was their
16 evidence in chief, if you will. I'd -- be unusual
17 for me to say at that point "oh, by the way, did
18 you think he was joking". I wouldn't think -- I'd
19 be surprised if I did that, maybe it will turn out
20 that I did.

21 Q Did, when you interviewed Melnyk and Lapchuk and
22 they told you "yes, this happened and he said
23 those things but it was clearly a joke and we were
24 horsing around and neither of us took it
25 seriously", would you have called that evidence?



1 A I would have thought that would discourage me from
2 calling it.

3 Q Yeah?

4 A Because you'd have to -- they'd be talking in that
5 same sense in their evidence then.

6 Q And so the prejudicial effect of that evidence
7 might outweigh the probative value of it; is that
8 a fair --

9 A That could well be, sir, and I might have been
10 stopped on that footing by the judge if it
11 happened to unfold that way.

12 Q And, again, I don't -- others may have a different
13 view of the evidence but I think, certainly in
14 chief, Melnyk and Lapchuk do not testify that -- I
15 think they used words that -- the serious
16 expression or a serious setting. So just back on
17 the joking part, you are saying that that might
18 have caused you not to call the evidence, if you
19 were of the view that this was said in jest?

20 A If, at the end of my preparation to deal with the
21 so-called motel room reenactment, all I had was
22 two witnesses who took the final position "it was
23 all said in jest", I may not have proceeded if
24 that was the case. And I'm saying 'if that was'
25 which --



1 Q Yes, okay.

2 A Yeah, yeah.

3 Q If we can just go down to the bottom paragraph,
4 and then you are again talking about what's --
5 what Mr. Milgaard was described to have done, you
6 say:

7 "Now the actions he went through in the
8 motel room obviously fit what happened
9 in real life. You heard about what the
10 injuries were to the body, how they were
11 made. Kneeling over the pillow as if it
12 were a body, making the stabbing motions
13 and even to the extent of talking about
14 a paring knife. Now there is no way the
15 accused could have known those details
16 ... it was the accused ... there is no
17 way he could have known those details
18 but that he was the killer in this
19 instance ..."

20 Now if I can pause there, do you know whether or
21 not the police had asked Mr. Milgaard, when they
22 interviewed him in March and April of 1969, about
23 a paring knife, having a knife?

24 A Offhand, Mr. Hodson, I can't recall that.

25 Possibly someone can find that and point it out in



1 the transcript?

2 Q But just the fact that would it be reasonable to
3 think that (a), if the police were questioning Mr.
4 Milgaard about the murder, that they might inquire
5 about a knife?

6 A Absolutely, because there was a broken paring
7 knife found at the scene.

8 Q Right. And so, again, back to if Mr. Milgaard
9 would have testified and said "well lookit, the
10 reason" -- and for example, I'm not saying he
11 would have, but for example if he would have
12 acknowledged the motel room reenactment, you would
13 have asked him these questions about the knife and
14 how did he know she was stabbed and the paring
15 knife, etcetera?

16 A I'd ask him questions about things that appeared
17 to match the facts as they were given by those
18 other motel room witnesses, sir, is how I'd put
19 it. Because, of course, that's all I had to go on
20 in terms of what had happened there.

21 Q And as the prosecutor, Mr. Caldwell, did this --
22 and you talked about this last day, about the
23 last-minute evidence. When you were preparing
24 your case to present to the Court, and I think you
25 told us this, you felt that you had a strong case



1 that could establish guilt on the part of Mr.
2 Milgaard; is that correct?

3 A That's right.

4 Q And then when Melnyk and Lapchuk came along, in
5 your mind, tell us what -- what did that do to
6 your conviction or your belief about Mr.
7 Milgaard's responsibility for this offence?

8 A Well, starting from the matter you had just
9 mentioned, I clearly felt I had a strong and
10 convincing case against Mr. Milgaard. The
11 appearance of these two persons, or my learning
12 about them the night before the trial and all that
13 followed from it, was an absolutely unique
14 experience to me and it certainly didn't lessen my
15 belief in the Crown's case, Mr. Hodson. I
16 certainly would have proceeded according to plan
17 if it had never happened, if the event had never
18 happened or I had never heard about it, it
19 wouldn't affect my plans to run the trial if you
20 will.

21 Q And prior to hearing this evidence from Mr. Melnyk
22 and Mr. Lapchuk were -- are you able to tell us,
23 did you have any lingering doubts about whether
24 the police had the right person, whether you were
25 charging the right person, and whether you could



1 establish Mr. Milgaard's guilt?

2 A Not at that point, I did not.

3 Q And what, if any, effect did the Melnyk/Lapchuk
4 evidence have on any doubts you may have had?
5 Now, in fairness, I think you said you didn't have
6 any.

7 A Well the Melnyk/Lapchuk evidence which I, you
8 know, after I'd interviewed them and I felt it was
9 genuine, certainly didn't detract from my belief
10 in the case as it was before. It, I suppose you
11 could say it was, it was an unexpected piece of
12 evidence, none of us expected it, but which
13 certainly wouldn't harm the Crown's case any, as I
14 saw it, in terms of success in the Queen's Bench
15 trial.

16 Q And, certainly, you believed that it would have an
17 effect on the jury; is that fair?

18 A I would have thought so.

19 Q And then you go on to say at the bottom, it says:
20 "... and it goes without saying that he
21 could not have invented the details
22 which would match the actual event so
23 closely. And it also goes without
24 saying that nobody who had, in fact, not
25 done that deed would ever, drunk or



1 sober, jokingly or otherwise, admit to
2 those deeds in any way, shape or form,
3 let alone describe them with such
4 accuracy as the accused did in that
5 motel room."

6 And I take it, from that, again you are raising
7 the question of it being said jokingly; is that
8 fair?

9 A Yeah, I include it as one of the four conditions,
10 drunk or sober, jokingly or otherwise.

11 Q And so what you are saying is no innocent person
12 would say those things that were attributed to
13 him, drunk or not, joking or otherwise?

14 A Absolutely I felt that way about it, sir.

15 Q And then you say:

16 "His admissions to the Regina boys are
17 not only consistent with his guilt, I
18 submit to you that they are inconsistent
19 with any other explanation ..."

20 Is that --

21 A Yeah.

22 Q And I think your case against Mr. Milgaard was
23 circumstantial evidence?

24 A That's right. I went on, Mr. Hodson, just to say
25 rational or otherwise there.



1 Q I'm sorry.

2 A No, that's fine, but it was a circumstantial case
3 if viewed properly.

4 Q And is what you are saying to the jury, that take
5 these admissions, there's no other explanation
6 that can be made to explain why Mr. Milgaard would
7 have said and done these things if the truth of
8 what Melnyk and Lapchuk say is accepted by the
9 jury, what you are saying is that there's no other
10 explanation that's rational other than he
11 committed the murder?

12 A That was my conclusion and I think I tried to set
13 that out in the closing here.

14 Q And then if we can just scroll down:

15 "In my submission I see no possible way
16 they can be interpreted other than that
17 as a direct admission that he was the
18 person who stabbed and killed the girl
19 in Saskatoon. And that evidence is
20 completely and entirely independent of
21 Nichol John, of Cadrain --"

22 Etcetera. And would you agree, Mr. Caldwell,
23 that the evidence from Melnyk and Lapchuk might
24 put Mr. Milgaard in a more difficult spot as far
25 as the decision to testify? In other words --



1 put it this way, it might factor in his decision
2 as to whether or not he testifies?

3 A Well, once they had testified it would be one more
4 piece of evidence that Mr. Milgaard would have to
5 assess as to whether he, let's say, thought it was
6 wise to testify, which of course was a decision
7 for other persons than myself, but I would think
8 it was something that would have to be looked at,
9 assessed like the other evidence, weak or strong,
10 to say how do we cope with this and should we go
11 ahead on that footing. That of course is only my
12 own theory, Mr. Hodson.

13 Q And then if we can just scroll down, I think you
14 finish up here on this point, you say it's
15 completely independent of John, Cadrain and
16 Wilson, the people that went on the trip.

17 "Nothing to do with Saskatoon, and I
18 submit that it is absolutely independent
19 evidence which is reliable and which
20 should be enough to remove any shadow of
21 a doubt you may have had, if indeed you
22 had any, up to this point as to the
23 guilt of the accused."

24 And is what you are saying, is lookit, if you
25 take John, Cadrain and Wilson, that's enough to



1 prove beyond a reasonable doubt, but if you still
2 had a doubt, Melnyk and Lapchuk's evidence ought
3 to take that doubt away. Is that a fair read of
4 that?

5 A Yeah, I was pointing out that it was independent
6 of the John, Cadrain and Wilson evidence, the
7 people that went on the trip. That's why I
8 included nothing to do with Saskatoon, in other --
9 the reenactment was, in effect, a Regina venture
10 as we know.

11 Q And so you are saying that independent of any
12 issues or concerns you may have had with Cadrain,
13 John and Wilson, Melnyk and Lapchuk have really
14 nothing to do with those three?

15 A Yeah, I ended up saying remove any shadow of a
16 doubt you may have had if indeed you had any at
17 this point as to the guilt of the accused. That
18 of course in part would depend on the evidence, as
19 we know, of John, Cadrain and Wilson, Mr. Hodson,
20 that last remark of course.

21 Q Right. We're done with that address. I would now
22 like to turn to Nichol John at trial and we
23 touched on this a bit the last time the Commission
24 sat and I just want to outline a couple of dates
25 and facts here, Mr. Caldwell, and I'll be going



1 through the trial transcript of Nichol John's
2 evidence, or parts of it, and we've heard
3 evidence, just to set the stage here, that March
4 11th, 1969 Nichol John gave her first written
5 statement to Inspector Riddell of the RCMP;
6 correct?

7 A I'm sure that's right.

8 Q That's the date, and in that statement she
9 described her activities the morning of January 31
10 and said that David Milgaard was not away from her
11 for more than I think a couple of minutes and that
12 he could not have committed the murder and
13 certainly nothing incriminating about Mr.
14 Milgaard. Is that what the statement says?

15 A Yes.

16 Q We then go to May 23rd, 1969 and that's when
17 Inspector Roberts conducted the polygraph on Ron
18 Wilson and then interviewed Nichol John and he
19 reported, certainly when he testified at the
20 Supreme Court in 1992, he said that during that
21 interview Nichol John told him, after being shown
22 the bloody uniform of Gail Miller, that she had
23 witnessed the murder. Do you remember that, you
24 know that that's what Mr. Roberts said happened on
25 the 23rd of May?



1 A Yes, sir.

2 Q And then the next day, May 24th, 1969, Nichol John
3 gave a written statement to Detective Sergeant
4 Mackie, I think it was 11 pages, and the statement
5 was actually sworn before a justice of the peace,
6 and in that statement she made a number of
7 incriminating statements against Mr. Milgaard,
8 including that she saw him grab the girl, grab her
9 purse, pull out a knife and stab her. Do you
10 remember -- you know the statement I'm referring
11 to?

12 A I do.

13 Q And then last sittings we went through the
14 preliminary hearing and at the preliminary hearing
15 Nichol John did not repeat portions of the May
16 24th statement; correct?

17 A That's --

18 Q In other words, she talked about the morning, but
19 when it came time to key pieces of evidence such
20 as I saw David grab a girl, I saw David stab her,
21 she did not adopt that or repeat that at the
22 prelim; right?

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

24 Q And at the prelim you did not invoke section 9(2)
25 of the Canada Evidence Act, you left the evidence



1 as it was, and I think you told us that you were
2 satisfied you had enough for a committal and
3 Mr. Tallis was aware of the statement because you
4 had already given it?

5 A I think all that's right, sir.

6 Q So you saw no reason at the prelim to
7 cross-examine her and invoke section 9?

8 A No, I didn't.

9 Q And you also told us about a statement that Nichol
10 John was heard to have said, I think you said
11 around the time of the prelim, in a witness room
12 and it was overheard by Albert Cadrain, Mary
13 Marcoux and your note says Mrs. Miller?

14 A That's right.

15 Q Where she said words to the effect about David
16 Milgaard, I don't know why he didn't kill me
17 because I saw it, but I'm not going to say
18 anything, or words to that effect. Do you
19 remember that note?

20 A I do. Now, the name David Milgaard was not
21 mentioned in that thing that I wrote down, sir,
22 but it clearly appeared to refer to him, and just
23 so that --

24 Q Fair enough. Certainly it was your understanding
25 that Nichol -- what was reported to you by others



1 in the room is that she was referring to David
2 Milgaard?

3 A That's how -- it had to be read that way.

4 Q And I think you told us that going into the trial
5 you had anticipated that Nichol John might not
6 adopt and repeat the incriminating parts of her
7 May 24th statement; is that correct?

8 A I assume I may have anticipated that as one of the
9 possibilities.

10 Q And in fact we looked at some of your notes that
11 suggest you may have talked to, or may have had
12 Del Perras look at that issue?

13 A Oh, that's correct. We attempted to be familiar
14 with the quite new section 9(2) of the Canada
15 Evidence Act provisions and actually construct a
16 chart, if you will, of how we could deal with, I
17 could deal with Nichol John depending on what she
18 said in her evidence upcoming.

19 Q Do you recall, Mr. Caldwell, whether you had any
20 discussions with Mr. Kujawa from the Regina
21 prosecutor's office about how to utilize section
22 9?

23 A I would be surprised, sir, if I didn't because he
24 was our immediate superior. He was the person who
25 went to the Saskatchewan Court of Appeal on a



1 frequent basis and they were the only, only in
2 Regina did they hear criminal appeals in our Court
3 of Appeal, so he was the person who would be up on
4 the law, if you will. Now, having said that, sir,
5 I can't believe that we didn't speak to him about
6 it, but I have no memory of it at this point.

7 Q I will show you a document a bit later --

8 A Okay.

9 Q -- that suggests that you may have had
10 discussions, and would it be, given that this may
11 have been the first time that this section had
12 been interpreted, at least in a Saskatchewan
13 court, it was a fairly new section; right?

14 A It was.

15 Q That this might be something you would talk to
16 your superior about and get some guidance?

17 A Yeah. As I say, I would be amazed if Del Perras
18 and myself did not do that because often Mr.
19 Kujawa would be privy to what the law was in
20 Saskatchewan up to date, if you will, most of
21 which was eventually settled in the Court of
22 Appeal in Regina.

23 Q Do you remember if Mr. Kujawa ever attended at the
24 trial?

25 A I don't believe he -- no memory of him doing it



1 and I don't think he did.

2 Q I want to now go through, if we could call up
3 003049 which is the Nichol John trial transcript,
4 and I want to go through just parts of this with
5 you, Mr. Caldwell, just to identify how you
6 questioned Ms. John, and I also want to get, where
7 you have a recollection, your observations of
8 Chief Justice Bence, what he said and impressions
9 you may have had as to how he was dealing with the
10 witness in the situation. Okay?

11 A Very good.

12 Q And first if we could go to the next page,
13 please -- sorry, this is just the index. If we
14 could skip ahead to 003065, and you've examined
15 her for I think the morning here, if we can just
16 call out the top part, and so it was after a Court
17 recess and you say here:

18 "Q I think, Miss John, before lunch that
19 you had just described the episode of
20 stopping to ask the young girl for
21 directions?

22 A Yes.

23 Q And I believe you said that you then
24 started again - like the car started up?

25 A Yes."



1 And I just want to go through for the record, Mr.
2 Caldwell, and identify where and how you tried to
3 get from Ms. John her evidence about what
4 happened around the critical time frame.

5 A Very good.

6 Q Do you understand?

7 A Very good, sir.

8 Q And then we go down, scroll down, and she says:

9 "A We went half a block to another
10 intersection."

