

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

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

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Volume 89

Inquiry Proceedings



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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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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

MR. HODSON: And I believe Mr. Pringle is
next to examine Mr. Caldwell.

COMMISSIONER MacCALLUM: All right. Good
morning, Mr. Pringle.

THOMAS DAVID ROBERTS CALDWELL, continued:

BY MR. PRINGLE:

Q Thank you, sir. Good morning, Mr. Caldwell.

A Good morning, sir.

Q As you know, I represent Justice Calvin Tallis who
at the time was the defence lawyer for Mr.
Milgaard.

A I understand, sir.

Q Thank you. Mr. Caldwell, at the start of your
evidence you gave us some information about your
experience and I would like to delve into that a
little more as I may ask you when, in your
subsequent questioning by myself, I may ask you
your opinion based upon the years that you've been
in trial practice and your experience in
courtrooms. From your previous evidence, I
understand that you graduated from law school in
1957 and you were called to the bar in 1958 and
shortly after you were called to the bar you



1 started prosecuting; is that correct?

2 A That's right, sir. I went in with the Attorney
3 General's department I believe the 1st of October,
4 '58. The actual prosecuting likely started
5 shortly into 1959 in Regina, sir.

6 Q And you were with that department until 1987?

7 A That's right, sir.

8 Q And during that time you functioned almost
9 exclusively as a trial prosecutor; is that
10 correct?

11 A Well, I did that, sir, and I was -- seemed to be
12 the administrative person wherever I was,
13 especially Saskatoon when I came here, but I
14 seemed to be the one who did the administration
15 and I certainly did lots of trials as well.

16 Q Okay. It sounds like you have prosecuted in
17 thousands of trials through the years?

18 A I'm afraid so, sir.

19 Q Okay. And then you were with the federal
20 government for three years, from 1988 to 1991?

21 A That's right.

22 Q And did you prosecute at that time too?

23 A Yes, I did. The Federal Department of Justice in
24 Saskatchewan is located in Saskatoon and I
25 prosecuted various drug cases, a couple of



1 substantial Income Tax Act cases, whatever came
2 along that I seemed, you know, able to help with I
3 did.

4 Q So you were a trial prosecutor over a period of
5 maybe 42, 43 years then?

6 A That's right, Mr. Pringle.

7 Q And then since then you've also had the
8 opportunity of observing the criminal justice
9 system as a judge; is that correct?

10 A That's correct, sir. In 1993 I was appointed as
11 what is really a relief judge, the terminology
12 they use is temporary judge in Saskatchewan
13 Provincial Court, and I still have that
14 appointment. Something like a year, year and a
15 half ago they ceased giving work to people like
16 myself who had never been full-time judges, if you
17 will, in that Court, so that was a very, you know,
18 interesting experience.

19 Q And so you functioned as a part-time judge for how
20 many years?

21 A '93 to more or less the end of 2003 I would say,
22 sir.

23 Q So you've had over 50 years of experience watching
24 criminal trials, participating in them as a Crown
25 prosecutor or as a judge?



1 A Yes, sir.

2 COMMISSIONER MacCALLUM: 50 or 40?

3 A Oh, it feels like 50, Mr. Commissioner. I don't
4 know.

5 COMMISSIONER MacCALLUM: I realize the
6 difference might be academic, but in any event --

7 BY MR. PRINGLE:

8 Q I think my math is wrong, you are right, it's over
9 40, close to 45; is that correct?

10 A Yes, sir. I'll accept anything you put forth at
11 this point.

12 Q Hopefully that's the first and only error I'll
13 make today, Mr. Caldwell.

14 A Very good.

15 Q So -- and during that period of time you would
16 have seen all different types of situations arise
17 in criminal trials?

18 A I think that's fair, sir.

19 Q But there's always something new that happens,
20 isn't that so in criminal trials, there's always
21 the unexpected?

22 A Absolutely, and one of the notorious homes of the
23 unexpected is jury trials, sir, but I'd go on
24 other matters as well.

25 Q Exactly. And I just, just to clear the record,



1 you have never yourself been a defence lawyer; is
2 that correct?

3 A That's right, sir, just finished articling and
4 within a couple of months I was out of practice
5 and into the department.

6 Q Okay. Now, your experience with Calvin Tallis,
7 you've talked about that already, as I understand
8 it you prosecuted -- you assisted him on a major
9 prosecution and perhaps some other prosecutions
10 that he was involved in?

11 A Yes. We had one case, I believe Mr. Tallis and I,
12 shortly after I moved to Saskatoon in 1962 or
13 thereabouts, I think he and I prosecuted and
14 Mr. Roger Carter defended it, a gentleman who had
15 killed his wife in sort of an accidental fashion,
16 and that is one. The other, sir, which I've
17 mentioned is the sequence of events with Leslie
18 Klassen which I set out the other day as you know.

19 Q Right. So it didn't happen very often, but
20 occasionally you had, on the very -- a couple of
21 occasions you had the occasion to view his work
22 from the prosecution side?

23 A Well, certainly when he was defending and I was
24 prosecuting, sir, and that -- those two times, if
25 you will, are --



1 Q But I mean when you were both on the prosecution
2 side.

3 A That was so in the case with, involving
4 Mr. Carter. The Klassen matter, those were
5 actually two separate endeavours, the thing that
6 started as a murder and the dangerous sexual
7 offender.

8 Q Right.

9 A Yeah.

10 Q But you certainly would have had a chance to
11 review a transcript of any work that Mr. Tallis
12 had done on that trial, on that matter before you
13 got involved?

14 A Yes. I don't remember the time, but I would be
15 thoroughly familiar with what he did on the matter
16 that started off as the murder charge, sir.

17 Q And you also had a great deal of experience with
18 him when you were prosecuting and he was defending
19 on cases that you shared; is that fair to say?

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

21 Q And there were several cases that you had with
22 Mr. Tallis before the Milgaard case?

23 A Oh, yes. In fact -- yes, I'm sure that's the case
24 and he, as you know, went to the bench at some
25 stage of the games.



1 Q Right. Yeah, he went to the bench of course after
2 the Milgaard trial?

3 A Yes. Not long after if I'm not mistaken.

4 Q Okay. And is it fair to say that when you
5 witnessed his counsel work, that his preparation
6 for cases was always thorough?

7 A It certainly was. He was -- I guess it's not
8 notorious, but he was very well known for putting
9 in the requisite hours and almost habitually those
10 ran into late evening in his law firm as I recall,
11 sir. That was Goldenberg, Taylor & Tallis of
12 Saskatoon.

13 Q So he was known for putting in long hours in
14 preparing cases; is that correct?

15 A That is so, and the other thing was effective
16 hours, he -- anything that I was involved with
17 with him in that sense, you could be sure that he
18 would thoroughly know the law, facts, etcetera, on
19 his side of it, Mr. Pringle.

20 Q In fact, he was somewhat of a legal scholar wasn't
21 he?

22 A He was, he taught us a class in third year law,
23 '56, '57 if my years are right, and I'm sure he
24 did other things at the law college after I had
25 graduated, gone to Regina, etcetera.



1 Q So you've experienced a lot of trial lawyers who
2 were good at cross-examination and oral argument
3 and getting the facts out, but Justice Tallis was
4 a combination of that along with the fact that he
5 was excellent at providing legal arguments, he had
6 an academic side to him; is that fair to say?

7 A That's all correct, sir, absolutely.

8 Q And as far as your perception of him as a counsel,
9 would you agree with me that he was, you know, at
10 the time of the Milgaard trial and in your earlier
11 dealings with him, he was a mature individual with
12 very good perception with respect to people?

13 A Yeah, absolutely, he was a mature individual in
14 that sense. He was of a slightly earlier vintage
15 than my law class which I would have expected, so
16 he was both those things, sir.

17 Q And did he display good judgment in your dealings
18 with him?

19 A Absolutely.

20 Q And his ability in Court with respect to
21 cross-examining witnesses, advocacy, things like
22 that, what are your comments in that regard?

23 A Well, he was an excellent cross-examiner in
24 various senses, I think the first being not
25 charging into every cross-examination as a fight



1 and duking it out regardless of the results, that
2 was not his style. He could do a very thorough
3 and, you know, penetrating cross-examination, but
4 he wasn't unnecessarily combative, among other
5 things, and I thought those were great qualities.

6 Q A lot of lawyers are much more effective taking
7 the approach, in fact most cross-examiners, would
8 you share this opinion, that take that approach
9 are more effective than someone who is combative
10 or overly combative?

11 A In my experience, sir, that's -- what you said is
12 correct.

13 Q And I would just like to -- there has been some
14 issue raised at some point in the public about the
15 fact that Mr. Tallis prosecuted and defended, Mr.
16 Caldwell. Do you see a problem with that, the
17 fact that he was a prosecutor for Humboldt, do you
18 think that would impair his ability to defend
19 cases while, you know, while acting as a
20 prosecutor in another jurisdiction?

21 A Not in the least. He had -- Humboldt is a
22 substantial centre, sir, and had its own RCMP
23 detachment, Provincial Court, it would have a
24 goodly turnover of work, if you will, in any given
25 month and there would be, you know, serious cases



1 coming his way in that respect. Now, all -- in
2 terms of elsewhere, he certainly moved around the
3 province as wanted or needed. That of course
4 would stand him in extremely good stead when he
5 went elsewhere. In terms of Saskatoon, if our
6 office, you know, could get him, we would use him
7 on any, you know, serious case where we felt we
8 needed another person, and prosecuting wherever he
9 did it and defending were not mutually competing
10 matters. In my view, one would learn a good deal
11 from each and of course in his case he would put
12 it to work when he did the next thing.

13 Q Would it be your opinion that a defence lawyer who
14 is engaged in prosecution work would learn from
15 that prosecution work and be a better defence
16 lawyer?

17 A Absolutely. I learned that, sir, by failing to
18 prove something that was in the Province of
19 Saskatchewan as a prosecutor, identify the
20 accused. All those things that you trip over as a
21 prosecutor are, of course, very good lessons when
22 you turn around to defend someone.

23 Q Right. And also, to some extent, learning how
24 police conduct their investigations?

25 A Absolutely. A person like Mr. Tallis would deal



1 with the city police here, various RCMP, various
2 forces, and as time goes on as you do that, I'm
3 sure you build up a knowledge of who you should
4 phone to track down information, all those useful
5 things.

6 Q Okay. And the fact that he was being sought out
7 to prosecute, to conduct special prosecutions and
8 to act as a lead prosecutor in Humboldt, does that
9 speak as to how good a lawyer he was?

10 A Yes. The provincial government of that day, or
11 any other, at least -- I shouldn't say that, but
12 the ones of that day would be very conscious of
13 not putting someone out there who would embarrass
14 the department, the government, whatever you want
15 to call them, and, I mean, they would be very, I'm
16 sure, fortunate to find that he was available.

17 Q The English bar, you know, has had a tradition
18 where lawyers prosecute and defend?

19 A Yeah.

20 Q Are you aware of that?

21 A I think I was at one point, Mr. Pringle, I'm sure
22 that's correct.

23 Q Yeah. And it -- and certainly it did occur for
24 many many years in England where the -- where a
25 lawyer one day might be prosecuting and then



1 defending the next; is that correct?

2 A Yes. And clearly the experience of England is,
3 you know, several decades or centuries ahead of
4 Canada, in the best sense of the word, so that
5 clearly was, you know, a -- thought to be a proper
6 process.

7 Q And are you aware that other provinces in Canada,
8 other than what Saskatchewan did at this time,
9 often hired defence lawyers to prosecute selective
10 prosecutions?

11 A I believe so, sir.

12 Q Now there's also been some discussion about Mr.
13 Tallis representing the Saskatoon Police
14 Association; do you think that would have impaired
15 his ability to represent David Milgaard or
16 represent an accused in the Saskatoon area?

17 A I would think that whatever knowledge he gained of
18 police operations in another sense in that area
19 could not do any harm in trying to deal with this
20 particular set of facts in this case or, indeed,
21 any other one.

22 Q Is it fair to say -- I don't know whether you can
23 comment on this, Mr. Caldwell -- but in major
24 cities in Western Canada reputable defence lawyers
25 often represent the police through their police



1 associations and then still do major defence
2 cases?

3 A I'm sure that's right because they tend to have
4 the skills that, in the first, that are very
5 useful in the second, Mr. Pringle, or vice versa.

6 The -- I think Mr. Halyk, my
7 counsel, was the villain in the police department
8 matter that was shown on my interview. Mr. Tallis
9 was wrongly identified there, but it was
10 Mr. Halyk, I believe, which is neither here nor
11 there.

12 Q Now with respect to, let's talk about the
13 disclosure issues here, Mr. Caldwell, --

14 A Very good.

15 Q -- and the -- just so you can follow my line of
16 questioning here, I'm not interested in whether
17 you made the correct decisions or not to make
18 disclosure, my primary interest is that Mr. Tallis
19 didn't get disclosure of certain items or certain
20 pieces of evidence.

21 A Okay, sir.

22 Q Okay. Now just to talk about, you know, it's hard
23 for lawyers now to put themselves back into
24 1969-1970 because the practice of disclosure is
25 completely different now; isn't it sir?



1 A That's right, sir.

2 Q Like you indicated that you prosecuted up to, I
3 believe you said, 1990, 1990 --

4 A Umm --

5 Q -- 1991?

6 A Yeah, with the federal end, yes.

7 Q But you were a judge up until 2003, and you've
8 seen the post-*Stinchcombe* situation with respect
9 to disclosure, have you not?

10 A Yeah. I knew of the case, Mr. Pringle, I frankly
11 never felt I knew it well enough, but I know it
12 set a whole new standard, if you will, for what
13 must be disclosed.

14 Q It's a case from the Supreme Court of Canada that
15 deals with what disclosure should be given to the
16 defence and it basically indicates that, subject
17 to privilege, the defence should get all the
18 information --

19 A Yeah.

20 Q -- that the Crown has, Crown or the police have on
21 their files, --

22 A Yeah.

23 Q -- concerning the case; is that correct?

24 A That's my understanding sir, but I add that caveat
25 about how well I know the case, but that is my



1 understanding.

2 Q Nowadays, if this *Milgaard* case was going forth
3 now, the defence would have -- would receive all
4 the witness statements, all those 95 witness
5 statements, --

6 A Uh-huh.

7 Q -- all of the police reports, and any other
8 information the Saskatoon Police, the RCMP, or the
9 Crown accumulated; right?

10 A That's my understanding, sir.

11 Q And going back to '69, you've indicated that the
12 defence did not get police reports in those days,
13 is that fair to say?

14 A That is my recollection of it, Mr. Pringle.

15 Q And it would have been that that was the practice
16 and judges would not have ordered defence to get
17 police reports in those days either; would they?

18 A No, they, all things being equal I'm sure they
19 wouldn't.

20 Q And the practice of getting disclosure was subject
21 to, really, what the prosecutor felt the defence
22 should receive, and that would depend upon the
23 prosecutor involved and the type of case that was
24 involved; is that fair to say?

25 A Yes, it is, sir.



1 Q For instance, I don't know what it was like in
2 Saskatchewan, but would it not be the situation
3 sometimes where the, in those days, the defence
4 lawyer would simply come into the prosecutor's
5 office, and the prosecutor would read out
6 selective portions of the file, and the defence
7 would be sitting there taking notes as to the
8 information --

9 A Yeah.

10 Q -- that the prosecutor provided orally?

11 A That would be a common procedure, Mr. Pringle, as
12 -- with the caveat that you had no reason to be,
13 you know, distrusting of the person who was
14 sitting there, absolutely.

15 Q Right. And, unfortunately, the flaw in that
16 system at that time was it placed tremendous
17 responsibility on the prosecutor to decide what
18 was relevant; right?

19 A I'm, I'm sure that is right, sir.

20 Q And it, you know, even if the prosecutor was
21 trying to look out for stuff that the defence, you
22 know, that not just proved his case but tended to
23 exculpate an accused, it was difficult for
24 prosecutors to do that because -- it was difficult
25 in some situations for prosecutors to do that



1 because they often wouldn't know what the defence
2 was?

3 A Well, that would be one caveat. Another one I
4 suggest is, another difficulty is whether or not
5 the prosecutor had received the whole -- the
6 important, if you will, or the meaningful parts of
7 the file, (a), and (b whether he knew he had or
8 hadn't. That was another hurdle.

9 Q That was another problem --

10 A Yeah.

11 Q -- in the sense that the prosecutor didn't always
12 get the file?

13 A No, I -- if I may take a second, the -- we went
14 through a whole series of ways of processing files
15 in Saskatchewan and at one point the RCMP, in an
16 effort I was told to get more people on the
17 highway, got to sending as little as a covering
18 letter to me for an impaired driving file. That
19 was "the file". Which was the, pleased to say the
20 bottom line, I phoned someone and they fixed that.
21 But that could happen, you could get a letter and
22 nothing else, all the way up to, you know, volumes
23 of material.

24 Q And in more serious cases the defence would tend
25 to get more disclosure, but there'd be no



1 guarantee that the defence would even get witness
2 statements?

3 A No, there wouldn't, Mr. Pringle.

4 Q And, now, the defence -- the police are ordered to
5 prepare disclosure packages containing all the
6 information they've collected, send it to the
7 Crown, and the Crown will give it to the defence
8 subject to anything that's privileged?

9 A That's my understanding, sir. You know that I am
10 not in that particular channel but I believe
11 that's right.

12 Q Okay. Now in this case we're talking, in the
13 *Milgaard* case back in '69, we're talking about a
14 murder case, and at that point in time the,
15 certainly the practice and the case law at that
16 point in time did not require you to provide
17 defence counsel with your entire file or the
18 police reports?

19 A That's my understanding of it, Mr. Pringle, from
20 that date.

21 Q So it was a situation where you had to make a call
22 as to what documentation Mr. Tallis should
23 receive, and if you could just advise me what your
24 thinking was in that regard, how did you decide
25 which of those witness statements he should



1 receive and which he should not?

2 A Well it is true that I would make that original
3 discussion -- or pardon me -- decision. Now it
4 seems to me without, don't wish to get into
5 looking at numbers, it seems to me I would have
6 supplied him with witness statements for witnesses
7 whom I intended to call as the kind of jumping-off
8 point, civilian witnesses that is, and then in
9 this particular case he asked me to reread the
10 however many, 95 statements, and I ended up
11 sending him, as we know, some four more that I
12 thought showed some possibility of assisting the
13 accused or defence, if you will.

14 Q Right.

15 A That's my memory of it, sir. I hope that that's
16 --

17 Q Okay. And let's just run through the
18 correspondence that he provided in this regard.
19 First, the first one is 054102.

20 A Mr. Pringle, this is from him to me I take it, is
21 it, that he provided?

22 Q No, this is from Mr. Tallis to you.

23 A Yeah.

24 Q It's a letter dated June 10th, 1969.

25 A That's what I thought, sir, thank you.



1 Q Yeah. The number I have is 054102. Okay. And in
2 this letter he advises you that he is acting for
3 David Milgaard and he asks you if you would let
4 him have copies of any witness statements and
5 related reports in this matter?

6 A Uh-huh, I see that, sir.

7 Q So basically he is asking you for any relevant
8 witness statements and any, what he says, "related
9 reports"; that would be any relevant reports,
10 would it not be?

11 A I assume so. I don't know until we go a little
12 further. That may include lab reports, for
13 instance, but I'm sure that'll become clear later,
14 sir.

15 Q Okay. So he is making a very general request for
16 disclosure at that point?

17 A That's correct.

18 Q He's basically trying to get as much as he can?

19 A That's absolutely right.

20 Q And then your response is 054116.

21 A Oh, thank you.

22 Q And it looks like it's taking a while for you to
23 get a -- to start to build up a file in this
24 matter from this letter?

25 A That's right, for a number of reasons, one of



1 which could be summer, holidays for policemen,
2 prosecutors, things I found tended to slow down,
3 you know, quite dramatically in the summer. But
4 that's clear from that, sir, that --

5 Q Do you recall, like I think the preliminary
6 inquiry started on August 18th, do you recall when
7 you got your -- when you started to get these
8 witness statements?

9 A I wouldn't, Mr. Pringle. I'm not sure there's
10 any, you know, written record of that as it
11 happened, if you will.

12 Q Okay.

13 A But I certainly got them in a -- maybe you can
14 even assist with that.

15 Q Well the next thing I can provide you is your
16 letter back to Mr. Tallis of August 15th, 1969,
17 document 054115.

18 A Yeah, I would see that as being my next letter to
19 him, as I understand it now, sir.

20 Q And I just -- just -- do you know how long before
21 that you would have received those documents?

22 A Is there -- I'm sorry, that date is what on that
23 letter?

24 Q August 15th, 1969.

25 A Okay, yeah. I can't really tell, I may well have



1 waited with these three important witnesses until
2 I had statements from all of them, Mr. Pringle, as
3 opposed to sending, you know --

4 Q Okay.

5 A But I hope shortly before, before I sent this
6 letter, I probably received those witness
7 statements as -- and it included, pardon me, the
8 autopsy report as you see. And I note, with re --
9 the last sentence indicating that, apparently,
10 those are the only statements I have from Wilson
11 and John at present.

12 Q The next letter is August 20th, '69, document
13 054097.

14 A Oh, I see that, sir.

15 Q And you are providing some additional disclosure
16 at that point, crime laboratory reports and a
17 further statement from Mr. Cadrain; is that
18 correct?

19 A That's right, the second statement that I
20 mentioned in that last letter.

21 Q And do you know, at this point, whether you have
22 additional documentation on your file over and
23 above what you are giving to Mr. Tallis? It would
24 probably be so that you would have more and you
25 are just selecting what to give him; is that --



1 A I would hope so, sir, because I likely had witness
2 statements which I essentially knew I wasn't going
3 to advance, --

4 Q Right.

5 A -- is what I would say.

6 Q Okay. And then Mr. Tallis sends you -- and you
7 will recall this letter, it's the one that refers
8 to the *Dallison* case, 054098 -- and this is a
9 letter dated August 31st, '69 where he is asking
10 for -- he's -- in the second sentence he's asking
11 -- or pardon me -- he's asking you, in light of a
12 conversation on the afternoon of Wednesday, August
13 20th, he wants you to make a point of checking to
14 see whether there are any witnesses that you do
15 not propose to call who may be able to give
16 evidence or assistance to the defence?

17 A Yeah, I see that, sir.

18 Q My first question is do you remember the nature of
19 that conversation on August 20th?

20 A Well, no more than I see in the letter, sir.

21 Q Okay. And then he quotes from an English case of
22 five years earlier. Would it be fair to say that
23 not many defence lawyers, back at that time, would
24 be -- send you such a sophisticated letter, citing
25 an English case, requesting disclosure based on



1 authority from the United Kingdom; do you recall
2 other lawyers sending you a letter like that?

3 A No, this -- this was you know, if you will, the
4 kind of thing I would expect from Mr. Tallis
5 because of his scholarly interest in the law, sir.

6 Q This letter really was state of the art in 1969;
7 wasn't it?

8 A Yes, it was.

9 Mr. Pringle, in -- earlier on I
10 noticed the second sentence:

11 "In the event I do want further witness
12 statements, I will first make a request
13 to you before raising it in court.",
14 and then he goes into the conversation. So he,
15 you know, takes the very civil approach of saying
16 "if I want these I'll ask you", not -- nothing
17 resembling a threat, but don't need to go any
18 further than that presumably. And then he covers
19 the matter of asking the police department to
20 turn over any material that they have not given
21 me, and "please do this before the completion of
22 the prelim", all of which are valid points in my
23 view.

24 Q And that would probably, you know, that would --
25 the fact that he wants the police to turn over to



1 you documentation, that probably would come in
2 part from his past as a prosecutor, knowing the
3 police may have relevant information that the
4 prosecution doesn't; right?

5 A Yeah, that's absolutely so, and that's something
6 you would learn basically, I think, by
7 prosecuting, although defence counsel would learn
8 it maybe by other means.

9 Q But not a lot of defence lawyers made that request
10 back in those days; right?

11 A That's correct, sir.

12 Q And, later, he did ask you for various witness
13 statements; didn't he?

14 A I'm sure he did.

15 Q Yeah. And you'll recall your reply, 054099, your
16 reply of September 9th?

17 A I see that.

18 Q And at that point you advise him of some evidence
19 you thought may tend to be exculpatory, you didn't
20 think it was exculpatory, but you recognized the
21 defence may have a different position on that?

22 A That's right, sir.

23 Q So at -- you did understand, at that point, that,
24 when he made this request, that you were -- it
25 wasn't really a decision as to what you thought



1 was exculpatory but what could be exculpatory;
2 right?

