

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 90

Inquiry Proceedings



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Mr. Eamon O'Keefe, Esq., **for** Mr. Larry Fisher
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Transcript of Proceedings

(Reconvened at 9:02 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Morning.

THOMAS DAVID ROBERTS CALDWELL, continued:

BY MR. WOLCH:

Q Morning, Mr. Caldwell.

A Morning, sir.

Q Just for the record's sake, after we broke yesterday you were given a number of questions, and I understand you spent some time here doing your best to refresh yourself; and also for the record, this morning you met with myself and your counsel just to clarify a little bit so we could expedite going through this?

A That's right, sir.

Q Okay?

A Yes, that's correct.

Q And I think I told you this morning that I would like to get through this portion as quickly as possible.

A You have my best wishes, sir, I'll try to help.

Q But, for the record, the questions you were given; can you recite them, --

A Yes.



1 Q -- exactly what you were asked, so we have it
2 exactly right?

3 A Yes sir.

4 "Please look at the original statements
5 of:

6 1. Ron Wilson March 3rd

7 2. Nichol John March 11th

8 3. David Milgaard March 3rd and April
9 18th

10 Refer to Mr. Lockyer's question to you
11 yesterday in transcript pages we are
12 giving you today."

13 Which I got yesterday.

14 "Review each statement by itself to
15 refresh your memory on what it says, or
16 of what it says, rather. Then compare
17 all three statements to each other to
18 find similarities between them and
19 differences between them. Then look to
20 each statement to see anything shown to
21 be false by known fact.",

22 sir.

23 Q Okay. And maybe, I'm not sure we can do this for
24 the record, perhaps you can; do you have in front
25 of you the numbers of the statements you looked



1 at?

2 A Yeah. Do you wish to start with which?

3 Q Just the ones you looked at, --

4 A Okay.

5 Q -- and if the staff can help by just quickly
6 pulling them up so we know what we're lookin' at,
7 just quickly pull them up?

8 A Okay. Well there is a John statement --

9 Q Sorry?

10 MS. KNOX: Tell him it's the Bates number
11 you need on the bottom of the page, he put his
12 own numbers on.

13 BY MR. WOLCH:

14 Q Oh, I'm sorry, thank you very much. Just that
15 number?

16 A 002124, sir.

17 Q Okay, let's just wait until that comes up, a speed
18 test for the staff.

19 A Okay, very good.

20 Q Okay, so that's Nichol John's statement, that's
21 out, dated March 11th. Okay.

22 A That's right.

23 Q We've all seen that many times.

24 A Okay.

25 Q What's the next statement?



1 A Well then a Wilson statement says 042086.

2 Q Okay, pause.

3 A Okay.

4 Q Okay. You see it on the screen now; that's the
5 statement?

6 A Yeah, I'm sure it is, sir. It is, yeah.

7 Q Yeah, that's the one. We've all seen that many
8 times, that's the March the 3rd statement, okay?

9 A Then there are two David Milgaard's statements,
10 the 006586, and I believe, Mr. Wolch, that -- the
11 typed version, if you will, of that is -- pardon
12 me, there is a second one April 18th, and that's
13 0 -- pardon me -- 30 --

14 Q The one on the screen now is March the 3rd, '69?

15 A Okay.

16 Q Okay. And the next one is?

17 A Is April 18th, '69, and that's 305267, and those
18 are I believe --

19 Q See that one now on the screen? That's the April
20 18th --

21 A Yes, sir.

22 Q -- copy of the statement --

23 A That's it, sir.

24 Q -- of David Milgaard?

25 A That's right.



1 Q Okay. So those are the documents you had to look
2 at?

3 A I -- that's right.

4 Q Okay. And what did you understand your first task
5 to be?

6 A "To review each statement by itself to refresh
7 your memory." I had read through them yesterday.

8 Q Yes?

9 A "Compare the three statements to each other to
10 find similarities between them and differences
11 between them."

12 Q Let's pause there.

13 A Okay.

14 Q Did you find -- obviously you found
15 similarities, --

16 A Yeah.

17 Q -- I'm more concerned about differences.

18 A Okay.

19 Q Did you find differences?

20 A Mr. Wolch, if -- very few, and inconsequential,
21 would be how I would answer you. I didn't try to
22 catalogue them, there were differences, and I'd --
23 I'd say they were that way.

24 Q But they would be a type you would expect to find?

25 A Yeah, in any two witness statements from one



1 person, if you will.

2 Q Yeah. So nothing stood out?

3 A No, sir.

4 Q Okay. And what was the second, your second
5 mission?

6 A Okay. It was "Compare all three statements to
7 each other to find" -- oh, I'm sorry, we've done
8 that I guess. "Then look to each statement to see
9 anything shown to be false by known facts as they
10 came to me."

11 Q Okay. Is there any particular statement you might
12 want to deal with --

13 A Yeah.

14 Q -- in that regard?

15 A Not really, sir. And the known -- I don't know if
16 you would like me to -- I think the 'known facts'
17 terminology occurred when Mr. --

18 Q Lockyer?

19 A -- no -- Mr. Carlyle-Gordge was interviewing me
20 years ago.

21 Q Okay.

22 A It got reproduced, I believe due to me, in some
23 later form in the case years later, and the same
24 terminology has come up now, as you can see, and I
25 believe that's where it came from, for whatever



1 good that may be.

2 Q Okay. Because there was some reference somewhere
3 along the way from you that perhaps they denied
4 being in Saskatoon --

5 A Yeah.

6 Q -- or something like that?

7 A That's right, sir, I'm sure I said that and it
8 isn't here.

9 Q Okay.

10 A It --

11 Q Okay. So when you read it over, --

12 A Yeah, that --

13 Q -- known facts, there's nothing to contradict?

14 A No, sir, that's right.

15 Q So --

16 COMMISSIONER MacCALLUM: Okay. So your
17 answer is there's nothing false by reference to
18 the known facts?

19 A I think that's correct, sir, I -- as I look
20 through the whole matter as best I can.

21 COMMISSIONER MacCALLUM: Okay.

22 BY MR. WOLCH:

23 Q And when you were -- this is perhaps a tough
24 question -- but when you were, back in '69,
25 reading statements of witnesses like these people



1 were you cognizant of the fact that, while they
2 appeared to be a narrative, many of these
3 statements omitted the questions that were being
4 asked along the way?

5 A Yeah. Truthfully, Mr. Wolch, I didn't notice
6 that, and I -- I'm -- I wouldn't doubt that that
7 was the case.

8 Q That is you wouldn't expect a 16-year-old normally
9 to sit down and give a complete story, what you
10 would expect is the officers would be saying "and
11 what happened next", "where did you go next", and
12 that is how the statement is created?

13 A That's right. And, all things being equal, the
14 questions would be -- for instance in Mr.
15 Milgaard's it's question/answer.

16 Q Right.

17 A All things being equal, one would expect the
18 questions there, when you mention it I'm sure that
19 wasn't always the case.

20 Q Because it might be unfair, at the end of the day,
21 might you agree, to accuse somebody of leaving
22 something out if they weren't asked about it?

23 A Yeah, that's so, sir.

24 Q I mean you wouldn't expect, for example, these
25 kids to say "oh yeah, we, then we went to Edmonton



1 and we did some marijuana there" --

2 A Yeah.

3 Q -- when (a) they know they are being questioned
4 about Saskatoon, --

5 A Uh-huh.

6 Q -- and (b) nobody has asked them about doing
7 marijuana in Edmonton?

8 A I've --

9 Q Do you follow me?

10 A Yeah, I do, and I've seen examples of just that,
11 where someone indignantly said "nobody asked me",
12 not with respect to this, but I've certainly seen
13 it, sir.

14 Q You see, we've got through a that very quickly.

15 A Oh good. It's not the break time by any chance,
16 is it, sir.

17 Q Oh, okay.

18 A Thank you, sir.

19 Q Now what I'd like to turn to, though, is what
20 occurred to Gail Miller and how you perceived it
21 back in '69, and I'd like to explore that with
22 you.

23 A All right, sir.

24 Q And we know somewhat what your position was, given
25 we have your closing address to the jury and we



1 have your draft copy leading up to it, and
2 unfortunately we have your letters to the parole
3 board where you gave your theory, we have that to
4 look at, but I'd like to go over this a bit --

5 A Sure.

6 Q -- with you.

7 A Yes sir.

8 Q And it might be better if we pull up my favourite
9 map, 091245. You've seen this many times I would
10 think?

11 A Yeah, that's right, sir.

12 Q And maybe if we can just sort of focus on that
13 area a bit. Now, when we talk about known facts
14 we know that Mr. Fisher committed the crime;
15 correct?

16 A That's absolutely the case.

17 Q That's a known fact?

18 A Yeah.

19 Q We also know that Gail Miller left her rooming
20 house somewhere around a quarter to 7:00 in the
21 morning?

22 A And that's her house shown on the map, as you've
23 pointed out.

24 Q And we know that she never got to the bus stop;
25 right?



1 A That is my understanding, that's correct, sir.

2 Q So -- and I could ask you this but maybe I'll lead
3 you a bit -- would it be -- would you ascribe to
4 the theory that she walked down Avenue O and was
5 likely accosted by Fisher where I have the X by
6 the alleyway; would that be a likely --

7 A Umm, it could be, Mr. Wolch. I think I should
8 just mention that, because of one thing and
9 another, I was not in the Inquiry when Fisher gave
10 his evidence during May.

11 Q No, but --

12 A No, just so that you know that.

13 Q I know, --

14 A Yeah.

15 Q -- but I'm not going to say what Fisher says, --

16 A Okay.

17 Q -- I mean just --

18 A No, no.

19 Q But, just looking at it logically, we know quarter
20 to 7:00, --

21 A Yeah.

22 Q -- we know she doesn't get to the bus stop prior
23 to 7:00, something occurred on that to stop her
24 from getting from A to B?

25 A Yeah.



1 Q Right?

2 A Yes, sir. And where you've marked the X could be
3 a place where --

4 Q Given the way he operates generally --

5 A Yes.

6 Q -- and where the body is found, etcetera, that
7 looks like a pretty simple --

8 A It certainly looks that way at this point.

9 Q Yeah. Now I'm not sure if I'm going to have to
10 help you or not but can you, without too much
11 assistance, tell us, when you were going to the
12 jury, what you thought happened?

13 A Yes sir.

14 Q And use the map if you could, I --

15 A Okay. Are you speaking about the route initially,
16 here, the --

17 Q Everything, what you thought happened in a general
18 sense?

19 A Okay.

20 Q She's leaving the rooming house, and what, where
21 do you think she's going?

22 A Umm --

23 Q You can trace it if you like?

24 A Okay, that's fine, sir. I thought she was --
25 presumed -- thought she'd gone to 21st Street,



1 along here, and gone south on Avenue N, and that
2 the meeting with the Wilson vehicle and occupants
3 occurred somewhere going down this avenue. The
4 request for directions, etcetera, I felt happened
5 as their car went south on N, and as I felt she
6 walked south on N on what I believe is the west
7 sidewalk, Mr. Wolch --

8 Q Okay. And then -- and then what did the car do?

9 A My memory of it is that the car kept going south
10 on N, got to 20th Street --

11 COMMISSIONER MacCALLUM: Just a minute, you
12 said the west sidewalk, do you mean the east
13 sidewalk?

14 A No, I actually meant -- I meant west, sir.

15 COMMISSIONER MacCALLUM: Okay. He's
16 driving --

17 A Yeah.

18 BY MR. WOLCH:

19 Q I'll try to help you on that.

20 A Okay.

21 Q That would make it impossible for David to be
22 calling out the window, I think, and being the
23 nearest person to her?

24 A Okay. Is --

25 Q I'm not going to hold you up, but the car is



1 coming down that street, she's walking down that
2 street; now where does the U-turn take place, or
3 whatever, take place?

4 A Okay. Just the direction thing, there is a little
5 map in the upper right corner, and I said west,
6 Mr. Commissioner, because it would be the sidewalk
7 on the right of the vehicle, if you will, as it
8 went south.