11 And again this is after stopping the young girl
12 for directions, and the next page, and at the top
13 she says:

14 "A Well, we were just about to go around
15 the boulevard and we got stuck on some
16 ice.

17 And if you can scroll down, and you ask again,
18 well, what happened:

19 "A Well, Dave got out of the car to see if
20 he could get out."

21 "A And then he got back into the car and he
22 said we couldn't."

23 And then scroll down:

24 "Q And how long would he be out for
25 incident?



1 A Oh, just to go to the back of the car
2 and then to come back in.

3 Q Very shortly?

4 A Yes."

5 And then the next page, and then you carry on:

6 "Q Now, what happened after that?"

7 Nichol John says:

8 "A Well, somehow we got off the ice and
9 then I remember pulling over to the
10 other side of the street, like after we
11 got out, and then Dave got back in a few
12 minutes later."

13 And then you say:

14 "Q Okay; now, if you can do your best just
15 to tell us in the order in which things
16 happened; we can start at the point
17 where Dave got out and went around to
18 the back of the car and then got back in
19 and said - we can't get out of the ice -
20 and I take it the three of you were in
21 the car?

22 A Yes.

23 Q And was Ron driving?

24 A Yes.

25 Q And was it at this particular point you



1 say you got unstuck from there?

2 A You mean after Ron got back into the
3 car?

4 Q After Dave got back in?

5 A I don't know how we got out or when we
6 got out, I can't recall that."

7 And then next page, and again I think you try
8 again:

9 "Q Now, what was the next thing that
10 happened, like after that?

11 A Well, the next thing I can remember is
12 pulling over to the curb and waiting a
13 few seconds before Dave got back into
14 the car.

15 Q Now, I take it very obviously you must
16 have become unstuck before you pulled
17 over?

18 A Yes."

19 And then scroll down to the bottom, and then you
20 ask:

21 "Q Now, how long would you say elapsed
22 after you got stuck on a bit of ice
23 until you got unstuck then?

24 A I don't know.

25 Q What's the best you can say?



1 A Oh, five - six - seven minutes maybe."
2 And then the next page, this becomes a bit
3 confusing, Mr. Caldwell, because I think Nichol
4 John describes, if I may just clarify, I think
5 she describes before they get stuck behind the
6 funeral home or in that vicinity, she describes
7 another short period where they got stuck and
8 David got out of the vehicle, so that's what I'm
9 just going through here.

10 A Very good.

11 Q She says -- the question at the bottom:

12 "Q And are we now to understand that the
13 business of pulling over to the curb
14 brought you to going back in that
15 direction?

16 A In the direction where she was?"

17 Next page:

18 "Q Yes.

19 A Oh yes.

20 Q Now, Miss John, are we to understand
21 then that that would put you going like
22 completely opposite to what you had been
23 when you talked to her?

24 A Right.

25 Q You were heading back ..."



1 So again I think what she has described here,
2 after seeing the lady they got stuck, they got
3 unstuck and now they are driving back. Then go
4 to the next page, I think you try and clarify
5 this, she says:

6 "A I remember waiting a few minutes before
7 Dave got back into the car.

8 Q Now, Miss John, I understand - and not
9 to belabour this - that David had gotten
10 out briefly at the place where you
11 stopped and got back in and said - we
12 can't get unstuck - or words to that
13 effect?

14 A Well, like I can't recall what his
15 reason was for leaving but the next
16 thing I remember is going to the curb
17 and waiting for Dave to get back in."

18 And then down at the bottom, and then Chief
19 Justice Bence interjects and says:

20 "Q You have already told us the accused got
21 out of the car to see if you could get
22 unstuck and came back in and said you
23 couldn't?

24 A Right."

25 And then scroll down here, and again this is



1 still Chief Justice Bence:

2 "Q Well, how can you say as you said a
3 minute ago that after waiting a few
4 minutes Dave got back in?

5 A Well, that's the next thing I recall
6 when we pulled over to the curb.

7 Q Therefore he couldn't be in the car?

8 A Like, I don't know - this is what I
9 don't remember. Well, he couldn't be
10 in the car if he got back in but I
11 don't know when he left, that's what
12 I'm trying to say."

13 And then Chief Justice Bence:

14 "Q Tell Mr. Caldwell just exactly what
15 happened with respect to either getting
16 in or out of the car; if you can't give
17 times and only guess say so but tell the
18 Court as well as you can recollect it
19 the actions of the other two people -
20 you didn't get out at all, did you?

21 A No."

22 Next page, this is again back to you, Mr.
23 Caldwell:

24 "Q And as I understand you the next thing
25 is that as far as Dave goes, his



1 actions, that you recall his once again
2 getting in?

3 A Right.

4 Q Now, do you recall him getting out prior
5 to the second time you got in?

6 A No, I don't."

7 So that long, convoluted section, I think if I
8 can summarize, what she was saying to your
9 questions was that after they saw the girl for
10 directions, they went to a boulevard, did a
11 partial U-turn, got stuck, Dave got out, then
12 they got unstuck, went up beside the curb and she
13 remembers Dave getting back in but doesn't
14 remember him getting out. I'm sorry, got back in
15 at the intersection, but she doesn't remember him
16 getting out, so again I just want to put that
17 before you, Mr. Caldwell, because it becomes
18 relevant later to some of the judge's questions.
19 I take it at this time you were having a bit of a
20 challenge in getting Nichol John to tell you what
21 it was that she remembered about getting stuck
22 and where?

23 A Well, I wouldn't attribute it all to her, but I
24 was having difficulty getting sort of a coherent
25 account of it, Mr. Hodson. One of the things, if



1 I may, is that I later found in evidence that what
2 they talked about as a boulevard I think Nichol
3 later identified as a so-called snow or ice
4 boulevard. One of the odd features is that I
5 don't think the police found any, you know,
6 permanent boulevard near that location, and
7 somewhere in the evidence she expanded on that, if
8 that helps any.

9 Q And that's again what you are describing is where
10 the snowplows have piled up snow in the centre of
11 the street?

12 A That's how it was put, yeah.

13 Q If we can go to the next page, please, and then
14 again I think you try another attempt here, so
15 this is -- she has already described getting stuck
16 and unstuck at the intersection, now going to the
17 curb, and you say:

18 "Q Okay; what happened when you got to the
19 curb?

20 A Well, we got to the curb and then I
21 remember waiting a few minutes and
22 then Dave got back into the car.

23 Q And that is the occasion you described
24 all along?

25 A Yes.



1 Q Okay; now up to this point and after
2 stopping to ask for directions, like
3 from stopping to ask the lady for
4 directions and up to the point where you
5 say Dave for the second time got back in
6 the car, had you yourself seen any more
7 of the lady?

8 A No."

9 So I take it you were trying to find out from
10 her, to get her to repeat what she had put in her
11 statement about seeing the lady after being stuck
12 or --

13 A Or -- either that or to make this thing sensible
14 so we could all understand it as I would put it.

15 Q Go to the next page, please, and down at the
16 bottom, you ask:

17 "So then when Dave got back in the car
18 on what we have been calling the second
19 time at the curb as you say, what
20 happened then?

21 A Then we drove away.

22 Q Which way did you drive?

23 A The opposite direction to which the
24 girl was walking."

25 And then the next page, and then you say:



1 "Q What is the next place you got to that
2 you can assign a name to or a
3 description?"

4 And then she says:

5 "A Well, I remember getting stuck in
6 another alley which I now know to be
7 behind a funeral home.

8 Q Okay; you remember getting stuck in
9 another alley which you now know to be
10 behind a funeral home?

11 A Yes.

12 Q And from saying now you know that I take
13 it you have been back on another
14 occasion?

15 A Yes I have.

16 Q With the police, I presume?

17 A Yes.

18 Q Okay; and you say that you got stuck in
19 an alley behind a funeral home?

20 A On the incline actually.

21 Q On the incline?

22 A Yes, into the alley."

23 And this is the part of her statement, Mr.

24 Caldwell, where she then talks about seeing David
25 grab a girl; is that correct?



1 A My understanding, that's correct.

2 Q So the preamble we went through with the two
3 previous being stuck, this is now the third
4 incident she described, at least in her
5 evidence-in-chief, of being stuck; is that fair?

6 A That's right.

7 Q And then if we can go to the next page, and then
8 you just ask her about the funeral home, she said
9 she recognized it when she went back with the
10 police, and then down at the bottom:

11 "Q Okay; now would you tell the Court then
12 - as I understand it the getting stuck
13 on the incline to the alley which led to
14 behind the funeral home was the next
15 step after being parked at the curb?

16 A Yes.

17 Q And driving off it; and what happened
18 when you got stuck at the juncture?

19 A Well, Dave got out of the car to see
20 if we could get unstuck. He came back
21 into the car and then he told Ron that
22 we couldn't. So then I remember both
23 of them getting out and looking.
24 Other than that I think they tried to
25 push the car; I'm not too sure



1 though."

2 Next page at the top:

3 "Q Okay; and just so we're clear, as I
4 understand it it's on the incline
5 leading into the alley behind the
6 funeral home?

7 A Yes.

8 Q And what kind of trouble briefly were
9 you in?

10 A Well, we were stuck in some snow.

11 Q I see, so that after - now if we can go
12 very slowly. You say Dave was out at
13 that point for a brief look again?

14 A Yes.

15 Q And was Ron out at that point too?

16 A They both went out together.

17 Q Well, can we go then from getting stuck
18 step by step on the incline; who was the
19 first one out?

20 A Dave.

21 Q And for how long?

22 A Only a few minutes - just to go to the
23 back of the car and to come back in.

24 Q Alright; and he did go out and he did
25 come back in?



1 A Yes.

2 Q And what is the best you can say about
3 how long Dave was out on that occasion?

4 A Only a few minutes.

5 Q Okay; and did Ron get out on that
6 occasion?

7 A Do you mean when Dave got out the
8 first time?

9 Q Maybe you could - I had better put it
10 after Dave got out and back briefly,
11 what happened then?

12 A They both went out.

13 Q They both got out; okay; are we to
14 understand that on this occasion on the
15 incline where you were stuck that that
16 would be the first time Ron was out,
17 that is when they both went out
18 together?

19 A Yes."

20 And then scroll down to here:

21 "Q Alright; what happened when the two of
22 them got out?

23 A Then they both came back into the car.

24 Q And how much time elapsed between the
25 two of them getting out and the two of



1 them coming back?

2 A Only a few minutes.

3 Q What is the best you can say as to - let
4 me ask you - did they get back the same
5 time as one another?

6 A I can't recall.

7 Q Well, you simply cannot recall that?

8 A Right.

9 Q And what is your best estimate then of
10 how long they were out on that occasion
11 when they left together?

12 A Only a few minutes. Just from the
13 time that would be to go to the back
14 of the car and come back into the car.

15 Q Alright; now, once they got out together
16 on this occasion did you pay attention
17 to where they went?

18 A No.

19 Q And did you sit in your same place in
20 the car?

21 A Yes I did.

22 Q And this was in the entrance to the
23 alley?

24 A Yes.

25 Q And did you look at all to see which way



1 either of them set off?

2 A No.

3 Q And did you see from which direction
4 either one of them arrived back?

5 A No, I didn't.

6 Q And what happened when they arrived
7 back?

8 A You mean from going to the back of the
9 car and coming back, is that what you
10 mean?

11 THE COURT: That's what you were asked.

12 A Okay. Could you repeat that please?"

13 You say:

14 "Q I understand you to say you don't know
15 whether they arrived back at once?

16 A Right.

17 Q But what happened when they did arrive
18 back?

19 A Well, they came back and they decided
20 to go for help.

21 Q Okay; and then what happened?

22 A Well, Ron went one way and Dave went
23 the other way."

24 If I can pause there. It looks as though she's
25 describing when Ron and Dave went back just to



1 check the back of the car for a short period and
2 then got back in and then went away again; is
3 that fair?

4 A Yes.

5 Q And then you say:

6 "Q I see; okay; so that this incident we
7 have been talking about up to now was
8 simply a go to the back of the car and
9 look sort of thing, was it?

10 A Yes.

11 Q Okay; then having come back they both
12 set off again?

13 A Yes."

14 And then scroll down, you ask:

15 "Q Did you pay any attention to which way
16 either of them went on that occasion?

17 A Ron went to the left and David went to
18 the right as the car was facing."

19 Etcetera. And then the next page, and I think
20 here is where you get into the relevant time
21 period, and you say:

22 "Q Now, what is the next thing that
23 happened?

24 A Well, I remember Dave getting back
25 into the car, that's about all.



1 Q And who got back first of the two?

2 A Well, Ron must have because when Dave
3 got back into the car I moved over to
4 Ron so --

5 Q You say Ron must have been back before
6 Dave?

7 A Right.

8 Q How much before Dave?

9 A I don't know.

10 Q How long would you estimate Ron was out
11 of the car on this occasion?

12 A I don't know.

13 Q And how long do you estimate Dave was
14 out on this occasion?

15 A I don't know that either.

16 Q I take it all you can say is longer at
17 any rate?

18 A Yes.

19 THE COURT: Longer than what?"

20 And:

21 "Q But longer than Ron?"

22 "Q And so when Dave got back there you say
23 you moved toward Ron?

24 A Yes."

25 Next page, you ask:



1 "Q Now, up till the point that Dave got
2 back in on this occasion had you up till
3 this point seen anything of any other
4 person than the two of them and yourself
5 since you got unstuck at the
6 intersection?

7 A Not that I can recall."

8 I take it at that point, Mr. Caldwell, you knew
9 in her statement that she said that before Dave
10 got back into the car she had witnessed him grab
11 a girl and stab her; right?

12 A That's right.

13 Q And so the question here is you are asking -- this
14 is the question where you are inviting her to
15 repeat what she had put in her statement about
16 witnessing Dave grab a girl; is that fair?

17 A That's my belief, sir.

18 Q And then scroll down, you say:

19 "Alright; now, when the two of them were
20 back in did you notice anything about
21 say the condition or appearance of
22 either of them?

23 A Well, Dave looked cold, that's about
24 all."

25 And I think in her statement she had indicated



1 otherwise when Dave got back to the car, didn't
2 she, something a bit more incriminating?

3 A I think so.

4 Q And then:

5 "Q And what happened when they were both
6 back in?

7 A Then we started driving."

8 And go to the next page, and then you ask the
9 question:

10 "Q Alright now; how did you get unstuck for
11 that purpose?

12 A I don't know.

13 Q From being stuck on that incline you
14 went straight ahead?"

15 And then you asked again:

16 "Q And I'd like you to think carefully how
17 did you get your car going or the boys -
18 or how did you get unstuck?

19 A I don't recall that."

20 And I take it at this time, Mr. Caldwell, you had
21 already had Ron Wilson's evidence that those two
22 fellows in a cream-coloured Dodge or Chrysler
23 came by and pushed them out after they got back?

24 A I believe that would predate this evidence, Mr.
25 Hodson.



1 Q Or you knew -- if he hadn't testified, you knew
2 that's what he was going to say?

3 A That would be right.

4 Q And did it concern you that she did not remember
5 these people coming to push the car out?

6 A Well, I was concerned that I was running into a
7 lot of I don't recall or I can't recall answers
8 for things that I thought she would have specific
9 answers for, or more definite ones.

10 Q The time she is answering these questions, as she
11 did at the trial, the ones I went through, Mr.
12 Caldwell, in your mind what was your perspective,
13 what did you think was the explanation for her not
14 repeating what was in her statement?