3 A That's correct, sir, the terminology "to see
4 whether any of these witnesses would in my
5 opinion", and then the quotation. And then it,
6 interestingly, goes on to say:

7 "The only material that could possibly
8 fall into this category, as far as I'm
9 concerned ...",
10 so clearly I looked at that issue, Mr. Pringle,
11 in view of his letter.

12 Q Okay. And then we get, for the -- might as well
13 go through the rest of the letters. There is a
14 series of letters that start coming shortly before
15 the trial and shortly after the trial had started,
16 the first letter of 054089, a letter to Mr. Tallis
17 from yourself dated January 12th, 1970, 054089.
18 And this letter, you're basically indicating at
19 this point in time that the only new witness you
20 are going to call at the trial is a rather
21 peripheral witness, a lab witness for continuity?

22 A Yeah, that's Mr. McLeod, and I think that's a
23 perfect description of what he was going to do.

24 Q And then you discuss, you send some other
25 statements to him and you also give him an update



1 on certain witnesses being subpoenaed, and things
2 like that?

3 A That's right, sir.

4 Q So at that point Mr. Tallis would have had the,
5 would have had some of the witness statements that
6 you had on your file, plus he would have had, of
7 course, the transcript of the preliminary hearing
8 where all the witnesses had testified at the
9 preliminary hearing, he would have their evidence,
10 and except for this new witness who really wasn't
11 that important, Mr. McLeod; is that a fair --

12 A That's right, sir.

13 Q And that would be sort of the disclosure that Mr.
14 Tallis had at that point?

15 A I assumed that it was, sir.

16 Q Okay. And then on January 15th there is a new
17 development involving a Maurice Cerato who, at
18 that point in time, potentially could have given,
19 you know, subject to further testing, could have
20 given incriminating evidence against Mr. Milgaard?

21 A Umm, now is that included in this letter, sir,
22 or --

23 Q It's, pardon me, 054091. Sorry.

24 A No, that's fine.

25 Q January 15th, 1970.



1 A Yeah, it refers to Mr. Cerato as a youth in
2 Regina, and a question of him possessing pants. I
3 evidently sent Mr. Tallis a photostatic copy of
4 the statement Detective Karst took from
5 Mr. Cerato, as well as a typed copy, since the
6 photostat, it says, is somewhat hard to read. He,
7 Mr. Cerato had been subpoenaed, indicated to Mr.
8 Tallis he -- I would have him to Saskatoon, in
9 effect, early next week, around January 20th, and
10 do you wish -- I'm happy -- anything else, sir?

11 Q No, that's fine.

12 A Yeah, that's fine.

13 Q Eventually, like this witness at that time could
14 have been a major witness, but as it turned out
15 after the lab reports were received by you, you
16 decided not to call him?

17 A That's my recollection of it, sir.

18 Q And -- but certainly at -- certainly at, on
19 January 15th, it was a quite a big development and
20 it -- but, as it turned out, you decided not to
21 call this guy so that situation never arose?

22 A That's right. I -- the marginal note, pardon me,
23 on the left is partially cut off, but I'm reading
24 that as "told see on or about Thursday",
25 something, "I didn't intend to call in view of



1 Molchanko's report", that -- the "C" would be
2 "Cal". That would be my note of a phone call to
3 him telling him that, because of Mr. Molchanko or
4 Corporal Molchanko's report, I didn't intend to
5 call the witness, sir, in addition to what's said
6 in print there.

7 Q Okay. Now January 19th you provide a number of
8 other witness statements. This is the day I
9 believe the trial started?

10 A Oh yeah.

11 Q These witnesses, these witness statements, some of
12 these people had testified at the preliminary
13 hearing?

14 A I would assume, sir, you -- the -- certainly the
15 Murdock, Michalyliuk, some or all of them had.

16 Q And --

17 A I don't -- didn't make a line-by-line but I
18 assume, Mr. Pringle, that the top say ten or so
19 had been -- had testified at the prelim, unless we
20 see otherwise, unless we see otherwise in a moment
21 here.

22 Q Do you recall when Mr. Tallis would have requested
23 these statements in --

24 A Well --

25 Q -- that are referred to in the first paragraph?



1 A I'm sure it would have been well in advance of
2 January 19th, if that was the day of the opening
3 of the trial, he would have requested them well
4 ahead. I think this would be a question of
5 accumulating the statements before I sent them to
6 him, perhaps.

7 Q Okay.

8 A The -- I see in the second heading were two people
9 I did not intend to call, and Mrs. Indyk, who I
10 ended up calling despite the -- what we discussed
11 there, and then there is a recitation of six
12 witnesses for which we, I thought or understood no
13 statements had been taken -- evidently Mr. Hounjet
14 that was incorrect -- and I -- there was one
15 numbered 68, Mr. Pringle.

16 Q So it looks like Mr. Tallis has been asking for
17 disclosure throughout the case, and appears from
18 this letter that he would have follow-up
19 discussions with you requesting witness statements
20 --

21 A Yeah.

22 Q -- and things like that?

23 A I'm sure --

24 Q Yeah.

25 A -- both those things are right, and I didn't by



1 any means necessarily record all our, you know,
2 conversations, but I'm sure that's correct.

3 Q And then, finally, the final letter is 054094.
4 This is the letter where you advise of, of the
5 witnesses Melnyk, Lapchuk and Frank, which you had
6 talked about with him by telephone the previous
7 Sunday, and at this time you are enclosing a copy
8 of their statements on the 21st of January?

9 A That's right, sir.

10 Q And I gather that we can pretty well assume that
11 he would receive these letters with the
12 accompanying statements on the date of the
13 letters?

14 A I would certainly hope so. At the very worst, I
15 would think the next day, sir. I think they just
16 went in the mail.

17 Q What about while the trial is going on here on
18 January 21st?

19 A Umm, let's see. I may well have tried to get them
20 to him by a messenger or, indeed, handed them to
21 him in Court, for that matter, sir.

22 Q Right. And these witnesses, it looks like that on
23 January 20th is when you finally got their written
24 statements; is that correct? This is after the
25 trial has started.



1 A That's right. The second paragraph says January
2 20th I got them.

3 Q Okay. Now, that reflects the correspondence that
4 we have concerning the disclosure issues, that you
5 have now, from previous questioning at this
6 Inquiry it has become clear that there's
7 disclosure that should have been provided to
8 Mr. Tallis that was not provided to him; right?

9 A I think that's right, Mr. Pringle.

10 Q And there is -- and we'll go through that
11 disclosure generally, but if he had received that
12 disclosure, it could have made a very material
13 difference in the way the trial was conducted?

14 A As I understand the situation now, I agree with
15 you.

16 Q And if you had appreciated the full significance
17 of that disclosure, you would have had to
18 re-assess whether the prosecution would proceed?

19 A That's right, sir.

20 Q Particularly if, with respect to these various
21 sexual offences that had been provided to you
22 yesterday when Mr. Lockyer questioned you, the
23 seven sexual offences, the three matters that
24 Fisher later pled guilty to and then the four
25 sexual assaults that occurred, you know, near the



1 timing of the Miller murder, if Mr. Tallis had
2 been aware of those sexual assaults, and we'll
3 just go through them briefly one by one --

4 A Okay, sir.

5 Q -- but if he had been aware of them and could
6 establish that Mr. Milgaard was not in Saskatoon
7 at the time, then that would put, you know, a real
8 damper or pose a real significant problem with
9 respect to the Crown's prosecution?

10 A That's right, sir.

11 Q And what would have happened, if Mr. Tallis had
12 that information, he probably would provide you
13 with notice of that information in advance of the
14 trial, like an alibi notice?

15 A I would expect that, sir.

16 Q But you didn't get that information --

17 A No.

18 Q -- for one reason or another?

19 A That's my understanding of it, sir.

20 Q And so there was a breakdown of communication, if
21 I can use that expression, between the police --
22 the police, yourself and to Mr. Tallis, Mr. Tallis
23 didn't receive everything he needed to properly
24 defend David Milgaard?

25 A Yeah, that's right. In the broad sense, Mr.



1 Pringle, I've concluded that.

2 Q Okay. Now if we could -- we'll look at this --
3 first of all, the three matters involving Mr. --
4 that Mr. Fisher later pled guilty to, the
5 (V2)-----, (V3)----- and (V1)- complaints, you
6 remember those ones?

7 A I remember those names, I do, sir.

8 Q And they -- the (V1)- incident happened in October
9 of '68, (V2)----- happened on November 13th of '68
10 and (V3)----- happened in November of '68.

11 A I'm sure that's right.

12 Q And you'll recall that police reports were
13 prepared that felt that there was a pattern
14 developing amongst those three incidents, that the
15 same person probably perpetrated those incidents,
16 and the person that perpetrated those incidents
17 could very well have committed the Miller murder.

18 A I understand that is the situation as of now, sir.

19 Q Okay. And just dealing with those three matters,
20 if Mr. Tallis had been aware of them, the -- with
21 his thoroughness he would have checked out when
22 they occurred, where they occurred within
23 Saskatoon, right, he would --

24 A I'm sure.

25 Q If he had found that out, he would have checked it



1 out, and he would have called that evidence if he
2 felt that he could prove that David Milgaard had
3 not committed those offences?

4 A Undoubtedly.

5 Q In other words, I hesitate to call this similar
6 fact evidence because we're looking at it from the
7 point of view of the defence --

8 A Uh-huh.

9 Q -- but similar fact evidence can operate two
10 different ways can't it, as a prosecutor I'm sure
11 you've prosecuted cases where you've used similar
12 fact evidence?

13 A I have on occasion, sir.

14 Q And what happens is you, maybe you can prove one,
15 the accused committed one offence, but the other
16 offences are -- other offences for which the
17 accused is charged are very similar and what you
18 conclude is that due to the fact that he committed
19 the one offence he must have committed the others;
20 right?

21 A Yes, and there's a very specific way of leading
22 that as you know.

23 Q Yes. Now, it can work the other way in the sense
24 that if the Court, from the defence point of view,
25 if the Court can conclude that the same person



1 committed all of the offences, just like when the
2 prosecutor is trying to achieve that through the
3 similar fact evidence --

4 A Right.

5 Q -- from the defence's point of view if the Court
6 can conclude that the same person committed all
7 the offences or if there's a reasonable doubt that
8 the same person committed all of the offences, and
9 then if the defence proves that they didn't commit
10 one of the offences, then all the offences could
11 be the -- could result in a not guilty verdict?

12 A That's all correct, sir, in my view.

13 Q And would it not be fair also to say that the
14 defence wouldn't have as much trouble getting this
15 evidence before a Court as the Crown would? The
16 Crown, back in '69, would be facing the tests
17 concerning similar fact evidence, but the whole
18 philosophy of that test is to protect the accused
19 from being convicted for other offences and being
20 prejudiced by the fact that he has committed other
21 conduct and a jury or a trier of fact leaping to
22 the conclusion that the accused committed these
23 other offences simply because he committed the one
24 that can be established; right?

25 A That's my understanding, Mr. Pringle.



1 Q But from the defence point of view, the
2 admissibility of the similarity of conduct would
3 be not as stringent as it would be on the Crown
4 because there's no -- that underlying philosophy
5 of the similar fact evidence rule doesn't apply to
6 the defence?

7 A Yeah, I agree with your view of that, sir.

8 Q And further, you know, when we talk about the
9 (V4)--- matter, for instance, it is so proximate
10 in time to the offence itself, it's almost part of
11 the narrative, arguably part of the narrative, it
12 would be admissible not even just because of the
13 similarity of events, but because it's so
14 proximate in time and location to the Miller
15 murder?

16 A If you -- I agree with that, sir.

17 Q That's the one that, the (V4)--- matter is the one
18 that happened I believe seven blocks away and at
19 7:07 a.m.

20 A Yeah.

21 Q On the same date.

22 A Yes, sir.

23 Q So the (V4)--- matter alone, if Mr. Tallis had
24 been aware of that matter, called that evidence,
25 it would have conflicted considerably with the



1 Crown's case, it would have conflicted with the
2 evidence of Wilson and whatever evidence you were
3 able to get out of Miss John?

4 A That's my understanding, Mr. Pringle.

5 Q And if we had today's law, this whole problem
6 would not have arisen because the defence would
7 have got all these statements because they were on
8 the prosecution file and -- not all of them were
9 on your file, pardon me --

10 A Yeah.

11 Q -- but they were either in the police files or in
12 the prosecution files, plus the police reports
13 that were prepared that talked about this
14 similarity of pattern, that would all be disclosed
15 to the defence?

16 A Yes. Subject to the caveat you just put there,
17 sir, I agree with you.

18 Q Yeah. Now, I'm not going to go through each one
19 of these, but I think you agree that with respect
20 to the (V1)-, (V2)-----, (V3)----- statements and
21 police reports relating to them, upon reflection
22 those should have been disclosed to Mr. Tallis?

23 A That's my understanding now, Mr. Pringle.

24 Q Okay. And the same with respect to the statements
25 involving (V6)--- (V6)-, (V)-- (V)----,



1 Ms. (V9)---- and Ms. (V4)---. I'll stop.

2 MS. KNOX: Just one point for the record,
3 the (V1)- and (V2)----- statements were not
4 provided to Crown counsel either, they were not
5 in his file.

6 BY MR. PRINGLE:

7 Q No, I'm quite aware of that, but I'm saying
8 looking at the overall picture, they should have
9 been provided to the defence. I realize you
10 didn't have them, but the police should have got
11 them to you and then you should have got them to
12 Mr. Tallis?

13 A Yeah.

14 COMMISSIONER MacCALLUM: (V6)-, (V)----,
15 who?

16 MR. PRINGLE: Oh, I was going to go on to
17 these four other complaints.

18 COMMISSIONER MacCALLUM: Yes. I just got
19 two of the names down, (V6)- and (V)----. Who
20 was the --

21 MR. PRINGLE: (V6)--- (V6)-, (V)-- (V)----,
22 (V9) (V9)----, and I can't remember Ms. (V4)---'s
23 name.

24 MR. ELSON: (V4)----.

25 MR. PRINGLE: (V4)---- (V4)---, and those



1 statements for the record are, for Ms. (V6)-,
2 006486, (V)-- (V)----, 006400, Ms. (V9) (V9)----,
3 006402, and (V4)---- (V4)---, 006404.

4 COMMISSIONER MacCALLUM: Thanks.

5 BY MR. PRINGLE:

6 Q And you would agree that Mr. Tallis didn't receive
7 the statements for any of those complainants?

8 A I assume that's right, sir. I said that I have
9 difficulty right now, as it were, remembering
10 those things, but I'm sure that what you are
11 telling me is factually correct; therefore, he
12 didn't get them. I just have that -- not a
13 caveat, but just that addition to make to what
14 you've said.

15 Q Okay. And we know that Mr. Tallis didn't receive
16 any police reports, and the police reports would
17 have been very helpful in this context in the
18 sense that you'll recall Mr. Hodson and
19 Mr. Lockyer both brought up police reports that
20 talked about the similar pattern of these -- of
21 some of these sexual assaults and the fact that
22 the person who committed the Miller murder --
23 well, I should restrict this to the (V1)-,
24 (V2)----- and (V3)----- matters, the person that
25 committed those matters could very well have



1 committed the Miller murder?

2 A Yes, sir.

3 Q And one of the statements that's -- one of the
4 police reports that's very pronounced in that
5 regard is the report of Corporal Rasmussen which
6 is an RCMP report, you never received that?

7 A That's right. I was -- I was absolutely amazed as
8 this Inquiry went on and as Mr. Rasmussen and
9 Edmondson, both of whom I knew when they were on
10 Saskatoon GIS section, testified and there were
11 two very substantial RCMP reports that were on our
12 screens and they were looking at them. As I
13 mentioned, told my counsel, I had never seen those
14 in any shape or form and I think there was a
15 received stamp which I think has clearly been
16 identified as a Regina thing.

17 Q Right.

18 A What happened there, Mr. Pringle, is that they --
19 this has even been subsequently investigated, they
20 would report up the RCMP chain to Regina, I think
21 it was the SIB, or some set of initials, section.
22 That department in turn sent the report over to
23 the, our Department of Justice provincial in
24 Regina and it did not come to me which, you know,
25 among other things, there was a good deal of



1 description of Mr. Fisher in both those, if my
2 memory is correct, so I found that a very, you
3 know, very frustrating or something, but I believe
4 that's how it operated, Mr. Pringle.

5 Q Yeah. Like, the four witness statements you
6 received that were in those 95 statements, the
7 (V6)--- (V6)-, the (V)----, the (V9)---- and the
8 (V4)--- matters, they are within the 95
9 statements, and then you have pots of police
10 reports and buried in those police reports is some
11 references to this pattern of sexual assaults that
12 very well could be the same person as the person
13 that committed the Miller murder.

14 COMMISSIONER MacCALLUM: Excuse me, Mr.
15 Pringle, we're getting some strenuous competition
16 from next door. It sounds like a recording of
17 some kind. We'll have to wait. Somebody has
18 gone to --

19 MS. CONGRAM: It will be one minute.

20 COMMISSIONER MacCALLUM: When it stops I'm
21 going to ask you to repeat your full question.

22 MR. PRINGLE: Okay.

23 COMMISSIONER MacCALLUM: Okay.

24 BY MR. PRINGLE:

25 Q You've got four statements from complainants for



1 sexual assaults buried in those 95 statements?

2 A Yes, sir.

3 Q I shouldn't say buried, but they were in those 95
4 statements you received?

5 A Yeah.

6 Q And then you have scattered references in the
7 police reports to a pattern of sexual assaults
8 whereby the person that committed the (V3)-----,
9 (V1)-, (V2)----- matters could likely be the
10 person who committed the murder?

11 A I agree with that, sir.

12 Q It -- that information could have been provided to
13 you much clearer, couldn't it? Like, in the sense
14 that you could have received a report, a more
15 clear report advising you of the significance of
16 this information and the fact that the police had
17 followed that up is a very serious form of
18 investigation or matter to be investigated and yet
19 the references to it in the reports seem, you
20 know, a paragraph here and a paragraph there, it's
21 not something that you got as part of, you know, a
22 detailed memo.

23 A No, that's right, that would have been helpful.

24 The fashion I got it in was -- is as you described
25 it. It never did come over in the manner you've



1 just outlined, sir.

2 Q If you had -- but it's clear, if you had realized
3 the significance of that information, it was
4 there, but if you had realized the significance of
5 that information, it would have been passed on to
6 Mr. Tallis?

7 A That's right, aside entirely from what I did on my
8 own accord about it, it would have gone to him,
9 sir.

10 Q And in those lab reports and in some of Penkala's
11 reports, you can -- upon reflection, you can see
12 that they were actually testing the (V1)- and
13 (V2)----- garments to see if there was any
14 substance on there that was from an A secretor?

15 A That appears to be so.

16 Q And actually on the (V1)- clothing it came back as
17 having a substance that did have an A secretor?

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

19 Q And once again, if Mr. Tallis had been privy to
20 that information, just the (V1)- one alone,
21 that -- if he had been aware of that one and could
22 demonstrate that David Milgaard was not in
23 Saskatoon at the time of that event, that would
24 really put a hole in the prosecution's case?

25 A Yeah, I agree with you.



1 Q Okay. Now, there was a discussion yesterday
2 about, forget about the sexual assaults and other
3 sexual incidents --

4 A All right, sir.

5 Q -- if Mr. Tallis had access to the police reports,
6 which I understand was not the practice at that
7 time, but if he had, he could have done a much
8 better job in cross-examining various witnesses at
9 this trial would it not be fair to say?

10 A Yeah. You are speaking of the ones on my file,
11 sir, or at large?

12 Q Oh, at large.

13 A The ones on my file I would suggest would be
14 helpful to him if, and reading them carefully and
15 finding those things we've just been discussing.
16 If the -- what I would call the Gail Miller murder
17 file at the city police department would have, I
18 would think, dozens more reports which he
19 certainly could have looked at and unquestionably
20 found something in it I assume.

21 Q Yup. Now, I'm not just talking about -- we've
22 already -- we've talked about the other sexual
23 assaults.

24 A Yeah.

25 Q And that of course is in some of the reports, but



1 what I'm talking about is other information that
2 would have assisted him in cross-examining
3 witnesses or determining what strategy the defence
4 should take. If he had been privy to that
5 information, he would have had an easier time in
6 defending this case?

7 A I would agree with you, sir.

8 Q Yeah. For instance, one of the -- well, this case
9 that he was facing as of the start of the trial,
10 you've indicated that you did not think it was an
11 easy case to defend, you thought you had a strong
12 case?

13 A That's correct.

14 Q And let's face it, what is Tallis facing at that
15 point in time, he's facing Wilson; right?

16 A That's correct.

17 Q And Wilson is a young man who was a friend of the
18 accused who is giving evidence against him and
19 basically providing purported admissions that
20 Milgaard made, plus eye witness testimony?

21 A That's correct. He was one of the main witnesses.

22 Q And a problem with his evidence too from the
23 defence point of view is that there were certain
24 things that arguably at that point in time Wilson
25 was indicating in his testimony that he could not



1 have learned about unless he had actually been
2 there?

3 A Well, that's my recollection, Mr. Pringle, as
4 well, of how his evidence looked at that point.

5 Q Like, for instance, the purse in the garbage can?

6 A That's an example of that, sir.

7 Q And that piece of evidence was a problem for the
8 defence; right?

9 A Well, I certainly would think so.

10 Q And with respect to why Wilson would give false
11 testimony from the defence point of view if you
12 were trying to develop a theory as to why he would
13 give false testimony against his friend, the --
14 what do you come up with, what do you come up with
15 at that point, what would be your theory? Can you
16 think of it the other way?

17 A I couldn't come up with much I don't think, if
18 that's what you are asking me, sir.

19 Q The theory that's now coming up with is the fact
20 that the police basically suggested or manipulated
21 Wilson into giving this statement that was false?

22 A Uh-huh.

23 Q Now, back in 1969 would that be, you know, would
24 that be something that's easy to develop,
25 convincing a Saskatchewan jury that the Saskatoon



1 police are basically obstructing justice?

2 A No, that would be an uphill battle, sir. Just in
3 that very narrow definition it would be.

4 Q But if Mr. Tallis had received some of the police
5 reports, maybe he would have had a better shot of
6 doing that?

7 A Oh, I'm sure that's correct, sir.

8 Q Such as if he had received the document that
9 they've called the script document?

10 A Right.

11 Q Right?

12 A That's --

13 Q You've heard the use that Mr. Lockyer had made of
14 that yesterday, calling it sinister and everything
15 like that?

16 A Yes.

17 Q Mr. Tallis didn't have that document in '69 did
18 he?

19 A Not at all.

20 Q And he's trying to do his best to come up with
21 something to develop a reasonable doubt about
22 Wilson's evidence as to why Wilson would be
23 testifying in this fashion and he doesn't have the
24 script document which may start making people
25 think that maybe the police cajoled the story out



1 of Wilson?

2 A That's right, he didn't have the script document
3 because the way things worked and knowing
4 Mr. Tallis, if he got it, he would have had to get
5 it from me, from the prosecution file, and it
6 didn't exist on my file, sir.

7 Q And the script document, just for the record, is
8 006799.

9 A Uh-huh.

10 Q And with respect to -- there's a number of other
11 police reports, I'll just go through a few of them
12 that will demonstrate that if Tallis had received
13 these police reports it would have been helpful to
14 the defence in cross-examining witnesses and
15 raising reasonable doubts about their testimony?

16 A By all means.

17 Q The next one I would like to refer to is -- just
18 give me a second.

19 A Okay, that's fine, sir.

20 Q -- a document entitled 007028, this is a report of
21 Detective Ullrich.

22 A Oh, okay.

23 Q You remember this one?

24 A Yeah.

25 Q This involves statements that Cadrain made about



1 the bathtub and the checking out with
2 Schellenberg. Did Mr. Tallis ever receive this
3 document, Mr. Caldwell?

4 A I don't believe so, sir, and maybe I can simply
5 read a bit of it before I finish that, if you
6 don't mind.

7 Q Or did he receive the information contained
8 therein, that Cadrain's story was going to be
9 checked out in this regard?

10 A At the moment I have no reason to think he got
11 this one, Mr. Pringle, maybe someone can correct
12 me, but clearly it was on my file, my writing is
13 on the upper right-hand corner.

14 Q Okay.

15 A And this is the matter that it turns out in fact
16 there was a report made which I think has only
17 come to light in the Inquiry here, sir.