9 Q So she would be on this sidewalk here?

10 A That was my understanding, Mr. Wolch, yeah.

11 Q That's --

12 A Okay, that's what I was trying to say.

13 Q Okay.

14 A And then the car, I felt, went to 20th Street.

15 Q Okay. Try to follow a bit on the map so we can
16 see.

17 A Do you want me to --

18 Q Yeah, sure, if you can mark it we'll --

19 A Okay, that's fine.

20 Q Okay.

21 A So the car went to 20th Street, attempted a
22 U-turn, --

23 Q Okay, now where is it stuck, I won't -- I'll let
24 you tell us?

25 A I felt that there was evidence of almost a snow



1 boulevard on 20th, and it initially got stuck
2 there, if my memory is correct.

3 Q Okay.

4 A Then I felt it went north, attempted to turn in
5 the alley behind the funeral home, which would be
6 complemented by some of the evidence from the
7 gentleman at the church, for instance, got --

8 Q Got stuck again?

9 A -- stuck again was the way I recall it now, sir,
10 somewhere in this -- somewhere in this area. That
11 would be my sort of memory on the car thing, sir,
12 subject to --

13 Q Okay. Now I'm wondering in your own mind, given
14 this theory, how you could account for 20th
15 Street, where you have a street that's
16 sufficiently busy, it has busses going back and
17 forth, --

18 A Uh-huh.

19 Q -- but nobody would see anything where the --
20 where you would know the stuck vehicle would
21 actually halt traffic?

22 A Well I can envision a situation, sir, where it
23 could be stuck, if you will, in the north half of
24 20th, for one thing. In other words there's --
25 that would be the westbound half, or -- and



1 attempt this U-turn and head back toward the alley
2 is --

3 Q But they got unstuck by them pushing the car out?

4 A I assume that that was the time, sir.

5 Q But with busses going by --

6 A Yeah.

7 Q -- and cars going by, nobody --

8 A Yeah.

9 Q -- in the entire city would see this impediment to
10 traffic?

11 A Mr. Wolch, I don't think anyone was located who
12 claimed to have seen it, I think that much is --

13 Q Well, that's for sure, that's in fact the point
14 I'm making.

15 A Yeah, well, I agree with that, sir.

16 Q Yeah.

17 A No one was found to --

18 Q And also, given that it was 40 below and Gail
19 Miller was not all that warmly clothed, --

20 A Uh-huh.

21 Q -- would you not expect that for all this to take
22 place, going down the street, turning around,
23 coming back, she would be long gone?

24 A I would have thought so, sir.

25 Q But why wouldn't that cause you to think that this



1 is impossible?

2 A Well, Mr. Wolch, I clearly would have no
3 knowledge, I would simply have theories on what
4 might happen. That theory, sir, that you've put
5 forth in my opinion is quite possible. In other
6 words, suppose she had run in any direction, she
7 would be gone by the time the latter parts of this
8 occurred.

9 Q But it makes the combined stories of Wilson and
10 John impossible. I mean -- and I haven't even
11 thrown in the fact that it's a bizarre reason why
12 she would be going down the wrong street given the
13 bus stop and the fact that the knife through the
14 dress, or through the coat and not through the
15 dress --

16 A Uh-huh.

17 Q -- when you throw that in, I have a very difficult
18 time understanding how this could have been
19 advanced by yourself even.

20 A Well, sir, the evidence, if you will, that I had
21 was roughly along those lines, I couldn't
22 hopefully invent any, and I had to work with what
23 appeared to be, you know, witnesses of various
24 types, including civilians, who had nothing to do
25 with it, etcetera.



1 Q Mr. Caldwell, I'm not for a moment suggesting that
2 you had an improper purpose or you were trying to
3 convict an innocent person, nothing at all --

4 A No, sir.

5 Q -- but what I'm trying to understand is how the
6 prosecutor's focus and mentality would adopt a
7 scenario that really makes no sense, that's what
8 I'm trying to --

9 A Okay.

10 Q -- identify, how you wouldn't see then, the
11 obvious, that it's just impossible.

12 A Well, frankly, sir, I didn't see it that way and I
13 find it, you know, it's a very legitimate stance
14 to take, it didn't seem to me to be that way, and
15 there was also, for better, for worse, three or
16 four witnesses or pieces of evidence which did
17 identify it with N instead of O as you may recall.

18 Q Well, we'll deal with that --

19 A No, that's fine, sir, I just wanted to mention
20 that.

21 Q You may have some trouble with that.

22 A Okay.

23 Q We'll deal with that.

24 A Very good.

25 Q Now, it's fair to say, though, that even you



1 couldn't really decide what street it was on until
2 very, very late in the day?

3 A In terms of the investigation you mean, sir?

4 Q Well, I'm going to suggest to you that you were
5 almost finished the jury trial and you hadn't in
6 your own mind decided if it was O or N.

7 A Mr. Wolch, that's not how I recall it, but you may
8 be correct.

9 Q Well, let's look at 007311.

10 A Okay.

11 Q This is not your closing address, but this would
12 be a draft that you were kind enough to provide --

13 A Okay, sir.

14 Q -- which is very similar to your eventual closing,
15 so I presume this was done sometime during the
16 jury trial itself?

17 A I assume it was, sir.

18 Q And I don't want to go through all of it, but you
19 say it's the Crown's theory, and if we can start
20 highlighting that part there.

21 A Do you want me to read it, sir?

22 Q No, not yet.

23 A Okay.

24 Q It says:

25 "It must be inferred that she set off on



1 foot ... on either Avenues P. or O., and
2 the Crown suggests, on the evidence,
3 down Avenue O."

4 You see that?

5 A I do. Mr. Wolch, was her -- I'm embarrassed to
6 say this, was her residence on P --

7 Q O.

8 A It was on O. So that to my way of thinking is
9 flatly mistaken by me. In other words, I don't
10 know why it would be Avenue P which is --

11 Q Okay, but you -- I would suggest probably you got
12 P mixed up with Avenue N.

13 A I think that's right, sir.

14 Q But Avenue O would be the obvious choice. But you
15 say she's going down Avenue O, but obviously when
16 it came to jury time you changed the street.

17 A Well, clearly this was incorrect, the P part.

18 Q Forget P.

19 A No, no, but that would be something.

20 Q Okay. I guess, Mr. Caldwell, what I'm suggesting
21 is here, if we call P N, you are saying it's
22 either N or O and I think it's O, those are the
23 only two choices.

24 A In that -- Mr. Wolch, because I got Avenue P in
25 this, I think I meant we moved up one street. P



1 is wrong, O was a very good possibility and N is
2 what I should have been talking about is the way I
3 read it.

4 Q Okay, but you do have O here and you talk about O
5 again and again.

6 A That's right, sir, but I can suggest that when I
7 got the Avenue P in there, which should never have
8 been in there, that moved it up one block in my
9 mind. What I should have been talking about was O
10 and N, sir, is my conclusion from this. I haven't
11 seen this for a while.

12 Q Oh, no, I appreciate that, but I guess the point
13 that I'm trying to make, and I don't know if you
14 accept it or not, is that you were having trouble
15 yourself in trying to determine what the Crown's
16 theory should be as to what street it occurred on.

17 A Well, Mr. Wolch, in this instance I think it was
18 strictly an alphabetical difficulty because that
19 incorrect Avenue P got in and moved my letters
20 down one, if you will. That's, I think, what must
21 have happened, sir.

22 Q But you realize now Avenue O is the logical street
23 for her to walk down?

24 A Yeah, all things --

25 Q You are satisfied with that?



1 A Yeah.

2 Q And I want to focus a little bit on your, on how
3 you perceived things happened and at this time if
4 I could turn to 067384 at 85 actually, and what
5 I'm referring to is your -- this is your letter to
6 the parole board. I'm not going into it for the
7 other purposes --

8 A Okay, sir.

9 Q -- other than how you describe the incident.

10 A Okay, sir.

11 Q It would have been very fresh in your mind at that
12 time, and starting about here, highlight that
13 portion there, they drove along Avenue N around
14 7:00 a.m., asked directions of Gail Miller, and
15 I'm going to read this quickly.

16 A Okay, fine.

17 Q And they asked for Peace Hill, didn't know,
18 replied stupid bitch. At the end of the block,
19 stuck, Milgaard heading back towards the sidewalk
20 on which Miller had been walking, confronted,
21 grabbed purse, pulled knife, took her down alley.
22 Now, you've got this portion here which is really
23 what I'm looking at.

24 A Okay, sir.

25 Q Nichol John observed this part of the episode and



1 ran away, eventually getting back into the car.

2 When Wilson returned to the car she was

3 hysterical, and you've got her running away coming

4 back to the car.

5 A That is --

6 Q Where does that come from?

7 A Okay, just a minute. That is Nichol John running
8 away?

9 Q Yeah. I'm just wondering, that would not have
10 been in trial evidence.

11 A I can't say, sir. Maybe it wasn't.

12 Q Might that have come from the script?

13 A Not by me, sir, it didn't, because I did not read
14 that thing. This could be the trial evidence, it
15 could also be wrong.

16 Q Now, I appreciate that when we look at your
17 closing address and your position you took back
18 then, there are some difficulties with remembering
19 and getting everything together, and I can
20 understand that.

21 A Okay, sir.

22 COMMISSIONER MacCALLUM: Just a second.

23 MS. KNOX: Mr. Commissioner, I don't mean
24 to needlessly interrupt, and I won't, but having
25 had the opportunity to review Nichol John's May



1 23rd statement last night, not in great detail,
2 it seems to me that that was said in her
3 statement but not in her evidence in trial, but
4 that may be --

5 MR. WOLCH: You might be right, but I guess
6 my point is that was not admissible evidence.

7 A No.

8 MS. KNOX: No, but it was in her statement.

9 BY MR. WOLCH:

10 Q I'm sorry, I'm sure you are right, but that was
11 not admissible evidence that you were putting to
12 the parole board is what I'm getting at.

13 A No, sir. I'm sure what my counsel said is no
14 doubt what happened.

15 Q I accept that.

16 A Okay, very good.

17 Q What I would like to do is bring to your attention
18 that, and I don't know if you are aware of this,
19 and I would be interested in knowing, that there
20 was prepared a film of your -- that deals with
21 your closing address. Are you aware of that?

22 A No. I was not asked to take part in it either,
23 Mr. Wolch, but I didn't know that.

24 Q Well, I don't think anybody plays your part, but
25 your voice is there.



1 A Very good.

2 Q I would like to have you see it and then I want to
3 ask you some questions.

4 A Certainly.

5 Q I think it will be quite enlightening and will
6 save an awful lot of time --

7 A Very good.

8 Q -- if we could look at it. I've arranged to have
9 it on the screen I hope. We'll go through it once
10 and then --

11 A Yes, thank you, sir.

12 Q -- and I'll ask some questions. Take your time
13 with it.

14 A Very good.

15 TRANSCRIPT OF NARRATION OF VIDEOTAPE REENACTMENT

16 "A single portrayal of the evidence
17 given at the trial of David Milgaard in
18 January of 1970 is virtually impossible
19 because of the many conflicting versions
20 put by the witnesses Nichol John and Ron
21 Wilson. This videotape attempts to
22 provide the viewer with a sense of the
23 area in which the crime occurred and to
24 portray the alleged encounter with Gail
25 Miller."



1 MR. WOLCH: Can we stop for a minute? I
2 thought it was going to work. Try it again.

3 "It's unclear as to whether this alleged
4 encounter occurred on Avenue O or Avenue
5 N between 21st and 20th Streets in
6 Saskatoon."

7 VIDEOTAPE STOPPED

8 MR. WOLCH: That's not the beginning.

9 COMMISSIONER MacCALLUM: You can take a few
10 minutes to set that up.

11 MR. WOLCH: Could we set that up if you
12 don't mind?

13 *(Adjourned at 9:30 a.m.)*

14 *(Reconvened at 9:45 a.m.)*

15 MR. WOLCH: Mr. Commissioner, for the
16 record, I probably should have said that the tape
17 in question is one that we prepared for the
18 Supreme Court. It was filed in the Supreme Court
19 for the reference itself and the tape, I believe
20 I provided it a number of months ago, quite a few
21 months ago with the intention of having it played
22 here. Unfortunately it wasn't -- is the word
23 digitalized, and so it makes the playing of it a
24 little more difficult, and so we're going to try
25 and do it at this point in time. Where it's at



1 now is about a minute into it, the first minute
2 is really blurry. I don't know if it will go
3 from here, but maybe we can give it a try and see
4 how it works out.