15 A Well, one of the possibilities might be that she
16 was building up to, in effect, refusing to give
17 the incriminating evidence of five or six things
18 that you spoke of a while ago, because she seemed
19 to be going into don't remember, don't recall,
20 quite frequently at this point. That was one of
21 the things I thought might be happening. In other
22 words, a build-up to say, hey, I don't know what
23 happened.

24 Q Well, the parts that I've read you already asked
25 the question what did you see next and she then



1 said they drove away?

2 A Yeah.

3 Q So in the time period she said I saw Dave grab a
4 girl, drag her down the alley and stab her?

5 A Yeah.

6 Q She said she didn't -- you couldn't -- you
7 couldn't specifically lead her and say didn't you
8 see David Milgaard grab a girl?

9 A That's correct, I couldn't lead her because she
10 was my witness and that time period would have
11 included where I expected her to give the evidence
12 we've --

13 Q And in fact the preamble that I went through, I
14 think, were four different occasions where you
15 invited her to tell the court and the jury about
16 being stuck, and I stand to be corrected, but I'm
17 not sure that those four instances were all set
18 out in an earlier statement.

19 A I can't say that, sir, without looking at it.

20 Q And maybe not being stuck, but being stopped, and
21 so it looks as though you continued to press the
22 point and gave her a number of opportunities to
23 say what happened when David Milgaard left the
24 car; is that fair?

25 A That's right.



1 Q And again as far as the reason, let's assume from
2 these questions, Mr. Caldwell, that you had
3 concluded she was not going to give you the
4 incriminating evidence, and I think I look here,
5 shortly you are done your examination-in-chief, so
6 at some point I suggest that you -- maybe gave up
7 is the wrong word, but you realized that she was
8 not going to repeat those unless you tried to
9 cross-examine her on her previous statement; is
10 that fair?

11 A I would think I must have come to that conclusion
12 because I wasn't getting anywhere with
13 conventional questioning as to things I thought
14 she knew about, sir.

15 Q And I think you told us last sitting that you
16 believed her May 24th statement to be the truth,
17 truthful version?

18 A That's correct. That's the so-called second
19 statement I believe?

20 Q Right.

21 A After the -- not her, but the polygraph of Wilson,
22 I believe that to be her truthful statement.

23 Q And so is it fair to infer from that that when she
24 is testifying here about not recalling some of the
25 incriminating things, that you were not believing



1 her?

2 A Right.

3 Q Now if there had not been a May 24th statement
4 from Nichol John, in other words her March 11th
5 statement had been her statement or, for example,
6 her evidence in chief here about what happened, if
7 that had been her version of events, would you
8 have accepted that as the truth?

9 A I don't believe so. The -- I believe her first
10 statement was to Inspector Riddell --

11 Q Yes.

12 A -- and they included, very briefly, things like
13 "we were not in Saskatoon", it included things
14 that I knew from independent facts that couldn't
15 be true. The second one, the one we've just been
16 speaking of now, you are asking me, if she had not
17 given that, what I would have --

18 Q Yes?

19 A I may have lost your question there, sir.

20 Q Let me just go back.

21 A Yeah.

22 Q Let's say on May 24th, May 23rd and May 24th,
23 Nichol John does not give incriminating -- any
24 incriminating statement to the police about the
25 morning of January 31.



1 A Okay.

2 Q So that she, she either says "I don't recall
3 seeing anything, I don't recall" -- much like
4 she's doing here in examination-in-chief.

5 A Uh-huh.

6 Q So there is no statement from her with the
7 incriminating things that were in her statement.

8 A Right.

9 Q And my question is, then, I take it you would have
10 still called her as a witness at the trial?

11 A Yeah, I would have. I think I would have looked
12 and see how the rest of the case had looked this
13 far. I would have had to call her as a witness at
14 the trial, and one of the things that might well
15 have happened is that she may have given what I
16 deemed -- thought was the truthful account of it,
17 which is what we were just getting out to here.
18 But appreciate, in your question, that's not
19 included.

20 Q Well let's just take a step back.

21 A Yeah.

22 Q If Nichol John had not given an incriminating
23 statement to the police, I take it step 1 would be
24 when you are looking at the case before trial, --

25 A Yeah, that's correct.



1 Q -- that would have factored in?

2 A Absolutely.

3 Q And the fact that one of the travelling companions
4 in the car didn't see anything incriminating might
5 cause you concern; is that fair?

6 A That being her in this question, sir?

7 Q Yes?

8 A Yes, it would have.

9 Q So that, if what Ron Wilson said happened, then
10 you might expect Nichol John must have seen
11 something or heard something; is that fair?

12 A Yes, yeah.

13 Q And so the fact that she would not repeat that, I
14 guess, would be one of two approaches; one, she's
15 telling you the truth, --

16 A Uh-huh.

17 Q -- and that might contradict Mr. Wilson's
18 evidence; or secondly, she's holding back?

19 A Yeah, I think those are two, two of the
20 possibilities, maybe all the possibilities.

21 Q And if you had concluded that let's say she says
22 nothing to Roberts, nothing to Mackie on the 23rd
23 and 24th, --

24 A Uh-huh.

25 Q -- you have the other evidence of Mr. Cadrain, Mr.



1 Wilson, and Melnyk and Lapchuk later on; would you
2 have still called her and said "lookit, she was
3 there, we don't think she's telling everything
4 even though she's never given a previous
5 statement"?

6 A Well I wouldn't have -- I wouldn't be armed, then,
7 with the sort of incriminating statement with the
8 five or six points that we've just been talking
9 about. It's possible that she could have got up
10 and said that anyway but I don't -- I'd find that,
11 you know --

12 Q Yeah. But would it be fair to say that you would
13 have to find a way to reconcile her version of
14 events with the version of events of other
15 witnesses?

16 A I would think so.

17 Q And one way to reconcile would be to say that
18 she's telling the truth and the others aren't;
19 that would be one?

20 A That's one way.

21 Q Another way would be that she's not telling the
22 truth and the others are?

23 A That's correct. And the possibility that she may,
24 if you will, tell the truth if called at the
25 trial.



1 Q Right. Okay. I may come back to that --

2 A Very good.

3 Q -- issue a bit later. If we can go to the next
4 page. So, again, we've gone through your efforts
5 to try and get her to talk about getting stuck,
6 and I just want to read -- this is a part from
7 Chief Justice Bence, and this is after you ask her
8 about how they got out from being stuck and
9 whether they were pushed?

10 COMMISSIONER MacCALLUM: Which page is
11 that, I'm sorry?

12 MR. HODSON: This is at page 003085, and
13 it's page 399 of the transcript, it's the very
14 next page from what I just read but the doc. ID
15 is 003085.

16 BY MR. HODSON:

17 Q And Chief Justice Bence says:

18 "Surely you must have known whether
19 somebody was pushing you. You were
20 sitting in the car in the front seat -
21 you must have known whether someone was
22 pushing you to get you out of there,
23 don't you?

24 A I don't remember.

25 Q Well, I take it you were a bit perturbed



1 about being stuck in the snow -
2 concerned about it?

3 A Yes.

4 Q And you must have felt the motion of
5 your car being moved?

6 A I don't remember that, no.

7 Q So you in fact don't remember at all
8 what was done to extricate you out of
9 this position - to get you out of this
10 position?

11 A No.

12 Q You can't remember it?

13 A No."

14 And before you got into the Section 9(2)
15 application, would it be fair to say, Mr.
16 Caldwell, that you had, based on Nichol John's
17 answers to your questions, concluded that she was
18 being untruthful and evasive?

19 A I think that's -- that's fair to say, sir, because
20 I tried to lead up to it gradually and take other
21 approaches, and certainly not in any sense leading
22 the witness, but I made those attempts and the
23 Court, I think it's clear, was becoming somewhat
24 impatient with the --

25 Q That was my next question.



1 A Yeah.

2 Q And, again, I will go through in detail what Chief
3 Justice Bence asks her when you get into the
4 Section 9(2).

5 A Very good.

6 Q But your impression then, and only your impression
7 of Chief Justice Bence, was he, in your view,
8 becoming upset with Ms. John in this area, about
9 her failure to remember these events, such as how
10 they got unstuck?

11 A I -- I think he was and he, he hadn't been, if you
12 will, impatient with other civilian witnesses.
13 And there are, I think Mr. Hodson, two or three
14 brief samples of that earlier in this same piece
15 of transcript. But I was, I was under the
16 impression that he was, you know, running out of
17 patience with her because of the way she was, you
18 know, "I don't remember this, don't know that",
19 etcetera.

20 Q And would that describe your, and maybe
21 'impatience' is the wrong word, but frustrated;
22 were you becoming frustrated with her --

23 A Well the one.

24 Q I'm sorry go ahead?

25 A Well the one thing is that I knew what was in her



1 so-called second statement. I, as you can
2 understand, believed it to be correct. Chief
3 Justice Bence did not know of that, of course, and
4 I think he was -- he couldn't know about it, he
5 was simply getting impatient with the difficulties
6 with what ought to have been reasonably easy
7 answers, is the way I assessed it.

8 Q So things that one would expect her to remember?

9 A Yup.

10 Q Yeah.

11 A And possibly so "no, I absolutely don't know", on
12 to the next question, but it was an unsatisfactory
13 process at this point.

14 Q And would it be fair to say that -- now you had
15 the benefit of this previous sworn statement --

16 A That's right.

17 Q -- that had information in it, but apart from
18 that, would you have formed the impression that
19 she was not being completely forthcoming about
20 matters in the evidence?

21 A Yeah, I would have.

22 Q If we can then go, I don't -- the next couple of
23 pages, Mr. Commissioner, just deal with the
24 Danchuks and the Trav-a-leer Motel, I don't think
25 I need to go through that, but what I've just



1 covered is the examination-in-chief and the
2 questions where Mr. Caldwell tried to get Ms. John
3 to recount the incriminating information about Mr.
4 Milgaard. And the Danchuk/Rasmussen I think is
5 important because that's, that's subsequent;
6 correct, Mr. Caldwell?

7 A That's as I recall it, sir.

8 Q If we can just call up, there's one document in
9 your notes that I didn't call up last time,
10 006809, and this is -- you remember we went
11 through your notes N.B. For Trial 1 to 14 and this
12 is an N.B. 14.

13 A Yeah.

14 Q I don't know if you need to see the original, this
15 is the only reference, but it says "see page 2 at
16 end of notes ex law course"?

17 A Yeah, "from law course" it is.

18 Q "Re: New section 9(2) of Canada Evidence Act. Re:
19 N. John. Kick out jury, apply to cross-examine
20 witness on statement to police, cross-examine her,
21 ask for ruling she's adverse"?

22 A That's right. That -- I wouldn't -- I do have the
23 original but I can read that fine I think.

24 Q And would that be your notes as to the process you
25 were going to use for 9(2)?



1 A That's right, boiled down a very, you know -- and
2 N.B. 14 I think was page 14 of that list, sir.

3 Q So other than maybe not -- maybe asking the jury
4 to leave instead of kicking them out, --

5 A Yeah.

6 Q -- this would have been your view of the process
7 that should be involved; is that fair?

8 A Try to be a little more suave than that, if I
9 could, sir.

10 Q Would it be fair to say, though, that going in it
11 was your view that the cross-examination of Nichol
12 John, at least the first of part of it should be
13 done in the absence of the jury, is that your view
14 of the law?

15 A That's right, and we -- there -- we must have had
16 a "page 2 at end of notes from law course", I
17 assume this was one I had attended in which this
18 new 9(2) was gone over concerning Nichol John.
19 "Kick out jury", clearly I felt they must not be
20 in the room, and as you know Mr. Tallis at that
21 point took the same view. "Apply to cross-examine
22 witness on statement to police, "cross-examine
23 her", and then "ask for ruling if she's adverse"
24 is very much boiled down to the basics there.

25 Q And I think we have seen this referred to before,



1 and we may hear a bit more from Mr. Tallis that
2 Section 9(2) was a new section, a new provision;
3 is that correct?

4 A That's correct.

5 Q And I think there's even reference, and I -- we
6 won't go into the arguments that you and Mr.
7 Tallis presented, but there was very little case
8 law interpreting Section 9(2)?

9 A That's right, sir.

10 Q And I believe there was maybe one unreported case
11 out of Ontario but, certainly, no binding
12 precedent on the Saskatchewan Court at that time?

13 A That's right. I think Mr. Ian Disbury, as
14 co-counsel, researched that and argued if I'm not
15 mistaken.

16 Q So this is a case where both sides might be a bit
17 freer to say "lookit, judge, here's how we think
18 this ought to be interpreted, this is the right
19 way to apply it"; is that fair?

20 A That's right. And of course all that, Mr. Hodson,
21 was done in the absence of the jury, the argument
22 of course.

23 Q The argument. I guess the question of having the
24 jury removed when you make the application and
25 cross-examine her on the giving of the statement;



1 correct?

2 A Yeah.

3 Q Let's just talk about --

4 A Yeah.

5 Q -- you are saying the jury should be out when you
6 ask her about how she gave this statement, who she
7 gave it to, and the circumstances; correct?

8 A The -- yes, including, in my view, the 9(2) aspect
9 of it.

10 Q Yes. So that certainly, and I'll go through in a
11 moment the steps that the Court of Appeal
12 outlined, but certainly that part where you would
13 ask her "did you give this statement, what were
14 the circumstances of who you gave it to, is it
15 your statement", --

16 A Yeah.

17 Q -- and that would be in the absence of the jury?

18 A Yeah, well if it were part of the 9(2) exercise.

19 Q Yes.

20 A I wouldn't be -- I would have thought initially,
21 obviously, I must have had her sworn in and got
22 some information with the jury present, as you
23 would with any conventional witness, with the
24 judge there, of course.

25 Q Right.



1 A But once this process started I felt it should be
2 in their -- in the absence of the jury.

3 Q So up until, from the starting point up until the
4 point where the judge would rule "this is a
5 previous inconsistent statement, you may
6 cross-examine on it, the witness is hostile, away
7 you go", so that --

8 A That was my understanding, sir.

9 Q And in that part, as well, that Mr. Tallis, as
10 defence counsel, would have an opportunity to
11 cross-examine Ms. John on the making of the
12 statement as well --

13 A That --

14 Q -- in the absence of the jury; that was your
15 position at the later --

16 A Absolutely, I think that's what happened, but
17 certainly that was my position.

18 Q Would there be any, quite apart from the actual
19 facts and circumstances of this case, was there an
20 advantage or a disadvantage to the Crown in having
21 this take place in the absence of the jury or was
22 it neutral?

23 A Well I simply didn't, if you will, feel right
24 about it taking place in the -- in the presence of
25 the jury. I -- I can't, you know, I hadn't come



1 up right now with all my reasoning for that. It
2 seemed to me that if they were out, whatever
3 ruling was made couldn't harm anything, she's
4 adverse, then we go through the procedure; if His
5 Lordship ruled that she was not then I'd be
6 reverting to conventional examination-in-chief,
7 which I think, Mr. Hodson, I had virtually over
8 for her by me at that point, but that's another
9 question.

10 Q And I take it one of the risks would be that if
11 you put the statement to her, the making of the
12 statement, and in the course of cross-examination
13 or otherwise the Court concluded that it wasn't
14 her statement or the circumstances were such that
15 she ought not to be cross-examined on it --

16 A That would.

17 Q -- the jury would hear what's in the statement; is
18 that --

19 A Well I -- inevitably, if they were in the room,
20 they would. But I'm not sure that I, you know,
21 pondered that as a possibility.

22 Q Yes. And certainly one of the outcomes that could
23 happen when you engaged in this process was that
24 Chief Justice Bence could have ruled that you
25 could not cross-examine her on that statement?