18 Q Right. And if we could turn to Detective Karst's
19 report of April 18th, '69, document number 009254,
20 this report, page 2, which is the next page, and
21 you've seen this paragraph before -- I can't do
22 the straight lines like Mr. Hodson.

23 A That paragraph starting although, sir, is that the
24 one?

25 Q Yes, that one.



1 A This is -- I think I was asked in a general way,
2 but this is an example, if you will, of one or
3 more of the investigators at this point feeling
4 that David Milgaard could not be connected with
5 the crime and based on, at that point, believing
6 Nichol John who was thought to be very convincing
7 with her story the way I read that, sir.

8 Q This is an opinion by one of the major
9 investigators in this case?

10 A That's right.

11 Q And although the opinion itself would not be
12 admissible, it certainly would have been helpful
13 for the defence to receive that information as to
14 the way she was being viewed at that point in
15 time?

16 A I would think so.

17 Q And then, if we go down and take a look at this
18 paragraph here, certainly the information
19 contained in that paragraph would have been
20 helpful in cross-examining Mr. Cadrain?

21 A Yeah, that's correct in my view, sir.

22 Q And, once again, Mr. Tallis would not have -- and
23 I should identify that paragraph for the record,
24 that's the paragraph that's on page 2 that starts
25 with:



1 "With regards to the above information
2 ...".

3 A Yeah, that's the one I'm looking at as well.

4 Q Okay. And that, as far as you know, Mr. Tallis
5 never received this document or that information?

6 A No, he, in my recollection or understanding, sir,
7 he would not have.

8 Q And then, if we go to the last paragraph in that
9 report, this is another example of where the
10 police -- where the police have found that Mr.
11 Cadrain's story had flaws in it?

12 A Umm --

13 Q The last paragraph on page 3, the last -- that's
14 009256. Next page, please, yup. This is the
15 paragraph that starts with:

16 "It is also known ...".

17 A Yeah. That was an interview with a witness which
18 his view, his information appeared to con --
19 contradict Albert's to the effect Albert was not
20 smoking those things on the night before the
21 murder, as I see it here.

22 Q And so there was, you know, there was evidence
23 there that would contradict Mr. Cadrain and also
24 could be used to effectively cross-examine him; is
25 that --



1 A I would certainly think so.

2 Q Okay. And then with respect to the summary that
3 Mr. Ullrich provided, 105605, --

4 A Oh, yeah, I see what you are -- is this, Mr.
5 Pringle, is this the approximate three-page
6 document?

7 Q Yes, it is.

8 A Okay, fine, yeah, that's fine.

9 Q It's the three-page document that I believe was
10 prepared prior to the preliminary hearing.

11 A I'm sure that's correct.

12 Q And in the -- there -- in the first page there,
13 the fifth paragraph, sixth paragraph, it says:

14 "They are alleged to have been looking
15 for Cadrain's address. This does not
16 seem altogether true as Milgaard is
17 reportedly to have been staying with
18 Cadrain at 334 - Ave. O south for
19 approx. 4 days during the fall of 1968."

20 A Uh-huh.

21 "This is approx. 2 blocks from where the
22 murder occurred."

23 There seems to be some questioning there, by the
24 police, of the Wilson and John statements?

25 A Yeah, that's right. In a small way I would agree



1 with you there, sir, in the sense of the address,
2 that presumably they would have known.

3 Q And then the next page, page 2, the first full
4 paragraph it states:

5 "John states she does not remember
6 clearly what occurred at this point but
7 seems to recall seeing Milgaard put a
8 ladies purse into a garbage can. The
9 purse was found in one of two garbage
10 cans at the rear of ...",
11 a certain address. Now it says there that she
12 "seems to recall"?

13 A It says that, yeah.

14 Q Do you know why he would have indicated that from
15 the reports you've saw?

16 A I can't say why. She may well have used the
17 terminology "I seem to" in her statement, Mr.
18 Pringle, but I don't know that.

19 Q And then the third, the fourth full paragraph on
20 that page:

21 "It is not clear exactly what occurred
22 ...",

23 and you can see here that, you know, the police
24 are not really sure that the Wilson and John
25 story or combined story, if you could call it



1 that, is what happened, they feel that something
2 else may have happened, they are -- that
3 Ms. Miller may have been in the car. Do you
4 think that, if Mr. Tallis had been provided with
5 that information, it certainly would have
6 assisted him in defending it just to realize the
7 police were unsure in that regard?

8 A Yeah, I would agree, that could be helpful to him.

9 Q And then we have -- and I'm not going to go
10 through all these police reports -- but the police
11 reports chronicle, to some extent, the development
12 of the statements that Mr. Wilson gave between May
13 22nd and May 24th where he -- which ultimately led
14 to his -- or made -- I believe his statements of
15 May 23rd and 24th, the development of that, first
16 of all the, you know, discussions in Regina,
17 discussions on the trip up from Regina to
18 Saskatoon, then taking him out to the scene and
19 things like that.

20 A Yeah.

21 Q If Mr. Tallis had all of that information, that
22 would have further assisted him in
23 cross-examining, when you can see that Wilson was
24 giving information by increment; is that correct?

25 A Yeah, he certainly was doing that, and I would



1 agree that that would have been useful to Mr.
2 Tallis.

3 Q And the same applies to the development of how
4 Ms. John ultimately gave a statement to the police
5 that same -- at that same time period. If you
6 look at the police statements there you can see
7 how she was taken out to the scene, how her
8 statement developed, you get some information that
9 could be used for cross-examination purposes; is
10 that correct?

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

12 Q If he had had access to those police reports?

13 A I'm -- I agree with you.

14 Q But really, but really another problem with the
15 lack of disclosure that Mr. Tallis received
16 concerning those two statements that came on May
17 23rd and May 24th is the lack of information too,
18 isn't there? And that was a big problem for you
19 too, in the sense that really there's not a
20 sufficient record that the police kept with
21 respect to how those statements were ultimately
22 taken, the, you know, the various developments
23 that occurred that led to those statements?

24 A The -- you -- one could say that, Mr. Pringle. I
25 suppose I'd recognize the, you know, difficulties



1 of getting on with whatever the job in question
2 was, but there was certainly -- I didn't get a
3 whole lot more than the statements, if you wish to
4 look at it that way, and it --

5 Q Well there's nothing, there's really no police
6 report that indicates, really, what happened to
7 Nichol John on May 23rd?

8 A I -- well that may well be the case, sir, I --

9 Q And we have this situation in this case where, you
10 know, she's -- we have this situation where they
11 are taken up to the Cavalier Hotel --

12 A Right.

13 Q -- into a room, and the room a listening device is
14 placed in, and we don't have a record of how --
15 what happened in that room when Wilson was in the
16 room, or John?

17 A That's right. If there's any tape or whatever
18 emitted or compiled there, it certainly never
19 surfaced, as I understand it.

20 Q And you've seen case after case now where, in
21 these kind of situations, the police video tape
22 the whole thing --

23 A I understand that's the --

24 Q -- or audio tape it?

25 A -- modern or current practice, sir.



1 Q And, if the defence had been able to see how those
2 statements developed, they would have had a much
3 better chance of breaking down these witnesses in
4 cross-examination?

5 A Yeah, I would think so, sir.

6 Q Like we have a, just a vacuum in all these
7 documents that we have, a complete vacuum with
8 respect to what happened when Mr. Roberts was
9 involved other than, basically, his testimony in
10 the Supreme Court?

11 A All right, sir, I follow your point on that.

12 Q And -- but Mr. Tallis, defending this case, he
13 talks to Roberts but there is no Q and A's, or
14 anything like that, that were compiled with
15 respect to the interviews that he conducted and
16 there is a -- really, the involvement with the
17 police is what you see with respect to the
18 development of statements by Nichol John and
19 Wilson, it's, you know, paragraphs in police
20 reports, there is no Q and A transcripts, there is
21 no audio tapes, there is no videotapes, it's very
22 selective information?

23 A Yeah. I under -- I agree with you, Mr. Pringle,
24 that that's how this thing evolved and that's, you
25 know, what, if you will, came out of it.



1 Q So, as far as attacking the statements that Wilson
2 and John made at that time, it was difficult in
3 the sense that a lot of the information the police
4 had did not go to the defence lawyer?

5 A Oh, the -- I believe that's so, sir.

6 Q Yeah. And is it not surprising that, if they went
7 to the trouble of putting a listening device in,
8 in that room to record or to at least listen to
9 the conversations that occurred in that hotel
10 room, would it not be surprising that there is no
11 written record of it?

12 A Yeah, I have seen other examples where those
13 things were carefully planned and nothing
14 whatsoever survived in terms of a tape, but there
15 should have been one and, to the best of my
16 knowledge, it did not survive for whatever reason,
17 sir.

18 Q In a murder case, in a very -- they would
19 ordinarily take a record, would you not?

20 A You mean a recording in the sense of that --

21 Q Well, yeah, --

22 A -- listening device?

23 Q -- get a, get some sort of record, you know, one
24 officer taking notes as it was going along, or
25 getting a transcript from a tape recording or



1 something?

2 A I would have thought so, and to my knowledge
3 nothing like that surfaced in -- about that
4 episode.

5 Q And certainly the defence didn't get anything like
6 that to try and cross-examine these witnesses?

7 A Yeah, I'm sure they didn't, because that would
8 have, in effect, come from me and I didn't have
9 it.

10 Q Okay. My Lord, this might be a convenient time
11 for me to stop, if it's okay with you.

12 COMMISSIONER MacCALLUM: Yes. 15 minutes,
13 please.

14 (*Adjourned at 10:28 a.m.*)

15 (*Reconvened at 10:50 a.m.*)

16 MR. ELSON: Mr. Commissioner, I wonder if I
17 might make a comment before Mr. Pringle continues
18 with his cross-examination.

19 In the course of his
20 cross-examination Mr. Pringle raised what I think
21 is a fairly important legal point for which I
22 don't believe any counsel have necessarily done
23 any research. I know after, Mr. Commissioner,
24 you made the comments about counsel doing legal
25 research with respect to a Section 9 issue under



1 the *Evidence Act*, I had raised with Commission
2 Counsel an issue regarding similar fact evidence.

3 Because Mr. Pringle had made
4 the point, and I think it's extremely important
5 in the context of this Inquiry that the similar
6 fact evidence, there are restrictions and there
7 indeed were restrictions in 1970 with respect to
8 the use by Crown counsel of similar fact evidence
9 in convicting an accused person, Mr. Pringle has
10 advanced the proposition in cross-examination
11 that that restriction was somewhat less if
12 defence counsel was seeking to use similar fact
13 evidence in order to exculpate an accused.

14 Now I've had informal
15 discussions with other counsel about this issue,
16 and indeed Mr. Wolch has pointed out that the
17 Supreme Court of Canada, in its reference in the
18 *Milgaard* case, did indicate that that was indeed
19 a possibility, but my recollection of the
20 decision was that that possibility was commented
21 upon without a particularly deep assessment of
22 the law then existing in 1970. And I'm of course
23 mindful, Mr. Commissioner, of your comments
24 respecting counsel doing research on Section 9, I
25 simply rise to inquire as to whether or not you



1 and Commission Counsel have given any thought to
2 a brief dealing with the use of similar fact
3 evidence by defence counsel?

4 Mr. Pringle has advanced a
5 proposition with which Mr. Caldwell agreed. With
6 the greatest of respect to both these eminent
7 gentlemen, I'm not entirely sure that the state
8 of the law in 1970, and certainly the state of
9 the law of evidence in 1970, would have permitted
10 Mr. Tallis, were he aware of the 1968 offences
11 then committed by somebody not known, that he
12 would have been able to use that evidence in
13 order to exculpate his client. And I think that
14 that's an interesting proposition, because it
15 becomes clear there is evidence as to what Mr.
16 Tallis did not have, what we don't know
17 necessarily is the state of the law and how it
18 would have operated if he had received what Mr.
19 Caldwell now says perhaps he should have
20 received.

21 COMMISSIONER MacCALLUM: Well, and here
22 let's be clear, we're not talking about internal
23 similar fact evidence, of which Mr. Pringle and I
24 have some mutual acquaintance, but -- he may not
25 remember, but --



1 MR. ELSON: That's correct.

2 COMMISSIONER MacCALLUM: -- this is
3 external. I don't see why we couldn't get a
4 brief together and look up some cases from the
5 era to be sure, but --

6 MR. HODSON: I think, Mr. Commissioner, I
7 can certainly have that done. We've only looked
8 at the point briefly, I know the point was raised
9 by Mr. Elson, and I think it's fair to say,
10 amongst the counsel in the room, there may not be
11 consensus as to what the status of the law was at
12 that time, comparing the test that the Court
13 would apply to admitting similar fact evidence by
14 the prosecutor compared to the test for defence
15 counsel to submit similar fact evidence to
16 indicate that someone else might have committed
17 the crime. I think that's the issue. And so we
18 will have -- we will review the law, prepare a
19 memorandum and cases for all counsel as soon as
20 possible, I think that's a fair request and we
21 will do that right away.

22 COMMISSIONER MacCALLUM: Now let's be clear
23 about one thing more. Would the issue arise out
24 of cross-examination of defence counsel where he
25 was only attempting to raise a reasonable doubt



1 or would it arise by way of defence evidence
2 being brought as part of its own case?

3 MR. HODSON: My understanding of the issue
4 is this question: Could Mr. Tallis have called
5 evidence at the trial to say "this crime is
6 similar to other crimes, and Mr. Milgaard did not
7 commit the other crimes, therefore jury conclude
8 a reasonable doubt in this case". And I think --
9 correct me if I'm wrong -- the issue is the
10 admissibility, where, when, under what
11 circumstances can defence counsel lead evidence
12 of other crimes and say they are connected to the
13 crime in question and then say "jury, conclude
14 that they are similar, that the same person
15 committed them, and since my client didn't do the
16 other ones he couldn't have done this one". And
17 so I think that's the issue about what sort --
18 what are the rules that would allow that to go
19 in.

20 In fairness, there may still be
21 a debate after we research the case law, but
22 certainly we will gather together whatever
23 materials we can to show the state of the law as
24 of January of 1970, and perhaps even afterwards
25 because that might be informative, and we can



1 provide that to counsel. Is that fair, Mr.
2 Elson, Mr. Pringle?

3 COMMISSIONER MacCALLUM: It may well be
4 that it wouldn't be characterized as similar fact
5 evidence at all within the meaning of the
6 understanding of that.

7 MR. HODSON: I think, actually, the term --
8 and I stand to be corrected -- I'm not sure that
9 it would be considered 'similar fact evidence', I
10 think it would be 'exculpatory evidence', and
11 what circumstances can a defence lead that type.
12 But certainly I understand the issue and we will
13 gather the law on that.

14 COMMISSIONER MacCALLUM: That would be
15 helpful, I think, to everybody. Thank you, Mr.
16 Hodson and Mr. Elson.

17 MR. PRINGLE: I think, Mr. Commissioner,
18 you are right, it may be the concept that similar
19 fact evidence is just viewed as being -- that
20 terminology is used when the Crown is trying to
21 lead it. And certainly there's another concept
22 here called 'innocence at stake' --

23 COMMISSIONER MacCALLUM: Yes.

24 MR. PRINGLE: -- where, for instance, the
25 defence are able to sometimes call evidence that



1 is subject to solicitor/client privilege when it
2 will exculpate an accused, and the rules of
3 evidence are relaxed because innocence is at
4 stake, and I would make the same argument here --

5 COMMISSIONER MacCALLUM: Yeah.

6 MR. PRINGLE: --- also.

7 COMMISSIONER MacCALLUM: Thank you.

8 BY MR. PRINGLE:

9 Q I'll just, Mr. Caldwell, just go through just a
10 few more police reports where -- that
11 demonstrate -- and I haven't, I'm not doing this
12 in a thorough fashion because it would take quite
13 a while, but just a few more that demonstrate
14 information that the police compiled or commented
15 upon that would have been helpful to the defence.

16 And the first report I would
17 like to look -- the next report I'd like to look
18 at is a report of Detective Karst dated May 25th,
19 '69, 009264. And in this report it talks about
20 bringing Mr. Wilson from Regina to Saskatoon and
21 the involvement that occurred while Wilson was in
22 Saskatoon with the police. And if you could take
23 a look at the next page, the bottom paragraph on
24 the next page, please, this paragraph here:

25 "Wilson pointed out the area ...",



1 Wilson was taken out to the scene and to try and
2 locate various locations relevant to his
3 statements. And it says here:

4 "Wilson pointed out the area of Avenue P
5 and Avenue M and N around 22nd St. West,
6 as an area which is similar to the
7 location where the girl was seen walking
8 on the street that early morning when
9 they approached her to ask directions,
10 however, he was unsure of the exact
11 block. Nor could he point out the exact
12 location where the car had become
13 stalled, where Milgaard had left the
14 vehicle to go for help."

15 And, if you go to the next page, it indicates in
16 the first full paragraph:

17 "On the morning of May 22nd, in company
18 with ...",

19 Inspector:

20 "... Short and ... Sgt. Olsysyn ..."

21 A I think that's 'Oleksyn'.

22 Q Oleksyn:

23 "... Wilson was again taken to various
24 parts of the City to ascertain if he
25 could point out the various areas where



1 they had been on the morning of Jan.
2 31st, however, he could add little to
3 the previous information other than when
4 they had been stuck the original time in
5 the vicinity of Ave. M or N that two men
6 in a vehicle described as a 1967-68
7 cream or yellow-colored Dodge or
8 Chrysler had come and assisted them in
9 pushing their vehicle out of the snow."

10 So you can see that he is taken out there twice
11 and cannot locate the location where he was
12 stuck, and yet you might recall at the trial, in
13 re-examination, you were able to get a location
14 out of him in re-examination; do you remember
15 that?

16 A I -- I am -- assume I did, sir. I don't recall
17 doing it but I'm sure you are right.

18 Q And certainly, if this information had been
19 provided to Mr. Tallis, he could certainly
20 effectively cross-examine, more effectively
21 cross-examine Wilson as to the fact that Wilson
22 really didn't have a clue where he got stuck --

23 A That's my --

24 Q -- or any specific knowledge of where he got
25 stuck?



1 A I would agree, sir.

2 Q And then police report 025176 dated May 29th,
3 1969. From here down, please. This is a report
4 of Sergeant Mackie, and you will see the part that
5 I've highlighted starting here, it says:

6 "Shortly after this I returned to the
7 Police Station where Nichole J was
8 interviewed in regard to the LSD trips
9 she had been on and nightmares she had
10 been having since this offence occurred.
11 At this time it appeared that Nichole
12 John had forgotten a great deal of what
13 had happened, possibly due to shock of
14 what she had witnessed."

15 Once again, that would have been helpful
16 information for the defence to have?

17 A I assume so, sir.

18 Q Would you not agree?

19 A Yes.

20 Q And the defence did not have that report; is that
21 fair to say?

22 A That's my understanding, sir.

23 Q And we also had -- also had been raised this whole
24 issue of Avenue N versus Avenue O.

25 A I know about that issue, sir.



1 Q And there were, there were some witnesses that
2 were interviewed that indicated that Ms. Miller
3 usually walked down is it -- and I keep getting
4 this mixed up -- she walked on Avenue O to the bus
5 stop; right?

6 A That would be my recollection.

7 Q And those were witness statements, first of all
8 006585 from Miss (V)----, Mr. Tallis was never
9 provided with that statement?

10 A I don't believe so, sir.

11 Q And the Betty Hundt statement, 006629, similar
12 type of evidence?

13 A I assume these are people from her residence --

14 Q Yes.

15 A -- who said she, yeah, did such and such a thing?
16 Mr. Pringle, I'm assuming that they weren't, and
17 I'm sure someone will correct me if I'm --

18 Q Okay.

19 A I mean I can't tell, just looking at this now,
20 whether it did go to him, is what I am trying to
21 say, but I assume it didn't.

22 Q And then the report of --

23 COMMISSIONER MacCALLUM: Were these
24 witnesses called, do you know? Were these
25 witnesses called?



1 A Sir, I'd have to look at the indictment to tell
2 you that.

3 COMMISSIONER MacCALLUM: They weren't
4 called?

5 BY MR. PRINGLE:

6 Q No, they weren't.

7 A That's fine, and that matches my memory of it.

8 Q Okay. And then, if we can look at the report of
9 Detective McCorriston, 002096, the seventh page of
10 that report, 07. I wonder if you could just go
11 one more page, please, to 07.

12 COMMISSIONER MacCALLUM: It would be 107?

13 BY MR. PRINGLE:

14 Q Oh I see, okay, we've got different numbers. Go
15 back, go back two pages please. Yeah, I can't
16 find the reference, it's somewhere in this report,
17 it's a reference to the evidence of Ms. Merriman;
18 do you remember that evidence?

19 A Yeah, Mrs. Merriman, the couple, I do in a word.

20 Q There it is right there. Thank you.

21 A Okay.

22 Q And that evidence there, about her waiting for a
23 taxi at her home, looking out, umm, looking out
24 onto the alley, as I understand it, she didn't see
25 any vehicle or anything of note there; do you know



1 whether that information was ever passed on to Mr.
2 Tallis?

3 A No. That came up recently in the Inquiry, sir. I
4 believe, in the first place, there was no witness
5 statement from that lady -- pardon me, I stand to
6 be corrected -- her husband evidently was -- had
7 exceedingly poor eyesight, and I -- I wouldn't
8 think that had been passed on to him because, in
9 effect, it's reduced to a paragraph in a police
10 report, Mr. Pringle, as I see it.

11 Q Certainly this report identifies her as somebody
12 that's watching out her front window, looking out,
13 and that information, that report, was not passed
14 on to Mr. Tallis?

15 A Not the police report, and I again believe there
16 was no witness statement, sir.

17 Q Okay. Now I'd like to talk about the, just
18 briefly about the preliminary inquiry and the
19 purpose of a preliminary inquiry.

20 A Very good.

21 Q As it appears, Mr. Caldwell, you like to call a
22 full preliminary inquiry, especially on a serious
23 case like a murder case?

24 A That's right, sir.

25 Q And that was your practice back in '69?



1 A It was.

2 Q '70?

3 A It was.

4 Q And one of the advantages of a preliminary inquiry
5 is both the Crown and the defence get an
6 opportunity to assess the Crown's evidence?

7 A That's my belief.

8 Q Is that fair to say?

9 A Yes, it is.

10 Q And it's very helpful for the defence to be able
11 to cross-examine the witnesses on one occasion
12 before the trial to get a feel for the witnesses
13 and also to explore certain avenues of
14 cross-examination that you may not ask at trial
15 because of one of the rules of cross-examination
16 that a lot of lawyers follow is that they don't
17 like to ask questions where they don't know the
18 answer; right?

19 A I agree, and it is very useful for the defence to
20 have a full prelim with those things in mind, sir.

21 Q And just due to the circumstances of the way this
22 case arose, and what I'm referring to is the late
23 discovery of the witnesses of Melnyk and
24 Lapchuk --

25 A Uh-huh.



1 Q -- would it be fair to say that Mr. Tallis was
2 facing the further difficulty here with respect to
3 these two witnesses that he didn't get a chance to
4 cross-examine them at a preliminary inquiry?

5 A That's quite right. We of course didn't know of
6 their existence until the night before the trial,
7 but that's quite correct, sir.

8 Q And it makes it more difficult to cross-examine
9 them when you haven't had that previous
10 opportunity to cross-examine them?

11 A It certainly does.

12 Q Now, there has been an issue raised about whether
13 an application should have been made for a change
14 of venue and with respect to this particular trial
15 there has been -- with respect to this particular
16 trial, what would have been your position if an
17 application for a change of venue had been
18 advanced?

19 A It would have been feasible. There were, I would
20 suspect, a lot of, if you will, legitimate reasons
21 to leave it in Saskatoon because of witnesses,
22 etcetera, etcetera. If the application was made
23 and succeeded, you would have to, you know, get it
24 to a city with, you know, presentable court
25 facilities, etcetera, and of course it's strictly



1 a Saskatchewan venture as you know, sir, you can't
2 go outside the province, my understanding of the
3 law at that time.

4 Q I put it to you, Mr. Caldwell, you would have
5 opposed the application?

6 A Truthfully, I think I would, Mr. Pringle, because
7 it would just raise very large logistic challenges
8 getting witnesses who were mainly Saskatoon people
9 to wherever it went to, so I think that's correct,
10 sir.