5 COMMISSIONER MacCALLUM: All right.

6 VIDEOTAPE CONTINUED

7 "... though her evidence was
8 considerably different at the trial.

9 In his closing address to the
10 jury, the Crown Attorney said the
11 following:

12 "Now, I'd like first to outline the
13 Crown's theory of the offence. The
14 evidence is that the girl, Miss Miller,
15 was standing at her residence home, 130
16 O South between, as I get it, 6:35 and
17 6:45 the morning of the murder. It must
18 be inferred that she set off on foot for
19 the bus line on 20th down either Avenue
20 P - excuse me, Avenue O or Avenue N, one
21 or the other. She had to go south from
22 her residence, and the Crown suggests on
23 the evidence that it was down Avenue N
24 proceeding southward on the west side of
25 that avenue, proceeding towards 20th



1 Street where the bus line is."

2 Although the Crown committed
3 itself to the theory that Milgaard's
4 encounter with Gail Miller occurred on
5 Avenue N, this passage from the jury
6 address shows that the Crown also had to
7 allow for the possibility of an attack
8 on Avenue O.

9 Let us begin with an
10 examination of the Avenue O theory.

11 Gail Miller lived at 130 Avenue
12 O South which was slightly over one
13 block in a straight line from a bus stop
14 located on the southwest corner of
15 Avenue O and 20th Street. There was
16 also a bus stop located at the corner of
17 Avenue N and 20th Street. If Gail
18 Miller were to take the bus to work
19 along 20th Street, common sense suggests
20 that she would take the most direct
21 route to the bus stop, straight along
22 Avenue O to 20th Street.

23 As we see in this portrayal,
24 Gail Miller would leave her home from
25 the front door and would have the option



1 of crossing over to the west side of the
2 street, either at 21st or when she
3 reached 20th Street. Here we see her
4 crossing over to the west side of the
5 sidewalk at 21st Street and then
6 proceeding south.

7 At this point, according to the
8 Crown theory, she would be stopped by
9 the Wilson vehicle and Milgaard would
10 ask her for directions.

11 "Hi. Do you know how to get to
12 the Peace Hill area?"

13 "No, I'm sorry."

14 "Stupid bitch."

15 Ms. Miller would then continue in a
16 southward direction towards 20th Street
17 and, according to Wilson and John, they
18 also proceeded in a southward direction,
19 arriving at an intersection on a street
20 with a center boulevard. Although 20th
21 Street has never had a center boulevard
22 or any sort of median, the Crown
23 nevertheless insisted that the street on
24 which the U-turn was made was 20th
25 Street. Here we see the point at which



1 the car has reached the intersection and
2 begun its U-turn as well as the location
3 of Gail Miller, given her forward
4 progress, after the encounter with the
5 vehicle.

6 The evidence at trial disclosed
7 that once the U-turn was three-quarters
8 completed, the car became stuck and
9 Milgaard and Wilson got out of the car
10 and spent a considerable period of time
11 trying to get it unstuck. By the time
12 the decision was made for Milgaard and
13 Wilson to get out of the car and try to
14 push it, Gail Miller would have already
15 arrived at the bus stop on Avenue O and
16 20th. The evidence that Milgaard left
17 on foot to get help toward where the
18 girl had been walking in this version
19 removes the possibility of an encounter
20 with Gail Miller on foot. The alleged
21 encounter with Gail Miller on Avenue O
22 is simply not possible.

23 Moreover, David Milgaard was
24 looking for St. Mary's Church as a
25 landmark to guide him to Cadrain's home.



1 Albert Cadrain lived one block south of
2 St. Mary's Church and, if this alleged
3 encounter had occurred on Avenue O, then
4 the Wilson vehicle would have been stuck
5 not more than 50 feet from this rather
6 imposing landmark, a landmark which, at
7 approximately 9:00 a.m. on the morning
8 of January 31st, 1969, in fact did guide
9 Milgaard to the Cadrain home.

10 The Avenue N theory evolved as
11 a result of the statement given by
12 Mr. Henry Diewold who was the caretaker
13 of St. Mary's Church. Diewold testified
14 that he walked from the rectory of the
15 church to the church itself at
16 approximately 7:00 a.m. and as he walked
17 he had a clear view into the east-west
18 portion of the T-shaped alley. He said
19 that he saw lights of a car positioned
20 at approximately the stem of the T in
21 the alley which would be approximately
22 at the point where the police vehicle is
23 positioned in this photograph. As he
24 returned from the church to the rectory
25 at about 7:10 a.m. he saw the lights



1 again and saw a figure pass back and
2 forth in front of the lights.

3 The evidence of Marie Indyk
4 suggests that either she or Mr. Diewold
5 is mistaken about the time. In order to
6 connect this car with the murder and
7 with Wilson, John and Milgaard, the
8 Crown had to explain how it would have
9 been in the alley facing in a westerly
10 direction. The way that this was done
11 was to place Gail Miller walking in a
12 southward direction on Avenue N headed
13 towards the bus stop at 20th Street.

14 Here we see a portrayal of the
15 route that Gail Miller would take to
16 come directly out of her front door,
17 head south on Avenue O to 21st, then
18 east on 21st to Avenue N, then south on
19 Avenue N toward 20th. With temperatures
20 hovering about minus 40 Fahrenheit, it
21 is difficult to conceive of why anyone
22 would take the longest route possible to
23 a bus stop. In any event, as Gail
24 Miller proceeds south on Avenue N, we
25 see and hear the alleged encounter with



1 her.

2 "Hi. Can you tell me how to
3 get to Pleasant Hill or downtown?"

4 "No, I'm sorry."

5 "Can we give you a ride
6 somewhere?"

7 "No, thank you."

8 "Stupid bitch."

9 Her response to the trio is inconsistent
10 with someone who had lived in the area
11 for several months, although at the
12 trial Nichol John testified that after
13 the encounter the vehicle went to the
14 intersection, made a U-turn, got stuck,
15 then got unstuck, then completed the
16 U-turn and pulled over toward the curb
17 before entering the alley behind the
18 funeral home. In her statement of May
19 24th, 1969 she told the police that
20 after the alleged encounter the vehicle
21 turned directly into the alley where it
22 became stuck. She described a period of
23 time spent trying to get the vehicle
24 unstuck with Milgaard and Wilson in the
25 vehicle. She then described both of the



1 boys getting out of the car, trying to
2 push and then ultimately going to seek
3 help.

4 As we see in this portrayal of
5 that statement, Gail Miller is long past
6 the car and the entrance to the alley
7 before either Wilson or Milgaard leave
8 the vehicle. The Crown's theory of how
9 this crime occurred did not account for
10 the forward progress of Gail Miller
11 because in this, the most damaging
12 scenario for Milgaard, Gail Miller is at
13 20th Street and, according to Nichol
14 John's trial evidence, a considerably
15 longer period of time was spent at the
16 intersection and at the curb before
17 actually heading into the alley. An
18 encounter with Gail Miller by Milgaard
19 after leaving the vehicle to seek help
20 was simply not possible.

21 In spite of this, Nichol John
22 then stated that she saw Milgaard
23 encounter the woman that they had asked
24 for directions, grab for her purse,
25 struggle and then draw with his right



1 hand a knife and begin several stabbing
2 motions at this woman. He then
3 supposedly dragged or moved this victim
4 into the east-west portion of the alley,
5 ultimately disappearing, as we see, to
6 the right into the north-south portion
7 of the stem of the T toward where the
8 body of Gail Miller was ultimately
9 found.

10 Nichol John's recollection is
11 fuzzy after this point. She claims that
12 she then ran from the car, came back to
13 the car and saw Milgaard at the T
14 portion of the alley depositing a purse
15 in a garbage can. Somehow both he and
16 Wilson were then back in the car and
17 inexplicably it became unstuck and they
18 drove away enroute to the motel, the
19 Danchuks and then Cadraains.

20 Aside from the fact that Gail
21 Miller's forward progress would have
22 precluded an encounter with Milgaard and
23 assuming that the car was stuck in this
24 area, there are several other factors
25 which defeat this theory.



1 First, Gail Miller was stabbed
2 through her coat and not her dress.

3 This means that Nichol John would also
4 have needed to see David Milgaard remove
5 Gail Miller's coat, take her dress down
6 around her waist, replace the coat and
7 then stab her.

8 Also, the police identification
9 officers testified that there was no
10 sign of a struggle beginning at one
11 point and leading to where the body was
12 found and, in particular, there was no
13 blood in the snow.

14 In addition, identification
15 officers testified that there were no
16 signs of a car having been stuck
17 anywhere in the east-west portion of the
18 alley.

19 The Avenue N theory, according
20 to the most damming version, Nichol
21 John's May 24th, 1969 statement, simply
22 does not work, and works even less so on
23 the basis of Nichol John's evidence at
24 the trial.

25 The stunning aspect of this



1 case is that the Crown had substantial
2 information in its possession not
3 apparently disclosed to the defence
4 which conclusively establishes the
5 fiction of the Avenue N theory.

6 1. Adeline Nyczai provided a
7 statement on January 31st, 1969 stating
8 that she saw Gail Miller alive between
9 6:35 a.m. and 6:45 a.m. dressed for work
10 but without her coat on. She stated
11 that Gail Miller usually left for work
12 before 7:00 a.m. This witness testified
13 at the trial.

14 2. Ann Friesen, another of
15 Gail Miller's roommates whose statement
16 apparently was not disclosed, said on
17 January 31st, 1969 that Gail Miller left
18 every morning between 6:40 a.m. and 6:45
19 a.m., walked straight south on Avenue O
20 to 20th Street and left by the front
21 door.

22 3. Betty Hundt, another
23 roommate, provided a statement on
24 January 31st, 1969 stating that Gail
25 Miller left every morning at 6:45 a.m.,



1 going out the front door, and Miss Hundt
2 believed that Gail Miller walked south
3 on Avenue O to 20th Street.

4 4. According to a witness by
5 the name of Mary Gallucci on the day
6 before the murder, a pretty nurse
7 travelled south on Avenue O to the bus
8 stop at 20th. This is consistent with
9 the statements of Nyczai, Friesen and
10 Hundt. Mrs. Gallucci also observed a
11 construction worker wearing a yellow
12 hard hat would come from south of 20th
13 Street to the bus stop on Avenue O at
14 approximately 6:45 a.m.

15 5. At 226 Avenue N South Mr.
16 and Mrs. Arthur Merriman were waiting
17 for a taxi that they had ordered for
18 6:55 a.m. looking out their front window
19 directly at the spot where Nichol John
20 claimed that the car became stuck. They
21 saw nothing.

22 6. Through the disclosure
23 process, the reference case contained
24 statements of many people who were out
25 on the streets in the vicinity of the



1 crime. No one saw a vehicle stuck and,
2 if Wilson and John are to be believed
3 that the car became stuck at the
4 intersection of Avenue N and 20th, a
5 considerable amount of traffic,
6 including city busses, would have had to
7 circumvent the car. The notion that
8 neither Milgaard nor Wilson was able to
9 find any assistance to get the car
10 unstuck is simply untenable.

11 7. George Jones, a student who
12 lived on the southeast corner of Avenue
13 N and 20th Street, left his home a few
14 minutes after 7:00 a.m. and walked north
15 along Avenue N to 22nd Street past the
16 funeral home and the back lane. He saw
17 nothing.

18 8. Another witness interviewed
19 by police who lived at the southwest
20 corner of Avenue N and 20th Street drove
21 his truck north on Avenue N from 20th to
22 22nd Street past the funeral home and
23 the alley at approximately 7:00 a.m. He
24 saw nothing.