1 A Absolutely.

2 Q And that was something you knew was a possibility?

3 A I -- I knew it was a possibility, and at that
4 stage with her I -- I -- it seemed to me this was,
5 in effect, all we had left to do was this 9(2)
6 exercise, but certainly it could have failed or he
7 could have said "I'm not satisfied she ever gave
8 the statement, move on to your next witness".

9 Q Right. And I take it, Mr. Caldwell, were you
10 concerned; you knew that the contents of the
11 statement were significant?

12 A Certainly.

13 Q And maybe that's even an understatement.

14 A Yeah.

15 Q An eyewitness to the murder?

16 A Absolutely, sir.

17 Q And that, if that was put to the jury in a form
18 that was not proper, that would affect the
19 integrity of the verdict; is that fair?

20 A I -- that's -- certainly would be a good
21 consideration for sure.

22 Q And I think, based on what's in the transcript,
23 would it be your position to the Court "lookit,
24 this, let's get the right process before I get
25 this statement before the Court"?



1 A Well, that's right, and it happened that both Mr.
2 Tallis and I thought that was the way to do it, I
3 don't think that was the result of any discussion
4 ahead of time, we simply both took that position.
5 It would appear at the time to be, if you will,
6 the safest one Mr. Hodson.

7 Q Right. If we could go to 003126, this is just
8 back to the transcript, and so I had gone through
9 your examination-in-chief and you finished up with
10 her talking about the Danchuks and the Rasmussens,
11 and then in -- the jury is out and you ask to make
12 an application, and I think this confirms what you
13 said:

14 "First of all, My Lord, that would be
15 all the questions I have in ordinary
16 examination-in-chief.

17 My Lord, I'd like to say that
18 this is a matter under Section 9 of the
19 *Canada Evidence Act* I am raising at this
20 time and as Your Lordship knows the Act
21 as amended, which now includes the new
22 subsection (2) ..."

23 And then I think you asked for the witness -- the
24 witness is then excused. Scroll down. And then
25 you touch on the section, and then at the bottom



1 you say:

2 "I think it's common ground, My Lord,
3 and it should be before Your Lordship,
4 that this girl did make two statements
5 that were reduced to writing dated March
6 the 11th and May 24th. A copy of that
7 material - I did supply these to My
8 Learned Friend August the 15th 1969 and
9 on my quick check of the preliminary
10 inquiry - I stand to be corrected - I
11 believe she testified September 4th and
12 5th".

13 Why did you tell the judge about her first
14 statement of March 11th, the one that did not
15 incriminate Mr. Milgaard?

16 A Well I didn't go into the contents of it. I
17 thought she, in fact, made two statements, they
18 were both reduced to writing, which was a
19 prerequisite of the 9(2) procedure, at least gave
20 the dates of them, and I should have, of course,
21 supplied those to Mr. Tallis, which I did, and I
22 wanted that, you know, to be recorded there. And
23 that, of course, was in advance of, I think of the
24 prelim, or during it at worst. You -- there was
25 ethical problems to be had if you -- if you, in



1 respect to some Crown witness, only gave one of
2 two or one of three or two of three witness
3 statements that person had given to the defence.
4 That would be one thing. And this was a, with the
5 dates, was a way of nailing that down accurately,
6 Mr. Hodson.

7 Q All right. And so I take it the first statement,
8 the March 11th statement, might be viewed as a bit
9 more consistent with her evidence-in-chief than
10 the May 24th statement; is that fair?

11 A Well is the -- I think the March 11th is the
12 Inspector Riddell?

13 Q Yes, it is.

14 A And my view of it was it was, with being unable to
15 recite it now, was that it was -- had very glaring
16 inaccuracies in it. One of them, if I'm not
17 mistaken, was "we didn't go to Saskatoon", but
18 things that I have -- had been satisfied by other
19 known evidence couldn't be correct.

20 Q If we could then just scroll down, so down to the
21 bottom, if we could just pause there. You then go
22 through, and I won't read it out, but you go
23 through about the process and then Chief Justice
24 Bence says:

25 "I won't hold a voir dire on it, if



1 that's what you mean."

2 And it appears that that's his first reaction to
3 your application, that he is not going to have a
4 voir dire; --

5 A Uh-huh.

6 Q -- is that right?

7 A That's right. And of course that voir dire, in
8 most times, applies to a confession by an accused
9 person to persons in authority, that's one of the
10 ways you get there, and I can't see any way in
11 which we could have a voir dire on this, Mr.
12 Hodson.

13 Q Right. So that the -- you describe, or what Chief
14 Justice Bence is talking here, the process under
15 9(2) outside of the jury would be similar to a
16 voir dire but not a voir dire; is that --

17 A Well, he may have felt that that whole process was
18 a voir dire, it applies to various different
19 procedures.

20 Q Right.

21 A In my experience at that time it was usually used
22 to describe the going through an admission to a
23 person in authority by an accused person.

24 Q Right. And then I think at the bottom he says:

25 ".. I'll hear it separate and apart -



1 certainly it must be a type of voir dire
2 if it's in the absence of the jury and
3 you would have to have it under oath."

4 And then he says:

5 "There's nothing in the section to say
6 it should be in the absence of the jury
7 and I haven't - the point hasn't come up
8 before me, it's been discussed amongst
9 my colleagues and it was felt that I
10 should be or the presiding judge should
11 inquire with respect to the application
12 that it is inconsistent with the present
13 testimony, and then if leave is given to
14 cross-examine it is restricted to
15 cross-examining on the statement alone
16 ... But all those matters should be done
17 in the presence of the jury."

18 So that's his first reaction; correct?

19 A That's right, and I believe that remained his view
20 on it, Mr. Hodson.

21 Q And then, if we can just scroll down, you then
22 say:

23 "With respect, My Lord, I haven't had
24 occasion to deal with this ...",

25 and you say:



1 "... I may be entirely wrong - that that
2 initial step be taken in the absence of
3 the jury, the initial step being for
4 Your Lordship to of course first of all
5 allow or disallow my application to
6 cross-examine ...",

7 and then we'll carry -- I don't propose to go
8 through the argument

9 A Very good.

10 Q So you would have been telling -- you would have
11 been disagreeing with Chief Justice Bence, I take
12 it, at this point?

13 A Yes, that's right.

14 Q And then, the next page, Chief Justice Bence says:

15 "... all examinations prior to the
16 enactment of this section for the
17 purpose of determining whether a witness
18 was adverse or not, was always in the
19 presence of the jury. I didn't know
20 this was coming up and I would like to
21 have a few minutes further to consider
22 this - I had thought originally when we
23 were considering this section that if it
24 did come up and I knew it would come up
25 in due course that I should examine the



1 statement to determine whether in my
2 opinion there is a basis for your
3 application."

4 And then I think you must have given him the
5 statement or both statements?

6 A I believe the second one, sir, but that might be
7 evident from the transcript.

8 Q And then, if we can scroll down, he does ask to
9 see the statement. Actually, scroll down a bit
10 further, he says, the judge says:

11 "Then let me have a look at the
12 statement."

13 And then Mr. Tallis sets forth his position. Go
14 to the next page. Mr. Justice Tallis tries as
15 well, and he says to Chief Justice Bence:

16 "I must say and I say this with
17 deference that I find myself in
18 disagreement with Your Lordship's
19 observations ...

20 THE COURT: .. but, Mr. Tallis, the thing
21 is so plain."

22 And carries on. And the Court says:

23 "... if the legislature had intended
24 anything otherwise then it should have
25 been in the section."



1 Then it looks as though the next page, I won't go
2 through it, and here's where I think Mr. Justice
3 Tallis outlines his argument, the point that I
4 think you talked about earlier that it would be
5 improper to permit cross-examination on a
6 statement in the presence of the jury and then,
7 having so permitted that, make a ruling that the
8 witness is adverse, that whatever observations
9 you then make to the jury, etcetera. And I take
10 it that you and Mr. Tallis then put argument in
11 before the Court on this issue, both in agreement
12 as to how it should be done?

13 A I -- we both felt the same way about it, but I
14 don't think it was based on any consultation
15 between us, Mr. Hodson. That might become clear
16 later, but we both seemed to think this was the
17 way to do it.

18 Q Okay. If we could then go to page 134, and I
19 think this is the judge summarizing Mr. Tallis'
20 position, that is:

21 "... I should first of all allow Mr.
22 Caldwell to cross-examine this witness
23 in the absence of the jury with respect
24 to this statement which he alleges is
25 inconsistent ..."



1 "And secondly that on this issue of
2 whether or not she is a hostile or
3 adverse witness - adverse to use the
4 language of the section - that I also
5 should be able to ask her some questions
6 on that issue in the absence of the
7 jury."

8 So I think Mr. Tallis is saying the same thing as
9 you, that you should both get a chance to
10 cross-examine -- or to examine her in the absence
11 of the jury; is that correct?

12 A That's how I read that, sir.

13 Q And maybe to the next page. I'll just point out
14 for the record, at the bottom, I think this is
15 where you put your position:

16 "... I submit Your Lordship should read
17 to himself the statement and that could
18 be the end of such an application."

19 So:

20 "That's number one."

21 And then actually, the next page, there is two
22 page 449s in our version of the transcript, if we
23 just go to the next page, please, 450:

24 "If Your Lordship gets past that hurdle
25 I must say that again possibly as My



1 Learned Friend, I cannot quote law on
2 this but it does seem to me that the
3 initial step would be to do this in the
4 absence of the jury, the reason being
5 that, you see, if it's done in the
6 presence of the jury and then Your
7 Lordship in due course ...",

8 and then he says:

9 ".. I understand the implication of it
10 but I didn't pass the law and it's
11 there."

12 Then you say:

13 "I must say my understanding on that
14 phase of it would be in agreement with
15 my learned friend."

16 So, again, that's where you agree with Mr. Tallis
17 on the point?

18 A That's right.

19 Q And then if we can go ahead to 003140, pardon me,
20 141 -- 140, if we can go to the top of the page.
21 And this is the next day and the judge is going to
22 rule on it, if you can go to the next page, just
23 touch on the ruling. He says:

24 "At this stage Mr. Caldwell has not
25 asked to have the witness declared



1 adverse. He has merely asked for
2 permission to cross-examine under the
3 amendment. Presumably he will after
4 such has been done ask that the witness
5 be declared adverse if he thinks such
6 has been demonstrated.

7 There is nothing in the section
8 to state that such cross-examination is
9 for the purpose of determining
10 adversity. If Parliament had intended
11 otherwise it should and I believe would
12 have said so."

13 And then goes on to rule that that should be done
14 with the jury in. And then go to the next page,
15 right here:

16 "I have determined that the
17 cross-examination under the section
18 shall take place in the presence of the
19 jury.

20 Call the jury back and the
21 witness."

22 And then I think you will agree, Mr. Caldwell,
23 that later the Court of Appeal indicated that
24 that procedure was wrong; --

25 A That --



1 Q -- is that correct?

2 A That's my understanding, sir.

3 Q And I will touch on that a bit later in the --

4 A Thank you.

5 Q And that it should have been done in the absence
6 of the jury, which was your position and Mr.
7 Tallis' position?

8 A That, in a nutshell, that's correct.

9 Q This is probably an appropriate spot to break, Mr.
10 Commissioner.

11 (Adjourned at 2:42 p.m.)

12 (Reconvened at 3:05 p.m.)

13 BY MR. HODSON:

14 Q Just before the break, Mr. Caldwell, I think we
15 finished off with Chief Justice Bence making his
16 ruling. If we can go to the next page, and this
17 is your questioning of her regarding the
18 statement, and just so that we are clear, I think
19 this is the part that you and Mr. Tallis thought
20 ought to be done in the absence of the jury; is
21 that correct?

22 A Yes, sir.

23 Q And I think we'll see when we look to the Court of
24 Appeal decision that followed, that that was the
25 correct view of the law at the time; is that fair?



1 A Yes. I just wonder if I missed something there.

2 Q Sure.

3 A The Court of Appeal in effect agreed with what we
4 had suggested?

5 Q Yes.

6 A I'm sorry, you are right, sir.

7 Q So what you and Mr. Tallis said is this should be
8 done in the absence of the jury, Chief Justice
9 Bence said no, the Court of Appeal later said he
10 was wrong but it didn't affect the verdict?

11 A That's correct, sir, thank you.

12 Q So then if we can skip ahead, I won't go through
13 the questions where you are establishing the
14 statement, but if we can go to page 003148, and so
15 this is I guess a cross-examination of her and you
16 ask her on the previous pages, as I said I won't
17 go through them, about the taking of the
18 statement, where it was, sort of some general
19 information, and then here you show her:

20 "Q I'd like to show you a statement just
21 for yourself to look at first, Miss John
22 - if you could have a look through it
23 ..."

24 And then the judge says:

25 "THE COURT: May I suggest that you ask



1 about the signatures."

2 And you say:

3 "MR. CALDWELL: Yes, My Lord -

4 Q Now, if you'll just follow this thing,
5 there's a Page 1 --"

6 And there's an "mmhm."

7 "THE COURT: Does that mean "Yes"?"

8 And then the next page, it looks as though, at
9 the request of Chief Justice Bence, you asked her
10 about every page bearing her signature; is that
11 fair?

12 A That's right.

13 Q And down at the bottom you say:

14 "Q Now, would you please read that silently
15 to yourself at this time; just take your
16 time and read it all over."

17 So I take it one of the things that you thought
18 might come out of this is that it might refresh
19 her memory and she might say I now remember those
20 things?

21 A That would be a possibility. That seemed to be
22 the next logical step.

23 Q And then if we can scroll down, you ask:

24 "Q And I ask you now whether or not you
25 made that statement."



1 Her answer:

2 "A I did.

3 Q Now, I'm going to ask you again to read
4 to yourself silently the third, fourth
5 and fifth .."

6 Pages, and then the judge interprets for a
7 moment. And just for the record,
8 Mr. Commissioner, I don't think we need to bring
9 up Nichol John's statement, the pages, the third,
10 fourth and fifth pages contain I think most, if
11 not all of the incriminating statements, and so,
12 Mr. Caldwell, it appears you are asking to read
13 silently those pages?

14 A Yes, sir.

15 Q Again, and then down at the bottom, you then say:

16 "MR. CALDWELL: My Lord, I propose to ask
17 the witness next whether those three
18 pages are true."

19 And the judge says yes. You say:

20 "Q Are pages 3, 4 and 5 true?

21 A I don't know."

22 And again, pages 3, 4 and 5 are where she
23 describes David grabbing the girl, dragging her
24 down the alley and stabbing her and a few other
25 incriminating statements. So after you ask her



1 if those pages are true, if we can scroll down,
2 Chief Justice Bence then interjects and says:

3 "Q What do you mean you don't know? You
4 signed them.

5 A Yeah, I know I did but I don't know -
6 I don't remember saying that.

7 Q You signed the pages each one at the
8 bottom of the page?

9 A Yes.

10 Q And you gave a detailed statement with
11 respect to what you said had taken
12 place, didn't you?

13 A Yes.

14 Q Now, having read it - having read it,
15 does that refresh your memory
16 sufficiently that you can now tell this
17 court what happened on January 31st?

18 A No it doesn't; I don't remember saying
19 that."

20 Again, and I know it's difficult to comment, Mr.
21 Caldwell, on what judges do and sort of the
22 interjections in your examination, but it appears
23 from this transcript that Chief Justice Bence
24 interjected, for lack of a better word, on a
25 number of occasions in your examination of Miss



1 John under 9(2)?

2 A That's right, sir, and that followed on attempts
3 by him to have the witness move on with things a
4 little earlier that we saw a few minutes ago. In
5 other words, he was, I think, getting impatient
6 with the process.