11 Q And were you aware at that point in time how often
12 that happened in Saskatchewan?

13 A Very seldom. There was the *Threinen* case, and I
14 believe it was after this one, in which --

15 Q It was after, yes.

16 A -- counsel spent something like a week, at the end
17 of which proposed moving it to Manitoba. Mr.
18 Justice Hughes, I believe it was, ruled that that
19 couldn't happen and the case went ahead in
20 Saskatchewan, but that was a very serious attempt
21 to move a serious case elsewhere, and in law -- I
22 wasn't involved, but we -- in effect, the courts
23 felt it couldn't be done, sir.

24 Q And the law is that you cannot obtain a change of
25 venue to a different province?



1 A That was always my understanding, sir.

2 Q And with respect to applying for a change of
3 venue, are you aware of what the law is in order
4 to obtain such an order?

5 A Mr. Pringle, I've never studied that. I know an
6 early case before I came back to Saskatoon, there
7 was an attempt to change a venue on a serious, a
8 case of some description, and they got overlays
9 showing which broadcasting stations covered where
10 and so on, but frankly, I don't know what the law
11 is on it, or was. Yeah, I'm sorry.

12 Q Okay. You would have to have grounds to do so
13 such as something pretty significant?

14 A Yeah, I would think so.

15 Q And your impression of the trial judge, as to
16 whether he would want to move this, or can you
17 comment on this, whether he would want to move
18 this case out of Saskatoon?

19 A Well, I would think for the reasons we've just
20 gone over, he would be reluctant to do that.
21 These sittings started -- as it happened in these
22 sittings, there was about two cases previous to
23 this one as I recall. I often made a practice of
24 setting my cases first because you avoided the
25 riot act being read by the trial judge who had



1 nothing to proceed with when he would come here
2 from Regina or something like that, so there was
3 no -- there would have to be, I would think,
4 substantial reasons, and I can't -- I would be
5 surprised if Chief Justice Bence had, you know,
6 readily agreed to that.

7 Q It would have to be more than the fact that the
8 crime itself was vicious and violent?

9 A I would think so, because clearly those things
10 happen elsewhere.

11 Q And they are routinely tried in the jurisdiction
12 in which they occur?

13 A That's where it starts, sir, for sure.

14 Q Now, with respect to just -- and with respect to
15 the issue of change of venue, there's -- you would
16 have no idea where the judge would order the venue
17 change? You could make a request, but it would be
18 up to the judge to decide what venue would be
19 taken?

20 A That would be my understanding, and with an eye
21 on, or to, you know, the court facilities, the
22 possible pool of jurors that may be there, he
23 might consult the sheriff in a case like that, but
24 there would be all kinds of factors I would think
25 that would weigh into it.



1 Q And you could end up, for instance, in a rural
2 area of Saskatchewan?

3 A Well, you could, but again, the difficulties with,
4 you know, hotels, restaurants, the sheer size of
5 the court building, there's some beautiful ones in
6 Saskatchewan in rural areas, or were, but those
7 were all things that I would think would work
8 against that, sir.

9 Q When I say rural, you know, smaller cities or, you
10 know, cities that have sort of a rural base to
11 them.

12 A Yeah. They would be good candidates for this for
13 sure.

14 Q There would be no guarantee, for instance, it
15 would go to Regina?

16 A I wouldn't think so. There would be a temptation
17 because of then and now Regina having adequate
18 court facilities, hotels, etcetera, would be my
19 answer, sir. There would be a temptation to go
20 there if it went anywhere because it would be much
21 easier to move it there, if you will.

22 Q But there may be considerations from the defence
23 that they don't want to go to Regina or to a rural
24 area; right?

25 A Absolutely.



1 Q Now, with respect to selecting jurors, both you
2 and Mr. Tallis selected a jury here. When I asked
3 you about Mr. Tallis' ability as counsel, I would
4 like to just get your thoughts as to whether you
5 think he would be effective in selecting a jury.

6 A I would think so because of his experience in the
7 law and possibly more so in general human
8 relations, sir, is how I would put it, because he
9 was a person who I think mixed daily with people
10 of all walks of life.

11 Q He was a people person?

12 A Oh, yeah, very much so.

13 Q And he grew up in a rural area himself didn't he?

14 A Yeah, at or about Borden, Saskatchewan, which is
15 just that, sir.

16 Q Now, I would just like to talk to you a little bit
17 about some of the events that happened before the
18 trial. These motel witnesses came forth?

19 A Right.

20 Q And they are coming right at the last, you know,
21 right at the last minute and you get their
22 statements, you pass the statements on to
23 Mr. Tallis and he interviewed Ute Frank didn't he?

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

25 Q And the Crown was looking for Deborah Hall; is



1 that fair to say?

2 A Yes, and she I believe was out of the province. I
3 think that's -- even was known shortly thereafter,
4 sir.

5 Q So at that point, I'll just go back, the case that
6 you had you've said is a strong case, you had
7 Wilson who was not retracting his testimony, you
8 had Cadrain who gave circumstantial evidence --

9 A Yes.

10 Q -- but supportive evidence, and then you had these
11 two motel witnesses, Lapchuk and Melnyk; right?

12 A That's right.

13 Q And then finally you had Nichol John who was a bit
14 of a crap shoot as to what was going to happen
15 there, but she wasn't going to hurt your case was
16 she?

17 A Well, I didn't think so, sir.

18 Q No. Now, from what you knew about the two motel
19 witnesses, what did Mr. Tallis have to work with
20 as far as cross-examining these witnesses, was
21 there some theory as to why they would give false
22 evidence?

23 A Well, all those four witnesses were, I'm sure, you
24 know, strangers to either Mr. Tallis and myself
25 the way this thing evolved.



1 Q Yeah.

2 A And the theory as to why one or more might give
3 false evidence, both of them, as I recall, had
4 something of criminal records. If I'm not wrong,
5 both of them had charges on the go in Regina.

6 COMMISSIONER MacCALLUM: Lapchuk and
7 Melnyk?

8 A Yes, sir, Mr. Commissioner. I think it was
9 advanced to me by Mr. Tallis that these, there's a
10 possibility there might be some favours done to
11 these fellows for what they testified in
12 Saskatoon. I didn't believe that was the case.
13 The file I think shows Arnold Pirogoff's phone
14 number, he would have been a Crown prosecutor in
15 Regina in those days, and I expect that I
16 consulted him to see whether the dates we would
17 want them in Saskatoon would conflict with their
18 Regina Court appearances simply to avoid, you
19 know, bench warrants or anything like that. It
20 didn't seem to be a difficulty and later on in the
21 case I phoned Murray Brown to check with him, the
22 suggestion that there had been some favours done
23 to these fellows, or would be, and he, you know,
24 indignantly refuted that case.

25 BY MR. PRINGLE:



1 Q So Mr. Tallis didn't have anything substantive to
2 indicate there was a deal in return for their
3 testimony?

4 A I never thought he did.

5 Q Nothing was uncovered in that regard?

6 A Oh, no, I don't think so, sir, I don't think it
7 existed, and certainly he -- I'm sure he would
8 have talked to me if he found something.

9 Q And these were friends of the accused who were
10 coming to Court, like, there was no indication of
11 animosity or that Milgaard had ripped them off in
12 a drug transaction --

13 A No.

14 Q -- where they wanted to get back at him, there was
15 nothing to indicate a motive as to why they would
16 give false testimony?

17 A No, there wasn't, and I -- when I interviewed
18 those two I stressed to them that I wanted them to
19 be, if you will, straight down the middle with
20 their evidence and if they happened to dislike the
21 guy, don't want them leaning against him; if they
22 happened to like him, I didn't want them, if you
23 will, favouring him, and I gave -- I know I've
24 said that before, but I did give them that
25 admonition, Mr. Pringle, when I interviewed them.



1 Q Yeah. So they were -- it wasn't an easy
2 cross-examination with respect to those two
3 witnesses?

4 A Well, I wouldn't have thought so for the reasons
5 you've mentioned. Mr. Tallis didn't have any
6 document indicating that they were lying or
7 anything of that description.

8 Q Or that they had a motive to sink Milgaard?

9 A It didn't -- it certainly didn't appear to be the
10 case.

11 Q And he didn't have a chance to cross-examine them
12 at a preliminary inquiry?

13 A No, that's quite right.

14 Q And with respect to Cadrain, we now know that he
15 had some mental health problems?

16 A Yeah.

17 Q But was there any knowledge at that time that he
18 had mental health problems?

19 A Not -- not in my view. I dealt with Albert on
20 several occasions and he was an uncomplicated
21 young man who seemed to understand what I was
22 talking to him about. I didn't see any change in
23 his situation as the case went on. I would of
24 course have had to be satisfied he was a fit
25 person to testify in the first place, and I was,



1 and the alleged -- the mental health problems, if
2 they existed, were, I believe, in point of time,
3 later than this, the trial, sir. I hope I'm right
4 in that.

5 Q When he -- when you saw him testify or when you
6 interviewed him, did he display any inappropriate
7 behaviour or did he seem sincere?

8 A No inappropriate behaviour. I was impressed by
9 the fact that on, and I believe it was the prelim,
10 he hitchhiked in from this farm he'd been working
11 at in North Battleford, or thereabouts, to be
12 absolutely sure to be here for Court when he was
13 supposed to be. I think that was the prelim, sir,
14 it may have been the trial, but there was nothing
15 in him to, you know, raise my concerns about
16 mental health or anything of that sort.

17 Q And with respect to John and Wilson, the, you
18 know -- now we see that the only, the most
19 effective thrust of cross-examination of
20 Mr. Tallis had all the information such as the
21 script document and all this other information and
22 all these pages that we have now when this case
23 was under microscope as compared to what he had
24 then, the only possible -- the best effective,
25 most effective form of cross-examination would be



1 to try to allege that the police manipulated these
2 witnesses into saying what they did?

3 A Well, that I would think would be all that would
4 be open, Mr. Pringle, at that time.

5 Q And that would be tough to do. Do you remember in
6 your final address to the jury where, and I'll
7 show you the page reference --

8 A Very good.

9 Q -- but Mr. Tallis had pointed out in
10 cross-examination that Nichol John had been in the
11 cells one night before her statement was provided.
12 Do you remember that?

13 A I do.

14 Q And he had brought that up in cross-examination
15 and you in your final address, and this is at,
16 I'll just get the page reference, this is from the
17 transcript of the trial, page reference -- well,
18 this is where it starts, either 020466, pages 29
19 to 30 of the address to the jury. In your
20 argument you refer to that, that attempt by
21 Mr. Tallis to suggest that, you know, the fact
22 that they kept her in the cell would taint her
23 evidence that she may be more inclined to come up
24 with something the next day after spending the
25 night in the cell, and you said at page 30 when



1 you were dealing with this, paragraphs 10 to 25:

2 "Now you will recall, I think I have
3 already mentioned another ... thing and
4 this is that Wilson said he deliberately
5 held back a lot of what he knew about
6 the murder when the policeman initially
7 saw him and only telling the truth story
8 fully for the first time on May 22nd or
9 23rd, and this is getting on towards
10 four months after the murder. I mention
11 this because I think you may agree with
12 me that the police did an excellent job
13 with the material they had to work with
14 and I don't think that you would be too
15 impressed, given all the circumstances,
16 by any representation this ... of this
17 poor girl being kept in the cells
18 overnight and that you should pay no
19 attention to what she told Mackie. I
20 don't think I need dwell on that."

21 A Yeah.

22 Q And I think what you are doing here is that --
23 correct me if I'm wrong, but your view at that
24 point in time is that the police had a good
25 reputation within Saskatoon?



1 A They certainly did, sir.

2 Q And it would be hard for a defence lawyer to
3 attack the integrity of the police, and that's an
4 example; is that fair to say?

5 A I believe that's a very accurate assessment of how
6 the city felt about the police department at that
7 point.

8 Q And you actually played that card in your argument
9 really, saying look, you know, I don't think you,
10 the jury, would be too impressed with, essentially
11 what you are saying is criticism of the police?

12 A Yes, and this of course is a situation, sir, where
13 Mr. Tallis followed me as opposed to preceding me
14 in the summation.

15 Q Yeah.

16 A And I'm not sure if the business of her staying in
17 the cell, if there was evidence called on that.
18 My impression is there was and that it was simply
19 a very practical way of, in fact, keeping her
20 where she could be found. She ended up, if I'm
21 not incorrect, sir, like, in a matron's office. I
22 hope I have that all correct.

23 Q Yeah. But a defence lawyer back in those days,
24 you could try, and you should if you had the
25 information available that indicated this, attack



1 the police for corrupting the process, but --

2 A Absolutely.

3 Q -- but it would be difficult in Saskatchewan at
4 that point in time to convince the jury that that,
5 that their police force would be like that; is
6 that not fair to say?

7 A That's right, and one wouldn't venture into that
8 unless he felt he had, you know, good facts to
9 support it would be my view.

10 Q Exactly. A defence lawyer could lose credibility
11 if they went out on a limb and start alleging that
12 and lose the ability to effectively argue before a
13 jury?

14 A Very quickly, sir.

15 Q Now -- I would like to move now to the trial
16 itself and during the trial there were some
17 evidentiary issues; for instance, I'll give you
18 one example, the issue of the driving pattern of
19 Mr. Milgaard leaving Saskatoon driving to Calgary,
20 and Mr. Tallis was effectively able to keep that
21 evidence, convince the trial judge to keep that
22 evidence out of the trial; right?

23 A I think that's correct. That was the, roughly
24 described, speed evidence, wasn't it --

25 Q Yeah.



1 A -- and reckless driving. I believe he had it
2 derailed in that way.

3 Q So he was effective in his arguments before the
4 judge?

5 A Well, yes, absolutely, and that was one point in
6 which he certainly succeeded, among others I would
7 assume.

8 Q And then both of you get to this 9(2) application
9 involving Nichol John and both of you provided the
10 judge in a sort of a landmark situation, you
11 provided the judge with the proper approach to be
12 taken on this application in the sense of the
13 procedural steps that should be followed?

14 A As the Court of Appeal appeared to agree with what
15 we did, sir, but I think that's correct.

16 Q You know, the argument that both of you provided
17 really was of high caliber in the sense that it
18 became the procedure that was followed later by
19 the highest, adopted by the highest Court in this
20 country and it is still the procedure that we have
21 in these cases, and both of you in your arguments
22 presented that approach to the judge?

23 A We did, among other things, or the interesting
24 thing is we both had the same view on where the
25 jury should be during the matter as you --



1 Q And the judge didn't follow what you recommended,
2 but the appeal courts did; is that fair to say?

3 A That's right, Mr. Pringle.

4 Q Now, I've got -- looking at that situation and,
5 you know, the dynamics of a criminal trial, I'm
6 going to put it to you that the fact that Nichol
7 John was recalcitrant or didn't come through with
8 the key evidence and said she didn't remember
9 after she admitted that she remembered a large
10 part of the statement before and a large part of
11 the statement after, that -- the fact that she did
12 that in some ways enhanced her evidence, the
13 impact of her evidence?

14 A In that --

15 Q In that it looked like that she was either a
16 friend of the accused trying to help him out or,
17 as you said, afraid of the accused and afraid to
18 come through because of fear of the accused.
19 Either way, it effectively -- was a situation
20 where it effectively damaged the defence's case;
21 is that fair to say?

22 A Yeah, you could look at it either of those ways,
23 Mr. Pringle, in my view.

24 Q And what also, you know, that we talked earlier
25 when I was asking you about your background and



1 Mr. Tallis' background, but what also was somewhat
2 unique about this case was the way the trial judge
3 himself became involved in the 9(2) application
4 through questioning of the witnesses?

5 A Yes, he did do that as we've seen.

6 Q And in your experience, I don't know how much
7 experience you've had with 9(2) applications, have
8 you seen a trial judge get so actively involved in
9 the questioning of the witness that is being
10 impugned as did in this case?

11 A Well, I had a few uses of the procedure after the
12 Milgaard case. In this instance, I think there
13 had, judges had to resist getting involved as best
14 they could and in this instance I think it's
15 arguable that Chief Justice Bence became alarmed,
16 if you will, about how Nichol John was going this
17 far and breaking into tears or didn't know this or
18 didn't know the other. He certainly did get
19 involved in that sense, Mr. Pringle. I don't know
20 if I'm following what you are asking, but he
21 certainly did, and there had to be -- I think
22 judges had to really try after this not to do
23 that, not based on this case or anything, but it
24 was to try and stay out of the procedure.

25 Q The -- sort of the back and forth between the



1 judge and the witness in this case was done in the
2 presence of the jury; right?

3 A That's correct, yeah.

4 Q And those comments back and forth reflected the
5 fact that the judge did not seem to believe the
6 witness when she said she couldn't remember this
7 and that?

8 A That's how I would take it, sir.

9 Q And it could very well have implied to the jury
10 that the truth was what was in the statement?

11 A It could have done that, sir.

12 Q And coming -- like, a counsel arguing it is one
13 thing, but a judge jumping in and saying that kind
14 of comment would have a lot more of an impact in
15 front of the jury?

16 A That would be my assumption, absolutely.

17 Q Now, with respect to that application, you did it
18 after you had examined the witness quite
19 thoroughly and you took a break. Did you know at
20 that point in time you were going to do the 9(2)
21 application or did you decide during the break
22 that you were going to do it?

23 A If it -- I know I was prepared to do it in, that
24 I've described previously in the hearing, because
25 we, Mr. Perras and I felt Nichol John might very



1 well, this might arise with her because she had
2 been an awkward witness, if you will, at the
3 prelim as I recall.

4 Q Right.

5 A So I would feel that the -- we had figured out
6 what we intended to do and probably at the break,
7 Mr. Pringle, decided that we would go ahead and do
8 it. I keep saying we, but I was up there and we
9 were, you know, putting our heads together on the
10 law, Mr. Perras and I.

11 Q Okay. If we could go to page 211295 of the
12 transcript of the trial, page 439 of the trial
13 transcript. Now, this is before you start the
14 9(2) application, you've examined her in chief
15 except for the 9(2).

16 A All right.

17 Q Now, does that comment that you made help refresh
18 your memory as to whether you knew at that point
19 whether you were going to go ahead with the 9(2)?

20 A There's one thing I tended to do, which was not to
21 close examination-in-chief until I checked and
22 made sure I hadn't missed any crucial item of
23 evidence. I can't tell just from this, Mr.
24 Pringle, looking at it.

25 Q Okay. Do you know whether Mr. Tallis knew that



1 you were going to do a 9(2) application?

2 A I don't know that he did in the sense that it
3 unfolded. I'm sure he would be aware that this
4 could be a possibility.

5 Q Okay. So initially you come back after this brief
6 adjournment and you advise the Court that you are
7 applying under the new subsection 9(2); right?

8 A Yes, sir.

9 Q And you are asking to cross-examine on a previous
10 inconsistent statement?

11 A That's right.

12 Q And you were not seeking a ruling at that point in
13 time that the witness was adverse or hostile?

14 A No, I had to go through that drill first in my
15 view, sir.

16 COMMISSIONER MacCALLUM: The drill of what?

17 A Of the 9(2), Mr. Commissioner.

18 COMMISSIONER MacCALLUM: Proving the
19 inconsistency?

20 A Yes, the procedure we ended up following.

21 BY MR. PRINGLE:

22 Q And when you do a nine -- if you get permission to
23 do a 9(2) application, you can just cross-examine
24 on the four corners of the statement, you cannot
25 cross-examine at large; right?



1 A That would be my understanding.

2 Q You can only cross-examine at large if you get an
3 order under 9(1) that the witness is adverse or
4 hostile?

5 A That's my understanding, sir.

6 Q Now, the argument takes place and the judge rules
7 that the witness will not be called upon to
8 testify in a *voir dire* in the absence of the jury
9 with respect to the taking of the statement which
10 now is the law; right?

11 A That's --

12 Q You now have the opportunity if you are the
13 defence or the Crown to get that witness to
14 testify in the absence of the jury to find out why
15 they are not going through with the statement that
16 they earlier provided?

17 A That's my understanding of how we ended up, sir,
18 with this case, in effect.

19 Q And if the defence is allowed that opportunity in
20 the absence of the jury, the defence could ask
21 questions that you may not want to ask before the
22 jury?

23 A I would agree with that.

24 Q You could explore things in the absence of the
25 jury with respect to why the witness is changing



1 or, in this case, you could explore whether the
2 police manipulated the witness into giving the
3 statement and you may not want to start doing that
4 in front of the jury in a very forthright and
5 aggressive fashion because you might lose the
6 credibility of the jury, but if you had had the
7 opportunity to do that in the absence of the jury
8 you might be able to build something up, but
9 Mr. Tallis didn't get that opportunity?

10 A No, that's right. I agree with what you said
11 about how things might or could go and he didn't
12 in this case get that.

13 Q And the irony is, as this case turned out, he
14 would have got that opportunity if this case had
15 come to trial after the Supreme Court had decided
16 this case?

17 A That's right, sir.

18 Q Now --

19 COMMISSIONER MacCALLUM: Just to be clear
20 on that question, Mr. Pringle, the Supreme Court
21 didn't so much address the problem specifically
22 as refuse leave to appeal; isn't that correct?

23 MR. PRINGLE: That's correct, yeah.

24 COMMISSIONER MacCALLUM: Yes.

25 MR. PRINGLE: You are right.



1 COMMISSIONER MacCALLUM: So the
2 Saskatchewan Court of Appeal was the one that
3 approved the procedure?

4 MR. PRINGLE: Yes.

5 COMMISSIONER MacCALLUM: Which became known
6 as the Milgaard ruling.

7 MR. PRINGLE: But it has been sort of a
8 seminal case ever since.

9 COMMISSIONER MacCALLUM: Oh, yes.

10 MR. PRINGLE: You are right,
11 Mr. Commissioner.

12 BY MR. PRINGLE:

13 Q Now, with respect to when the jury comes back, Mr.
14 Caldwell, if we could just take a look at certain
15 aspects of the transcript, and Mr. Hodson has gone
16 through this with you, we had the situation where
17 you start cross-examining the witness and you are
18 following the law, you are cross-examining on the
19 four corners of the statement because you've been
20 given permission to cross-examine on the
21 statement?

22 A Yes.

23 Q And then the jury is called back at page 211311,
24 211311, and you start to question the witness on
25 the statement, Mr. Caldwell; do you see that?



1 A Yes, I see that.

2 Q And the next page, which is page 464 of the
3 transcript, you are trying to get the witness to
4 admit the key pages, pages 3, 4, and 5, are true;
5 do you see that?

6 A I do.

7 Q And then you ask the question:

8 "Q What do you mean you don't know? You
9 signed them."

10 And on it goes. And then you say, near the end
11 of the page, Mr. -- you say:

12 "MR. CALDWELL: Now, My Lord, if Your
13 Lordship pleases, with that question I
14 am ending my cross-examination of this
15 witness and I'm next going to ask Your
16 Lordship for the ruling as to adversity.
17 I suppose, My Lord, ought this statement
18 she read just be marked for
19 identification?

20 THE COURT: Yes."

21 A I think, Mr. Pringle, that first admonition in
22 fact was from the Court. Could you scroll that
23 down again?

24 Q The -- oh, I'm sorry, yes.

25 A Yeah.



1 Q At page -- right after you say:

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

3 A I don't know."

4 And then the Court indicates:

5 "Q What do you mean you don't know? You
6 signed them."

7 That is, this is part of the commentary from the
8 judge that is questioning the witness in a fairly
9 significant fashion; is that right?

10 A That's right. And I didn't notice either, sir,
11 but the rest of this question-and-answer session,
12 until it mentions the Crown again, was Mr. --
13 Chief Justice Bence.

14 Q That's right. I'm glad you pointed that out.

15 A Yeah.

16 Q And then you intervened, and you indicate you are
17 ending your cross-examination, you want a ruling
18 for adversity. And you will see the Court starts
19 asking her questions again in front of the jury
20 for a full page and then the Court, without
21 hearing argument from counsel, declares the
22 witness to be hostile right in front of the jury;
23 do you see that?

24 A I think I'm a page behind, sir.

25 Q And, normally, wouldn't that --



1 A Oh, I see.

2 Q Wouldn't argument with respect to whether a
3 witness is hostile, or even indication that the
4 witness may be potentially hostile, wouldn't that
5 normally be done in the absence of a jury?

6 A It would, to the greatest extent you could arrange
7 it, because of the kind of reasons we've just been
8 going over, sir.