25 Several independent witnesses



1 failed to corroborate the Avenue N
2 theory. In fact, they contradicted it.
3 The conclusion is that it, like the
4 Avenue O theory, must fail.

5 Consequently, there is no
6 credible evidence placing Milgaard at or
7 near the scene of the crime when Gail
8 Miller was killed."

9 VIDEOTAPE ENDS

10 COMMISSIONER MacCALLUM: Has that been
11 marked for the record?

12 MR. WOLCH: Please, sir, might it? I think
13 it has a document number I think.

14 MR. HODSON: It will have a doc ID. Is
15 there one on that --

16 MR. WOLCH: No, that's mine, not the one I
17 gave you.

18 MR. HODSON: I will get and advise you of a
19 doc ID for the tape.

20 COMMISSIONER MacCALLUM: Thank you.

21 BY MR. WOLCH:

22 Q Mr. Caldwell, I'm going to have a -- sorry, I'll
23 wait for Mr. Hodson.

24 Mr. Caldwell, I'm going to have
25 a few questions only about the tape, but before I



1 ask you a few questions, do you have any reaction
2 to seeing that given the mindset you had back in
3 '69?

4 A Well, it -- number 1, sir, I hadn't seen it before
5 now as you may realize.

6 Q Correct.

7 A And it certainly presents a -- I don't know --
8 umm, possible, at the bottom level, alternative to
9 the facts as I understood them; in other words, it
10 presents, you know, a presentable other way the
11 thing may have happened. I maybe should -- I
12 didn't see that one, Mr. Wolch, as you know. I
13 also did not read any of the books or see any of
14 the movies, just so that that's clear.

15 Q That's fine. I'm just trying to say, you see that
16 and when you look at it it shows that whichever
17 theory you are advancing, they appear to be
18 impossible. Do you now see the impossibility? We
19 know it didn't happen.

20 A Yeah.

21 Q Do you now see the impossibility of it?

22 A Well, I'm -- umm, what can I say. I'm not sure,
23 sir, that I see that it's impossible based, of
24 course, on what we had at the time of the trial,
25 which you realize is not what's in this film.



1 Q But everything in this film was available at the
2 time of trial.

3 A Were all those -- there's names of witnesses there
4 that I didn't recognize, but that may not be --

5 Q But they come from police reports.

6 A Okay.

7 Q I'm not saying that you had all that
8 information --

9 A No.

10 Q -- but I'm saying between yourself and the police
11 everything there was available.

12 A Okay. If that's the case, I don't doubt what you
13 are telling me, sir. Clearly some of it didn't
14 get to the Crown.

15 Q But when you act it out, do you see the
16 impossibility of Gail Miller going ahead, you see
17 20th Street, which is a busy -- you can see how
18 active that street is generally?

19 A Uh-huh.

20 Q It's not a hidden-away street?

21 A I realize it is an active street. There was
22 evidence at some stage I think of Nichol John
23 indicating they ran into what she called I think a
24 snow boulevard. Clearly there was no, you know,
25 civic boulevard there. I did -- I think I said



1 one of the things that could have happened is she
2 could have kept going south and been totally out
3 of the picture when any of this was about to
4 happen.

5 Q But they are all could-haves?

6 A Yeah.

7 Q You see there's people around, there's the
8 Merrimans, there's busses going by, there's people
9 going by, nobody sees a single thing -- Diewold
10 and Indyk see other things -- but nobody sees
11 anything to corroborate any theory you have.

12 A Well, sir, that's certainly how this looks, yeah.

13 Q And then you have the added feature of Wilson at
14 40 below for 15 minutes. Where's he going?

15 A The 40 below aspect, I'm amazed that much of any
16 of this happened, including, you know, the killing
17 itself, but that seemed to be a fact at the time.

18 Q Oh, no, but there was much speculation and more
19 logic in the idea that it happened inside a car,
20 the car that Diewold was looking at.

21 A Yeah.

22 Q But, I mean, you accept that Wilson may have
23 walked for 15 minutes --

24 A Uh-huh.

25 Q -- I mean, he would have been further away than



1 Miss (V4)---, but how -- I'm trying to understand
2 how you could accept in 40 below he's going for 15
3 minutes. Where is he going?

4 A Is he not the one who was going to a service
5 station or trying to find one?

6 Q He can't find help on 20th?

7 A No, I'm just --

8 Q Yeah, no, but I'm trying to understand how you
9 dealt with that in your own mind as you are
10 putting together your case?

11 A Mr. Wolch, that, the Wilson part, as I recall he
12 was looking for a service station --

13 Q Okay.

14 A -- and very well may have --

15 Q All right. But given -- oh, I'm sorry.

16 MS. KNOX: Just one, and this is purely a
17 technical point in terms of distance. Wilson
18 said that he, at one point he was away from the
19 car for 15 minutes, he would have only been
20 walking in one direction for 7 1/2 --

21 MR. WOLCH: Oh, okay.

22 MS. KNOX: -- because he would have had to
23 do it twice --

24 MR. WOLCH: Okay.

25 MS. KNOX: -- so he couldn't have gone a



1 distance of 15 minutes and come back.

2 MR. WOLCH: So he couldn't have got to Ms.

3 (V4)--- and back.

4 MS. KNOX: I --

5 BY MR. WOLCH:

6 Q No, I get your point.

7 A Yeah. Actually, Mr. Wolch, I had just thought of
8 that myself and --

9 Q Okay, it wasn't a trick.

10 A But it was 7 1/2 each way according to Wilson,
11 yeah.

12 Q Each way, but 7 1/2 minutes at 40 below, you are
13 going to go pretty far?

14 A Yeah, I follow you, sir.

15 Q I mean Gail Miller can get from her house to the
16 bus and back two or three times in that amount of
17 time?

18 A Yes.

19 Q But, in any event, would it be fair to say that,
20 at the time of the prosecution, you were so
21 focused on David being the killer that you never
22 took a step back, like this video did, and say
23 "okay, let's look at it all and test it, let's
24 test the frailties, let's test the
25 improbabilities", that; you never went to the



1 scene, you told us that?

2 A I did not.

3 Q But you never really tested it, you relied, 'the
4 police believe he did it so I believe he did it',
5 and we go in one direction?

6 A Well, Mr. Wolch, in a sense I did not take a step
7 back and look at it because in -- at the time when
8 the case was being developed, if you will, there
9 were, in my view, no other possible suspects known
10 to me -- and I appreciate that I wouldn't know of
11 all of them -- but there was no other likely
12 scenario that I was aware of, and that of course
13 would tend to fo -- you know, keep me focused on
14 Mr. Milgaard.

15 Q Okay. And that's assuming you didn't know about
16 the other attacker in the area, like --

17 A Yeah, and --

18 Q Although it was on your file, but you didn't know
19 about that?

20 A Yeah, the -- that's an -- I don't mean to be --
21 that's a very awkward topic, as to who found out
22 what when, as I believe I didn't clearly or in --
23 you know, know about the other attacker matter.
24 I'm sure we could go through that again, but --

25 Q No.



1 A No, I didn't think you would wish to, but --

2 Q No. But would it be fair to say that, when you
3 see the video, it causes you considerable
4 discomfort as to the case you put in?

5 A Well, it, it advances another tenable explanation
6 of how the murder occurred.

7 Q No, it, with respect it doesn't, it just says
8 "this is how it didn't happen"?

9 A Or yeah, pardon me, I meant how it did not occur.

10 Q Yeah, but I mean --

11 A Yeah.

12 Q -- all that was there for you, I mean all the
13 statements were taken from police reports, --

14 A Yeah.

15 Q -- files, I know of nothing in that video that
16 wasn't available to you back in '69?

17 A I did -- never saw a person named George Jones in
18 a witness statement for one thing, was that --

19 Q It was in your police reports, though, I'll -- I
20 can't find it now, but we didn't just make it up.

21 A Yeah. But I think, Mr. Wolch, that it was, if you
22 will, not in my prosecution file, that I think I
23 would have remembered that name to start with.

24 Q Well we'll -- you mean the singer, you mean, is
25 that the idea?



1 A No, I just, I had just never seen that.

2 Q Okay. We'll try and find it for you.

3 A Okay, that's fine, sir.

4 Q Okay. I'm going to leave that video for now --

5 A All right, sir.

6 Q -- and I'm not going to go over it with you again,
7 but is there any other comment you want to make,
8 having seen it, that you feel might be of some
9 assistance?

10 A Is that -- was that made by the reconstruction
11 gentleman from Vancouver?

12 Q No.

13 A Okay. That's fine. Because that gentleman phoned
14 me, I've forgotten his name, about times, places,
15 measurements, etcetera.

16 Q Okay. I'm not worried about that, I'm worried
17 about the content.

18 A Yeah.

19 Q Is there anything else in there that says "wait a
20 minute, I should have known that", or "how did
21 that get by me", or anything like that at all?

22 A Not that I can pick out at the moment, sir.

23 Q Okay. And we could turn to a different topic with
24 you. Mr. Pringle asked you a number of questions
25 about Mr. Tallis and you clearly, you clearly had



1 nothing but praise to say for Mr. Tallis, there is
2 no doubt about that, and I was taken by your
3 comment several times about how hard a worker Mr.
4 Tallis is.

5 A Yeah, I knew him to be that, sir.

6 Q An extremely hard worker?

7 A Yeah.

8 Q The preliminary hearing in this case, if my memory
9 serves me right -- and I'm sure if I'm wrong
10 somebody will correct me -- was August the 18th;
11 is that when it started?

12 A I don't have that but I'm sure --

13 Q Sorry, I'm --

14 A -- it's easily findable.

15 Q Okay. I'm pretty sure it was August 18th or
16 thereabouts. I'm sorry, I should have known the
17 date, --

18 A No, that's fine, sir.

19 Q -- but I just do it by memory.

20 MS. KNOX: I can give you a document that
21 will assist you.

22 MR. WOLCH: Oh, thank you.

23 MS. KNOX: That's the start date and that's
24 --

25 BY MR. WOLCH:



1 Q Yeah. It started on Monday, August the 18th, --

2 A Very good.

3 Q -- and then it went, it says here, Thursday the
4 21st, Wednesday the 27th, Thursday the 28th, looks
5 like maybe Tuesday the 4th possibly -- Thursday
6 the 4th, Friday the 5th, Wednesday the 10th, and
7 Thursday the 11th, so it's into September.

8 A That was, Mr. Wolch, was that all prelim dates or
9 were there a couple of opening/adjournments in
10 there?

11 Q Well, there would be gaps, but those appear to be
12 the dates when the preliminary went on.

13 A When the actual evidence was running, is that --

14 Q Well, that's right, that's --

15 A Okay. I just want -- as you know, there were two
16 or three early appearances where, essentially, the
17 thing got adjourned, but --

18 Q No, I'm talking about the preliminary hearing.

19 A Okay, that's -- I am too, sir, but --

20 Q As I see it, Monday the 18th was the first day?

21 A Okay. I'll --

22 Q Okay?

23 A That's, I'm sure, right.

24 Q And the reason I ask you about that is if we can
25 pull up 0015 I think it's 06, but I could be



1 wrong, I have the document with me but I'm having
2 a hard time reading it. Oh, that's right.

3 A Okay.

4 Q Now here's your letter to Mr. Tallis, and what you
5 are giving him are -- is really the most important
6 part of your case, Cadrain's statement, the two
7 Wilson statements, and the John statements; you
8 see that?

9 A Yeah, I do.

10 Q And that's dated August the 15th, if we can get
11 the whole --

12 A Okay, I see that as well.

13 Q You see?

14 A Yeah.

15 Q Now would that have gone by mail?

16 A I assume so. The -- it -- our office was in the
17 courthouse and the lawyers had a, pickup drawers
18 in land titles, which at that point was in the
19 courthouse.

20 Q Okay. Well August 15th would have been the
21 Friday, I take it, --

22 A Yeah.

23 Q -- the Friday preceding the Monday when the
24 preliminary started?

25 A Uh-huh, yeah.



1 Q So we don't know if Mr. Tallis can tell us, or we
2 -- when he got it, but the absolute earliest would
3 have been the Friday and more likely the Monday?