7 Q And this may be a difficult question, but just
8 based on your observations and your recollection
9 at the time, and I guess the transcript speaks for
10 itself, but was he -- did he interject with other
11 witnesses in the course of your examination in
12 this way?

13 A No, he did not, he essentially, you know, left the
14 examination, cross-examination to counsel. Very
15 rare interjections with other witnesses, Mr.
16 Hodson.

17 Q And again did it cause you concern at the time
18 that these questions would be asked sort of in --
19 I presume you had a plan going in as to how you
20 were going to ask these questions?

21 A I did, and I simply had to be careful once he had
22 asked his question, got whatever answer he did or
23 didn't get, that I stayed on track with my plan,
24 sir.

25 Q And then after he's done you say:



1 "MR. CALDWELL: Now, My Lord, if your
2 Lordship pleases, with that question I
3 am ending my cross-examination of this
4 witness and I'm going to next ask Your
5 Lordship for the ruling as to adversity.
6 I suppose, My Lord, ought this statement
7 she read just be marked for
8 identification?

9 THE COURT: Yes."

10 So as I understand the process, let me go through
11 that, under 9(2) you were entitled to
12 cross-examine her as to that previous
13 inconsistent statement first of all?

14 A Yes.

15 Q And that only applies to the statement and that's
16 what you did; correct?

17 A Yes, yes.

18 Q Secondly, 9(1) says you can apply to have a
19 witness declared adverse or hostile and if that
20 ruling is made, you can then cross-examine the
21 witness on anything; is that fair?

22 A That's my understanding.

23 Q So step 1 is to use the statement, the prior
24 inconsistent statement to get evidence to have her
25 declared hostile; is that fair?



1 A That's my understanding of the sequence.

2 Q Right. And in the process of having her -- that
3 process alone, the 9(2), just putting the previous
4 statement to her, I mean, at this point the jury
5 hasn't heard anything about what's in the
6 statement; correct?

7 A That's right too.

8 Q And so step 1 under 9(2) is to give you the
9 opening to cross-examine her?

10 A That's correct.

11 Q And then under 9(1), once she's hostile, you can
12 then put some of the things in her statement to
13 try and discredit her?

14 A That's my understanding, sir.

15 Q And if we can just back up, if 9(2) had not been
16 in there, you said it was a new section, the
17 challenge you would have, sir, is to try and get
18 her declared adverse or hostile?

19 A That's right. The very -- kind of briefly stated,
20 before this 9(2) a witness, in effect, could say
21 what they want as long as they continued to smile
22 or look pleasant, in effect you were defeated in
23 terms of getting them declared adverse or hostile.
24 This gave a different approach to it.

25 Q And again, just to go back, and I read this and



1 I'm going to read it again, you had gone through,
2 and I went through with you, Mr. Caldwell, Nichol
3 John's evidence about the morning of January 31
4 and in particular the time prior to their vehicle,
5 the Ron Wilson vehicle going to the Trav-a-leer,
6 so the critical time from, let's say, 6:30 until
7 7:20, or after seven, whatever time it was, that
8 time period when they were stuck and Mr. Milgaard
9 left the car, I went through that in detail with
10 you, your examination of Nichol John --

11 A Okay.

12 Q -- earlier, and you would agree that in her answer
13 she never mentioned anything incriminating about
14 David Milgaard; is that --

15 A That's right.

16 Q And then I just want your comment on this. This
17 is a question not of you but of Chief Justice
18 Bence, I think I had asked you earlier did one of
19 the things you thought might come of this is that
20 she might have her memory refreshed?

21 A That could have well have happened.

22 Q And this question here from the Chief Justice is,
23 he says to Nichol John:

24 "Q Now, having read it - having read it,
25 does that refresh your memory



1 sufficiently that you can now tell this
2 court what happened on January the
3 31st?"

4 And I'm wondering, Mr. Caldwell, again there is
5 the judge's question, but does that not imply
6 that what she said earlier was not what happened
7 on January 31st?

8 A Well, I would put it that the -- yeah, what she
9 said earlier in the, to the extent that she did
10 not adopt the things that I, we believed to be
11 correct, the incriminating things, like, this gave
12 her the -- the Chief Justice may have felt now
13 that you've read this, does this refresh your
14 memory sufficiently you can now tell this court
15 what happened; in other words, implicit in that
16 would be the truthful account of what happened.

17 Q Or possibly, and again I appreciate we're talking
18 about trying to ascertain what the judge meant,
19 one other possibility is that she had earlier said
20 she didn't recall a bunch of things and I guess
21 one other option is to say does this assist you
22 now in remembering?

23 A That -- you could very well read it that way as
24 well, Mr. Hodson, she may have felt now that
25 you've done that, can you not tell us what



1 happened on January 31st, and that would, you
2 know, imply the act, the aversion that was in her
3 most recent statement to me.

4 Q And did you have an impression as to whether the
5 Chief Justice, when he was questioning Nichol John
6 at the time, whether he -- and again just your
7 impression, whether he was of the view that she
8 was not being forthcoming about the events of that
9 morning?

10 A Yeah, I had that impression exactly.

11 Q And was that based on what you observed in Nichol
12 John and what you observed in him?

13 A Well, I guess my knowledge of the evidence in the
14 trial leading up to this point, the Chief Justice
15 had been present when all that was, the evidence
16 was given and you could sense that he was running
17 out of patience with her continual evasions and
18 not settling down to say okay, it did happen this
19 way and I'll go through it, or (b), it never
20 happened at all, to over simplify.

21 Q And at this time he would have now had a chance to
22 read the May 24th statement?

23 A That's right, sir, he was given the -- as was
24 Mr. Tallis, copies of the one I was working from.

25 Q Okay. And then if we can just go on, I had left



1 here, and you are asking to have the statement
2 marked for identification, I think you said I'm
3 done my cross-examination under 9(2), mark it for
4 identification, and then you are going to ask for
5 your ruling on adversity, and it looks as though
6 Chief Justice Bence then asks some questions here,
7 he says:

8 "Q You recall giving the statement to
9 Detective Sergeant Mackie; you've
10 already admitted that?

11 A Yes I did."

12 And then the next page, he goes on to talk about:

13 "Q You remember it quite clearly?

14 A But I don't remember ..

15 Q .. just a minute please.

16 A Okay.

17 Q You remember quite clearly where you
18 were?

19 A Uh-huh.

20 Q You remember quite clearly that the
21 statement was taken down in narrative
22 form?

23 A Yes.

24 Q And you remember quite clearly that it
25 was read over to you?



1 A Yes.

2 Q You remember quite clearly that you
3 signed every page?

4 A Yes.

5 Q Well, can you tell me why you can't
6 remember what you said on that occasion?

7 A I don't know.

8 Q Did you have any discussions about this
9 statement with anybody outside of the
10 police officers afterwards?

11 A No."

12 And then carrying on:

13 "Q Afterwards?

14 A Afterwards with what?

15 Q With anybody afterwards as to what you
16 had said?

17 A Are you talking about Mr. Caldwell -
18 including Mr. Caldwell?

19 Q No, no; I mean anybody else?

20 A No."

21 Xx if I can just pause there, is it a correct --
22 or let me just back up. The question that the
23 judge asked Nichol is after giving this statement
24 he asked her then why she can't remember what she
25 said and then says did you discuss this statement



1 with anybody other than the police and the Crown.
2 Is that fair?

3 A That's how I read it.

4 Q And is the inference or the implication there, Mr.
5 Caldwell, that Chief Justice Bence was probing to
6 see whether someone may have influenced Nichol
7 John to not repeat the contents of the statement?

8 A That could very well be an inference. He excludes
9 the police officers who we would assume would be
10 proper persons to talk to if anyone and the
11 prosecutor in that one category and she goes -- he
12 asks her about every one but those, which could
13 very well lead to that conclusion or assumption.

14 Q He doesn't ask her about the discussion she had
15 with the police and you ask her; correct?

16 A No, and presumably, Mr. Hodson, because one would
17 expect those things could have been legitimate if
18 certainly my case and/or the police, if they
19 happened at all, interviews with her, what have
20 you.

21 Q Did you have any impression whether, and again
22 just your impression, Mr. Caldwell, at the time,
23 about whether the judge may have had concerns or
24 suspicions that Nichol John had talked to someone
25 or been influenced by someone outside the police



1 or the Crown?

2 A Yeah, that's all I can read into this line of
3 questioning. He asks any discussions about this
4 with anybody outside the police and then goes on
5 to mention the Crown, and then he ends up no, no,
6 I mean anybody else, so that's -- that would leave
7 everyone else open that he would like to know
8 whether --

9 Q And I think you told us last sittings that your
10 belief at the time at trial as to why Nichol John
11 did not repeat the incriminating information was
12 that she was scared of Mr. Milgaard?

13 A I believe I said that and that is the truth in my
14 opinion.

15 Q And that's what you thought at the time?

16 A Yes, sir.

17 Q And what about -- did you ever consider whether
18 one explanation might be that she was trying to
19 help Mr. Milgaard who was a friend of hers, did
20 that cross your mind at the time?

21 A I think the -- I suppose you could regard that as
22 trying to help him. I felt the main factors were
23 the fear and the desire not to have to give that
24 incriminating evidence.

25 Q I see. Then at the bottom, the judge then



1 declares her to be adverse, and we can go to the
2 next page, the statement is marked for
3 identification, and just to clarify, I don't
4 believe the actual statement, the May 24th
5 statement, the physical document was never shown
6 to the jury; is that correct?

7 A I wouldn't think so, and this enables you to see
8 later if it's the one we were talking about in
9 this --

10 Q Yes, it is, and I can tell you, I don't believe
11 anywhere in the transcript that the May 24th
12 statement didn't become evidence for its contents.

13 A No, I'm sure that's right.

14 Q Now, I take it if you could have got that
15 statement in as an exhibit and before the jury,
16 that would have helped the Crown's case?

17 A Well, I don't know, Mr. Hodson, that you could --
18 I don't envision how you could do that, you can't
19 make rulings saying go ahead and show the jury the
20 statement, let them read it one after the other, I
21 can't -- I don't know if I'm understanding your
22 question.

23 Q Well, for example, if the defence may have tried
24 to put in the March 11th statement as an exhibit,
25 her non-incriminating statement, would you have



1 then asked for the second statement to go in?

2 A Well, I honestly can't see how, with my knowledge
3 of the law at that time, how that would be
4 possible. The point of marking for identification
5 is that we all know which statement we're talking
6 about.

7 Q But let's just back up.

8 A Okay.

9 Q If there was a way to get that statement in as a
10 full exhibit, in other words, in front of the
11 jury, the May 24th statement, regardless of
12 whether it's truthful, its contents, if you could
13 get the physical document in the jury room, I take
14 it that that would be something favourable to the
15 Crown?

16 A Well, it would be, but I would have to be
17 convinced how one could do that procedurally.

18 Q Putting aside the procedural issue, I appreciate
19 that --

20 A Okay.

21 Q -- and you may be right on that, Mr. Caldwell, but
22 I'm just saying from the Crown's perspective you
23 believe that statement to be the truth at the
24 time?

25 A That's right.



1 Q And so if that statement in written form is in
2 front of the jury, would that be better than
3 simply having you read it out in court and having
4 them listen?

5 A It would certainly be evidence useful to the Crown
6 to the extent that it indicated guilt on the part
7 of the accused.

8 Q And if -- and it didn't happen in this case, but
9 if something would have happened in the course of
10 cross-examination of Nichol John, it would have
11 allowed you to seek to put the May 24th, '69
12 statement before the jury; am I correct that you
13 would have tried to do so?

14 A Well --

15 Q In written form?

16 A Subject to the caveat that I don't know --

17 Q I appreciate that.

18 A Yeah. I would find it hard to say yes, I would
19 like to, because I can't envision --

20 Q If there was a lawful way to have the document,
21 the statement put before the jury, would you have
22 pursued that?

23 A Well, I would have, because the operative part
24 being lawful.

25 Q Yes.



1 A If the proper procedures allowed for it, it
2 obviously would be helpful to the Crown's case,
3 Mr. Hodson, in my view, but I hope I understood
4 what you've asked me.

5 Q Yes, you have, yes. And if we can just go to
6 the -- so now Chief Justice Bence has declared her
7 hostile and then here's where you now start to
8 cross-examine her, and I take it, and you touched
9 on this last sitting, you would be trying to
10 impeach her credibility; is that fair?

11 A That's right.

12 Q And -- but only on parts of her evidence; is that
13 fair?

14 A Well, that's right, because her -- this very
15 compact part with five or six points in it was, I
16 think, well on in her evidence as I recall.

17 Q So her evidence about getting to Saskatoon, I
18 think the knife, I think she may have adopted
19 that, some parts of her evidence-in-chief you were
20 fine with; is that fair?

21 A Certainly, yeah.

22 Q And the part where, I think pages 3, 4 and 5 of
23 the statement where she did not adopt the
24 incriminating evidence, on that part of it you
25 were going to attack her credibility, try and



1 impeach it and say jury, don't believe her when
2 she says I don't remember what happened?

3 A That's right, sir.

4 Q And again we touched on this before, and if the
5 jury did not believe that Nichol John was telling
6 the truth when she says I don't recall what
7 happened in the alley, the only logical or
8 rational other recollection would be that in her
9 statement; is that fair? In other words, that
10 don't believe her when she says I don't recall,
11 the only other option for the jury would be what
12 she put in her earlier statement?

13 A Earlier in that statement?

14 Q The May 24th statement.

15 A That's the one we're speaking of?

16 Q Yes.

17 A Yes, I think that's right.

18 Q And then again you ask her to direct her attention
19 to the second page:

20 "Q And I'm asking you about the statement
21 which you've identified as being the one
22 you gave to Mackie."

23 Go to the next page, and I won't go through all
24 of these, but it looks as though, maybe just --
25 the approach that you took, and I think this is



1 borne out in the transcript, Mr. Caldwell --

2 A Yes, sir.

3 Q -- that you would then take a part of the
4 statement, read it to her --

5 A Yes.

6 Q And then you would ask her two questions, did you
7 tell Mackie that and is it true?

8 A That's correct.

9 Q And here she said yes.

10 A That's correct, on that initial thing she answered
11 yes to both of those.

12 Q Right, and then if we could just go to the next
13 page, and then you ask the question about the part
14 of the statement where she says they talked to the
15 girl and asked the girl for directions and you
16 say:

17 "Q Did you tell him that?

18 A Yes.

19 Q Do you remember telling him that?

20 A Yes I do.

21 Q And was that true?

22 A Yes."

23 And then here's where the judge steps in and
24 says:

25 "Q You distinctly remember saying that?



1 A Yes, I remember saying that."

2 I take it that is to Mackie in her statement?

3 A Yes.

4 Q And then if we could scroll down, you then say,
5 and I think we're getting into page 3:

6 "Q Did you tell Sergeant Mackie:

7 "He offered to give her a ride to
8 wherever she was going. She refused the
9 ride. Dave closed the door and said,
10 'the stupid bitch'."

11 Did you tell Sergeant Mackie that?

12 A Not all of it. I don't remember
13 saying part of it."

14 And then the judge says:

15 "Q You said you didn't say it - did you say
16 it?

17 A The first part I said but I don't
18 remember saying the last part here.

19 Q Well just a minute - that's the kind of
20 thing I suggest that you might not
21 easily forget - the expression the
22 "Stupid Bitch"?

23 A I don't remember him saying anything.

24 Q Well, do you remember telling Sergeant
25 Mackie that?



1 A No.

2 Q You're suggesting that he wrote it in
3 then?

4 A I don't remember saying it."

5 So I take it here the judge is saying to Nichol
6 John that she's suggesting that Mackie wrote it
7 in the statement without her saying it; is that a
8 fair --

9 A Well, he's saying she wouldn't --

10 "A I don't remember him saying anything.