9 Q And wouldn't that be harmful to the, you know,
10 harmful to the defence in the situation that it
11 looks like the witness is hostile, that she is
12 being declared hostile in front of the jury, --

13 A Yeah.

14 Q -- therefore she is not coming through with the
15 goods, i.e. pages 3, 4, and 5?

16 A They could very well read that in or assume that's
17 the case, Mr. Pringle.

18 Q But have you ever seen a judge declare a witness
19 hostile in front of the jury?

20 A My recollection is that the adverse witness things
21 I had after this were largely done before judge
22 alone, some may have been before a jury, but I --
23 the procedure we went through here, of course,
24 wouldn't have been followed this way after, very
25 shortly after this case, when the Court of Appeal



1 judgement came out and did what it did to the
2 procedure, Mr. Pringle.

3 Q In any event, Mr. Tallis didn't appear to get a
4 chance to argue that issue, did he?

5 A I guess not.

6 Q And so that, once the witness is declared hostile,
7 you can cross-examine at large; is that fair to
8 say?

9 A That's my understanding, sir.

10 Q My Lord, this might be a good time to stop.

11 COMMISSIONER MacCALLUM: Thank you.

12 MR. PRINGLE: I was --

13 COMMISSIONER MacCALLUM: Thanks. 1:30,
14 please.

15 (*Adjourned at 11:46 a.m.*)

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

17 COMMISSIONER MacCALLUM: Apparently we are
18 honoured by the presence of some sons and one
19 daughter today, and in the program Bring Your
20 Sons to Work or some such thing, and so I am very
21 pleased to welcome you all. And Mr. Pringle, I
22 know, is pressed for time, so I can't invite you
23 to ask any questions or anything, but I would be
24 pleased to meet you afterwards, during our
25 adjournment if you would like, just see the clerk



1 and she will show you back.

2 MS. KNOX: Thank you.

3 BY MR. PRINGLE:

4 Q Mr. Caldwell, we had talked this morning to some
5 extent about information that the defence did not
6 receive and in a sig -- and, a lot of times,
7 information you did not receive.

8 There was one other topic I'd
9 like to raise with you in that vein, and that is
10 in murder cases is it not a fairly standard
11 practice of identification officers to do a
12 walk-through -- do you know what I mean by a
13 walk-through -- of a crime scene?

14 A I'm not sure, sir; would you explain that to me?

15 Q Okay. Well is it not a fairly standard practice
16 when a scene is being investigated, whether it be
17 a crime scene or something related to the crime,
18 the identification officers will go through it
19 fairly thoroughly, and nowadays with video tape
20 they will often video tape the whole scene, walk
21 through with a video camera and video it as they
22 go along, and then make notes of various things
23 they see?

24 A All right, sir. That's something, frankly, that I
25 wasn't aware of but I'm sure it's -- happens now.



1 Q Okay. But in this case there was no information
2 provided to you or to the defence as to whether
3 anybody else lived in the Cadrain house --

4 A Umm, --

5 Q -- other than the Cadrain family itself?

6 A No, that's correct, the Cadrain family was there
7 and --

8 Q For instance the Fishers living downstairs?

9 A Yeah, that proved to be the case, and that came to
10 my attention I don't know how much later, months
11 if not more.

12 Q And would that not be surprising in the sense
13 that, if it's suggested that Milgaard came there
14 and took off clothing at that residence, that a
15 thorough search of that residence would normally
16 take place and notes would be made as to who lived
17 there, particularly if there is a basement suite
18 there, things like that?

19 A I would think, in the best of all worlds, sir, it
20 would be. If the thing was properly realized, and
21 there was time and personnel, I presume that it
22 could have happened. I must say that I didn't see
23 things on that scale happen too often at that
24 time.

25 Q Okay. Now with respect to Wilson testifying, umm,



1 he was one of your major witnesses, and part of
2 his testimony was the fact that he was -- he --
3 Milgaard told him that he put the victim's purse
4 in a garbage can; do you remember that?

5 A Yeah, that's right.

6 Q And a significant part of your case would be how
7 did he know this, how did he know this
8 information?

9 A That being Mr. Wilson, I assume?

10 Q Wilson, yeah?

11 A Yeah, yes, I'm sure that's --

12 Q Yeah, if he hadn't been there?

13 A Yes.

14 Q And yet Mr. Tallis, with the very limited
15 information that he had available, was able to
16 extract some fairly good answers from Wilson on
17 cross-examination on that subject; do you remember
18 that?

19 A I would assume that he did, sir.

20 Q This is with very limited information.

21 A Uh-huh.

22 Q I'll just point you to the part that I am
23 referring to. Now if we could go to page 211184
24 of the transcript, which is page 328 of the
25 transcript of the trial, 211184. And you'll see



1 Mr. Tallis, the Court intervenes with a question,
2 and Mr. Tallis at the middle of the page is
3 exploring with this witness if this witness had
4 been receiving any information from the police
5 prior to making a statement. And you will see at
6 line 20:

7 "Q Now, were you shown the purse?

8 A Yes I was.

9 Q And then as I understand it when you
10 were out in this alley you were with
11 police officers?

12 A Yes I was.

13 Q And I believe you said you walked up -
14 you may have walked up a portion of the
15 alley?

16 A Yes we did

17 Q And you were shown where the body had
18 been found?

19 A Yes.

20 Q And was Nicky with you?

21 A No, she wasn't.

22 Q She wasn't; you were shown where the
23 body had been found and you were shown
24 where the purse had been found?

25 A Yes.



1 Q You were shown a trash can where the
2 purse had been found?

3 A Yes."

4 Now that's pretty remarkable cross-examination
5 considering the information he had available;
6 isn't it?

7 A It is, assuming, sir, that he had virtually none
8 of that available to him as I understand it.

9 Q And Wilson later sort of seems to back off a bit
10 on that, but to try and do your, the best for your
11 client and be able to sort of tamper the effect
12 that that piece of evidence had with that getting
13 that admission from Wilson was, was something that
14 tarnished your case to some extent; is that fair
15 to say?

16 A Yeah, it would, sir.

17 Q Okay. Now with respect to Nichol John, we had
18 talked about the 9(2) application, and you, when
19 you are conducting this application you are
20 following the law as best you know it, and
21 following the rulings of the judge?

22 A That's right.

23 Q And in your final address, Mr. Caldwell, you
24 indicated that, if she didn't adopt parts of that
25 statement, then you -- she would have to follow



1 the judge's instructions in that regard?

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

3 Q But one of the problems with this whole process is
4 that once that statement is put before the jury,
5 there is a problem in the sense that the jury
6 finds out about it, and even though they are being
7 instructed not to consider it, it's there, and
8 some of the members of the jury may very well
9 consider it even though they have received sort of
10 this admonition not to; is that fair to say?

11 A Yeah, I would agree with that, sir, that quite
12 likely would happen to some of them.

13 Q You, I feel constrained to ask you about this,
14 there is a letter that you wrote to Inspector
15 Roberts after the trial?

16 A Oh yes.

17 Q This is 006864, and I'd just like to ask you about
18 the third paragraph in this letter, of what you
19 were trying to convey to Inspector Roberts in the
20 last couple of sentences in that paragraph.

21 A All right, sir. The, as the:

22 "... on conclusion of this
23 cross-examination, the Chief Justice
24 ruled her hostile, whereupon I
25 cross-examined her in the presence of



1 the jury on the statement she gave to
2 Det/Sgt. Mackie after your interview
3 with Ron Wilson and herself in May of
4 1969. This brought to the attention of
5 the jury the fact that she had, at one
6 time, given a statement indicating that
7 she had seen the actual attack on the
8 girl by Milgaard."

9 is how it reads, sir.

10 Q Yeah. And just what were you trying to convey to
11 him with that last sentence?

12 A Well I was attempting to let him know how the
13 application had gone, and I -- I guess it's fair
14 to say I was not attempting to emphasize that it
15 had been brought to the attention of the jury, the
16 fact that she had given a statement, etcetera.
17 The way it reads, one could very well take it that
18 way, Mr. Pringle, I -- and I think, in some of the
19 earlier cross-examination, I more or less realized
20 that.

21 Q Okay.

22 COMMISSIONER MacCALLUM: So what is, to
23 answer Mr. Pringle's question, what exactly were
24 you trying to get at?

25 A Well I was attempting simply, Mr. Commissioner, to



1 tell him how the 9(2) had gone, but the language I
2 fell into here said "brought to the attention of
3 the jury the fact", etcetera, whereas, all things
4 being equal, that shouldn't have been brought to
5 their attention but in the way our application
6 went it was, sir.

7 COMMISSIONER MacCALLUM: Oh, okay.

8 BY MR. PRINGLE:

9 Q Okay. And I had asked you before lunch about the
10 judge finding the witness hostile in front of the
11 jury. Just for those that aren't involved in the
12 justice system, generally rulings with respect to
13 evidentiary issues are made in the absence of a
14 jury during a jury trial; is that fair to say?

15 A Right, correct.

16 Q And in this type of situation, where a wit --
17 where a judge declares a witness to be hostile,
18 just looking at it from a future point of view as
19 to what type of practice you would recommend being
20 followed, would you not agree with me that
21 practice would be better for a judge to make that
22 ruling in the absence of a jury so that the jury
23 does not get affected by the opinion of the judge
24 that the witness is hostile?

25 A I would agree, sir.



1 Q The reason the judge is making that finding is of
2 no relevance to the jury, really, in other than
3 the sense that it allows you to cross-examine at
4 large. It's not something that will assist the
5 jury in their fact-finding, the fact that the
6 judge forms that opinion, it just allows a wider
7 form of cross-examination by yourself?

8 A I would agree, sir.

9 Q And I know that there's different practices by
10 courts, but in a 9(2) situation where a witness
11 is -- like in this case -- is indicating they
12 cannot remember, would you recommend, from your
13 experience, that judges sort of try to stay away
14 from questioning the witness themselves unless
15 some clarification is required, rather than
16 getting into a question -- form of questioning
17 that involves the credibility of the witness?

18 A I would, sir. And that I'm, I believe is
19 sometimes difficult to do, especially you have a
20 witness who the judge perceives as, you know,
21 being deliberately difficult. But, all things
22 being equal, I'm sure the judges would prefer to
23 stay out of it, and presumably counsel would as
24 well.

25 Q It would be better a role for counsel, because



1 counsel can cross-examine the witness, but when a
2 judge starts doing it in the form of leading
3 questions or commentary, the jury could be
4 affected by the judge, whereas they are always
5 instructed to disregard opinions or comments that
6 lawyers make --

7 A Uh-huh.

8 Q -- in the trial; right?

9 A That's right. And the fact that the judge may do
10 this, of course all things being equal, carries
11 more weight than counsel. Counsel can still
12 attempt to debate it, but as you know, sir, that
13 could be a sort of an unrewarding pursuit, I
14 think.

15 Q And I should be fair; the judges also generally
16 instruct the jury, and I believe this judge did
17 too, that they should disregard their own opinions
18 on factual matters also?

19 A Yeah.

20 Q But from a practical point of view, if a judge
21 starts expressing an opinion, it would have more
22 weight than if counsel did during the course of a
23 jury trial?

24 A That would be my view, Mr. Pringle.

25 Q Okay. Now, with respect to the questioning by --



1 let's put it this way, you didn't know exactly
2 what Nichol John was going to admit or what
3 exactly her testimony was going to be at the time
4 of trial; is that fair to say?

5 A That's correct, sir.

6 Q And she admitted a fair amount except for about
7 three pages of a 12 page statement; right?

8 A That's right.

9 Q And so would it be fair to say that you didn't
10 have any idea how far she would go and then we've
11 got the added situation where the judge gets
12 involved in the questioning, it became sort of an
13 impromptu situation as to how to handle her
14 evidence?

15 A That's -- I agree with that, sir.

16 Q And so the defence, after all this happens, has to
17 cross-examine her; is that fair to say?

18 A That's right.

19 Q And the way -- I put it to you the way her
20 evidence came in, which would be with the judge
21 being skeptical of her credibility, even though
22 the jury is going to be told to disregard anything
23 that she didn't adopt, it certainly -- the jury
24 would be thinking that she's holding back either
25 because she's scared of David or because she's



1 remaining friendly with him?

2 A That -- those are good possibilities, if not
3 likelihood, sir.

4 Q So -- but the defence has got, when the defence
5 starts cross-examining, they know they are going
6 to get an instruction from the judge to disregard
7 anything that she doesn't adopt?

8 A That's what should and would happen.

9 Q And the defence would not want to lose that
10 instruction would they?

11 A No, no. It would be keeping the thing balanced
12 and fair presumably.

13 Q If the defence starts weighting in here with that
14 second statement and starts cross-examining
15 extensively on it, have you seen judges that mark
16 those statements as exhibits?

17 A Well, I think they mark them simply so they will
18 know which document everyone was looking at. This
19 happened to this exhibit I believe. I seem to
20 recall that marking them was not uncommon and the
21 question after that became what use you made of
22 them. I would expect the judge would be very
23 careful in saying what use if any the jury could
24 make of it.

25 COMMISSIONER MacCALLUM: You are referring



1 to the March 11th statement? You began --

2 MR. PRINGLE: No, I was referring actually
3 to the May --

4 COMMISSIONER MacCALLUM: 23rd?

5 MR. PRINGLE: 24th statement, sir.

6 COMMISSIONER MacCALLUM: So the defence
7 started weighting in on that statement; is that
8 what you mean?

9 MR. PRINGLE: Yeah, weighting in on that
10 statement.

11 COMMISSIONER MacCALLUM: Uh-huh.

12 BY MR. PRINGLE:

13 Q For instance, if -- so the way this trial was
14 working out, there was no indication -- you know,
15 Miss John wasn't prepared to concede that she saw
16 anything in the alley, the stabbing or anything
17 like that?

18 A That's right.

19 Q And yet the defence has contradictory evidence of
20 what she saw in the form of the autopsy report;
21 right?

22 A I'm -- yes, that's correct.

23 Q Like, the way that, you know, the clothing was
24 assembled and stuff like that?

25 A I would --



1 Q It sort of contradicted her version as to what
2 happened?

3 A I would think so, sir.

4 Q But the way this thing, the way the situation is
5 left after your examination-in-chief, the judge is
6 going to instruct the jury to disregard that
7 evidence?

8 A That being my -- which evidence, sir?

9 Q The evidence of what she said in her statement
10 about what she saw, what she did not adopt at the
11 trial.

12 A Okay, yeah, I think he would have to do that, and
13 do that.

14 Q So would it not be fair to say that, you know, a
15 lawyer making a decision as to what to do here
16 would leave that alone and accept the judge's
17 instruction on the charge rather than trying to
18 establish that she actually said what she said on
19 the May 24th statement?

20 A You are thinking of defence counsel or --

21 Q Yes, defence counsel.

22 A I think it would be often advisable to leave it
23 alone, not try to get into it for fear of, you
24 know -- disastrous results would be the way I
25 would put it, sir.



1 Q And with these recalcitrant witnesses, a lot of
2 times where it's, you know, the jury could be
3 thinking that the defence got to the witness or
4 that it's a friend of the witness, if the defence
5 lawyer starts cross-examining and gets a whole
6 bunch of yes answers, that doesn't help a lot
7 either does it?

8 A I would think not.

9 Q Because it looks like the witness is just going
10 along with anything the defence wants?

11 A That's how that would look.

12 Q So it's complicated how you cross-examine in this
13 type of situation isn't it, there's a lot of land
14 mines?

15 A There sure are, and how, and including in that if,
16 Mr. Pringle, I would say, if you do, in other
17 words, as well as how you do. In other words,
18 ordinarily you would do it, but you have to make
19 that decision first, and if you do cross-examine,
20 there's all kinds of possible results that might
21 not be favourable to you.

22 Q Right. And this witness backing off on her
23 statement, her backing off on the statement, it
24 looks, especially with the way the judge addressed
25 it, it looks like she doesn't want -- you know, a



1 jury could very well have concluded she doesn't
2 want to come through for the Crown for one of the
3 reasons I expressed?

4 A That would be certainly open to them, sir.

5 Q And the fact that she had said in an early
6 statement that didn't implicate the accused, do
7 you think that's going to help a lot if you get
8 into that when the jury is of that mind?

9 A Well, I wouldn't think so. I think if they heard
10 the second statement, the fact she had given an
11 earlier one not implicating the accused might be
12 discounted in favour of the second one, if you
13 will.

14 Q You said earlier in your testimony that these, a
15 lot of these people give their statements
16 incrementally against an accused, they try to
17 protect the accused initially and eventually after
18 the police spend a lot of time with them they
19 eventually come through with it?

20 A I think that's been known to happen, sir, in some
21 cases, without a doubt.

22 Q Now I would like to ask you about some of your
23 observations over the years watching trials from
24 the prosecutorial, or from the standpoint of being
25 a judge. Would you agree with this statement,



1 that you have, through the years, Mr. Caldwell,
2 seen many cases lost because the accused did give
3 evidence, they get up and they actually improve
4 the Crown's case by getting up and giving
5 evidence?

6 A I have seen many of those, sir.

7 Q And, you know, prosecutors, you know, see
8 situations where maybe there would be a reasonable
9 doubt, but after the accused gets up and gives
10 evidence it's -- the evidence is hurt in
11 cross-examination where admissions come out that
12 actually improve the Crown's case or at least lead
13 to a conviction?

14 A That certainly happens, sir, on occasions, no
15 doubt about it in my opinion.

16 Q And is it fair to say that from what you've seen
17 of the criminal justice system, it's often a
18 difficult decision as to whether the accused
19 should take the stand in cases such as this?

20 A I believe that's right. There's one school of
21 thought, if you will, that some lawyers tend to
22 put the accused on regardless of the consequences
23 on the footing if he didn't do it, why didn't he
24 say so. The other side of that, Mr. Pringle,
25 which I think is very risky, is the one we've been



1 talking about where you put, let's say, an accused
2 on the stand to testify and actually complete the
3 Crown's case because of the way his evidence comes
4 out in chief and in cross-examination.

5 Q For instance, the accused person could sort of
6 give their evidence in a cavalier fashion?

7 A Yeah.

8 Q Or they could present themselves not in a likable
9 fashion to the jury?

10 A Absolutely.

11 Q Or they could lie about smaller parts of their
12 testimony?

13 A Those would be three things that would, you know,
14 trigger resentment, all things being equal.

15 Q Now, in speaking now about this case, were you
16 ready to cross-examine the accused in this matter?

17 A Well, I can't say at this point whether I was. I
18 thought there were some reasons why it was wise
19 that he didn't testify, and in fact he didn't,
20 there was no defence evidence called, and I think,
21 Mr. Pringle, that I was relieved, as a matter of
22 fact, that he didn't because I knew exactly how
23 far the case was going. Clearly he could have and
24 there could have been other defence witnesses, but
25 I knew it concluded at that point after Mr. Tallis



1 also indicated no witnesses, whatever.

2 Q But I put it to you that if he had testified, you
3 would have been ready to cross-examine him
4 vigorously; is that fair to say?

5 A That's right. I didn't mean to -- that's right, I
6 would have been prepared to and carried that
7 through to the best of my abilities.

8 Q And as far as Mr. Tallis advising him whether to
9 testify or not, is there any doubt in your mind
10 that Mr. Tallis would have the best interests of
11 Mr. Milgaard at heart in giving him that advice?

12 A No doubt at all because of his experience that
13 we've spoken of before and his knowledge of these
14 trials and of human nature in general terms, I'm
15 sure he would have given him whatever Mr. Tallis
16 felt was the preferable and advisable advice.

17 Q Have you ever seen young witnesses, like David
18 Milgaard would have been, inadvertently put their
19 character in issue by giving their evidence,
20 saying things like I'm not that type of person
21 or -- you know, despite advice from counsel not to
22 get into those areas?

23 A Yes, that's very easily done by simply asking,
24 making one wrong assertion, the other side can
25 argue his character is in issue, and that opens up



1 a whole field of cross-examination.

2 Q And you had prepared yourself with psychiatric
3 information and things like that?

4 A That's correct, sir.

5 Q Now, both you and Mr. Tallis addressed the jury.
6 I find it interesting, Mr. Caldwell, that both you
7 and he in your marks take up approximately 50
8 pages of transcript.

9 A I --

10 Q Did you notice that?

11 A No, I didn't, but I'm pleased to learn it.

12 Q When you are addressing a jury, I mean, there's
13 different schools of thought, but is there not one
14 school of thought you don't want to talk too long
15 or you'll lose them?

16 A I'm sure that that is absolutely right, sir.

17 Q And you can't make every argument when you are
18 making your final argument; right?

19 A No, I think that --

20 Q You've got to hone in on what you feel is
21 important, give the arguments and hope that the
22 jury will consider some of the other aspects of
23 the case?

24 A That's right, and if you yield to the other
25 temptation, it will lose them based on sheer time



1 would be my -- time of your address would be my
2 fear.

3 Q So it looks like you and Mr. Tallis spent roughly
4 the same amount of time in addressing the jury?

5 A I expect that, sir.

6 Q Neither of you probably wanted to go too long?

7 A No, I would hope not to carry on to the point
8 where people are becoming resentful of listening.

9 Q And one part of your argument, if we could go to
10 page 020490 which is -- yes, that's what I was
11 looking for. You talk about Wilson and why the
12 jury should believe him and around the middle
13 there I think you say:

14 "But briefly, I suggest that the frank
15 admission of all the convictions that my
16 learned friend asked him about, indeed,
17 supports his credibility rather than
18 detracting from it since he told the
19 truth when asked about the
20 convictions --"

21 You know, thinking about that comment now, I know
22 this is made in the heat of the trial, but do you
23 really, do you feel that that supported his
24 credibility?

25 A I do, sir, in the sense that once, if he indeed



1 has the criminal record and if it comes out,
2 number 1, by admitting it he's, (a), being
3 truthful, and it supports his credibility in the
4 sense of yes, the guy admitted all those things,
5 we know they happened. Now, the other and wrong
6 side of that is if he denies them and it could
7 very rapidly be proved they exist, which of course
8 would tend to destroy his credibility, sir, so
9 that was a position I used to take at that time
10 and I thought that it made sense.

11 Q Okay. And you pointed out to the jury with
12 respect to Wilson's evidence that he was
13 restrained, he was believable because he was
14 restrained, you know, he wasn't saying he saw the
15 stabbing, he was using words like -- I can't
16 remember the exact words, "I got her" -- I'll see
17 if I can find the portion, sir.

18 A Okay.

19 Q I thought I had that portion of your argument, but
20 do you remember Wilson's evidence that he
21 basically quoted Milgaard as saying "I fixed her"
22 or something like that when he got back to the
23 car?

24 A Yeah, or "I got her".

25 Q "I got her"?



1 A One or the other.

2 Q And then when he's talking about the admission
3 made in Calgary, he's using kind of indirect
4 language also?

5 A Yes. He clearly -- that was about as unvarnished
6 a statement as he could make, "I fixed her" or "I
7 got her," assuming, as I did, that Wilson was
8 truthful. He didn't expand on those with things
9 that evidently --

10 Q It made it tougher to cross-examine him in the
11 sense that he was restrained in what he was
12 saying?

13 A Well, that's --

14 Q You pointed that out to the jury in the final
15 address.

16 A The more one might expand, Mr. Pringle, I think
17 the more opportunity it gives any cross-examiner
18 to say didn't you get that wrong, if you will.

19 Q We have it now on the screen.

20 A Okay.

21 Q At page 020490.

22 A I see that, sir.

23 Q And your comment was if he was out to get his
24 friend Milgaard, I certainly would think he could
25 have done a more workmanlike job of that in his



1 testimony. That was, you know, the way that
2 Wilson's evidence came out, that was a powerful
3 argument that you made?

4 A Well, I thought it was genuine and appropriate
5 there, sir.

6 Q Yeah. Well, that's the way the evidence did come
7 out, Mr. Caldwell.

8 A Yeah.

9 Q Now, with respect to Justice Tallis, his argument
10 will speak for itself, but I would like to just
11 ask you about something that happened after the
12 judge charged the jury, and that is the judge gave
13 a fairly good charge to the jury didn't he?

14 A I thought, Mr. Pringle, that it was even handed
15 and not, you know, excessively long or
16 complicated.

17 Q Yeah. And it was a charge where it was difficult,
18 like, you didn't have any -- like, maybe we should
19 just talk about the practice of lawyers when, at
20 the end of a charge of a jury, lawyers are invited
21 to make comments about the charge to the jury, any
22 criticisms in an attempt to get the judge to
23 recharge the jury, and one of the things that is
24 going through a lawyer's mind at that point is
25 they don't want to agree that the charge is



1 perfect because that could be -- if the verdict
2 goes against that particular side, it could make
3 it tougher to argue an appeal if you say that the
4 charge was a good one; right?