4 A Yeah. It could be, sir, depending on which method
5 --

6 Q Well, if you mailed it, for sure he didn't get it
7 until Monday?

8 A Absolutely, which makes me wonder if I mailed it.
9 I think we may have used another method, I don't
10 know.

11 Q Okay. Whatever it is, we're now talking about
12 either the day of the preliminary hearing, or the
13 weekend before, he is getting the most important
14 statements of the case?

15 A It looks that way, sir.

16 Q Now you made comment about how Mr. Tallis burns
17 the midnight oil and works hard, and I don't doubt
18 that to be correct, but at that point he didn't
19 have very much to work with?

20 A Yeah. If that's the -- I have no reason to doubt
21 the dates, timing, etcetera, sir. I don't -- I
22 don't know if this is the first material I sent
23 him, is one thing.

24 Q But you appreciate how important a preliminary
25 hearing is, I think Mr. Pringle took you through



1 that?

2 A Yes, absolutely.

3 Q It's a chance to ask questions that you might not
4 want to risk at a trial?

5 A Yeah, I --

6 Q You know, you might want to attack the police a
7 little bit at a preliminary --

8 A Yeah.

9 Q -- as to how they took statements, but you might
10 not want to do it in front of a jury?

11 A No, I agree with that, sir. Yeah.

12 Q So you can really experiment and try things at a
13 preliminary, but it's pretty hard to do if you
14 don't have the statements?

15 A I agree with that principle exactly, sir.

16 Q Now we know disclosure is crucial on defending
17 people, but I understand the word that always goes
18 before disclosure is the word "timely"?

19 A That I would -- I understand that as well.

20 Q So August 15th, and maybe the day of the
21 beginning, is pretty late to be giving out the
22 most important statements in the whole case?

23 A I agree, sir. The first sentence in my letter:

24 "Further to your letter of June 10 ...

25 and our telephone conversation, enclosed



1 ...",

2 etcetera. Evidently, we had spoken about this at
3 or shortly after June 10th, by the way this
4 reads.

5 Q Well --

6 A But Mr. Tallis might have more knowledge on that
7 than I do, sir.

8 Q It just seems to me that August 15th is a rather
9 late response --

10 A Yeah.

11 Q -- to the June 10th request when I take it you had
12 those statements for some period of time?

13 A Well that, Mr. Wolch, is something I don't know,
14 frankly. There were difficulties with summer
15 holidays, both in terms of investigators and in
16 terms of our office, I -- Mr. Tallis may know this
17 better than I, but I would assume there was some
18 difficulty in assembling the material:

19 "I also enclose ... the Autopsy Report
20 ...",

21 and some of this may have been waiting on others,
22 is all I can suggest.

23 Q No, but I mean I appreciate -- I'm not trying to
24 say anything about Mr. Tallis, --

25 A I -- yeah.



1 Q -- but when you say he was such a hard worker and
2 prepared, --

3 A Yeah.

4 Q -- you can't prepare if you haven't got it?

5 A No, I understand your point, sir. I can't expand
6 on that unless you can have some other --

7 Q Well I can perhaps, then, take you to 001509.

8 A Okay, sir.

9 Q Now I'm relying on what your counsel gave me as to
10 dates of the preliminary, --

11 A Yeah.

12 Q -- and the preliminary continued on the 10th and
13 the 11th, I believe, according to the note I got,
14 and I have no reason to doubt that. So here you
15 are writing to him on September the 9th; do you
16 see that?

17 A I do.

18 Q So you are now well into the preliminary?

19 A It appears that way, sir.

20 Q I think you've had about six days of preliminary
21 by then, and you are responding to him by this
22 time, and I don't know when he would have got this
23 letter, whether the preliminary was still on or
24 not on or whatever, and you talk about Les Spence
25 who we heard about, and Dennis Elliott who we



1 heard about, and then you say they were both
2 eliminated as suspects. So, in your mind, that's
3 not going to help him a great deal; is it?

4 A No, but I think it's something he should know,
5 sir.

6 Q No, but they were eliminated?

7 A Yes, that's correct.

8 Q Yeah.

9 A In other words it -- if he had the -- that could
10 save him chasing around trying to find things
11 about them out I would assume.

12 Q But if you look, earlier in this letter you say
13 that you have gone through the 95 statements, --

14 A That's right.

15 Q -- so you would have read the (V4)---- (V4)---
16 statement?

17 A Assuming it was one of them, sir, I would have
18 read it.

19 Q Yeah. Now I'm still astounded as to how you could
20 read (V4)---- (V4---'s statement that she was
21 attacked on the same day, at roughly the same
22 time, in roughly the same area, --

23 A Uh-huh.

24 Q -- and not say "this is something that falls
25 within Mr. Tallis' request"?



1 A Yeah. At this point I don't know that, sir, in
2 other words I'm sure I read it but I don't know
3 what the -- what followed that.

4 Q No, but what I am getting at is you read it
5 carefully enough that you are able to give them
6 Dennis Elliott, that you know isn't going to help
7 him, --

8 A Yeah.

9 Q -- Leslie Spence that you know isn't going to help
10 him, and yet you have the (V4)--- statement, which
11 many will say should have been led regardless of
12 whether it helps him or not as part of the
13 story, --

14 A Uh-huh.

15 Q -- and somehow, at this time, it doesn't go to
16 him? I --

17 A Doesn't --

18 Q You can't explain it; can you?

19 A No, sir. The second, or the paragraph that says:

20 "The only material that could possibly
21 fall into this category ...",

22 I mention Spence and -- let's see here.

23 Q And Elliott?

24 A Yes, and those were things that -- I ended up
25 saying they were eliminated as suspects, I did



1 give them to Mr. Tallis on the footing that he
2 might have, I suppose, a different view of that
3 than I did, so that I said they'd been eliminated
4 but I recited what I thought they could say --

5 Q No.

6 A -- in that, yes. Just --

7 Q You know, I won't belabour it, but you see --

8 A Yeah.

9 Q -- the (V4)--- missing, --

10 A Okay.

11 Q -- you know, I'm not even focusing on any other
12 statements of victims of Fisher, --

13 A Okay.

14 Q -- I'm just focusing on (V4)---, who is so closely
15 related that you wouldn't have spotted it is quite
16 remarkable?

17 A Well, evidently I didn't, sir.

18 Q And if you turn to the next page, to 001510, the
19 next page in this letter, --

20 A Oh, I see that now.

21 Q -- you see you give some more information about
22 some man --

23 A McCrea Fraser.

24 Q Yeah, a cab driver I think. But I'm more
25 concerned with the next paragraph:



1 "You also asked for, and I now enclose,
2 copies of the statements by Sandra
3 Danchuk and Walter Joseph Danchuk, both
4 of whom were Crown witnesses at the
5 preliminary inquiry."

6 A I assume that I did not have their statements,
7 Mr. Wolch, that's all I can read into that, at the
8 prelim, because this says I:

9 "You also asked for, and I now enclose,
10 copies of the statements by ...",
11 Danchuk, the two Danchuks:

12 "... both of whom were Crown witnesses
13 at the preliminary inquiry."

14 The only thing I can, you know, sense I can make
15 of that, they must have been called, I must have
16 been working without their actual statements.

17 Q Does that make much sense to you, --

18 A Well --

19 Q -- that you would have these witnesses called and
20 you wouldn't have the statements they gave to the
21 police?

22 A I might have had a police report saying "this is
23 what they say", sir, that's -- just let me read a
24 little further on. Yeah, no, that's the way that
25 looks to me.



1 Q It just strikes me as a bit strange that "here,
2 Mr. Tallis, here are the statements of the
3 witnesses who have already testified"?

4 A Yeah, yeah. That's unusual, Mr. Wolch, in this
5 scenario. I can't say it didn't happen though.

6 Q Well, it did happen, it's here?

7 A No, I mean it appears to have happened in this
8 scenario. If it were a number of witnesses of
9 course I'd be, you know, concerned about that, but
10 that's -- that's the only way that makes sense to
11 me and I believe that's true.

12 Q Well the one, the more troubling paragraph, is the
13 one that follows:

14 "I also enclose copies of the two
15 statements taken from the accused, ...",

16 A Uh-huh.

17 Q "... one in Winnipeg, March 3rd, 1969,
18 and the other in Saskatoon April 18th
19 ... As I mentioned to you, I may or may
20 not attempt to have either or both of
21 these statements ruled voluntary, either
22 for the purpose of putting them in as
23 confessions or holding them for
24 cross-examination purposes, at the trial
25 herein."



1 A Yeah.

2 Q There is a couple of issues to be addressed there,
3 sir.

4 A Okay, sir.

5 Q First, as I understand it, the law then was that
6 you couldn't cross-examine the accused on a
7 previous statement unless you had proven it
8 voluntary?

9 A That's correct.

10 Q But you didn't have to put it in as part of your
11 case?

12 A Yeah, there was a -- the law, as I recall it, was
13 that one could prove -- pardon me -- the statement
14 or statements voluntary and then hold them in case
15 the accused testified. That was a, the law as I
16 recall it at that time, that could be done. I,
17 frankly, don't ever recall doing it but,
18 evidently, I knew about that at this point.

19 Q Okay. But that would be, that would also be --
20 and I don't say this derogatorily -- but that
21 would be a trial tactic on your part?

22 A Well, yeah, it's something you could do.
23 Evidently I didn't so --

24 Q Yeah. Are you aware that the policy in certain
25 provinces at that time was to always put in the



1 statement of a person charged with murder?

2 A I did not know that, Mr. Wolch.

3 Q It's not a legal obligation but some provinces had
4 a policy?

5 A Well I -- I -- I don't doubt that that was the
6 case. I would have thought it would have created
7 some difficulty imposing it but, nonetheless, I
8 understand what you are saying.

9 Q That was a Manitoba policy. I was a prosecutor in
10 '69.

11 A Okay. Very good.

12 Q But, leaving that aside, I'm more concerned with
13 this; we are now towards the end of the
14 preliminary hearing and it would appear that Mr.
15 Tallis does not have the accused's statements?

16 A Until this time.

17 Q Yes.

18 A That's right, that appears that way to me.

19 Q Now, as I understand the law back in '69, the Code
20 mandated that the accused must be given copies of
21 his statement, that was actually in the Code?

22 A Okay. Now I won't say, Mr. Wolch, that he wasn't
23 given them, I don't know that, in other words that
24 the accused was not given them, or was, at that
25 time.



1 Q Well, they wouldn't be given to David, they would
2 be given to his lawyer I would think?

3 A No, but I -- literally speaking, they could have
4 given them to him, I don't know whether that
5 happened.

6 Q Okay, well, assume it didn't happen.

7 A Okay. This is my attempt to pass them on to Mr.
8 Tallis.

9 Q Okay. But I'm just wondering, why so late in the
10 day, I mean how is Mr. Tallis to prepare properly
11 for a preliminary hearing when he doesn't even
12 know what his client told the police?

13 A I don't know why it was at this late juncture, I
14 simply don't know that at this point, sir.

15 Q Well you were asked a lot of questions about, from
16 Mr. Pringle in particular, about a lawyer
17 preparing for Court --

18 A Yeah.

19 Q -- and being up on everything. In your experience
20 can a lawyer properly conduct a preliminary
21 hearing without knowing --

22 A Yeah.

23 Q -- what his client told the police?

24 A Yeah. No, it's -- that would be a must, and I
25 don't know why this thing developed in the



1 sequence it did, but it clearly did.

2 Q Maybe we're going to learn something.

3 MS. KNOX: No. Mr. Commissioner, again I'm
4 -- I don't mean to be difficult, but the
5 presumption in Mr. Wolch's questions is, by the
6 date of this letter, Mr. Tallis didn't have or
7 hadn't seen the statements in order to prepare.
8 I draw your attention to a -- one sentence in the
9 letter that indicates that he is now sending him
10 copies of statements he has already seen, or he
11 has already had, referring to the McRae Fraser
12 statement. The language of it -- I didn't mark
13 it as I was looking -- but when he talks about
14 the McCrea:

15 "I now enclose copies of these
16 statements for your file ...",
17 and:

18 "... you will recall from reading the
19 statement ..."