11 Q Well, do you remember telling Sergeant
12 Mackie that?

13 A No.

14 Q You're suggesting that he wrote it in
15 then?"

16 And the judge, I assume, saw that to be highly
17 improbable is the way I put it, and her answer
18 was:

19 "A I don't remember saying it."

20 Q Right. He's saying, well, if you didn't say it to
21 him, then he just wrote it in and made it up?

22 A And which I implicitly, I think, the judge would
23 find that difficult to accept, at this stage of
24 that exchange, Mr. Hodson.

25 Q Okay. And then you carrying on:



1 "Q Well, on that point, that's on one of
2 the pages of course that you say already
3 you read over and signed, isn't it?

4 A Yes.

5 Q And your position now is you don't
6 remember Dave saying it?

7 A No."

8 And the Court jumps in again:

9 "Q And you don't remember telling Sergeant
10 Mackie that?

11 A No.

12 Q Might you have told Sergeant Mackie
13 that?

14 A I might have, yes.

15 Q And Dave might have said it?

16 A He might have, yes."

17 And so then carrying on back about getting stuck,
18 we'll go to the next page, and he agrees with
19 that, about:

20 "Q "Ron and Dave got out and they tried to
21 push the car. They couldn't get it
22 out."

23 Did you tell him that?

24 A Yes.

25 Q Do you remember telling him that?



1 A Yah, I did.

2 Q And was that true?

3 A Yes."

4 So again that's sort of the format of your
5 cross-examination on the statement?

6 A Right.

7 Q And next if we can scroll down:

8 "Q O.K. Did you tell Sergeant Mackie:

9 "I recall Dave going back in the
10 direction we had spoke to the girl. Ron
11 went the other way past the funeral
12 home."

13 And again scroll down, the three questions, and
14 you say yes. The court says:

15 "Q So he did go back in the direction of
16 the girl?

17 A Yes."

18 And then the judge says:

19 "Q Yesterday you told us you couldn't
20 remember.

21 A I said that ..

22 Q You said that one went left and the
23 other ..

24 A .. one went right. And the girl was
25 coming from ..



1 THE COURT: .. Alright. Go on."

2 Mr. Caldwell, and then again the next question:

3 "Q Did you tell Sergeant Mackie this:

4 "The next thing I recall seeing Dave in
5 the alley on the right side of the car.
6 He had ahold of the same girl he spoke
7 to a minute before. I saw him grab her
8 purse. I saw her grab for her purse
9 again."

10 And I take it that is a fairly incriminating
11 piece of information?

12 A That would be, yeah, the ultimate incriminating
13 information at this point, Mr. Hodson.

14 Q And I think the next page we'll see about the
15 knife and the stabbing and putting those together,
16 a jury would be hearing you read this to Nichol
17 John on the stand; is that correct?

18 A Yes.

19 Q And again we will touch on the charge to the jury,
20 the judge would caution about the use of this?

21 A Uh-huh.

22 Q But would you agree, sir, that it was -- part of
23 the process, you knew that the contents of Nichol
24 John's May 24th statement would at least be heard
25 by the jury?



1 A Yes, that's right.

2 Q And then again when you ask her about, I think
3 that's the first piece of incriminating
4 information in the statement:

5 "Q Did you tell Sergeant Mackie those
6 things?"

7 She answers:

8 "A I don't remember."

9 And again the court then asks some questions
10 here. Was it your intent, would you accept her
11 answer "I don't remember", was that -- had you
12 made your point? In other words, here's what you
13 put in your statement, did you tell Mackie, is it
14 true, and if she says no, I don't remember, would
15 that be enough for you to sort of advance your
16 point to the jury that she's holding back or was
17 not truthful?

18 A Now, Mr. Hodson, the top half of that is, that's
19 still the judge making, doing that questioning.

20 Q No, that's you.

21 A Okay.

22 Q And again, it looks from the pattern in the
23 questions that your intent was to say here's
24 what's in the statement.

25 A Yeah.



1 Q Did you say it to Mackie?

2 A Right, and was it true.

3 Q And was it true?

4 A Yeah, that was my --

5 Q And if she says no, I don't remember, is it true,
6 I don't remember, I don't know, would that be
7 enough for you to then -- or had you planned on
8 challenging her further?

9 A Well, it would depend how this thing unfolded I
10 think. Quite a few of these she agreed to, then
11 we get into "I don't remember" and then the judge
12 intervened as you see at this point. I would
13 assume I would have challenged her further in an
14 attempt to get what I thought was an accurate
15 answer out of her.

16 Q Okay. So then we'll carry on, if we can scroll
17 down, so she then says I don't remember and the
18 judge says:

19 "Q Do you remember any part of it?

20 A No.

21 Q Are you saying you didn't tell Sergeant
22 Mackie that?

23 A I'm saying I don't remember if I did
24 or if I didn't.

25 Q Well, if you did see the accused grab



1 the purse it's something you would have
2 remembered, isn't it? Isn't it?

3 Witness?

4 A I don't know.

5 Q Take a drink of water and stop crying.

6 A If I could tell you what happened I'd
7 tell you. I don't know. I can't
8 remember."

9 I take it that Miss John was crying through parts
10 of this?

11 A I take it that that's right.

12 Q Do you have a recollection of her being upset or
13 crying at the time or --

14 A Well, I guess with this wording I accept that it
15 happened. I can't say. I know she was upset, Mr.
16 Hodson, as this process kept going.

17 Q And was the judge upset with her based on your
18 answer?

19 A Oh, absolutely.

20 Q And then the judge says:

21 "Q The point is this. You told Sergeant
22 Mackie on March the 22nd according to
23 this statement."

24 I think the judge has got the date wrong, I think
25 that should be May 24th.



1 "Q Now are you saying you did tell Sergeant
2 Mackie or you didn't tell him?

3 A I don't know if I did.

4 Q Did you see Dave have ahold of the girl?
5 Did you see Dave have ahold of the girl?

6 A I don't remember anything. My mind is
7 a blank. Nobody understands. Nobody
8 wants to believe me."

9 And the judge:

10 "Q You remember the other things, don't
11 you?

12 A Yes, I do."

13 And then:

14 "THE COURT: Go ahead."

15 And then you carry on questions along the same
16 lines and you say:

17 "Q "Alright, Miss John, if you will try and
18 just follow along with this and we'll
19 get through it - you have told His
20 Lordship now that you don't remember
21 whether you told Sergeant Mackie that
22 last group of statements?

23 A Yes.

24 Q Do you remember whether that's what
25 happened or not?



1 A I don't remember anything."

2 So again it looks like again on the first
3 incriminating statement about grabbing the purse,
4 now I appreciate Chief Justice Bence asks some
5 questions in the middle, but it appears that your
6 line of questioning is simply to say do you
7 remember whether that happened or not?

8 A I think it followed that same pattern.

9 Q But then you move on to the next statement and it
10 doesn't appear that, apart from asking her memory
11 of it, it doesn't look as though you challenged
12 it?

13 A Do you wish to -- is that the question 20 there,
14 Mr. Hodson?

15 Q Yes. This is the question before. Let's go
16 through the next question and maybe I'll ask after
17 that. I think this is probably a more
18 incriminating statement.

19 "Q Did you tell Sergeant Mackie this:

20 "Dave reached into one of his pockets
21 and pulled out the knife. I don't know
22 which pocket he got the knife from. The
23 knife was in his right hand."

24 Did you tell Mackie that?"

25 Let me just pause there. You would agree, sir,



1 that the jury hearing this, regardless of what
2 direction a judge may give, that this might have
3 some effect on the jury favourable to the Crown;
4 is that fair?

5 A Yes, I would.

6 Q And so to have before them that Nichol John had
7 previously said that she saw Dave get a knife
8 while he grabbed this girl, that would be
9 favourable to the Crown's position?

10 A I would say so.

11 Q And then, when you ask her that, you say:

12 "I don't remember."

13 And then you say:

14 "Alright; and did that happen in fact
15 whether or not you told Mackie?"

16 So in other words she says "I don't remember
17 telling Mackie that", you say, "okay, but did
18 this happen", and she answers "I don't know".
19 And then you move on to the next incriminating
20 statement?

21 "Did you tell Mackie this:

22 "I don't know if Dave had
23 ahold of this girl or not at this time,
24 all I recall is seeing him stabbing her
25 with the knife."



1 And let me just pause there. And you will agree
2 with me, Mr. Caldwell, that that is very
3 prejudicial evidence against the accused
4 regardless of what direction a judge might give
5 to the jury about that?

6 A Yes, it is, in the same sense as the last one,
7 only in this sense more so, I would suggest.

8 Q And, at the time, you believed this to be
9 truthful?

10 A I did indeed.

11 Q And, again, you say:

12 "Did you tell Mackie that?"

13 A I don't remember.

14 Q And whether or not you remember telling
15 him, did that happen? Did you see that?

16 A I don't know.

17 THE COURT:

18 Q You don't know whether it did or it
19 didn't?

20 A No, I don't."

21 And then you go on:

22 "Q Now, Miss John, I put it to you that
23 that is something you absolutely would
24 never forget if you saw that happen?

25 A As far as I'm concerned I don't know



1 what happened. I don't even know if I
2 was on that trip or not."

3 So if I can pause there. It looks here that you
4 are challenging her a bit, saying "lookit, if you
5 witnessed one of your friends stabbing a girl or
6 killing a girl, that's something you would never
7 forget". So you are challenging her credibility
8 when she says "I don't remember saying it"; is
9 that fair?

10 A That's -- that's correct.

11 Q And then Chief Justice Bence says:

12 "Well, you've already given evidence
13 that you were on the trip ...",

14 let me just back up. She says here:

15 "I don't even know if I was on that trip
16 or not."

17 And, again, it's hard to tell from the
18 transcript; was that said sarcastically, do you
19 know Mr. Caldwell, or --

20 A No, I think that meant "I, at this point I don't
21 know whether I in effect ever came to Saskatoon,
22 was here, any of this stuff happened". I don't
23 think it referred to "trip" in the drug inducement
24 sense at all.

25 Q Oh, I'm sorry, no no, I'm just -- let me rephrase



1 that.

2 A Okay.

3 Q She had given evidence about being in Saskatoon
4 already, I mean, that morning?

5 A Yeah.

6 Q And then she says here:

7 "As far as I'm concerned I don't know
8 what happened. I don't even know if I
9 was on that trip or not."

10 And let's assume I thought "trip" meant the trip
11 to Saskatoon?

12 A Well, I assume the same. At this point I think
13 she is saying "I don't even know whether I came to
14 Saskatoon", you could read that into she doesn't
15 know whether she is on that trip or not.

16 Q Are you able to help us as to whether or not that
17 was said sarcastically by her or whether she was
18 really doubting whether she was in Saskatoon?

19 A No, I think it was she was retreating from things
20 that -- what little she did agree to knowing to
21 this sort of final fall-back position. You see
22 what the Court says, Mr. Hodson, in the next line?

23 Q Yeah, I'll maybe read that --

24 A Okay.

25 Q -- and then I will come back.



1 A Okay.

2 Q The Court then says:

3 "Well, you've already given evidence
4 that you were on the trip - very
5 extensively yesterday. Have you
6 forgotten since yesterday that you told
7 us you were on the trip?

8 A If you just stop and think how much
9 this bothered me - I'm beginning to
10 wonder if I even did it or not."

11 Am I correct that she's referring to the murder?

12 A No, I can't think that that could be interpreted,
13 "if I even did it or not" would not be a
14 suggestion that she may have committed the murder.
15 I'm not just sure what she was trying to convey
16 there, but only shrinking memory, it seems to me.

17 Q And I take it, as far as her credibility then,
18 this -- that was your objective, to challenge her
19 credibility when she said that?

20 A Well, yeah, it would be at that -- and as you've
21 pointed out, or I agree, more so in these last
22 three or four questions.

23 Q All right. And if we can go bottom of the page, I
24 don't think I need to go through these, you
25 continue to ask some other parts of the statements



1 that are similar. She says "I don't" -- go to the
2 next page -- "I don't know", and again asked
3 whether she told Mackie, she says "I don't know",
4 and then she talks about running down the street,
5 she says "I don't remember saying that, I don't
6 know if it happened". Then again scroll down, you
7 put to her the part of her statement about the
8 purse in the garbage can and "did you" -- you
9 asked her:

10 "Did you tell Mackie those things?

11 A I don't remember.

12 Q And whether you remember telling him or
13 not, did you see those things happening
14 or not?

15 A I don't know."

16 And then at the bottom, I'll read through this,
17 you say:

18 "Alright; did you tell Mackie:

19 "The next I remember sitting
20 in the car. I don't remember Ron being
21 in the car or coming back. I remember
22 Dave coming back and getting into the
23 front seat of the car. I remember
24 moving over towards the driver's side
25 because I didn't want.." ".. to be near



1 him."

2 Did you tell Mackie those things?

3 A Yes I did.

4 Q And did those things happen?

5 A Yes."

6 So this is the first, you've gone through a
7 number of parts of the statement where she does
8 not remember, now this one she does remember
9 telling Mackie. And then the Court says:

10 "You remember that?

11 A Yes, I remember that. Oh God!"

12 And, again, are you able to tell us whether --
13 what that reference to -- do you recall her being
14 upset throughout this whole --

15 A Yeah, I'm sure she was, and I think that was just
16 a, you know, a release of tension via that
17 language, if you will.

18 Q And then down to the bottom of the page, again you
19 put the part of the statement about the compact,
20 the cosmetic case being thrown out. And then the
21 next page, at the top, you ask:

22 "Did you tell Mackie those things?

23 A Yes I did.

24 Q And do you remember telling Sergeant
25 Mackie those things?



1 A Yes.

2 Q And are those things true?

3 A Yes.

4 THE COURT:

5 Q How is it you can remember that?

6 A I don't know. If I had a solution for
7 it --

8 THE COURT: Alright - go ahead.

9 MR. CALDWELL: My Lord, I'd like to deal
10 with one thing out of page 1 of the
11 statement."

12 The Court, go ahead, you can cross-examine on it.
13 And then over to the next page, and I think this
14 is you summarizing:

15 "So that your position today is, as I
16 understand you, that you don't know
17 whether you saw Dave in the alley with
18 the same girl that he had spoken to
19 shortly before for directions?

20 A No I don't.

21 Q Alright; and you don't know whether you
22 saw him grab her purse ..?"

23 And then the Court says:

24 "Excuse me a minute, just a minute -

25 (to the witness) It's very easy for you



1 to stop crying because you've done it
2 several times when you were asked a
3 question with which you would agree - so
4 would you please stop crying."

5 And it looks as though this is in the middle of
6 your questioning, Mr. Caldwell. Do you recall
7 this event specifically, or I think you said
8 generally you were aware that she was upset?

9 A Well yeah, I'm sure it happened, Mr. Hodson,
10 because it's -- it's narrated there by the judge.

11 Q If I can call up 039133, please. This is a
12 newspaper article from January 22nd, 1970, I think
13 it's a *StarPhoenix* report, and the report of the
14 events in Court, I think it's the same day of the
15 transcript, and it says:

16 "When the Crown prosecutor
17 pressed for an answer again on whether
18 the witness saw Dave reach into his
19 pocket and pull out a knife, Miss John
20 again started to sob loudly."

21 And, again, are you able to tell us whether
22 that's accurate or not?

23 A I can't say, sir. I wouldn't challenge it though.

24 Q And then at the top of the next column. And then:

25 "At this point, Mr. Justice Bence



1 ordered her to stop crying. He said,
2 "You have shown that you are able to
3 stop crying, so stop crying now."