5 A That's a very valid point which I'm glad you
6 mentioned that because it's one of the things you
7 would have to consider if you decide not to
8 suggest any alterations, you might be faced with
9 that in the Court of Appeal.

10 Q And you, you know, I'm sure you carefully listened
11 to this charge, you did not find any errors from
12 the Crown's point of view and you so indicated to
13 Chief Justice Bence?

14 A That's right, sir, I wasn't -- I didn't find any
15 errors, didn't wish to get up and suggest
16 something for the sake of hearing my own voice,
17 and I believe at the end Mr. Tallis after, I'm
18 sure you will cover this, but after what he did, I
19 also did not ask for any changes.

20 Q No, you didn't.

21 A No.

22 Q You did not disagree with Mr. Tallis. If we could
23 go to 212112, and you'll note here that when it
24 comes to Mr. Tallis' turn to comment on the
25 charge, he comes -- he's able, right after this



1 charge, to come up with a litany of matters that
2 he wanted the judge to charge upon, that if he's
3 successful in convincing the judge to do that
4 would get more of the defence argument before the
5 jury and it would come not from the defence
6 counsel, but from the judge; right?

7 A That's a very good way of looking at it, sir.

8 Q And he was able to convince the trial judge to put
9 those matters to the jury that he suggested when
10 he's giving this request for a recharge and he was
11 able to convince the judge to do that and the
12 judge then put those matters to the jury and that
13 would be something that would be favourable to the
14 defence; would it not?

15 A Oh certainly, certainly, because the judge put
16 credit in what Mr. Tallis suggested and went ahead
17 and added those various recommendations or -- to
18 his original charge which must clearly be in the
19 favour of the defence.

20 Q Yeah. So the last words that this jury hears when
21 they go out is points in favour of the accused,
22 and not just one, but a few --

23 A Yes.

24 Q -- points in favour of the accused that are put to
25 them by the judge rather than defence counsel.



1 A That's right, sir, and that should be helpful to
2 the defence by any measure I would say.

3 Q That was a good piece of barrister work wasn't it?

4 A It was, and it's also impressive that he could, if
5 you will, not necessarily compile, but restate
6 those three or four or five things in very short
7 order the way he did.

8 Q And the judge in the charge to the jury did a lot
9 of the standard instructions, one important one
10 was to disregard any publicity that may have
11 emanated in this matter?

12 A Yes.

13 Q Now, looking back at this trial and, you know, a
14 lot of people look back at this trial with the
15 hindsight, in hindsight and sort of take an
16 armchair position, but looking back at it, you
17 know, you are the best person to see how it
18 unfolded at the time, you were there. Did you
19 think that Justice Tallis did a good job of
20 defending David Milgaard?

21 A Absolutely, sir. He, first of all, undertook the
22 case in -- you know, at all, which was a, you
23 know, was a very good victory, if you will, for
24 Mr. Milgaard, in that Mr. Tallis took the case on,
25 stuck with it, made all the, more than one would



1 ordinarily expect requests for disclosure, copies
2 of statements, all the things we've essentially
3 been through today, ran the prelim himself in
4 person as defence counsel, ran the trial himself,
5 kept, you know, kept a very good relationship with
6 the Crown as I would have expected, and as he did,
7 and I can't -- I mean, I just -- I don't think he
8 could have been a better choice at that time, sir,
9 and I don't feel he could have performed better in
10 the fairly, I would say, tough task he was
11 assigned in this trial, even though we know much
12 more now than we do then. It was a very serious
13 and, you know, challenging matter from the defence
14 point of view.

15 Q Yeah. And, you know, you talked about his
16 relationship with you, Mr. Caldwell. Would it be
17 fair -- I think you've already alluded to this,
18 but would it be fair to say that, you know,
19 considering the practice at the time with respect
20 to disclosure, he probably received more
21 disclosure, as limited as he received, than what a
22 lot of counsel would have received?

23 A Yes, he did, for one reason, that he knew it
24 existed, he knew about *Dallison vs. Caffery*, wrote
25 me, asked me to do certain extra things, which I



1 did, certainly more than I would be used to at
2 that time essentially almost from anyone. He
3 certainly covered, if you will, every base, Mr.
4 Pringle, that I could see in any event.

5 Q Did you ever see any sign that he was not working
6 hard on this case or was not trying his hardest to
7 obtain the acquittal of Mr. Milgaard?

8 A No, that's -- he customarily worked, you know,
9 very full and long days into the evenings,
10 weekends, whatever the job took, and in no way did
11 that diminish, you know, his vigour, etcetera, to
12 come to Court or his energy in dealing with the
13 Crown, hey, I need this document or that letter,
14 so there was nothing resembling that whatsoever.

15 Q And you talked about the difficult task he had.
16 If we could just go over some of the difficulties,
17 he didn't have the disclosure with respect to the
18 sexual assaults and he couldn't work with that?

19 A That's, as we now know it, is right, sir.

20 Q He didn't have the police reports which would have
21 been helpful in cross-examining various witnesses
22 and try to develop reasons as to why John and
23 Wilson were changing their stories?

24 A That's correct as well.

25 Q And he was faced with the situation that there



1 were four of the accused's friends or people that
2 he was associated with who were coming forward and
3 saying essentially that he was guilty, well three
4 plus Ms. John, --

5 A Yes.

6 Q -- and the way Ms. John's evidence came out, I put
7 it to you really that was pivotal evidence in this
8 trial, the way it came out. It unfortunately,
9 because of the rules of evidence at the time and
10 the way the judge got involved in it, that piece
11 of evidence was as harmful to the defence as the
12 other witnesses?

13 A Well I agree with that, Mr. Pringle. The way it
14 happened at that time, that's true, it was very,
15 you know, umm, striking evidence to say the least.

16 Q And, this case, the jury was out for almost a
17 little over a day or almost 24 hours?

18 A I think we're -- something like 22 hours, I was
19 saying 24, but --

20 Q Okay, and so they were out a significant period of
21 time, it was not a short jury deliberation?

22 A Not at all. It was overnight. It was overnight,
23 from roughly noon until 10:00 the next morning,
24 give or take.

25 Q Thank you, Mr. Caldwell, those are my questions.



1 A Thank you, sir.

2 Q Yes.

3 MR. WOLCH: Mr. Commissioner, before I
4 commence, might I say the following; that in
5 terms of the order of counsel it -- sometime
6 there's some rearranging or some contention as to
7 who should go in what order. Originally, I was
8 going to go first, and to accommodate other
9 counsel I'm going later on, but I wish to make it
10 clear that, if I touch on areas that affect Mr.
11 Tallis or Mr. Pringle, subject of course to your
12 ultimate ruling, I would have no objection to Mr.
13 Pringle revisiting, if you so allow, if I touch
14 on those areas. I want to make that clear.

15 COMMISSIONER MacCALLUM: Thank you,
16 Mr. Wolch.

17 **BY MR. WOLCH:**

18 Q And, Mr. Caldwell, you would know that I am Hersh
19 Wolch, and we know each other, and you would also
20 know that I am David Milgaard's counsel?

21 A That's correct, sir.

22 Q And I've also noticed, Mr. Caldwell, that at some
23 times today you've appeared to be a little bit
24 tired so, if you do feel that way, don't be shy to
25 let us know that. I might not be as nice to you



1 as Mr. Pringle was, so I want you to be alert, so
2 I don't take any advantage of your being a little
3 tired; okay?

4 A Thank you, sir.

5 Q You've indicated, and obviously you have been a
6 Crown attorney for a long time, I'd like you to,
7 in your own words, tell us how you would see the
8 duties and responsibilities of a Crown prosecutor?

9 A Umm, well that could go on for a while, I can --
10 your duties would include working on individual
11 cases or files, very -- I guess most important of
12 all going at them in an orderly fashion,
13 attempting to call evidence, if you will, that was
14 admissible, lining up all your witnesses well
15 ahead, things of that sort. Then there is the
16 whole other side of dealing with defence counsel
17 and attempting to be forthcoming and fair with
18 them, disclosure and more I would think,
19 Mr. Wolch. I don't know if --

20 Q Okay. And so just a few points then.

21 A Sure.

22 Q Did you consider yourself to be together with the
23 police, that you why joined at the hip, so to
24 speak?

25 A I hope not. I had a good regard of and for the



1 Saskatoon Police Department at that day, and
2 various ones, of course, I had had a quite a bit
3 to do with in other cases. One, I think one had
4 to watch being joined at the hip, in other words
5 you had to be vigilant for that. I hope I was.
6 That's how I would answer that, sir.

7 Q So you never thought of yourself as being a
8 spokesperson for the police, or an advocate for
9 the police, but somebody independent of the
10 police?

11 A Yes. As far as possible, one had to try to dodge
12 things offered or forced on you, "why don't you
13 give a statement or whatever". As far as possible
14 I tried to do that, sir, to avoid it that is.

15 Q So, if the police were engaged in misconduct, you
16 would not be the person to cover it up or to try
17 to avoid it coming to the fore?

18 A I don't feel I could, sir, for all the usual
19 reasons. If it came to my attention, I would feel
20 I'd have to --

21 Q And you understood that you had a duty of
22 disclosure, albeit it may -- and I emphasize the
23 word "may" -- have been different than what it is
24 now, but you had a duty of disclosure to the
25 defence?



1 A Yes, I thought that sir, and attempted to carry it
2 out.

3 Q And, putting it in a general term, it would have
4 been a duty to disclose what was relevant, I
5 suppose, put in simple terms?

6 A Well, that's true, I would -- one would add to
7 that I hope I had possession of everything that
8 was relevant or knew about it, but I agree with
9 you, sir, in that respect.

10 Q See, I'm having a little bit of difficulty with
11 the comment that today you would have disclosed
12 certain things, such as the other, other victims
13 of Fisher, etcetera.

14 A Uh-huh.

15 Q It seems to me that today, if you didn't think it
16 was relevant, you wouldn't disclose it?

17 A Well I'm saying "today", sir, in the sense of what
18 we have seen in this trial. I did have police
19 reports that had some of that material embedded in
20 them, if you will, which didn't get disclosed
21 based on the fact that we essentially didn't
22 disclose police reports, 'disclose' in the sense
23 of handing them over to someone.

24 Q I'd like to touch on your involvement. You
25 obviously were preliminary and trial counsel?



1 A That's right.

2 Q Were any other counsel contributing to your
3 decision-making or helping you along that process?

4 A I don't think so, sir. As has been mentioned, we
5 only had one other prosecutor in the person of Del
6 Perras in our office, we may have -- I know we
7 discussed points of evidence, and so on, but
8 there -- I don't think there was anyone else I
9 could, if you will, turn to in a general way about
10 the case.

11 Q Do you feel you had sufficient time to conduct
12 this case? By that I mean busy practices can
13 affect how much time a counsel will give to a
14 case; do you feel that your workload was too much
15 or did you have sufficient time to properly do
16 what you think you had to do?

17 A I think I did have sufficient time. Mr. Wolch, as
18 you know, the case ended up being concluded in a
19 year, but the informations were laid, there was
20 various preparations for the preliminary inquiry,
21 witnesses, etcetera, but the preliminary inquiry,
22 as you know, was spread over possibly as much as
23 two months, the trial was set for the next jury
24 sittings when it did go ahead, so I was certainly
25 doing other things but I was giving this case



1 precedence, you know, in terms of my order of
2 doing things.

3 Q You are not saying that the failure to disclose,
4 or the failure to do anything in this case, was
5 caused by a very heavy workload?

6 A No, I think I don't think that, I think it was
7 more a question of what should be done, as we
8 maybe see it now.

9 Q Well, just in terms of preparation, I'm just sort
10 of curious; did you ever go to the alleged scene
11 of the crime to look at it, to study it, to walk
12 around or anything like that?

13 A I'm quite sure I did not, Mr. Wolch, do that,
14 subject to somebody telling me I did.

15 Q So, given the difficulties between John and Wilson
16 and location, might you now think it might have
17 been advisable to go and try to see for yourself
18 what they are talking about?

19 A Well, I know you are not suggesting I go with
20 them, I certainly --

21 Q Oh, no.

22 A No, I understand that, sir. But I don't -- I
23 didn't make a practice of going to those scenes,
24 and I had quite an accurate -- the large map of
25 the city block showing items, and so on, so I in



1 fact did not go, for better or for worse. I,
2 frankly, didn't think I was hampered by that.

3 Q Now after the trial we get to the appeal level;
4 can you describe your involvement in the appeal,
5 if any?

6 A Yes. It was I put my report on completed cases
7 in, I -- that would go to Regina, presumably
8 Regina would have other correspondence about the
9 case and I -- as you'd know, sir, I did not
10 actually physically attend to the Court of Appeal
11 case in Regina.

12 Q Okay. The appeal was conducted by which Crown
13 counsel?

14 A By Serge Kujawa, sir.

15 Q I take it you and he would have had some
16 communication?

17 A Yeah, we did, and I'm quite sure we discussed the
18 Section 9(2) matter. I think that's in writing
19 somewhere here.

20 Q Do you know if you would have looked at the two
21 factums that might have been produced, if any, or
22 --

23 A Mr. Wolch, I don't think there were any at that
24 day and I -- so I just --

25 Q Just oral argument then?



1 A That's my memory, sir.

2 Q And I expect you likely talked to Kujawa about the
3 trial and what you may have known about the case,
4 or whatever?

5 A I expect so, sir.

6 Q Okay. The matter went to the Supreme Court?

7 A That's right.

8 Q That was an application for leave to appeal?

9 A That's correct, sir.

10 Q And did you play any role in that?

11 A I was -- am a -- I was a part of the audience, I
12 was there physically but I didn't speak or
13 anything of the sort.

14 Q Who argued it for the Crown?

15 A I think there was Serge Kujawa and a man, I think,
16 named Brian Crane who did Ottawa things for our
17 department, in effect.

18 Q The Ottawa agent from Gowling's or whatever?

19 A I think that's right, sir.

20 Q Yeah. And now you went there, and I'm -- trust
21 me, this is not a Gomery kind of question -- but
22 did you -- the government send you, did you pay
23 your own way, or how did that --

24 A No. I had the great good fortune to know Otto
25 Lang socially in those days and --



1 Q So maybe this is a Gomery question. Okay, so you
2 knew Otto Lang, so what happened?

3 A Don't hold your breath. I found out that he had a
4 governmental plane with an empty seat in Saskatoon
5 going to Ottawa and I got a free ride down, sir,
6 with -- in that manner.

7 Q Okay, but so, but the government wasn't sending
8 you?

9 A Well they, I'm sure, had approved me going there,
10 yeah, and not --

11 Q I see.

12 A I'm sorry.

13 Q And would those be the days when the leave to
14 appeal was limited to about 15 minutes of
15 argument?

16 A Yeah, the -- this very case had three judges and
17 it was argued in something, I would think, from
18 that to half an hour. I didn't --

19 Q I recall they had a 15-minute limit on leave
20 applications?

21 A It may well have been that, sir.

22 Q Okay. And leave applications, as you know,
23 weren't concerned with innocence or guilt?

24 A That's my understanding.

25 Q That is, the issue was can you find an error in



1 law, and it must be of national importance?

2 A Yeah, I'm sure that's right, Mr. Wolch.

3 Q And whether the person is innocent or not really
4 didn't matter, you had to satisfy those two tests?

5 A I think that was correct.

6 Q Innocence, at that time, was defined as not a
7 matter, by itself, of national importance?

8 A I assume that's correct.

9 COMMISSIONER MacCALLUM: Was there a factor
10 of unanimity in the Court below present in these
11 leave applications?

12 MR. WOLCH: I'm sorry, I'm not --

13 COMMISSIONER MacCALLUM: Was there a factor
14 of unanimity in the Court below as a requisite?

15 MR. WOLCH: Yes, you had to have -- if you
16 had a dissent you could get automatic right, as I
17 recall.

18 COMMISSIONER MacCALLUM: Yes.

19 A And I believe, Mr. Wolch, it was a unanimous Court
20 of Appeal decision was --

21 BY MR. WOLCH:

22 Q That's why you would need leave?

23 A Yes, yeah.

24 Q And I think you might also know that the
25 likelihood of getting leave is very difficult, I



1 don't know the stats, but 3 percent or 5 percent
2 have been bandied about in the past?

3 A I honestly didn't know that but it wouldn't
4 surprise me, sir.

5 Q Okay. Now, Mr. Caldwell, your going to the
6 Supreme Court like that; might that indicate that
7 this case really, really got your attention in
8 terms of your interest, involvement, and how
9 deeply committed you were to it?

10 A Well it -- it -- the case certainly got my
11 attention because it was a challenging case to
12 prepare and prosecute. I think my trip to Ottawa,
13 which maybe involved a couple days off, was --
14 could be viewed as a bonus for having got through
15 the case to that point, if you will, Mr. Wolch.

16 Q Well it was a horrific crime; would it be fair to
17 say you got emotionally involved in it?

18 A I hope not, sir.

19 Q It's pretty hard not to, though?

20 A I --

21 Q You've got a terrible crime, you've got a horrific
22 result there in terms of what happened to this
23 young lady, you know, as a human being I would
24 think you might really get emotionally involved?

25 A Well, I can see that point. I don't believe I



1 did, but certainly I can understand if someone,
2 including me, would.

3 Q But going as an extra person to watch 15 minutes
4 in the Supreme Court suggests to me that you were
5 very deeply committed to this case?

6 A Well, sir, I was very happy, truthfully, to get a
7 trip to Ottawa because I had children in the
8 vicinity and things that --

9 Q Oh.

10 A As it happened I took my gown, I could have
11 certainly argued it, but the way things worked out
12 there I was very happy to do what I did with it,
13 sir.

14 Q Because it leads me to, having heard your
15 interview with Peter Carlyle-Gordge, I get the
16 feeling -- and I'm going to invite you to comment
17 on this -- that this was sort of a defining case
18 in your career, it was one that you were -- and
19 I'm not making light of it --

20 A Yeah.

21 Q -- were tremendously proud of what you had
22 accomplished, and like most human beings you were
23 happy to get acclaim for what you had
24 accomplished?

25 A Well I was, I was certainly gratified that the



1 case came out the way it did, I was undoubtedly
2 proud of the fact that I hadn't failed in some
3 manner to have it go through, and I am sure I got
4 an adequate amount of gratitude from various
5 places, sir.

6 Q Yeah.

7 A I hope that answers you but --

8 Q Yeah. But also, though, the worse the character
9 of David Milgaard, the greater your
10 accomplishment; would that be fair?

11 A I -- I don't see it that way, sir.

12 Q But if he was, in your eyes, the killer/rapist, --

13 A Yeah.

14 Q -- and he also had a history of terrible
15 things, --

16 A Uh-huh.

17 Q -- then it's a worse person that you have put
18 away, you've, in a sense, accomplished more the
19 worse he is?

20 A Yeah, in that sense, sir. But of course the, as
21 we know now what the truth is of the matter, the
22 -- how it was then, without any other convictions,
23 etcetera, of course --

24 Q The --

25 A -- he, at that point, certainly looked like a very



1 bad person, if I may put it that way.

2 Q Oh, I'm not quarrelling with you, I'm --

3 A No, I'm just trying to --

4 Q And, you know, I can accept how strongly you
5 felt, --

6 A Uh-huh.

7 Q -- there is no doubt about it. I'm just trying to
8 explore how you did feel.

9 A Okay.

10 Q And I can appreciate it must be very difficult for
11 you to take it back to how strongly you felt and
12 now realize you were wrong, --

13 A Yeah.

14 Q -- and that's just a fact of life?

15 A It certainly was wrong, without any doubt, sir,
16 the way it turned out.

17 Q Yeah, but it's difficult, you must think to
18 yourself I honestly believed this and yet this
19 young man of 16 went to jail and went through
20 horror after horror, and no one would ever listen
21 to him and I wouldn't even listen to him, and here
22 we are, I can't undo it?

23 A Yeah, I agree with all that. The "I didn't listen
24 to him" part, of course he and I clearly didn't
25 talk, but I know what you are saying, sir.



1 Q I mean his protestations of innocence is all I am
2 getting at.

3 A Okay, but that's what I am saying, sir.

4 Q Yeah. And I hesitate to bring this to your
5 attention but I must. If we could look at
6 document 006846, and this is a small point but I'd
7 like to, --

8 A Okay, very good.

9 Q -- I'd like to explore it with you.

10 A Okay.

11 Q This is your letter to the Miller family, and I
12 pause by saying we seem to have a contradiction
13 somehow, that here you are writing to the victims,
14 which is commendable, --

15 A Uh-huh.

16 Q -- to keep them informed, and later you are
17 writing to Roberts to keep him informed, yet we
18 know that certain victims aren't informed. So
19 there seems to be some contradiction as to when
20 people are notified or not.

21 But leaving that aside, that's
22 not my point, in effect, --

23 A Okay.

24 Q -- just if we could highlight this paragraph here.
25 See:



1 "He then attempted to obtain leave to
2 appeal to the Supreme Court of Canada,
3 and on November 15th, 1971, I appeared
4 on this application before a panel of
5 three judges of the Supreme Court ... at
6 which time his application was
7 dismissed."

8 A Yeah.

9 Q Now I draw to your attention that -- and that is
10 obviously wrong, creating an impression that you
11 were the counsel arguing the case?

12 A Well, sir, Mr. Rodin raised this with me and we
13 went through it in the exam for discovery on the
14 civil action. I did not appear, strictly
15 speaking, in the sense of being gowned and
16 counsel; I appeared and meant to indicate to them
17 that I was physically present, sir.

18 Q Okay. Mr. Caldwell, let me ask you this, --

19 A Okay, that's fine.

20 Q -- from this point on --

21 A Okay.

22 Q -- we'll get along much better if you answer my
23 questions specifically, because if you tell me
24 what you told Mr. Rodin --

25 A Okay.



1 Q -- it then means I have to ask "what" and go back
2 into that. I'm just asking you a straightforward
3 question, you can just, you know, give the answer,
4 you can remember what you told Mr. Rodin and be
5 consistent or whatever, --

6 A Okay.

7 Q -- if you are inconsistent I'll tell you.

8 A Very good.

9 Q But I'm simply asking you, specifically this says,
10 you know, to the victim's family that you argued
11 the application, I mean no one could interpret it
12 any differently?

13 A No, it doesn't say that to me, sir, it says "I
14 appeared on this application". I did not mean to
15 leave the impression that I had argued it by any
16 means, because I hadn't.

17 Q Well, you didn't appear on the application, you
18 sat like a spectator at the back of the room?

19 A Well I agree that that's what happened.

20 Q Right. Well it -- are you trying to make yourself
21 look more important in those days?

22 A No, not in the least, I was -- I guess I didn't
23 appreciate that distinction. I felt that I had
24 appeared in that sense, Mr. Wolch, and that -- I
25 don't know what more I can tell you about that.



1 Q I'll leave it.

2 A Okay.

3 Q But you do -- or do you -- appreciate that any
4 reader of that would assume you argued the case?

5 A Yeah, I think a legally-involved person would
6 assume that, sir.

7 Q And a "legally" --

8 A Well, a lawyer or --

9 Q I wanted to leave it --

10 A Okay.

11 Q -- but I am going to suggest to you that anybody
12 reading that --

13 A Yeah.

14 Q -- would say the author appeared on the
15 application as a lawyer and argued the case?

16 A Okay.

17 Q If you can agree with me, I'll leave it?

18 A That could be very well read into it, sir, and in
19 that sense I agree with you.

20 Q Okay. I want to turn to a different topic, and
21 the main players in a courtroom, outside of the
22 witnesses, would be the judge, the Crown, and the
23 defence counsel; --

24 A Yes, sir.

25 Q -- would that be right?



1 A That's right.

2 Q And in your experience, your lengthy experience in
3 the courts, would you agree with me that, in spite
4 of what we sometime read in the media and what
5 certain politicians have to say, that the average
6 citizen has a lot of respect for those people who
7 partake in the judicial system?

8 A Umm, Mr. Wolch, I honestly don't know whether I
9 can outright agree with that.

10 Q I mean mainly jurors. I should be more specific.

11 A Okay. I would say jurors.

12 Q Jurors?

13 A Yeah, jurors would, because they have had
14 something to do with it obviously.

15 Q I mean, when a juror comes into the courtroom, I
16 would suggest the juror has a lot of respect for
17 the presiding judge?

18 A I would assume so.

19 Q Right?

20 A Yup.

21 Q And, if there is a pecking order, probably the
22 Crown comes second?

23 A Could be.

24 Q And the defence lawyer third?

25 A Yeah.



1 Q That is the judge, of course because being a judge
2 is a very important role in society --

3 A Correct.

4 Q -- and you don't get there, you know, that easily?

5 A That's right, sir.

6 Q Right? And it carries with it a lot of respect.
7 The Crown attorney speaks for society and that's a
8 very respected position?