20 So, clearly, Mr. Tallis had read statements that
21 he is now being given copies of in advance, if
22 the language of this letter is right, so --

23 BY MR. WOLCH:

24 Q Well, that may be true, but I don't think it's
25 that clear. That's not -- I mean, on a plain



1 reading we can interpret it, and I may agree that
2 it's possible you discussed with Mr. Tallis what
3 Mr. Milgaard said, --

4 A Yeah.

5 Q -- I don't know, --

6 A Do you --

7 Q -- but I would think, as counsel, he would want a
8 copy before the preliminary starts?

9 A Mr. Wolch, is it -- could I just -- I didn't
10 notice this either. Could I deal with that McRae
11 Fraser paragraph because it may throw some light
12 on the rest of it?

13 Q Okay. Well --

14 A This is paragraph 2 on page 510:

15 "You will recall asking me earlier about
16 a taxi driver who was supposed to have
17 driven Gail Miller and a man to work on
18 the morning of January 31st, and I some
19 time ago supplied you with copies of the
20 two statements by MacRae Fraser to read.
21 I now enclose copies of these statements
22 for your file, and, as you will recall
23 from reading the statements, it appears
24 that Fraser is of the opinion that this
25 incident took place either on January



1 30th or 29th and not January 31st."

2 Q Okay. Can we pause there for a second?

3 A Yeah.

4 Q Okay.

5 A What that means to me, Mr. Wolch, is that I showed
6 them to Mr. Tallis in person previous to this and
7 I'm now sending them to him.

8 Q But if we go to the next paragraph, --

9 A Yeah, okay.

10 Q -- you don't say "I enclose copies of two
11 statements from the accused as I showed them to
12 you before"?

13 A Yeah, I don't say that in there, sir, and that's
14 true.

15 Q You say "I mentioned to you a different topic", I
16 mean I --

17 A Oh, I see.

18 Q I don't know what happened, what I am saying is on
19 the plain reading of this letter it's quite a
20 quantum leap to say that, because you say to him
21 "I showed you the McCrea statement, the McCrea
22 statements, I also showed you the David Milgaard
23 statement"?

24 A Well, if I can read that last one, maybe I can
25 help, sir:



1 "I also enclose copies of the two
2 statements taken from the accused, one
3 in Winnipeg, March 3rd, 1969, and the
4 other in Saskatoon April 18th, 1969."

5 It says:

6 "As I mentioned to you, I may or may not
7 attempt to have either or both of these
8 statements ruled voluntary, either for
9 the purposes of putting them in as
10 confessions or holding them for
11 cross-examination purposes, at the trial
12 herein."

13 Now that can only mean, Mr. Wolch, that I showed
14 the -- them to Mr. Tallis, I think probably in
15 the same way as the other one we were speaking
16 of, now I'm sending them to him. Simply -- and
17 it may all have been done earlier, but that
18 appears to be how it was in this instance.

19 Q Mr. Caldwell, I've had trouble yesterday with how
20 you interpret what you write, ...

21 A Very good.

22 Q -- and I'm having a lot of trouble with this one.

23 A Very good.

24 Q I'm not saying you didn't read them to Mr.
25 Tallis, --



1 A Okay, that's fine.

2 Q -- I'm just saying this paragraph doesn't say
3 that, and no reading of the previous paragraph can
4 make you believe that. It would have been just as
5 easy for you to say "I showed you these statements
6 before", in fact one might conclude that the
7 McCrea paragraph contradicts that you would have
8 shown him the statement, because you would have
9 said so?

10 A The way, Mr. Wolch, I read this is that it appears
11 to deal with three, if you will, sets of
12 statements. In all these it appears that Mr.
13 Tallis had seen them previously. The one says:

14 "... as you will recall from reading the
15 statements ...",
16 Fraser's, this and that.

17 Q Is that the statement -- yeah, go ahead?

18 A The next paragraph says:

19 "... statements by ... Danchuk and ...
20 Danchuk, both of whom were Crown
21 witnesses at the ...",
22 prelim; and then third deals with the statements
23 of the accused which, on that, the way -- that
24 appears to be one whole sequence and I can't read
25 it the way you are suggesting, sir.



1 Q Well, moments ago you said you may not even have
2 had the Danchuk statements?

3 A Well, that I may not?

4 Q Yes.

5 A Yeah, I did say that, because --

6 Q So now you are saying you might have shown
7 Tallis --

8 A Okay.

9 Q -- the Danchuk statements that you didn't have?

10 A The only way I would know of what was in them,
11 or -- should be, would be I assume, from a police
12 report.

13 Q No, but --

14 A But I didn't have the Danchuk statements.

15 Q Okay, but if you didn't have the Danchuk
16 statements, you may not even have had Milgaard's
17 statements?

18 A No, that can't be so, sir, because I sent them to
19 Mr. Tallis, I --

20 Q But later, on the 9th?

21 A Yeah.

22 Q But you may not have had them until then, like the
23 Danchuks', I don't know?

24 A Well I -- I don't know that, sir, without looking
25 at some documents.



1 Q Well why -- why -- can -- how can you say "I would
2 have shown the Milgaard statements to Tallis" on
3 the plain reading of the letter "but the Danchuk
4 statements I wouldn't have shown because I didn't
5 have them"?

6 MS. KNOX: Mr. Commissioner, what the
7 witness said is that he might not have had them.
8 In order for us to be able to determine whether
9 he had them we need to pull up the Danchuk
10 statements, show him the dates on them, and then
11 he can determine, based on the record, whether
12 they were part of the 95 that he got in August.
13 He is saying "might", he is speculating, and then
14 it's being put back to him that it is factual.

15 This is the relationship
16 between counsel that was ongoing for many months
17 between June about a file. Nobody, and certainly
18 Mr. Caldwell, could not have anticipated that, 35
19 years later, he would be sitting here with a
20 letter he wrote to a man that he was having oral
21 communication as well as written communication
22 with and it was being dissected in a way that
23 would suggest this was the only time they talked
24 about or had any connection about this stuff.

25 MR. WOLCH: Mr. Commissioner --



1 MS. KNOX: This letter just does not
2 capture everything that went on between the
3 parties. Mr. Tallis --

4 COMMISSIONER MacCALLUM: Ms. Knox, please,
5 you'll have a right to examine your own client
6 after Mr. Wolch is finished, and I would
7 appreciate it if you wouldn't put argument before
8 me, and it's come up before with other counsel.

9 The man has been asked to
10 explain why he is sending the statements of the
11 accused to his own lawyer at the very last
12 minute, and he has offered his explanation which
13 Mr. Wolch finds wanting, and he is just trying to
14 canvass that issue so let him go ahead.

15 MR. WOLCH: Thank you.

16 COMMISSIONER MacCALLUM: I just pause to
17 point out the obvious, that we will have an
18 explanation, perhaps, from the witness who is
19 best qualified to give it.

20 BY MR. WOLCH:

21 Q But I mean, Mr. Commissioner, just for the sake of
22 the record, I think My Friend is sort of missing
23 the point. I'm trying to get an interpreting of
24 his own words, I'm not concerned with anything
25 more than what you are saying here, and, if I may,



1 my difficulty, Mr. Caldwell, is that I can't seem
2 to get you to agree that there's nothing in this
3 paragraph that suggests that you had gone over
4 those statements before, or anything that conveys
5 that?

6 A Okay.

7 Q I'm not saying you didn't, --

8 A Yeah, okay.

9 Q -- I'm just saying there's nothing in there that
10 says that on plain reading?

11 COMMISSIONER MacCALLUM: Well, yeah, but
12 Mr. Wolch, I think his explanation was it's
13 inherent in the words "as I mentioned to you",
14 which demonstrates that they must have discussed
15 the statements before, that's all he can say to
16 you, I think that's what he is saying.

17 A Mr. Wolch, I was -- I was simply going to say the
18 same thing, the language "as I mentioned to you"
19 simply has to mean that we discussed the
20 statements previously.

21 COMMISSIONER MacCALLUM: Yeah, that's fine
22 Mr. Caldwell, you've already said that.

23 A I thank you, sir.

24 BY MR. WOLCH:

25 Q That's fine. And I guess the point is I think you



1 can agree with me, and we can talk about standards
2 back then, --

3 A Uh-huh.

4 Q -- that this is far from timely disclosure? I
5 mean --

6 A Yeah, it certainly would have been better if
7 everything could have been advanced, if you will.

8 Q Well the statement of an accused --

9 A Yeah.

10 Q -- is really where defence counsel starts with, --

11 A Uh-huh.

12 Q -- as "what did my client say about the incident
13 to the police" --

14 A Yeah.

15 Q -- is, I mean, law school first day. I mean it's
16 the most basic of all; you agree with that general
17 principle?

18 A Yeah, that's correct, sir.

19 Q I mean that's where you start from.

20 Mr. Commissioner, I note the
21 time, I'm not sure if I -- if we're close or not.
22 I'm going to move to a different topic, I'm happy
23 to continue or take the morning break, whatever
24 you prefer?

25 COMMISSIONER MacCALLUM: Well, we had one



1 unofficial break, but I suppose we could take
2 another one.

3 MR. WOLCH: I was working during that
4 break.

5 COMMISSIONER MacCALLUM: Could we have some
6 evidence on that point?

7 *(Adjourned at 10:35 a.m.)*

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

9 BY MR. WOLCH:

10 Q Mr. Caldwell, just before I do get onto another
11 area, the name George Jones came up earlier and I
12 didn't have the handy reference.

13 A Okay, sir.

14 Q And if we could turn to 183170. Now, this
15 Detective McCorriston's report that has been
16 looked at many times. I'm not sure, is this your
17 handwriting here or not?

18 A It is. "Re Diewold", that's my writing.

19 Q That's your writing, so obviously this is
20 something that --

21 A This may, Mr. Wolch, be what I was trying to
22 describe a moment ago, the Diewold business may be
23 built into this report, though I didn't have their
24 statements. Maybe we could look at that.

25 Q Okay. If we could turn to the next page. This



1 has actually got Larry Fisher in it. You see
2 that?

3 A That's a relief. I see that, sir. Now, is this
4 McCorriston's report?

5 Q Yes.

6 A Yeah, this would be the one, Mr. Wolch, where he
7 was checking people who might have been taking the
8 same or similar busses and that's one of course
9 that, among many other names, I read at the outset
10 and essentially it didn't mean anything, but I
11 think it's the same report, sir.

12 Q And if we can just turn one more page --

13 A Okay.

14 Q -- this is obviously a report that you had a fair
15 bit to do with in terms of your writing all over
16 the margins. Am I wrong about that?

17 A Only partially. I think the "purse" writing is
18 mine. The "no compact, N. thinks it's
19 squeeze-out," and the "purse found", sir, at the
20 bottom, the two purse founds are not my writing,
21 the two expressions purse found.

22 Q Okay. And if we can turn the page, here we have
23 Merriman, Mrs. Merriman?

24 A Okay.

25 Q You see that?



1 A I do, sir, and none of that is my writing, by way
2 of interest.

3 Q Okay. But you have no doubt you saw this report,
4 you've written on part of it?

5 A Oh, if it was the McCorriston one we were just on,
6 I certainly did, sir.

7 Q I think we found George Jones though, if we can
8 just --

9 A Okay.

10 Q -- pull up that portion:

11 "George B. Jones of the same address was
12 also interviewed. He is also a
13 University Student who states he left
14 home shortly after his brother Jim,
15 walked north on Ave. N. to 22nd. Street
16 and caught the same bus as his brother.
17 He stated it was approximately 7:05 A.M.
18 when he left home that date, however he
19 heard nor saw anything and he has no
20 information to offer."

21 A I see that, sir. That would be just one of those
22 McCorriston interviews that at the time didn't
23 mean anything to me at least, the George Jones
24 part that is.

25 Q Okay. You say it didn't mean anything to you, but



1 it's just one more example of somebody not seeing
2 anything and I think that perhaps should have been
3 of some meaning to you.