4 She stopped."

5 Again, you are not able to tell us whether that's
6 accurate or not?

7 A No, I'm not.

8 Q Okay. Again, go back to the transcript, please.
9 Page 003165. And, again, I just read you the part
10 at the top where the judge asked you to stop
11 crying, and then down at the bottom here you've
12 finished with your questions, and then -- then go
13 to page 003167. And, again, it looks as though
14 you had contemplated calling Sergeant Mackie to
15 give evidence about the circumstances of Nichol
16 John giving this statement to him?

17 A Was --

18 Q And --

19 A Was --

20 Q Let me --

21 A I'm sorry, no, go ahead?

22 Q No, you go ahead.

23 A Was this previous to what we've just been looking
24 at?

25 Q No.



1 A Oh, okay.

2 Q Maybe I'll just go through it with you.

3 A Okay.

4 Q So you are done your cross-examination, the judge
5 asks you "are you finished", and actually just go
6 back to the previous page. So right at the top
7 you say you have ended up your
8 examination-in-chief, finished the questioning,
9 "finished questioning the witness completely",
10 "that's right", and then the Court asks "when you
11 returned to the car", this is Nichol John, some
12 questions about crying, hysterical, and go down to
13 the bottom. And then the judge is going to say:

14 "Members of the jury, I intend to give
15 you these instructions at the conclusion
16 of the addresses of counsel ..",
17 and you say:

18 ".. My Lord, I don't know if this is an
19 appropriate time but there is one more
20 item under that Section 9 that I want to
21 raise with Your Lordship."

22 "And that is, having made the ruling, My
23 Lord, to ask Your Lordship to prove that
24 the witness made at another time a
25 statement inconsistent with her present



1 testimony; and what I propose of course
2 is calling Sergeant Mackie to deal with
3 parts of that document which is P.31 for
4 identification. That's what I would ask
5 Your Lordship and of course will abide
6 by your ruling."

7 And he says:

8 "No."

9 So I take it from that you either thought of or
10 asked to call Mackie, who took the statement, to
11 prove the giving of the statement; is that --

12 A That's right. And from the "no" I would infer,
13 Mr. Hodson, the judge felt that was already
14 proven.

15 Q Right. And I think that's correct, --

16 A Okay.

17 Q -- and that was my question, --

18 A Okay.

19 Q -- that -- and again, if we take a step back under
20 the 9(2) process, you knew that one part of the
21 process was you had to prove the giving of the
22 statement?

23 A That's right.

24 Q And the circumstances?

25 A That's right, sir.



1 Q And we'll see, when we touch on the Court of
2 Appeal ruling a bit later, that when the Court of
3 Appeal set out the procedure they said that one
4 part of the inquiry which should be in the absence
5 of the jury was to inquire into the giving of the
6 statements?

7 A Uh-huh.

8 Q And that both sides have a chance to cross-examine
9 or examine the witness; correct?

10 A Yes.

11 Q And so is it fair to say that, here, you were
12 offering to call Sergeant Mackie to be examined by
13 you and Mr. Tallis about Nichol John's giving of
14 the statement to him?

15 A Umm, I would read it that I wanted to have him
16 identify the statement as being one made at
17 another time inconsistent with her present
18 testimony, he -- and the fact that the judge
19 rejected that I could only take as meaning that he
20 felt that it had already been proven, Mr. Hodson.

21 Q Correct.

22 A Yeah.

23 Q But just back before, the purpose of you calling
24 him, you were --

25 A Yeah.



1 Q -- going to call him about the circumstances under
2 which Nichol John gave him the statement?

3 A I assume so. I'd have to do --

4 Q Yeah.

5 A -- that as part of proving that he had got it from
6 her.

7 Q And let me ask this; and that would be on that
8 issue only about the giving of the statement?

9 A Oh, I -- yes, it would be.

10 Q And that Mr. Tallis would have a right to
11 cross-examine him on that?

12 A I would think so.

13 Q Okay. We're done with that transcript.

14 I'm now going to move on to the
15 charge to the jury, just touch on a couple of
16 parts of that, that's 006175. And I want to go
17 through parts of this, Mr. Caldwell. I had, when
18 we were sitting two weeks ago, I went through with
19 you your opening address to the jury and the Crown
20 theory --

21 A Right.

22 Q -- about where things may have happened and how
23 things may have happened and what the Crown's
24 position was, and I just want your comment on a
25 couple of these points that Chief Justice Bence



1 comments on. If you could go to 006190 -- and I
2 take it just for the record the judge is giving
3 the charge to the jury summarizing some of the
4 evidence and giving the jury some direction; is
5 that a fair --

6 A That's my understanding.

7 Q And he says:

8 "The evidence of Wilson was and I think
9 it was also the evidence of John that it
10 was in the process of endeavoring to
11 make a U-turn. Now from that time on it
12 would appear from the evidence that the
13 accused, Wilson and John were all in
14 that neighbourhood, around 20th and "O"
15 and "N" and the location of the church
16 and of the funeral chapel and of the
17 motel and of the service station. It
18 seems from all the collective evidence
19 that their time was occupied in moving
20 around that area, principally for the
21 purpose of endeavoring to locate the
22 Cadrain household."

23 And I think that again, without getting into too
24 much detail about where around O and N, that that
25 was generally the Crown position?



1 A That's right.

2 Q And then, down at the bottom, the judge talks
3 about, again going through the evidence, and he
4 says:

5 "The motel man ...",
6 and that is Rasmussen, the fellow at the
7 Trav-a-leer Motel who David Milgaard asks for a
8 map:

9 "The motel man said as I recollect it
10 that he opens up about seven o'clock and
11 this was shortly after - approximately
12 seven ten that the car arrived at the
13 motel for the purpose of obtaining the
14 map and the directions."

15 And so it looks, and I'll come to a reference
16 later, it looks as though 7:10 is the time that
17 the trial judge indicated was when the -- Mr.
18 Milgaard's vehicle got to the Trav-a-leer?

19 A That's what -- he evidently concluded that.

20 Q And would it be fair, I think this is obvious, but
21 that, from and after Mr. Milgaard's attendance at
22 the Trav-a-leer Motel, that he would effectively
23 have an alibi or an explanation that he could not
24 have -- if he were to have committed the murder he
25 would have to have done it before he went to the



1 Trav-a-leer Motel; is that --

2 A That's -- my recall of the facts --

3 Q Right.

4 A -- would be the same as that.

5 Q Because from the Trav-a-leer they went to the
6 Danchuks, and the Danchuks gave evidence about the
7 time they got there, etcetera?

8 A Yes, sir.

9 Q And Wilson and John certainly said, either in
10 their statements or their evidence, to the extent
11 that they did say Mr. Milgaard was involved in the
12 murder, that it was before the Trav-a-leer Motel;
13 that's --

14 A That would be my memory of it, sir.

15 Q If we can go to the next page and I want to touch
16 on the bus route, because much has been made of
17 that in subsequent years, Mr. Caldwell. And the
18 judge says:

19 "There is of course some speculation as
20 to which route she took on her way in
21 all likelihood to catch a bus. If you
22 look at the sketch P.1 you will see that
23 she had probably three alternative
24 routes. I think Mr. Caldwell suggested
25 two. His theory was that she came down



1 Avenue "N". The house in question,
2 which was 130 Avenue "O", is situated at
3 the corner of 21st Street and Avenue
4 "O". She could have come down Avenue
5 "O", she could have come down Avenue N,
6 she could have skirted through this
7 alleyway and out at the blind end, the
8 "T" end; it wouldn't have saved her any
9 time, it wouldn't have saved her any
10 distance to go down the alley, as I see
11 it. According to the evidence she could
12 have picked up a bus on 20th at either
13 "O" or "N". Now, if she was the girl
14 who was walking along the street when
15 the car with Wilson and the accused and
16 John stopped to make an inquiry - if she
17 was the girl and if you accept the
18 evidence of John and Wilson that it was
19 on a street, then you would conclude I
20 suggest that it was either Avenue "N" or
21 Avenue "O" that she was walking on. But
22 of course there is nothing conclusive to
23 demonstrate that in fact she Gail Miller
24 was the one who walking down the street.
25 The girl who was stopped had a coat on



1 which apparently was similar to the one
2 worn by the deceased - a black coat. I
3 know nothing about women's clothing of
4 course except occasionally have to pay
5 for it, but it was described by one of
6 the witnesses - I think it was John - as
7 something I think she called an A cape
8 or something to that effect, whatever it
9 was anyway you will recollect it and
10 certainly the lady in the jury will; and
11 I don't know whether this particular
12 coat was as described by John or not,
13 that is whether it was this particular A
14 cape or A line as she described it.
15 However, that's a matter that you will
16 consider. As I said there is nothing at
17 all to show positively that the person
18 who was walking down the street was Gail
19 Miller. The only thing that you have is
20 the time that she likely left the house
21 and the time that they likely were
22 driving along the particular road ..."

23 If I can just pause there, so it appears the
24 judge is saying first of all it may not have been
25 Gail Miller who they stopped for directions; is



1 that fair?

2 A That, yeah, that's how I read it.

3 Q And the Crown theory was, I think, that it was
4 Gail Miller who they stopped and asked for
5 directions?

6 A Absolutely.

7 Q And Chief Justice, I think, is saying here it
8 might not have been and it might still have been
9 Gail Miller who was murdered that morning?

10 A That's how I read it now, sir.

11 Q In other words, that if the woman they asked for
12 directions was not Gail Miller, would the Crown
13 theory still be, well, that David Milgaard still
14 killed her; do you follow?

15 A Umm, --

16 Q Let me rephrase it.

17 A Okay.

18 Q The Crown's theory that David Milgaard was
19 responsible for the death of Gail Miller depends
20 upon establishing with the jury that it was Gail
21 Miller who they stopped for directions?

22 A I would say so, sir.

23 Q And so that if it was someone else, for example
24 that they stopped someone else and asked for
25 directions in the same vicinity where Gail Miller



1 was killed, went up, got stuck, and then left the
2 car, I'm trying to understand whether -- the
3 significance of it being Gail Miller that -- being
4 stopped for directions; do you follow?

5 A I believe so. I think the judge here was, you
6 know, attempting to avoid telling the jury what to
7 decide in terms of facts, saying "these things are
8 open". Clearly, the Crown's theory was that
9 indeed it was Gail Miller and the only female, if
10 you will, involved in this episode was her. I
11 don't know, Mr. Hodson, if that --

12 Q I'm trying to understand why that had to be the
13 case, Mr. Caldwell, --

14 A Yeah.

15 Q -- and it may well have been -- for example, if it
16 had been another woman they asked for directions,
17 but Gail Miller came two minutes after?

18 A Well, that is feasible, that never occurred to me
19 as a factual situation.

20 Q And again, I'm sorry, just back to my question.

21 A Yeah.

22 Q And because the judge seems to be saying here is
23 that there is no -- I don't know what his words
24 are, but it's not positively proven that it was
25 her --



1 A I see.

2 Q -- being asked for directions. And my question
3 about the Crown theory, was it possible that maybe
4 it wasn't Gail Miller, but that it was still Gail
5 Miller who David Milgaard grabbed?

6 A Well, I suppose that would be possible, I -- I
7 guess there, viewed in that way, there was what --
8 arguably evidence of a second female walking
9 there, as I read this, Mr. Hodson.

10 Q And the judge also says that it may or may not
11 have been Gail Miller --

12 A Okay.

13 Q -- and, secondly, it may or may not have been on N
14 or O?

15 A Yeah, he made that clear further on, I think, in
16 the --

17 Q Well, the part that I read, --

18 A Yeah.

19 Q -- he says -- if you want to just scroll up to the
20 top. After saying about:

21 "... if she was the girl and if you
22 accept the evidence of John and Wilson
23 that it was on a street, then you would
24 conclude I suggest that it was either
25 Avenue "N" or Avenue "O" ..."



1 A Yeah.

2 Q "... that she was walking on."

3 And so I take it that that was put to the jury
4 that it was one of those two streets?

5 A Yeah. He is saying "you would conclude I
6 suggest", he's leaving it open to them, but
7 suggesting that's all the evidence would support
8 is --

9 Q And if in fact Gail Miller was walking down Avenue
10 O to catch the bus, and not Avenue N, again did
11 the Crown's theory depend upon that fact being
12 accepted by the jury?

13 A I wouldn't think so, although the Crown's theory
14 was very emphatically that it was Avenue N.

15 Q And why was that?

16 A Well, umm, I'll try to -- the Wilson car -- the
17 evidence I recall, sir, and I hope I'm right, is
18 that it was going at one point south on Avenue N,
19 that they caught up to a girl walking along the
20 street, the car stopped, the window rolled down
21 and David Milgaard was alleged to have asked her
22 about where Peace Hill was, she was alleged to
23 have said she didn't know and that remark was
24 made, window was rolled up. The car then went
25 further south on Avenue N to at or about 20th



1 Street, attempted a U-turn, came back in effect
2 the same way they had been coming, according to
3 John I believe got to the entrance of an alley, as
4 I recall there was some evidence that the car got
5 stuck on what amounted to an inclined approach
6 into that alley. Those were the -- I don't know
7 if I've missed anything but I felt that those were
8 all, you know, believable bits of evidence from
9 wherever they came from.

10 Q Might I also suggest Henry Diewold from the church
11 viewing the headlights --

12 A That would --

13 Q -- in the alley?

14 A Yeah, that would have -- if -- Henry looking east,
15 yeah, thank you, from, from his Avenue O location,
16 the headlights in the alley could very well have
17 been that car.

18 Q So if I can paraphrase, and please correct me if
19 I'm wrong, the known facts, if I can call it that,
20 at the time, being as you've outlined --

21 A Uh-huh.

22 Q -- fit better with Gail Miller walking down Avenue
23 N than Avenue O?

24 A Yeah, that's correct sir, and I or you may have
25 missed one or two but that was the basic outline.



1 Q And so that, first of all, that David Milgaard was
2 on the passenger's side when they pulled over to
3 the curb?

4 A That's right.

5 Q And, if she was on Avenue O, I suppose that's
6 possible; right?

7 A Oh yeah, that wouldn't change anything, because
8 she'd still be on the right-hand side of the car
9 presumably.

10 Q Secondly, when they pull up to the intersection
11 and do a U-turn and then get stuck, now Ron Wilson
12 put them stuck near the intersection, Nichol John
13 said it was an inclined alley behind the funeral
14 home?

15 A Uh-huh.

16 Q And if it was on Avenue N that Gail Miller was
17 walking, then that would fit with at least Nichol
18 John's version, being by the funeral home in the
19 alley?

20 A I would think so.

21 Q And if that was on Avenue O that they pulled
22 around and got stuck --

23 A There was --

24 Q -- that might not fit as good with Nichol John
25 saying they were behind a funeral home?



1 A Well yeah, it could not be O and the funeral home
2 the way I recall it, because it was at N.

3 Q And certainly if they were on Avenue O where they,
4 where Gail Miller was walking down Avenue O and
5 they stopped her at that point, that in order for
6 them to get into the north-south alley behind the
7 funeral home -- or sorry -- the east-west alley
8 behind the funeral home, --

9 A Alley, yeah.

10 Q -- that that would fit with Mr. Diewold seeing the
11 lights, the headlights?

12 A Well, I wouldn't think so, and they would have to
13 either go out onto 20th, west on 20th, north on N,
14 and one more turn to put them facing -- pardon me,
15 west on -- I got my directions wrong. They end up
16 facing west in the alley, as I recall it, just off
17 of Avenue N --

18 Q Right.

19 A -- which is the Diewold viewing.

20 Q Right. If -- and let me just try and test it this
21 way, Mr. Caldwell. I'm trying to understand
22 whether the Crown's case that Mr. Milgaard had
23 committed the murder rested on Gail Miller being
24 -- going down Avenue N. And let me ask it this
25 way. If the evidence had been uncontroverted that



1 she was walking down Avenue O that morning would
2 the Crown still have put forward the position that
3 Mr. Milgaard had committed the murder?