9 A Yeah, I believe that, sir.

10 Q Okay. And defence lawyer, a little below, but not
11 too bad.

12 A I wouldn't even say that, and some of that would
13 depend on the seniority, if you will, of the
14 prosecutor and defence.

15 COMMISSIONER MacCALLUM: What do you mean
16 you wouldn't say that?

17 A Well I --

18 COMMISSIONER MacCALLUM: Would it be a lot
19 lower or about the same?

20 A I think I should get my lawyer in here, sir.

21 MS. KNOX: I'll stay out of it.

22 BY MR. WOLCH:

23 Q But what I am getting at is that the jurors really
24 pay attention, and when a judge gives a direction
25 as to what the law is, what to do, they try their



1 best to listen?

2 A Yeah, I'm -- agree, sir.

3 Q Yes. And when a prosecutor appears to believe,
4 through action and deed, that the accused is
5 guilty, that can have an effect on a juror?

6 A Certainly.

7 Q And jurors, for the most part, respect police?

8 A I think that's right.

9 Q And so the jurors there are really thinking, I
10 suppose, that the Crown believes the guy is
11 guilty, and the police believe the guy is guilty,
12 and that's somewhat comforting to a juror, I
13 suppose, to some degree?

14 A I would say so.

15 Q Yeah. And, accordingly, we have built into the
16 legal system, through our juris prudence, certain
17 warnings and instructions that judges give to
18 jurors?

19 A Yes sir.

20 Q Correct? And I want to deal with that a little
21 bit, and I think with your experience you might
22 agree with me that certain types of witnesses can
23 appear to be credible, but we have to look at
24 their evidence with a great deal of caution?

25 A I think that's correct, sir.



1 Q For example, when you get the jailhouse informant,
2 there is a real risk in their evidence; is there
3 not?

4 A Yes.

5 Q That is, when you have a jailhouse informant, they
6 are often a person who is street-wise, very adept
7 at lying, cheating, and a juror could easily be
8 fooled more readily, perhaps, than you or a judge
9 or somebody who has seen them before?

10 A I would believe that you are right, sir.

11 Q For example, if we wanted to get somebody today to
12 say something false about Commission Counsel, for
13 example, if I went to the jail and said "anybody
14 who says he cheated on his law exams is free", can
15 you imagine how many would come forward and say
16 that?

17 A I hope they were all at law school earlier, but
18 subject to that, sir, I'll agree with you.

19 Q Well most of them would be lying, but in any
20 event -- but in any event you see my point, you
21 offer the carrot, you are going to get the
22 evidence?

23 A I agree with you largely on that, sir.

24 Q Yeah. I mean if you look at the other cases I'm
25 just -- for example, we know that in the *Truscott*



1 case there is a confession to a guy who wasn't
2 even in the same jail, you know. You can go on
3 and on, they're ridiculous, and they cause
4 problems?

5 A Undoubtedly.

6 Q And then we have the other aspect of somebody
7 who's under the heading, in quotation marks,
8 "accomplice or involved", who has a reason to lie?

9 A Yes.

10 Q That is "if he is not blamed I will be blamed" or
11 "I'm involved", or whatever; we know about that?

12 A Yes sir.

13 Q Okay. And it would be your understanding, based
14 on your experience, that judges are required at
15 times to warn juries about the frailty of that
16 type of evidence?

17 A I would believe that that is correct.

18 Q And that is something you would expect the jurors
19 to take to heart?

20 A I certainly would.

21 Q And you would agree with me it's a valid
22 warning --

23 A It's --

24 Q -- and it's something you would think is
25 meritorious?



1 A Certainly.

2 Q Now I'd like to turn to document --

3 COMMISSIONER MacCALLUM: Sorry, I don't
4 mean to be picky about this, but you are speaking
5 post-Vetrovec, are you, the unsavoury witness
6 warning?

7 MR. WOLCH: Yeah, I think --

8 COMMISSIONER MacCALLUM: That's the case
9 today but it wasn't necessarily in '69?

10 MR. WOLCH: I think it was then too.

11 COMMISSIONER MacCALLUM: Was it? It was
12 after the Vetrovec?

13 MR. WOLCH: It was. It's gone back and
14 forth quite a few times, I think they've actually
15 lowered the standard as opposed to raising it,
16 but we'll -- I'm sure, between Commission Counsel
17 and ourselves, we will be dealing with that.

18 COMMISSIONER MacCALLUM: Yes, okay.

19 MR. WOLCH: But I think it -- for my
20 purposes that won't be required at this time,
21 sir.

22 COMMISSIONER MacCALLUM: Okay.

23 BY MR. WOLCH:

24 Q If we can go to 006938, I hope I have the right
25 page, I might have gotten the middle page of a



1 document, for that I apologize. That's 48. Yeah,
2 that's the one. These would be your notes?

3 A That's right, sir.

4 Q And I take it they are there for trial
5 preparation?

6 A What they were was the thing -- I'm sure everyone
7 is tired of hearing about N.B. for trial, the
8 upper right corner says that, and page 11, they
9 were all items that I felt had to be somehow
10 prepared or dealt with or discarded before the
11 trial, Mr. Wolch.

12 Q I want to deal with that portion there if I could.

13 A Okay.

14 Q I'm going to ask you to help me with handwritings
15 as well.

16 A By all means.

17 Q Wilson, is that mitts?

18 A Mitts, that's correct.

19 Q Maybe you could help me, it's your handwriting.
20 Can you read what it says?

21 A It says, 'make sure to leave out conviction re --'
22 pardon me, conversation is what that means, 're
23 purse snatching, but would this make him an
24 accomplice and is it therefore better left out,'
25 and then I've written again in a different --



1 that's my writing, 'Yes, leave it out.'

2 Q So you have it in two different hand -- well,
3 pens?

4 A Yeah, it's all my writing, sir.

5 Q Do you know why it would be in two different pens?

6 A The top one looks like a ballpoint. I think I did
7 the main bulk with the nib pen and those two are I
8 would think --

9 Q One guess that I might make is that you wrote it
10 out and then you went and talked to perhaps
11 another counsel, got some advice and came back and
12 told yourself what to do?

13 A That's quite possible, sir, the way it's
14 constructed.

15 Q That's the only guess I can make.

16 A Yeah.

17 Q Now, 'Better left out? Yes - leave it out, makes
18 him an accomplice,' can you explain what you were
19 intending there?

20 A I was -- let's see. Wilson, it's all respecting
21 Wilson. It says, 'would this make him an
22 accomplice, and is it therefore better left out,'
23 and I've written, 'Yes, leave it out,' which is
24 presumably what I ended up doing in the trial. I
25 must have talked to someone, Mr. Wolch, about it



1 the way this is constructed and concluded that
2 that was a sound way, if you will, to go about it.

3 Q If we may just turn the page, the next page, can
4 you read whatever that is at the bottom right
5 there?

6 A Yes. I guess it's letters, 'D.M. wearing toque,'
7 which would mean Milgaard, question mark. Oh, E,
8 it looks like, 'No women B & E, dope, battery
9 theft.'

10 Q I read that as no mention, but --

11 A Yeah, you are right, sir, that's correct, that is
12 what it says.

13 Q 'No mention B & E, dope' --

14 A 'Or battery theft.'

15 Q Battery theft?

16 A Yeah.

17 Q And if we can then go to the next page, perhaps
18 that could be highlighted and we could -- you
19 could tell us what that means.

20 A It says, 'Brief re accomplices.' I think that
21 would be a reminder to myself to get out or look
22 up a brief on accomplices which I likely had in
23 the office from some other case.

24 Q Would I be correct in understanding what occurred
25 here to be that you had concern that if Wilson



1 testified to some of the things that he had given
2 to the authorities, that would make him an
3 accomplice in law perhaps and the judge would have
4 to warn the jury?

5 A That could have been, sir, at the time.

6 Q Now, there were numerous times when Wilson was
7 considered to be possibly an accomplice or
8 involved; that would be a fair comment?

9 A I think so, sir.

10 Q Yeah. But you thought factually he was an
11 accomplice to some degree based on what you've
12 indicated you want to leave out?

13 A I'm sure that's correct, sir.

14 Q With hindsight do you think that was appropriate,
15 to manipulate, and I use that word not as harshly
16 as it sounds, the situation so that the judge
17 wouldn't caution the jury about Wilson?

18 A It may have been an unwise decision, sir, at that
19 time.

20 Q Now, the other two witnesses we've been talking
21 about of the four -- and I'm putting John to the
22 side --

23 A All right.

24 Q -- and that's Lapchuk and Melnyk. Now, they
25 turned up late in the day?



1 A That's right.

2 Q And I should have looked this up, I'm going by
3 memory, I think they testified the very last
4 couple of days in January, 28, 29 I think,
5 or whatever it was.

6 A They were --

7 Q In that area.

8 A Yeah. I think the first week of the trial had
9 either gone by or almost, sir.

10 Q Right. Whatever dates they were going to testify,
11 they were required on criminal charges in Regina?

12 A Okay, are you -- if you are saying that, sir, you
13 know that to be the case?

14 Q Well, you know they were pending on criminal
15 charges in Regina?

16 A I did, but I do not know that they were on the
17 very dates they were going to testify.

18 Q Oh, no, sir, not the same dates.

19 A Okay.

20 Q But they were pending for future dates in Regina.

21 A I knew that was the case, that's right.

22 Q Yeah. And I would assume that they knew when they
23 had to go to Court?

24 A I would hope so, sir.

25 Q I mean, you had many Court days, they have few,



1 and presumably they would know when they have to
2 go to Court?

3 A I would hope that they would.

4 Q And if there was a conflict, they could tell you?

5 A Well, that's right, I would -- I think in that
6 kind of thing I would feel better with a second
7 opinion with someone in the system who in fact did
8 know, Mr. Wolch.

9 Q Well, the police could check that out?

10 A They could.

11 Q But, I mean, if Melnyk or Lapchuk would have said,
12 look, Mr. Caldwell, I'm supposed to be here but
13 I'm supposed to be in Regina today, what do I do,
14 that's one thing?

15 A Yeah. I think, Mr. Wolch, in this magnitude of
16 the case, I think I would have tried to get
17 someone to change the Regina date as opposed to
18 change when they got into this one.

19 Q But if there is no conflict, there's no need to do
20 anything?

21 A No, no, that's quite right, exactly.

22 Q Now, I want to address with you a problem that has
23 arisen in other situations, many situations, and
24 that is this: We know of a number of people like
25 Melnyk and Lapchuk who testify and have no deal,



1 that have no deal?

2 A Okay.

3 Q There's no deal with the prosecutor at all, but in
4 actual fact they believe they do.

5 A Oh.

6 Q Let me explain that.

7 A Very good.

8 Q The conversation goes something like this. We
9 don't want to make a deal with you now because it
10 might taint your evidence, so there's no deal now.

11 A Uh-huh.

12 Q And the accused comes in the Court, and I can name
13 you cases, Unger is one of them --

14 A Okay.

15 Q -- where -- not the accused, I mean the witness
16 accused, comes in the Court and says I have no
17 deal.

18 A Yeah.

19 Q And like in the Unger case, he then, two months
20 later, goes to Court and actually says I
21 co-operated, I didn't say I was making a deal
22 because it might taint my deal, but I want my
23 deal, I want that break.

24 A All right.

25 Q You see that?



1 A I understand what you are saying.

2 Q Okay. Or the prosecutor might say to the witness
3 I can't give you a deal because it will taint your
4 evidence, but I will talk to the prosecutor later,
5 or I'll -- no matter how you couch it, the person
6 thinks they got a bargain. You see the problem?

7 A Yeah, I follow you on that, sir.

8 Q That is, the witness himself thinks they have a
9 deal and they've got to come through and if they
10 do they are going to get a break.

11 A Yeah.

12 Q Right?

13 A I follow you, sir.

14 Q Now, if you were not the prosecutor of David
15 Milgaard, but you were in Regina and you were
16 prosecuting Melnyk and Lapchuk and you got a call
17 from the Milgaard prosecutor saying when are these
18 boys coming up, they are really important, they
19 are really helping me in Saskatoon --

20 A Uh-huh.

21 Q -- okay, and you say, well, how are they helping
22 you. Well, they are giving very important
23 evidence on a horrible murder --

24 A Uh-huh.

25 Q -- and later you had to prosecute those people --



1 A Uh-huh.

2 Q -- wouldn't you be inclined to give them a break?

3 A I would not, sir, because that is a wholly
4 improper arrangement no matter who is involved in
5 it.

6 Q But you've been told that they have helped put a
7 murderer away.

8 A But a prosecutor in that instance is certainly
9 ethically not, can't be giving people breaks based
10 on those kind of things.

11 Q But why not? You say to a judge, Your Honour,
12 this young man has shown his rehabilitation, he
13 has, at risk, gone in front of a Court and
14 fingered a friend and that shows that he's well on
15 the way to rehabilitation. What's improper about
16 that?

17 A Well, number 1, that was not the Melnyk and
18 Lapchuk situation in our case, sir.

19 Q No, no, but I'm going to suggest to you that it
20 was uppermost in their minds.

21 A Was there some -- I don't mean -- was there
22 evidence to that effect in the Milgaard trial,
23 sir?

24 Q Well, let me say this.

25 A Okay.



1 Q When both of them came forward it was very late in
2 the day?

3 A Right.

4 Q Both of them were facing criminal charges?

5 A That's also right.

6 Q And would it not cross your mind that maybe they
7 are doing this to get a break on their criminal
8 charges?

9 A It did not, Mr. Wolch, because of the very unusual
10 way in which the thing came about, as you said,
11 that virtually the night before the trial I was --
12 that didn't occur to me at all.

13 Q You are saying it never dawned on you that two
14 little criminals with bad backgrounds, basically
15 dishonest people who had gone onto lives of
16 dishonesty, would not be looking for a break on
17 serious charges pending?

18 A If they were, sir, they did not convey it to me, I
19 assure you, and they did not get it from me by the
20 way.

21 Q Well, did you try to be cautious that it might not
22 be misinterpreted?

23 A How do you mean, sir?

24 Q Well, did you ever say to them, look buddy, you
25 are not getting a break, I'm not doing anything to



1 help you, you are getting nothing for this
2 evidence, did you ever specifically tell them
3 that?

4 A I don't -- I do not believe I told them that
5 because it was completely out of the question as
6 far as I was concerned. I mentioned to you the
7 cautions I gave them about testifying truthfully,
8 Mr. Wolch, that did happen.

9 Q Did you ever tell them that you were going to call
10 their prosecutor?

11 A I very much doubt it.

12 Q You may have though?

13 A I may have because -- the reason I say that is the
14 name Arnold Pirogoff appears in my file and it
15 would be there in my estimation because I needed
16 to find out the date end of it.

17 Q But had you told them I'm going to call the
18 prosecutor, do you not see the danger in them
19 believing that they will be getting a break
20 somewhere down the line?

21 A If I -- they could have jumped to that conclusion
22 on their own hook. I gave them no reason to think
23 that, sir.

24 Q I appreciate that, but with the benefit of
25 hindsight, do you see the danger in possibly



1 telling two witnesses of criminal background I'm
2 going to go call your prosecutor about you being
3 here testifying?

4 A Yeah, yeah, I can see that they might jump to
5 conclusions based on their own, you know,
6 imagination, if you will.

7 MR. WOLCH: I'm sorry, Mr. Commissioner,
8 I've lost track of time. I'm not sure what
9 your --

10 COMMISSIONER MacCALLUM: Oh, I guess we
11 better have a break. 15 minutes. Thanks.
12 Ms. Knox, I wonder if you would do me a favour
13 and collect the young people who are here for
14 this event, and what's the room number of our
15 retiring room?

16 MR. WILDE: 401, sir.

17 COMMISSIONER MacCALLUM: And bring them up
18 to 401?

19 MS. KNOX: I will, sir.

20 *(Adjourned at 3:00 p.m.)*

21 *(Reconvened at 3:20 p.m.)*

22 BY MR. WOLCH:

23 Q Mr. Caldwell, I would like to draw your attention
24 to document 006910. This would be in your
25 handwriting?



1 A That's correct, sir.

2 Q Can you tell us what you are marking down here?

3 A Yes. This appears to relate to the charges
4 against those two fellows. '23rd of January,
5 1970, Craig M,' which would be Melnyk, 'Trial,
6 armed robbery, Regina.' It said Thursday, I
7 crossed it out and put, Wednesday 28th and
8 Thursday 29th,' and I crossed out Friday, 30. It
9 says Pirogoff in brackets, who would have been the
10 Regina prosecutor. Number 2, 'George L,' would be
11 Lapchuk, 'Monday 26 - plea to forgery and uttering
12 - Monday, 26 --' it looks like George -- oh, yeah,
13 mileage. I had had a witness who hadn't been paid
14 mileage, or words to that effect, sir, and it
15 looks -- oh, one day is what that means. I think
16 that must have been for prelim.

17 Q Does this bottom part relate to them or is that
18 something else?

19 A Yes, it does, 'Criminal records for above 2,' I
20 guess it says 'and Milgaard,' that last entry.

21 Q Required up here, 28th and 29th, would that be
22 required in the Milgaard case?

23 A No, that's Regina, sir, the R-E-G, the very top
24 one there.

25 Q Okay.



1 A It's not R-E-Q, it's R-E-G as in Regina, Mr.
2 Wolch.

3 Q 'Melnyk for armed robbery'?

4 A That's correct.

5 Q And, 'Lapchuk, forge and uttering'?

6 A That's correct.

7 Q And these would be serious charges?

8 A Oh, I would assume so.

9 Q I mean, if I remember, armed robbery I think
10 carried a possible life sentence?

11 A I think you are right, sir.

12 Q And forgery and uttering, 14 year possible
13 maximums?

14 A Yes.

15 Q So they are not facing minor shoplifting kind of
16 cases?

17 A Not at all.

18 Q And did that not set off a red flag that maybe
19 they want something or they are not just being
20 good citizens?

21 A Well, I guess, Mr. Wolch, it didn't convey itself
22 to me, if I may put it that way, I didn't come out
23 with that caution to myself.

24 Q Once again we have the benefit of hindsight. Do
25 you think now you might think back and say to



1 yourself, you know, maybe I should have noticed
2 that these two fellows, who went on to greater
3 fame in the criminal world, may have been trying
4 to get some kind of consideration as they were
5 going quite quickly to trial, or facing
6 consequences within weeks?

7 A I think -- I never had a thing like this happen
8 with that little notice, sir. I think I would
9 look at that now and these -- I keep forgetting
10 this was the trial, not the prelim.

11 Q That's right.

12 A Yeah, that's right, sir. So in other words, that
13 would be something to look at and have in one's
14 mind as a caution.

15 Q The reason I'm questioning it is not so much to be
16 critical, but I think that the Commission may want
17 to make recommendations as to how people in
18 similar circumstances are dealt with --

19 A Yeah.

20 Q -- when they come forward and they are facing
21 criminal charges and what should be done to make
22 sure that they -- that any potential deal, or deal
23 in their minds, is before the trier of fact, so
24 that's why I'm pursuing it.

25 A Yeah, yeah.



1 Q So the reason you have Pirogoff here is because he
2 would be the prosecutor you talked to I assume?

3 A That's right. He was in Regina.

4 Q And then if we can turn to 006904, just sort of
5 highlight the top part.

6 A Okay. Do you wish me to read it, sir?

7 Q Tell us what you are saying -- well, we'll leave
8 out this part which could be a total topic by
9 itself, but -- and go into that part there.

10 A Okay. It says to do, item 2 is phone Pirogoff. I
11 think maybe this is the past tense, maybe phoned,
12 but it does say, 'Phone Pirogoff, Melnyk trial
13 Regina, Wednesday, 28th and Thursday 29th.
14 Lapchuk - plea Monday 26 - forgery and uttering,'
15 is what that says.

16 Q Do you think you may have phoned Mr. Pirogoff on
17 more than one occasion, sir?

18 A I may have, sir. I don't see an indication, but I
19 very well may have.

20 Q And just for the record, Pirogoff would be Arnold
21 Pirogoff who went on to be a prosecutor in
22 Alberta?

23 A That's correct, sir. He was in the Regina
24 downtown office, if you will.

25 Q Now if we could turn to 054411, this is a



1 newspaper clipping, which is about the best I can
2 do, but if we can highlight that portion to begin
3 with, you see it says here that Craig Melnyk,
4 that's the same Melnyk we've been talking about,
5 was sentenced to six months in Regina for the
6 August armed robbery of money from Pinder McNeill
7 drug store, and then it goes on to say the
8 sentence is believed to have been the lightest
9 ever handed out in Regina for armed robbery, and
10 if we can just go down a bit and I'll try and
11 paraphrase what follows.

12 A Okay.

13 Q It says the co-accused received certain years in
14 the penitentiary and it goes on to say that Mr.
15 Pirogoff was seeking a heavy sentence for the
16 co-accused, and so you can see that Melnyk, who
17 testified, appears to have received the lightest
18 sentence ever for armed robbery in Regina, and I
19 appreciate that Melnyk may have his own
20 explanation for it that one may question given his
21 background, but having said that, do you at the
22 beginning -- or at least do you see why people
23 might put that together with his testifying and
24 come to the conclusion that he did get a
25 consideration?



1 A They might do that, Mr. Wolch. I would be
2 interested in knowing what the *Leader-Post* was
3 told later, but that's of no consequence.

4 Q Well, whatever they were told, I mean, on their
5 own volition the newspaper seems to have drawn the
6 conclusion that this guy got an exceptionally
7 light sentence.

8 A It looks that way, sir.

9 Q And, I mean, it's quite conceivable, is it not,
10 that Mr. Pirogoff, armed with the knowledge that
11 Melnyk had led to the conviction of an horrific
12 killer, might have taken an easier approach.

13 A Well, a couple of things, sir, one is -- is this
14 after in time of the Milgaard trial as you are
15 reading it?

16 Q Let's go back to the date, it's on the top.

17 A Okay. I don't know.

18 Q It says February 9th, 1970.

19 COMMISSIONER MacCALLUM: Excuse me. Ms.
20 Knox?

21 MS. KNOX: Mr. Commissioner, I just have a
22 little bit of concern that the witness is being
23 asked to comment on what Mr. Pirogoff might have
24 done. I don't remember whether Mr. Pirogoff has
25 been interviewed or he's been questioned on this



1 issue, but surely this witness has no way to know
2 what was in the mind of Mr. Pirogoff and to ask
3 him to comment on it seems to be a bit of a
4 stretch.

5 COMMISSIONER MacCALLUM: Well, I don't
6 think so, Ms. Knox. It obviously involved this
7 witness, he was making notes of Mr. Pirogoff in
8 connection with Court dates of Melnyk and Lapchuk
9 and so -- for what reason is another matter of
10 course, but counsel certainly is entitled to
11 delve into that because the appearance is there.

12 MS. KNOX: Yes.

13 COMMISSIONER MacCALLUM: I know he can't
14 say what was in Pirogoff's mind, and I don't know
15 whether Pirogoff will be called, but if this
16 witness had any part in it, he would know what
17 was in Mr. Pirogoff's mind.

18 MS. KNOX: And I don't have a concern about
19 the questions about what they discussed and what
20 he remembers, but to ask him to, you know,
21 comment on what might have been in Mr. Pirogoff's
22 mind I think is beyond which is an answer.

23 COMMISSIONER MacCALLUM: Well, I mean,
24 there again, I'll go further, you know, this
25 witness is a highly experienced Crown counsel,



1 even then he was well experienced, so I think
2 from his own knowledge he can probably predict
3 what Pirogoff might have had in mind or might
4 have done as counsel prosecuting different
5 charges at the time. I mean, it's -- counsel has
6 already laid the ground work by suggesting that
7 prosecutors commonly take into account in dealing
8 with an accused that he has co-operated with
9 police in some other matter. That's all.

10 MS. KNOX: Okay, thank you.

11 BY MR. WOLCH:

12 Q I think, Mr. Caldwell, the point I made earlier
13 was that I would think you might do the same
14 thing, with all your experience, if you are
15 prosecuting somebody and you are told that this
16 person testified against Karla Homolka, wouldn't
17 that be a factor you would consider in how hard
18 you went after that person or what you put before
19 a judge?

20 A I would think if it was sort of self-generated,
21 Mr. Wolch, if I felt it was proper and a good
22 idea, I might well do it. This I don't think,
23 this situation here doesn't seem to fit into that
24 to me.