4 A Sir, that could well be. I said didn't mean
5 anything in the sense that I read it initially,
6 undoubtedly read all of it, and it didn't -- I
7 mean, presumably I could have called him, or
8 whatever, revealed something like that.

9 MS. KNOX: Again, this is just -- because
10 I'm not sure that we've got it exactly right, but
11 if I'm reading what this witness is saying, he
12 says he was going to 22nd Street would be the,
13 which -- I took a quick look at the map, would be
14 the opposite direction from 20th Street, he would
15 have been walking away from.

16 COMMISSIONER MacCALLUM: All right.

17 MR. WOLCH: No, north from 20th.

18 COMMISSIONER MacCALLUM: That's what she
19 asked.

20 MR. WOLCH: You go right by the scene.

21 MS. KNOX: 22nd.

22 A I think, sir, it's north on 22nd, Mr. Wolch.

23 MR. WOLCH: Let's go back to where he
24 lives.

25 A Okay.



1 COMMISSIONER MacCALLUM: North on N to 22nd
2 Street.

3 MR. WOLCH: Yeah.

4 A Okay.

5 BY MR. WOLCH:

6 Q It speaks for itself. I thought it was somewhat
7 significant. He lived on 1319 20th Street, walked
8 north on N to 22nd; right? Okay. In any event,
9 I'm moving on.

10 A That's fine, sir.

11 Q Now, I wanted to deal with a topic that has been
12 skirted around for quite a while and it's one that
13 I really don't like to deal with at all, but I
14 take it one of the first things a prosecutor would
15 look at in prosecuting somebody would be their
16 criminal record?

17 A I wouldn't say one of the first. It would
18 certainly be something that you would find out if
19 it existed, and either way, if it didn't, and if
20 it did, you would presumably have it in your file.

21 Q Okay. Well, there's been all kinds of innuendo
22 and everything else about David. What was his
23 criminal record at the time of his trial?

24 A If my memory is right, Mr. Wolch, he didn't have
25 one.



1 Q Would I be correct in comparing him to Wilson,
2 John, Melnyk and Lapchuk, he would have been the
3 only one with no criminal record?

4 A If the others had them, and I know Melnyk and
5 Lapchuk did --

6 Q Wilson was in jail, we know that.

7 A Oh, I'm sorry, that's right.

8 Q And John is on probation, we know that.

9 A In that respect you are right, sir.

10 Q He was the best of the bunch on the face of it.

11 A In that -- that's correct.

12 Q Okay. And of that bunch he was the only one who
13 was employed; was he not?

14 A That undoubtedly was the case.

15 Q He had no criminal record and he was working for
16 Maclean's Magazine?

17 A That's my memory of it.

18 Q Right?

19 A That's right, sir.

20 Q The other group was either in jail, pending on
21 charges, running away from home. The other four,
22 your mainstays of your case, on the face of it,
23 compared unfavourably to David?

24 A Yeah, in that respect they did, sir.

25 Q Right?



1 A That's right.

2 Q And yet at the end of the case, leaving aside the
3 horrific nature of the facts, you were prepared to
4 write to the parole board and present David as
5 some sort of monster based on previous conduct?

6 A Yeah, at the end of the case, sir, I did write
7 those letters. I understood that they were, you
8 know, welcomed by the board and that of course at
9 the end of the case we, or whoever, he had been
10 convicted of the offence as we all know.

11 Q Oh, I appreciate the nature of the crime, but you
12 know that the penitentiary will get a clear
13 understanding of what the inmate is there for?

14 A I assume that's the case, sir.

15 Q Okay. But you wanted to put before them this
16 picture of David's previous history?

17 A Yeah.

18 Q Knowing he had no record?

19 A Well, those two things are correct, he did not
20 have a record and I did want to put before -- I
21 believe you are speaking of the file or chart
22 Dr. McDonald got for him, sir, is what I assume
23 you are talking about?

24 Q Well, yeah.

25 A Yeah, that's right.



1 Q Now, the parole board could have sought out
2 Dr. McDonald if they wanted to?

3 A Yeah. I think there's, on the file, sir, there's
4 some correspondence where they followed up in some
5 fashion, I can't recite it to you, but --

6 Q I would like to deal once again with one of your
7 parole board letters and I can tell you, I just
8 picked it at random, they all do seem to have the
9 same theme, and in fact some of them are borrowed
10 from the, from others.

11 A Okay.

12 Q I'm having a little trouble here. I know it's
13 067386 is in it, but I'm trying to find the first
14 page. I think I referred to it before. That's
15 great. If we can just go to 86.

16 A Yes, sir, I have it here.

17 Q Just look at this part here:

18 "Having been intimately involved in his
19 case from the time of the killing until
20 the final disposition ... I, of
21 necessity, came to know a great deal
22 about the personality of the accused,
23 Milgaard."

24 Now, in fairness, you never even talked to him
25 did you?



1 A No, I didn't, sir.

2 Q "While I no longer have his psychiatric
3 history available, it was an extremely
4 lengthy record of continual trouble with
5 educational institutions, persons
6 attempting to help him, etcetera.
7 Albert Cadrain, whose evidence was very
8 important in the trial, knew Milgaard
9 previous to this episode, and told the
10 police and myself of episodes in Calgary
11 wherein Milgaard had young girls in his
12 living quarters to whom he would supply
13 heroin to the point at which these girls
14 completely lost their senses. One of
15 these episodes involved Milgaard
16 inviting Cadrain to have sexual
17 intercourse with a girl in this state
18 whom Milgaard had in a bathtub filled
19 with water. This was only one example
20 of the almost unbelievable lifestyle of
21 Milgaard before this offence, which I
22 came to know as a result of preparing
23 for the prosecution of this trial."

24 Now, David Milgaard had no record and he was
25 working.



1 A That's --

2 Q What was the rest of his lifestyle? What are we
3 talking about?

4 A The -- I think it was -- well, it would largely be
5 based on this Calgary episode which I thought was
6 very --

7 Q Well, I thought I heard you to say, I think it was
8 to Carlyle-Gordge, not to use this because it was
9 slander --

10 A Oh.

11 Q Let me finish -- slanderous and unsubstantiated.

12 A Mr. Wolch, in Carlyle-Gordge's case I was dealing
13 with a person who was purporting to write a book
14 about western Canadian murders. In this case,
15 first of all, I did have this information, and
16 second, I'm writing to a responsible institution
17 in the form of the parole board who would have a
18 legitimate interest in it. They wouldn't be
19 publishing it to anyone.

20 Q Well, if you believe it to be true, what does it
21 matter whether Carlyle-Gordge is writing it or you
22 are writing it?

23 A Well, I did -- I had had the report that this had
24 happened, sir.

25 Q No, you had, as I understand it, the word of



1 Cadrain who said that Schellenberg would
2 corroborate it and you had no corroboration from
3 Schellenberg.

4 A That may well be the case, sir.

5 Q And you had a young man who you know originally
6 said he didn't do dope the night before, and that
7 was a lie, who said he first found out about the
8 crime in Saskatoon when we know he was questioned
9 in Regina, who testified -- or sorry, whose
10 evidence had grown to the point where David
11 belonged to the Mafia, to the point where David
12 was ordering hits on witnesses who we know didn't
13 see anything, to the point eventually where I
14 think David was stomping on the face of the Virgin
15 Mary. We're talking about a very disturbed young
16 man.

17 A Well, Mr. Wolch, the material I saw in the chart
18 about his past, to my way of thinking, would
19 describe quite a lot of very difficult behaviour,
20 if you will.

21 Q I want to deal with how you would react to what
22 some may say, and I would be one of them, is an
23 absurd allegation of lining up virgins, sticking
24 needles in their arms, putting them in bathtubs
25 and having sex in a bathtub, which is probably as



1 hard as 40 below, but I don't know, but whatever
2 it is, it's a ridiculous notion, it's weird.

3 A That thing, as you know, was followed up, and we
4 didn't know about the --

5 Q And Schellenberg didn't back him up.

6 A Yeah -- the final situation until the hearing got
7 underway in my --

8 Q But it's coming from a man, Cadrain, who, as time
9 goes on, is becoming more and more incredible. In
10 fact, by this time I think he's in a mental home.

11 A I don't know about the timing. One thing about
12 Mr. Cadrain, the fact that he forgot that he had
13 reported the matter to the Regina police in my
14 view didn't discredit him with what I knew about
15 his evidence. In other words, that happened
16 before he got back to Saskatoon if my memory is
17 correct.

18 Q I wasn't planning on getting into that, but why
19 wouldn't it discredit him when he tells you or the
20 police I learned about it first when I got back to
21 Saskatoon when you later find out he was in jail
22 in Regina and was questioned about it? Why
23 wouldn't that cause you to think --

24 A I didn't -- he was in jail in Regina and was
25 questioned about it in Regina. I wouldn't think



1 that would necessarily leap out in his memory once
2 he got back to Saskatoon, so if in fact he was
3 wrong in that, it wouldn't discredit him in my
4 books as to everything that I thought he was
5 correct in.

6 Q Would you think that if David Milgaard made a
7 mistake like that in his statement or talking to
8 the police, you would consider that to be very
9 significant?

10 A Now --

11 Q Do you think you would show the same degree of
12 relaxation towards a mistake if it was the accused
13 making it as opposed to the star?

14 A Well, I don't think -- Mr. Cadrain of course was a
15 Crown witness. I don't know how I could compare
16 those things, sir. All things being equal, I
17 should show the same degree of compassion, if you
18 will, no matter who the statement was made by if,
19 I assume, it was credible.

20 Q Getting back to my original point, I can't
21 understand why you would think to tell the
22 reporter that this is slanderous, don't do it,
23 it's slanderous, when you don't think it's
24 slanderous when you write it where it might have a
25 real effect.



1 A Well, all I can say, sir, is that I felt the
2 parole board had a legitimate interest in knowing
3 about persons who had those sentences. I followed
4 what they had suggested in the booklet which we'll
5 eventually maybe get to. That's all I can say I
6 think.

7 Q Do you acknowledge there does appear to be an
8 inconsistency between telling Carlyle-Gordge it's
9 slanderous, don't print it, and you yourself
10 printing it?

11 A Well, I think there is an inconsistency, but
12 again, the reason I was printing it was I was
13 notifying a legitimate organization in the form of
14 the parole board about a person who was, who I
15 thought, you know, was a legitimate interest for
16 their file, that's what I can say, and it isn't,
17 you know, it -- well, I guess that's what I can
18 say, sir.

19 Q Now, based on your knowledge, experience and
20 background, you would agree with me that anyone
21 going into jail convicted of a vicious rape/murder
22 would have a very difficult time?

23 A I believe that is almost a standard situation,
24 sir.

25 Q You got to see David Milgaard in Court?



1 A I did, yeah.

2 Q He was a good looking young boy?

3 A He was very presentable in his appearance.

4 Q And going into jail, it would be understood,
5 presumed and accepted that he was guilty of the
6 crime?

7 A Well, that's correct because of the state of the
8 case at the time when he was sentenced, sir.

9 Q Right. And staff, psychiatrists, psychologists
10 would all accept the fact that he was a
11 rapist/murderer?

12 A The way the case ended up, I think they would,
13 sir.

14 Q And inmates would look at him as a
15 rapist/murderer?

16 A That I assume would be the case.

17 Q And that would be one of the most precarious
18 positions for an accused to be in, in jail?

19 A I would think so, sir.

20 Q So being a terrified 16-year-old going into jail
21 with that stigma over your head would be
22 absolutely about as awful a circumstance as one
23 could imagine?

24 A I would think that's right.

25 Q And leaving aside what may have happened in jail



1 for a moment, would you appreciate that it would
2 be almost impossible to convince anybody, such as
3 a psychiatrist or a psychologist, that you are
4 normal?

5 A With that background, I think you would have a
6 challenge to make that happen.

7 Q Based on your experience with accused people being
8 diagnosed, no psychiatrist or anybody evaluating
9 an inmate who starts with the proposition that in
10 40 below you raped and murdered somebody is going
11 to say you are normal.