4 A I would think so. I don't think -- I think all of
5 the evidence that we had, we've just gone over
6 most of it that pointed at N, but if there was
7 credible evidence that she was on O it wouldn't
8 have meant the thing couldn't have happened --

9 Q Yeah.

10 A -- I wouldn't think.

11 Q Right. And the Chief Justice Bence is saying to
12 the jury "it could be N, it could be O, that's
13 your decision"; correct?

14 A That's correct, yeah.

15 Q Right. And, again, we don't know what the jury --
16 we know the jury's result but we don't know what
17 the jury concluded, do we, as to whether or not --

18 A Absolutely not. And he was following the, I
19 think, conventional wisdom of reminding them often
20 that it was up to them to decide these facts which
21 might be (a), (b), (c), or what have you. That's
22 how I read his -- that's what I would have
23 expected any trial judge to do.

24 Q And so again, just so that we're clear, the
25 Crown's theory was that Avenue N, I think you said



1 you were in -- fairly emphatic on that --

2 A Yeah.

3 Q -- because the facts that you recited fit it, but
4 if she was walking down Avenue O, that didn't
5 change the Crown position that Mr. Milgaard had
6 committed the murder; is that fair?

7 A It wouldn't in view of my understanding of the
8 facts at that time, sir.

9 Q You might have to explain a few more things as far
10 as the evidence; is that fair?

11 A Yeah, that -- there'd be a question of how the car
12 got from Avenue O and the T alley, if you will,
13 around to the funeral home. I think I got my
14 directions wrong and it would have to go slightly
15 south, a block what I would call east, turn again
16 to go north to get it behind the funeral home, and
17 one more time to go west, but --

18 Q Well why don't we just maybe call up the map. We
19 have the map B, maybe we can just --

20 A Okay.

21 Q We can just turn that around, please. If we could
22 just enlarge that area. Let me just go through,
23 if I may, I think the Crown theory was that the
24 vehicle was travelling south on Avenue N, Gail
25 Miller was approached where I've got the X on the



1 west side of the street, and then the car did a
2 U-turn there.

3 A Right.

4 Q And then, according to Ron Wilson, got stuck where
5 I've put the X, and then according to Nichol John
6 where I've put the Y -- that's not a very good
7 Y -- an O, --

8 A Yeah.

9 Q -- so in that vicinity; is that correct?

10 A That's approximately correct. I don't -- I didn't
11 assign any street number to where she was walking,
12 as you will appreciate.

13 Q And then --

14 A And then the U-turn, sir, would be the opposite to
15 what you showed of it.

16 Q And if I could say that Mr. Diewolf was looking
17 this way, --

18 A That's right.

19 Q -- so if there was a vehicle pointing this way, or
20 pointing west, that would fit his viewing the
21 headlights?

22 A Absolutely, in my view.

23 Q And, in order to get the Wilson vehicle in the
24 east-west alley facing west, Avenue N was the
25 logical way to do that; is that correct?



1 A Well, that's right, you wouldn't expect him to
2 back up, as it were, from O to the T alley.

3 Q Right. And if in fact Gail Miller was travelling
4 south on Avenue O, and that's where they asked her
5 for directions, she'd have to be on this side of
6 the street, the west side; wouldn't she?

7 A That would be something I meant to mention is that
8 I would still expect her to be on that side of the
9 street.

10 Q Because the bus stop's on the west side?

11 A Yes.

12 Q And so that would fit pulling over to the west
13 side of the curb to ask for directions?

14 A Yes.

15 Q And then, I guess according to Mr. Wilson, doing a
16 U-turn and getting stuck, unless it's a big
17 U-turn, wouldn't really fit; would it?

18 A Well I didn't think so, Mr. Hodson, because the
19 known facts are I believe that the car ended up
20 behind the funeral home, or right at the T alley,
21 facing west.

22 Q And then again I think Nichol John had the vehicle
23 in the --

24 A In the entrance.

25 Q The east side of the entrance behind the funeral



1 home?

2 A Yeah.

3 Q So I take it if Gail Miller was travelling down
4 Avenue O, there would have to be some -- maybe not
5 an explanation, but the Crown position would be
6 that somehow the vehicle ended up over here where
7 Wilson and John said it did?

8 A That's correct. One of the investigations that
9 took place, the investigators sounded me out, if
10 you will, on why I didn't think that was feasible,
11 that explanation, somewhere along the way.

12 Q This was post conviction?

13 A I'm sure it was.

14 Q Many years later?

15 A Yeah.

16 Q We'll touch on that a bit later.

17 A Yeah.

18 Q Okay. Is there anything else on the map there,
19 Mr. Caldwell, that assists you, or are we done
20 with it?

21 A I think that's all from my point of view.

22 Q If we can go back to the charge to the jury, and
23 next page, please, I'll just go through parts of
24 this, Chief Justice Bence says:

25 "What are the pieces of evidence which



1 tend to inculcate the accused, tend to
2 show that the accused might have been
3 the one who caused the death? First of
4 all, there is evidence which you will
5 consider to show that he was in that
6 locality at or about the time the murder
7 was probably committed; and although the
8 body was not discovered until about
9 eight twenty-five by the Marcoux girl,
10 the fact that the deceased was found in
11 the alley so close to home, the fact
12 that there is evidence which indicated
13 the time that she likely left there,
14 then you might conclude that the death
15 took place shortly after she left the
16 house. That's entirely for you to
17 decide, however. I will deal in a few
18 minutes with the suggestion or possible
19 suggestion that she might have been
20 taken there after she was killed."

21 And then scroll down:

22 "There is the evidence that he was in
23 the vicinity. Wilson of course was also
24 in the vicinity; so was John. There is
25 the evidence which you may consider,



1 which you may accept or reject with
2 respect to the blood stain on the
3 trousers of the accused and the rip in
4 his pants. Both Wilson and Cadrain
5 testified that there was blood. Wilson
6 I believe confined it to the pants; he
7 said that there was no blood on the
8 shirt or sweater. Cadrain on the other
9 hand said there was blood on the shirt
10 and on the pants. Cadrain said that
11 there was a rip in the pants when he
12 changed his pants; Wilson didn't know
13 whether he saw the rip at the time the
14 pants were changed or whether he saw a
15 rip when the accused was in Regina prior
16 to embarking on this trip. John as I
17 recollect it said that she saw no blood
18 on the clothing."

19 That is a summary of the blood evidence. Just go
20 down to the bottom, I want to touch on, and we
21 went through this evidence in detail with Ron
22 Wilson about how many blocks he went when he and
23 Mr. Milgaard left the vehicle, and here's what
24 the judge says:

25 "And then he said that he walked not



1 more than five blocks, he was certain
2 that he walked four blocks, that he was
3 gone somewhere in the neighbourhood of
4 fifteen minutes and that it was five or
5 six minutes after he returned that the
6 accused returned to the car. But you
7 will recollect the questions that were
8 put to him in cross-examination when he
9 admitted that he had said at the
10 preliminary inquiry that it was only two
11 and a half blocks and he cut down the
12 entire time I think it was to some five
13 minutes or so. He said that that was
14 wrong, that he had said those things but
15 that now he had given more time to think
16 it out - I think he used the words "in
17 depth" he was certain that he had gone
18 four blocks and that he was more certain
19 that the time was longer than he had
20 indicated before. And he said that the
21 accused returned to the car and that the
22 accused said "I fixed her - or something
23 to that effect."

24 And I take it the judge would have gone through
25 Mr. Wilson's various lengths that he went or



1 walked that morning?

2 A That's my recollection, sir.

3 Q If we can go to the next page -- actually, sorry,
4 just to the bottom of that page, I won't read it,
5 but go to the top of that paragraph, scroll up,
6 please, he then goes on to talk about the evidence
7 of Nichol John and then if we can go to the next
8 page, the top, he says -- and this is right after
9 a summary of Nichol John's evidence:

10 "I want to deal at this time
11 specifically with the evidence of this
12 girl Nichol John. You heard her in the
13 witness box. You must have got some
14 impression of the type of character she
15 is, the kind of a person who would go on
16 this particular kind of a trip in the
17 first place, the kind of a girl who
18 would admittedly do the things that she
19 did in and around Regina, the fact that
20 she was a user of drugs - those are the
21 kind of things I referred to before
22 which you will take into consideration
23 in assessing a person's evidence. What
24 kind of a person are they? Are they
25 likely to be telling the truth? Are



1 they likely to be lying? But I want to
2 deal with it specifically and for the
3 purpose of trying to avoid making any
4 errors I have had a large portion of her
5 evidence typed out by the court
6 reporter, because as you will recollect
7 I gave permission to Mr. Caldwell to
8 cross-examine her on a statement that
9 she allegedly gave to the police and I
10 told you at the conclusion of that
11 evidence that anything that she did not
12 adopt at the time she gave the evidence
13 in the witness box in that statement was
14 not evidence against the accused. Even
15 though she might be asked a statement -
16 did you say this, did you say that, did
17 you say something else - unless she in
18 the witness box adopted that, admitted
19 she said it and admitted it was true, it
20 cannot be considered as evidence against
21 the accused and I repeat that to you
22 now, so that there will be more no
23 question at all in your minds about it."

24 So that would be the warning, I guess if I can
25 call it that, about the use of her statements?



1 A That's correct, sir.

2 Q And then if we can go just to the bottom of the
3 page, and just for the record, I won't go through
4 all this, but then the judge goes through those
5 parts of the statement where she admitted she had
6 told Mackie those parts and that they were true.

7 A All right.

8 Q And then if we can go to page 006202, down at the
9 bottom, so again he finished reading I think,
10 straight from the transcript, her evidence about
11 what she adopted, and then he says:

12 "I repeat again that those things which
13 she did not admit must be completely
14 disregarded; and also with respect to
15 those things that she did admit as being
16 true that they are only the evidence of
17 this girl and they may be true or they
18 may not be true; it's entirely up to you
19 to determine whether she was telling the
20 truth when she admitted that she had
21 said those things and that they were
22 true."

23 And just pause there. When the judge says that
24 the part she didn't adopt should be completely
25 disregarded by the jury, let's assume that for



1 the moment, Mr. Caldwell, your position before
2 the jury was when Nichol John says I don't recall
3 what happened that morning at critical parts and
4 you are saying to the jury don't believe her when
5 she says that, you didn't put anything -- you
6 didn't directly put anything forward to her, to
7 the jury as to what it is she did?

8 A I think that's correct.

9 Q And so the judge says two things, one -- or let me
10 just back up. Number 1, your position is don't
11 believe her when she says she can't recall
12 anything that morning?

13 A That would be my position, sir, yes.

14 Q Yes. Don't believe her, she's lying, she's not
15 telling you everything?

16 A Right.

17 Q And the judge is saying that part of the sworn
18 statement that's not evidence where she said
19 certain things and didn't adopt them, completely
20 disregard them, jury?

21 A Yeah, that's -- that's a pretty sweeping
22 characterization of them I would think, but I
23 don't know whether he should have done it any
24 different way, sir.

25 Q No, and I appreciate -- and I guess what I'm



1 trying to understand, sort of what impression it
2 might have had on the jury, and I guess the
3 trouble I'm having, Mr. Caldwell, in that if the
4 jury is there saying, okay, I can't -- let's say
5 the jury says I accept the Crown's position, I
6 don't believe Nichol John, I think she's being
7 untruthful based on her demeanour and everything
8 else, I think she's lying when she says she
9 doesn't remember, what is it, what's left open for
10 the jury to think happened?

11 A Well, I wouldn't -- even if a juror took that
12 position, it doesn't mean they have to disbelieve
13 all her evidence. Like, I think a good bit of her
14 evidence wasn't very, you know, controversial or
15 challenged, the things that -- I don't think they
16 would have to take the position I disbelieve
17 everything and most witnesses are, I'm told juries
18 may believe part, all or none of what they say.
19 Does that -- I'm not sure if I'm on the same --

20 Q Well, I'm just -- I'm trying to -- and I think you
21 had told us last sittings that certainly in
22 putting the information in her statement, the May
23 24th statement, you believed that to be truthful
24 evidence?

25 A Absolutely.



1 Q And that was in the minds of the jury and I think
2 you said that you wanted that in the minds of the
3 jury?

4 A Yeah, that's what I understood to be the truthful
5 situation.

6 Q And yet here Chief Justice Bence is saying to the
7 jury she didn't adopt it, completely disregard it?

8 A Well, I don't know, what would you like me to say
9 about that?

10 Q Well, I'm just -- I'm trying to understand what it
11 was that -- your position, and I think your
12 position to the jury, or your position at the time
13 of putting the evidence forward was that she was
14 not being truthful when she said she couldn't
15 recall?

16 A That's right.

17 Q So therefore let's assume you are correct and the
18 jury believes you, then she can recall; right,
19 that's the opposite of --

20 A I would think so.

21 Q So that she can recall, and the only piece of
22 evidence before the jury or the court about
23 another recollection would be the May 24th
24 statement?

25 A That's right.



1 Q And I'm not suggesting anything inappropriate at
2 all, Mr. Caldwell, I'm just trying to understand
3 the -- what's left for the jury is to say don't
4 believe her when she says I don't recall. If the
5 only other recollection that's alive that they've
6 heard is the recollection in the sworn statement,
7 which the judge then says completely disregard it,
8 and I guess my question maybe is this, if I'm a
9 juror and come back and say, okay, I accept your
10 position, Crown, I don't believe her when she says
11 I don't recall anything, what is it you would like
12 me to believe her evidence to be?

13 A But the -- that factual scenario never happens.
14 In other words, a jury very seldom will come back
15 and say -- perhaps they ask for some more advice
16 in this case, but please sort that out for us.
17 That's something they would have to struggle with
18 themselves I would think.

19 Q But as far as a juror is concerned, if they accept
20 the Crown's position that Nichol John is not
21 credible when she says I don't recall, then she
22 must -- the flip side is, well then, okay, she
23 must recall something; right?

24 A I would assume so.

25 Q And the only other version of events that was put



1 forward about being another recollection would be
2 that of the statement, the May 24th statement?

3 A Now, is that the original --

4 Q No, that's the incriminating statement.

5 A Okay. That's right, but she -- that's the one she
6 was not adopting in this exercise --

7 Q Right.

8 A -- if I'm not mistaken. That's the one that I
9 felt was truthful and we went through the 9(2)
10 exercise about it; is that not right, sir?

11 Q Yeah, no, I appreciate that, Mr. Caldwell.

12 COMMISSIONER MacCALLUM: Mr. Hodson, I
13 wonder if we can, it has been a rather long
14 afternoon and I think the witness is not really
15 following the substance of your question.
16 Perhaps we could adjourn now and go at it again
17 in the morning.

18 MR. HODSON: That would be fine.

19 A Thanks, Mr. Hodson. I'll try and improve.

20 MR. HODSON: I'll try on my side first,
21 how's that.

22 (Adjourned at 4:18 p.m.)
23
24
25



OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,
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contain a true and correct transcription of our shorthand
notes taken herein to the best of my knowledge, skill, and
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Karen Hinz, CSR

Official Queen's Bench Court Reporter

_____, RPR, CSR

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Official Queen's Bench Court Reporter



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