25 Q Well, you are looking at February 9th, 1970.



1 A Right.

2 Q How long was that after Melnyk testified?

3 A Very shortly I believe, isn't that right, a month
4 plus or minus?

5 Q I would say it's less than two weeks.

6 A Okay, you're right, sir, I'm sure.

7 Q I mean, less than two weeks he's getting into a
8 courtroom and getting the lightest sentence
9 perhaps in history in Regina.

10 A Uh-huh.

11 Q And I would take it that the Milgaard case likely
12 received some notoriety in Regina?

13 A I wouldn't doubt it at all.

14 Q You would be surprised if Pirogoff didn't know all
15 about it?

16 A In that sense I would, sir, yes.

17 Q So he would know that you had prosecuted Milgaard,
18 this horrific killer and put him away, and now
19 he's dealing with one of the people who, possibly
20 at risk to himself, put him away?

21 A I'm sure he would know that personnel.

22 Q And a street-wise person like Melnyk, knowing that
23 you talked to Pirogoff, would expect to get some
24 consideration?

25 A If -- he may have assumed that, sir, is all I can



1 say to you.

2 Q Right.

3 A Is there anything further down you wish me to look
4 at, sir? I'm not suggesting there is.

5 Q Unless you think there's something there you want
6 me to --

7 A I don't know.

8 Q I'm not trying to be selective. If there's
9 something else, I'm happy to go to it.

10 A No. If you can just crank that up and I could
11 read it, I'd be obliged.

12 Q Please. No, no, I'm not trying to in any way take
13 your attention away from anything.

14 A No, I understand, sir.

15 Q Keep scrolling down.

16 A Can you scroll up or down or whatever it is again,
17 please?

18 Q I can't, but somebody else can.

19 A No, but the staff. Yeah, I see Mr. Pirogoff gave
20 an enthusiastic speech about sentence, but I can't
21 disagree, Mr. Wolch.

22 Q No. In fairness, the enthusiasm seems to be
23 directed at the co-accused.

24 A Okay.

25 Q Mr. Melnyk appears also to have been on a



1 suspended sentence when this happened, which is a
2 very aggravating fact?

3 A I didn't notice that.

4 Q And I think we might also note that there doesn't
5 appear to have been an appeal.

6 A There's no indication of it, that's for sure.

7 Q Right. Mr. Caldwell, I'm just trying to
8 emphasize, I'm not suggesting that you were being
9 improper, but I am suggesting that what you did
10 unwittingly may have caused a witness to testify
11 thinking he was going to get a break when that
12 wasn't your intention. That's all I'm saying.

13 A Okay, sir. I wasn't taking it that first way and
14 I thank you.

15 Q Now, Mr. Pringle brought a document to your
16 attention that I would like to also go over with
17 you a bit, and that's 006864, and I'll be briefer
18 than I intended.

19 A Okay.

20 Q But it's this portion here and I won't go through
21 everything because Mr. Pringle did take you
22 through it.

23 A Very good.

24 BY MR. WOLCH:

25 Q I am concerned, as he was, with:



1 "This brought to the attention of the
2 jury the fact that she had, at one time,
3 given a statement indicating that she
4 had seen the actual attack on the girl
5 by Milgaard."

6 A Uh-huh.

7 Q Now, of course, you are talking about Nichol
8 John --

9 A That's right.

10 Q -- and the infamous statement that gives rise to
11 the Milgaard rule?

12 A That's right, sir.

13 Q Now, I'll try to say this delicately, but what I
14 am getting at, Mr. Caldwell, is that my reading of
15 that is that you were a little proud of the trial
16 tactic of getting that statement in front of the
17 jury and that they heard the contents that were so
18 damning. Now that's my reading of it and --

19 A Okay, sir.

20 Q -- if you have a different view, you can tell us,
21 but I want to know if you agree with that view?

22 A I didn't mean it in a way of, let's say,
23 expressing pride that I achieved that, if you
24 will, I --

25 Q It --



1 A It does say "brought to the attention of the jury
2 the fact that", and it clearly was brought to
3 their attention, but it couldn't be otherwise in
4 the 9(2) proceeding, sir, as I understand it.

5 Q No, but what I am getting at, it was uncharted
6 waters to some degree?

7 A Oh, certainly, yeah.

8 Q And you are, I suppose, somewhat competitive in
9 the overall circumstance of the case?

10 A Within reason I hope.

11 Q Right?

12 A Yes, I --

13 Q I mean you are prosecuting what you believe to be
14 a terrible person?

15 A That's correct, sir.

16 Q For a terrible crime?

17 A Yeah.

18 Q And you are talking to a police officer -- or
19 writing, rather, to a police officer who you feel
20 contributed to your success?

21 A In, in that procedure, I do.

22 Q Yeah. And I'm suggesting that what you are saying
23 here to him is "look, even though the statement
24 that indirectly arose from your police work was
25 not supposed to be considered by the jury, I



1 managed to get them to know of the contents"?

2 A Hmm.

3 Q It's not a horrible accusation, but I think that's
4 what it is?

5 A No. Mr. Wolch, I must tell you I didn't take it
6 that way myself, and I can understand if someone
7 else did.

8 Q You see, on a plain interpretation of the words,
9 it looks like you feel somewhat proud --

10 A Yeah.

11 Q -- that you were able to get around the difficulty
12 with Nichol John, to some degree, by at least the
13 jury knowing that she made this terrible
14 statement?

15 A Yeah. The way it's, it printed there, you could
16 take that as the meaning.

17 COMMISSIONER MacCALLUM: But what are you
18 telling me, that was your intention, or it wasn't
19 your intention?

20 A No, it wasn't, Mr. Commissioner. The terminology,
21 I -- was unfortunate, and what I said was:

22 "This brought to the attention of the
23 jury the fact that she had, at one time,
24 given a statement indicating...",
25 etcetera. I didn't mean that to convey that I



1 had, you know, somehow improperly or under the
2 table done that, because I didn't feel I had,
3 because we had followed the 9(2) procedure, it
4 turns out not exactly perfectly.

5 BY MR. WOLCH:

6 Q What I am getting at is I put this together with
7 the trial tactic of avoiding people being dubbed
8 accomplices, --

9 A Uh-huh.

10 Q -- so skillfully you've managed -- and I'm -- to
11 avoid having the jury warned about accomplices;
12 and skillfully you've gotten them to hear about a
13 statement they shouldn't have heard about, and if
14 they can follow a direction to ignore they would
15 be one heck of a jury?

16 A I suppose that's right, sir.

17 Q And do you see, with hindsight, that if the
18 accused was guilty these tactics wouldn't mean
19 much, they would have accomplished a good purpose;
20 but if the accused is innocent it's a very
21 difficult thing?

22 A I -- I would think they'd be either right or wrong
23 regardless of the outcome of the trial, Mr. Wolch,
24 --

25 Q Okay.



1 A -- I don't know --

2 Q But if the person is guilty, the damage is far,
3 far minimal?

4 A Well that's right, but of course that's something,
5 we don't know what's going to happen at this stage
6 obviously.

7 Q Right. Right. I want to touch on, fairly
8 briefly, the script document that's been talked
9 about so many times, and unless I have to I'm not
10 going to bring it up at this moment, I just want
11 to touch on a few points about it. I'm not
12 totally confident that I understand your evidence.

13 A Okay, sir.

14 Q Is it your evidence that you now believe you never
15 saw it at the relevant times?

16 A Umm, it's my evidence, sir, that it was never part
17 of, or on my prosecution file, that I did see it
18 twice, once in Regina with Sergeant Pearson --

19 Q Mr. Caldwell, I hate to interrupt you, I'm only
20 concerned about the trial time.

21 A Oh yeah.

22 Q So we can stay on focus, I'm only concerned about
23 seeing it up to and around the trial time?

24 A Yeah. Then I, my answer is that I didn't, sir.

25 Q Okay. And if I can hopefully summarize it, you



1 see where the RCMP at least doubt your version of
2 that, because you remember Lorne Milgaard comments
3 that only appear in that script document?

4 A Yeah, I did see that, sir.

5 Q And what is your explanation for that?

6 A Umm, I did think that there was a statement
7 describing the Lorne Milgaard business, it never
8 showed up, and I have no idea, presumably it
9 doesn't exist now. I may, I may well have come to
10 that memory from the once or twice I saw the
11 thing, sir, as we've discussed about the one --
12 the other two that weren't involved with the
13 trial.

14 Q Maybe you can help me with this.

15 A Okay.

16 Q Like most witnesses you have some difficulty
17 thinking back that far?

18 A Yes sir.

19 Q And I'm interested in how you can remember what
20 you didn't see, that is it's hard enough to
21 remember what you did see, --

22 A Yeah.

23 Q -- but to be able to say "I didn't see something"
24 strikes me as a bit difficult?

25 A Well, if you are speaking of the script, --



1 Q Absolutely.

2 A -- yeah. I never, Mr. Wolch, saw a, if you will,
3 parallel or similar document to it on any of my
4 other cases that came from the Saskatoon Police
5 Department. It wasn't part of a standard package,
6 or like the Sergeant Ullrich matters at all, I
7 simply had not seen one before or since, it was a
8 unique document, and I don't know what more I can
9 tell you, sir.

10 Q Well might I suggest that the reason you now
11 believe you didn't see it is because the content
12 is so startling to you?

13 A Well I'm sure the content is startling, sir, but
14 that's not the reason I'm saying what I am.

15 Q But it's fair to say, had you seen it back then,
16 it would have cast some doubt on John and Wilson?

17 A I would think so.

18 Q Because it would have been striking to you that,
19 somehow, they changed stories to coincide --

20 A Yeah.

21 Q -- in a broad sense with what the police theory
22 was?

23 A Yeah, that's correct, sir.

24 Q So, leaving aside the referral at the beginning to
25 Ms. (V1)-, just the idea that suddenly we're into



1 a new story which these people, these kids now
2 say, would have been like a red flag to you?

3 A I would think so.

4 Q What would have been your knowledge of the
5 Roberts' role? Now obviously, had you seen the
6 script document, you would have known that he was
7 tasked with questioning, rather vigorously, these
8 young people?

9 A Uh-huh.

10 Q What, from your perspective, was his role?

11 A Umm, I, Mr. Wolch, did not -- I did not know that
12 he was coming or that that thing was going to
13 happen, and -- to begin with. I have some memory
14 of learning about it about the time when it was
15 actually going on, so I didn't take part in (a)
16 getting him here, (b), you know, telling the
17 police what he should do, because I simply learned
18 about it once it was already in progress, if you
19 will.

20 Q Umm, maybe I'm in error, but I got the impression
21 from your testimony from Commission Counsel that
22 you placed a lot of stock in what Roberts
23 accomplished through the polygraph?

24 A Well I placed stock in it to the extent that it
25 was, if you will, a scientific way of someone



1 coming up with an opinion on how credible, or
2 otherwise, Mr. Wilson was, which I think the
3 polygraph did. Whether one admires it or not, it
4 was a way of measuring that.

5 Q But, as I understand it, his story or his eventual
6 story as to Milgaard's involvement in the crime
7 was never tested by Roberts?

8 A Is he -- I thought he was the one that was --

9 Q No, no, but he was tested on two questions, as I
10 understand it.

11 A Oh, yeah, okay.

12 Q And "are you telling everything you know" sort of
13 thing?

14 A Yeah.

15 Q I mean you never did get his records from Roberts,
16 as I understand it?

17 A We've -- not to -- we've never been able to locate
18 them anywhere.

19 Q Yeah, they had some policy they wouldn't give them
20 out, or something like that?

21 A That's right, that's in the file that I phoned
22 Roberts, he phoned back and said "I can't release
23 these without the chief's say so", as I recall it
24 Mr. Wolch.

25 Q But the best you got was there was maybe a couple



1 of questions of Wilson, but nothing substantive,
2 as to "did you see this" or "did you see that" or
3 any of that?

4 A No, it didn't go on in that way, sir.

5 Q No. So I'm going to suggest there's not much
6 comfort you can take in the polygraph when the
7 incriminating story is not even tested?

8 A Well I suppose, in dealing with Wilson, it was
9 some comfort the way his testimony went in --

10 Q Did you have any idea what went on with -- between
11 Roberts and Wilson and John?

12 A No, I didn't, sir.

13 Q Like did you know it was being taped or listened
14 to or --

15 A At the time, Mr. Wolch, I don't believe I knew the
16 whole thing was happening, is my recollection now.

17 Q But did you know, for example, that exhibits were
18 being used?

19 A Well, again, I wouldn't have known that because I
20 didn't know the polygraph episode was taking place
21 at all at that point.

22 Q Well, at a later point in time, I mean?

23 A Oh, eventually.

24 Q By trial time?

25 A Yeah, eventually I would have learned that.



1 Q At trial time?

2 A I assume so, yeah.

3 Q Well that would have probably come to your
4 attention because of the continuity of exhibits?

5 A I, yes, because some of the items of clothing were
6 used in that.

7 Q So you would have known they were taken away from
8 the exhibit locker?

9 A Yeah.

10 Q And you would obviously have said "well why were
11 they taken to the hotel"?

12 A Yeah, it appeared in my exhibit chart, and I would
13 know that way --

14 Q Yeah.

15 A -- if nothing more than that.

16 Q Did it cause you concern that 16-year-olds were
17 being shown autopsy pictures and bloody clothes?

18 A Well in the, in the setting of this offence, if
19 you will, I think that may have been
20 understandable where it may not have been in a
21 robbery or a holdup or this or that.

22 Q Well I, I mean for example autopsy pictures, --

23 A Yeah.

24 Q -- how could that trigger a memory in a
25 16-year-old other than just scare them?



1 A I believe, Mr. Wolch, that one possibility is a
2 person who sees a very, very shocking episode and
3 is affected by what is called hysterical amnesia
4 can actually come out of that by being shown some
5 other photo that suddenly snaps them back. That's
6 very badly put, but that's --

7 Q No, but okay, --

8 A Yeah.

9 Q -- well hysterical amnesia, that's an interesting
10 term but I don't know much scientific basis for
11 that term?

12 A Well it exists, sir, or did at that time.

13 Q Well would it strike you as a bit, a bit difficult
14 that, when you follow the story through, that
15 Nichol John would presumably see a crime, a
16 horrible crime, forget about it, remember it in
17 Calgary when she talks to Wilson, --

18 A Uh-huh.

19 Q -- comes back and she forgets about it, remembers
20 it for the police, forgets about it for Court; I
21 mean --

22 A Yeah.

23 Q -- my understanding of any kind of amnesia is that
24 when you come out of it, you come out of it, you
25 don't forget, remember, forget, remember?



1 A I can see that point, sir.

2 Q Yeah.

3 A The -- there are amnesias that, when you come out
4 of it, you stay out of it, in effect.

5 Q Well, she is flipping in and out, if you follow
6 her story?

7 A Yeah, --

8 Q It's kind of ridiculous.

9 A -- it's very unusual, to say the least.

10 Q Did it ever dawn on you, the very simple fact that
11 perhaps she just got scared and gave the police
12 what they wanted?

13 A I didn't feel that that happened in this case, I'm
14 sure it does in some cases.

15 Q Well, in your three interviews with her, did you
16 ever say to her "look, if you weren't telling the
17 truth to Mackie, and is it because you are scared,
18 tell me about it"?

19 A No.

20 Q "We're not out to get you, we just want to know
21 the truth"?

22 A I don't believe I did that, sir.

23 Q In fairness -- and I respect you for saying it --
24 I would think that what you were saying to her is,
25 "come on, tell us, you saw it, you told us you saw



1 it, come on, tell the truth as I perceive it"?

2 A I don't believe that I followed that exact course,
3 sir.

4 Q But she was never given an opportunity to say
5 "look, I was pressured", --

6 A Uh-huh.

7 Q -- "I'm kept in a jail, I'm taken there, I'm shown
8 horrible, horrible pictures, bloody clothes", --

9 A Uh-huh.

10 Q -- "I'm given all these ideas as to what did
11 happen, and I finally said 'okay, I'll give you
12 what you want'"?

13 A Presumably, she could have volunteered that, she
14 didn't in my presence.

15 Q But nobody here ever said to her, to my
16 knowledge -- and maybe you know somebody -- nobody
17 ever said to her "look, young lady, if you were
18 forced into this, or if you didn't see anything,
19 tell us now"?

20 A Yeah. You are correct, sir, I don't know of
21 anyone who did that.

22 Q Well, I'll leave the script document, but I leave
23 it with the understanding that your evidence is
24 that, had you seen it, it would have been
25 extremely important to you?



1 A That's my conclusion now, sir. 'Seen it' in the
2 sense of, of course, reading it as opposed to --

3 Q Read it, digested it, appreciated it?

4 A Yeah.

5 Q You know, whatever you would have done with it to
6 familiarize yourself with it. Okay.

7 Mr. Caldwell, I'd like to turn a
8 bit to what I promised I would do yesterday with
9 Mr. Lockyer's questions about statements, --

10 A Okay, sir.

11 Q -- and I believe you had ample time, I think, to
12 read them over, I hope you did?

13 A Umm, I don't know if you've spoken to eminent
14 Commission Counsel, Mr. Wolch, I --

15 Q I --

16 MR. HODSON: Mr. Caldwell had asked me
17 yesterday what, specifically, you wished to do
18 with those, and I advised him to read them, and I
19 wasn't sure what else you wished to canvass with
20 him, if there is something more specific. And,
21 again, I am precluded from talking to the witness
22 about his evidence, so I didn't want to get into
23 any of that with him yesterday. So it may be,
24 Mr. Wolch, that you might need him to do some
25 further reading, it might not, but maybe if you



1 ask him the questions you can find out whether he
2 needs more time.

3 BY MR. WOLCH:

4 Q Okay, I'll go through it. But for future
5 reference I can say on the record that I don't
6 mind if Commission Counsel, from my perspective,
7 talks to witnesses to help them during the
8 hearing, that doesn't -- I have confidence in him.
9 But --

10 A Mr. Wolch, could I maybe explain to you that when
11 I got home with these statements last night after
12 the day in Court I just couldn't make head or tail
13 of what I was supposed to do with them to begin
14 with, and ended up not, essentially, doing
15 anything.

16 Q Okay.

17 A What I did want to canvass with you is I'm happy
18 to go through it in any form you want, if --

19 Q Okay.

20 A But I just simply was beat, as they say in law.

21 Q Okay, no, I'll try to do it fairly quickly, and if
22 not I presume we will be going until tomorrow
23 anyway, so I'll give you tonight if I have to.

24 A Yeah.

25 Q And trust me, if you get tired, like I told you



1 before, I don't want to put you in a position
2 where you are saying things you don't mean because
3 you are exhausted.

4 A I appreciate it, sir.

5 Q But I'll just identify it very quickly and we
6 might be able to do it quite quickly.

7 A Okay.

8 Q The first document is 006609.

9 A What name is on that, sir?

10 Q Oh, I'm sorry, it's maybe better as 006709. I
11 haven't looked at them but I know them pretty
12 well.

13 A Okay.

14 Q I'm looking for the typed version. Okay, now,
15 have you had a chance to read this at all?

16 COMMISSIONER MacCALLUM: Sorry?

17 MS. KNOX: Mr. Caldwell has the handwritten
18 version as well as the typewritten version.

19 I was just having a quick
20 discussion with Commission Counsel. Mr. Caldwell
21 communicated to him, as well as to me, that
22 because he just felt very tired and overwhelmed
23 last night he didn't read this.

24 Mr. Wolch has made the
25 observation, and I make it, that he seems to be



1 getting particularly tired at the end of today.
2 And I had raised with Commission Counsel whether
3 we might want to suggest that once he understands
4 that he needs just basically to read them, that
5 we could adjourn for the day, he could undertake
6 to do that tonight and start fresh tomorrow, but
7 I leave it to him to decide if that's best, but
8 it certainly is an option that might be helpful.

9 MR. WOLCH: Okay. Well I'll, I bow to the
10 Commission, but maybe I can be a little helpful
11 in this.

12 BY MR. WOLCH:

13 Q I'm going to take you through the typed
14 statements.

15 A Okay.

16 Q No, no, not now.

17 A Okay, very good, okay.

18 Q I'm going to take you through the typed
19 statements. What I am going to look for is, first
20 of all, comparisons between what David, Nichol,
21 and Ron said initially, that is how similar they
22 are --

23 A Okay.

24 Q -- in terms of how they progress, how they seem to
25 be consistent, and matters of that nature; okay?



1 A All right, sir.

2 Q Then I want you to look at each one individually
3 to see why they would be inherently false, that is
4 you made a comment -- and you will see you were
5 wrong, with respect -- that they didn't say they
6 were in Saskatoon, or words to that effect, --

7 A Right.

8 Q -- you will correct that pretty quickly.

9 A I'm sure that's correct, sir, what you are saying.

10 Q But I want you to go through them to say what fact
11 stands out as being false, and we may explore that
12 in terms of it may be it's later statements that
13 cause you to say they are false, but that's not
14 what Mr. Lockyer was getting at. He was getting
15 at what is there in those statements that proven
16 facts show to be false; you follow me?

17 A I think so, sir.

18 Q I mean if they say "we arrived at so and so time,
19 we went down this street with Danchuks", etcetera,
20 etcetera, what is false in the statements, if
21 anything?

22 A All right. Now --

23 Q Do you understand that?

24 A I hope so, sir, I think. Should I be examining
25 these sort of abreast of one another or --



1 Q Both.

2 A -- more or less?

3 Q Cross-compare them for consistency, you know. You
4 know, and I'll give you a hint on the exam, --

5 A Uh-huh.

6 Q -- the only thing I see that's different is David
7 says he -- they asked an old woman for directions.

8 A Uh-huh.

9 Q But that's just a hint. But you look at it for
10 inconsistencies, if you wish, that's what I am
11 getting at, look at them individually to see if
12 any -- if there's anything in there you say "that
13 can't be right, the mo -- Trav-a-leer guy says
14 something different but this says something
15 different", --

16 A Okay.

17 Q -- something in that. That's, I think, what Mr.
18 Lockyer wanted, those two things explored; do you
19 follow?

20 A I do, sir, and --

21 COMMISSIONER MacCALLUM: Why don't you
22 write out your questions on a piece of paper and
23 give them to him? No, I'm serious.

24 MR. WOLCH: Okay. I'm sorry, I'm back to
25 the exam.



1 COMMISSIONER MacCALLUM: After adjournment.

2 MR. WOLCH: I'm happy to do that, sir, I
3 didn't mean to laugh at it, I'm just going back
4 to the exam point. Okay.

5 BY MR. WOLCH:

6 Q Or perhaps myself and your counsel can do that
7 and, together, --

8 A That would be -- yeah.

9 Q -- and I think your counsel is nodding and I think
10 she knows, so help me, I was never good at being a
11 teacher.

12 A Yeah.

13 MS. KNOX: I can help you with that.

14 BY MR. WOLCH:

15 Q Anyway, you got that right?

16 A Yeah, Mr. Wolch, I would be happy for you to do
17 that.

18 Q Yeah, we'll do it between ourselves, and we'll
19 have exactly what we want you to explore.

20 A Yeah, that's fine, because I frankly just simply
21 didn't get anywhere on the project last night, so
22 --

23 Q Okay. And, because of the timing and everything,
24 I might give you some other ideas so that we go a
25 little better tomorrow. I am going to take you



1 through the scene of the crime, your theory, --

2 A All right.

3 Q -- just so you have notice.

4 A All right.

5 Q I'm going to have you explain what your theory
6 was, perhaps even what you now know did happen,
7 just the -- your theory, I'm going to take you
8 through that. Okay?

9 A Okay.

10 Q And just so you know, I'm also going to take you
11 through some medical evidence regarding David that
12 I think you have had for a few days now, and I
13 think you have read it?

14 A I read it yesterday, that's correct, yeah.

15 Q Okay. So we're going to go through that too. And
16 I'm gonna take you through your press release, I'm
17 gonna take you through the Supreme Court decision
18 a bit, umm, and I'm gonna take you a little bit
19 through disclosure. So I'm giving you a whole
20 kind of advanced warning so it will go a bit
21 smoother. I'm not trying to be sarcastic.

22 A No, I understand, sir.

23 Q I just want you to know so you can gear up for it,
24 and that's my intention.

25 Mr. Chairman, I don't think it's



1 productive to carry on at this point.

2 COMMISSIONER MacCALLUM: I agree. We'll

3 adjourn.

4 A Okay, thank you.

5 *(Adjourned at 4:00 p.m.)*

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