12 A No, I'm sure they wouldn't.

13 Q It's impossible really to -- by common sense, you
14 can't call somebody normal who has done a crime
15 like this, so David in jail has the hurdle of
16 getting around the terror he is facing as a
17 youngster in jail --

18 A Uh-huh.

19 Q -- the people who are saying you did it and maybe
20 you are crazy, or whatever you are, and surviving;
21 right?

22 A Yeah, I follow you, sir.

23 Q So to get reports out of the jail that says he's
24 just a normal young man is almost impossible based
25 on that premise?



1 A I would assume so.

2 Q However, you know there were reports done before
3 he got to you?

4 A Before which, sir?

5 Q Before he came into your life.

6 A Yeah, that's correct.

7 Q There were reports done?

8 A Yeah.

9 Q And you referred to them in your letters
10 portraying David with this horrible psychiatric
11 background --

12 A Uh-huh.

13 Q -- that has sort of caught on, and I might say in
14 a very hurtful way, into the public domain, that
15 he was some kind of, whatever he was, as a
16 youngster; right?

17 A Well, yes, there was -- there is and was what I've
18 been calling a chart of his difficulties, if you
19 will, in various towns and with his family,
20 etcetera.

21 Q And there's no question, I think you would agree,
22 that Mrs. Milgaard, in public, has quite clearly
23 said that David had troubles, he was a
24 troublemaker, he was rambunctious, he had all
25 kinds of problems, but in fairness, I would



1 suggest, many kids have those kind of problems and
2 turn around, get jobs and carry on with their
3 lives?

4 A Yes, I hope -- I'm sure that some do, sir, and
5 there's indications in this material of the effort
6 she and her husband made on his behalf of course.

7 Q Yeah. Now, I go into this area with some
8 hesitation, and I appreciate that I'll be asking
9 the Commissioner to protect the privacy of people
10 who come into reports and really have no bearing
11 on the point that I'm trying to make --

12 A All right, sir.

13 Q I mean, I don't think we have to know much about,
14 very much about David's siblings, parents, I'm
15 focusing on David.

16 A Okay, sir.

17 Q Okay. And I'm aware of the fact that Commission
18 Counsel has provided to me and you with what
19 Dr. McDonald provided to him, you've had a chance
20 to read it, I've asked you to read it carefully
21 and go over it; correct?

22 A I did read it, sir.

23 Q And I'm going to go through a little bit of it,
24 I'm not going to spend all day on it, believe me
25 --



1 MR. HODSON: If I might, for the benefit of
2 other counsel, we did receive some documents from
3 Dr. McDonald that we've heard about before. He
4 has been interviewed, I was not sure if he needed
5 to be a witness, I wasn't sure if his evidence is
6 relevant. It appears that it now likely will be.
7 The documents that he provided to us he described
8 as remnants of his file. They were given to Mr.
9 Wolch and Ms. Knox on Monday and they were put up
10 on CaseVault for the benefit of other parties.
11 I'm not sure if they are up -- they should be
12 going up today as a separate folder called -- I'm
13 not sure. They will be up for all parties.

14 There are -- the information in
15 the documents are reports, for the most part,
16 predating 1969 relating to David Milgaard's
17 background history, working with social workers,
18 and there is sensitive information in there and
19 which is again, if it becomes relevant, which it
20 now appears it is, we will deal with it and it
21 may be that some parties may want to have some
22 restrictions on external publication.

23 COMMISSIONER MacCALLUM: Well, we'll come
24 to that question when it arises.

25 MR. WOLCH: Thank you, sir.



1 COMMISSIONER MacCALLUM: Thank you.

2 A I'm sorry, Mr. Commissioner. Mr. Wolch, the one
3 thing that I wanted to say, apropos of what
4 counsel said, is that I did get material, I'm sure
5 I got what you did, but it is not -- it is not, in
6 essence, complete, I can tell that, so we can
7 expand on that if you wish.

8 BY MR. WOLCH:

9 Q We're going to try and find out because some of
10 these documents seem to summarize everything to
11 date.

12 A Okay.

13 Q So -- and the main one that I see is a social
14 history of November the 14th of '96 when David was
15 14, which it seems very comprehensive, about six
16 pages, and then there are others of the same
17 period of time, December the 8th, '96, a social
18 history. There is -- I didn't count them, believe
19 me, but I think there's at least 20 pages, single
20 typed, so there's lots of material.

21 A There is, sir, but I just did want to mention I'm
22 satisfied that not all I saw when Dr. McDonald has
23 it is in this.

24 Q Well --

25 A Just so --



1 Q I asked you to go through this --

2 A Yeah.

3 Q -- and I wanted to find something of violence,
4 that David had a history or occurrence or
5 something that made him a violent person, the kind
6 of person you portrayed. Give it your best shot.

7 A Okay.

8 COMMISSIONER MacCALLUM: For the sake of my
9 notes, can you refer me to the portion of his
10 letter to the parole board where he described him
11 as being of a violent past? Could we have
12 067384.

13 MR. WOLCH: Sorry, I'm thinking about the
14 one, the prediction in kindergarten that he was
15 going to kill is one that stands out.

16 A Mr. Wolch, the --

17 MR. WOLCH: I'm sorry, Mr. Caldwell, before
18 --

19 COMMISSIONER MacCALLUM: I just wanted to
20 be sure that the question was appropriate.

21 A The --

22 COMMISSIONER MacCALLUM: Just a minute, Mr.
23 Caldwell.

24 A Oh, I'm sorry, sir.

25 MR. WOLCH: I'm looking at document 067387



1 where it --

2 "... it could confidently be predicted
3 that he would return immediately to a
4 life of crime, which might well soon
5 lead again to another senseless and
6 brutal killing ..."

7 "He has a sociopathic personality, and
8 in my view there is not just a
9 possibility, but rather a certainty,
10 that he will return to crime on his
11 release, since he is unqualified for any
12 other occupation."

13 "... it is ironic to note that the only
14 occupation which Milgaard held with any
15 degree of success in the past was a
16 door-to-door salesman of magazine
17 subscriptions ... which is a
18 circumstance which should be of great
19 comfort to the housewives of the nation
20 if he is eventually allowed to return to
21 this trade."

22 COMMISSIONER MacCALLUM: Okay. At the
23 bottom of the page:

24 "... confidently be predicted that he
25 would return immediately to a life of



1 crime which might well soon lead again
2 ..."

3 MR. WOLCH: Top of the page, sir.

4 COMMISSIONER MacCALLUM: "... to another
5 senseless and brutal killing of the sort
6 described above."

7 So that's the --

8 MR. WOLCH: Yeah, I can --

9 COMMISSIONER MacCALLUM: So that's the
10 tendency of, yeah, that's what you predict,
11 that's what he predicts for the future. I'm
12 interested, I think your question was directed to
13 "where, in his past records, did you see any
14 indication of violence?"

15 MR. WOLCH: Perhaps I may, with your
16 indulgence, have Ms. McLean look for it while
17 we're talking, and perhaps interrupt me, and I'll
18 provide it, and it might save a bit of time.

19 COMMISSIONER MacCALLUM: Okay.

20 MR. WOLCH: If I could?

21 COMMISSIONER MacCALLUM: At the moment the
22 witness -- now you were trying to say something?

23 A Oh, yes I was.

24 COMMISSIONER MacCALLUM: Have you found
25 something in his past reports that indicated he



1 was violent?

2 A I am not right there, sir. But the one thing I
3 did want to mention, Mr. Wolch, was that the
4 statement that was quoted, "I believe some day he
5 will kill someone, only this is a stab in the
6 dark", is not in this material.

7 BY MR. WOLCH:

8 Q Oh, I know it's not, that's my point.

9 A But I wasn't aware of -- at one point it was, and
10 of course it, it attracted everyone's attention,
11 it -- as I find it, sir, it's not in this
12 material, sir.

13 COMMISSIONER MacCALLUM: Well look, if
14 we're going to continue with this, we simply have
15 to know.

16 MR. WOLCH: Yeah.

17 COMMISSIONER MacCALLUM: The question was
18 phrased on the premise that there wasn't anything
19 to indicate violence in his past record, that is
20 pre-1969, and Mr. Wolch was asking the witness
21 "so why did you describe him as a violent person
22 before 1969", the question. So did he describe
23 him that way is one thing, and was there any
24 records to that effect for another thing, so I
25 don't -- do you want to take a minute to read?



1 A I'm --

2 COMMISSIONER MacCALLUM: He didn't -- he
3 doesn't seem to have said to the parole board
4 "this person has a history of violence which
5 predates the Miller offence"; would you agree
6 with that, Mr. Wolch?

7 MR. WOLCH: Well I -- I'm not -- if you
8 look at 067387, it might place a different
9 interpretation on the paragraph I'm looking at.

10 COMMISSIONER MacCALLUM: So, if it isn't,
11 then the -- if I'm right about that then the
12 question is not fair.

13 MR. WOLCH: Yes. Here:

14 "The offence, of course, is of the
15 utmost gravity, and was unprovoked,
16 senseless and brutal in the extreme,
17 resulting in a violent and horrible
18 death ... As noted above, his past
19 behaviour, which was well documented,
20 from his psychiatric file, had been
21 compounded of one endless series of
22 trouble with the authorities of every
23 variety."

24 A Yeah.

25 COMMISSIONER MacCALLUM: Yeah.



1 MR. WOLCH: "He has a sociopathic
2 personality, and in my view there is not
3 just a possibility, but rather a
4 certainty, that he will return to crime
5 ..."

6 Now documented problems of every variety, under
7 these circumstances, would clearly suggest a
8 history of violence.

9 COMMISSIONER MacCALLUM: All right. So you
10 are saying it's implicit in what Mr. --

11 MR. WOLCH: Yes. I think the impression --

12 COMMISSIONER MacCALLUM: -- Caldwell said
13 to the board?

14 BY MR. WOLCH:

15 Q I mean, Mr. Caldwell, we've had a lot of trouble
16 with your letters before but it just seems to me
17 that, when you are writing about this young man,
18 you are saying when he committed this crime it was
19 all predictable, his history dictated it would
20 happen, and it's going to happen again?

21 A Well that -- that is -- that is, in effect, what I
22 said there, Mr. Wolch, I agree with you.

23 There is a -- I -- at a -- I
24 don't know. Did you wish me to proceed or --

25 Q Well, here's what I am pointing out.



1 A Okay.

2 Q Dr. McDonald first saw Mr. Milgaard when he was
3 identified to McDonald as the killer of Gail
4 Miller?

5 A Yeah, that's correct.

6 Q He didn't come into it, "oh my goodness, here's a
7 young man I'm looking at to see if he is going to
8 go to school, I can get his grades up", his first
9 contact was with a vicious killer. I'm trying to
10 say to you is there anything in the previous
11 history that you have been able to find, in all
12 the reports we've got here, to say there is a
13 violence in this young boy? No one has ever
14 denied he has difficulties, --

15 A Okay.

16 Q -- we're -- I'm talking about having a violent
17 disposition?

18 A The -- the -- Dr. McDonald clearly was asked by me
19 to interview Mr. Milgaard, and did so, and at that
20 time he was a person charged with a criminal
21 offence, as you know.

22 Q Yes, but there is all sorts of material
23 pre-McDonald, pre-Miller, --

24 A Okay.

25 Q -- and no one disputes David had problems at



1 school, had problems not much different than
2 Wilson and John and all these kids who were
3 travelling around in the hippie lifestyle.

4 A Uh-huh.

5 Q But there is a big difference between those kind
6 of problems and violence?

7 A Okay. Mr. Wolch, one of the things I have located
8 --

9 Q Okay.

10 A -- is a document of -- quite a, pardon me,
11 comprehensive report from a Dr. Rockstro, who at
12 this point evidently was at -- not in Saskatoon,
13 but at we'll say I think Yorkton, but in any event
14 I can figure that out here.

15 Q Okay.

16 A He -- he --

17 Q It --

18 A Did I give you a number?

19 Q I thought Rockstro was 1979, but --

20 A But that was -- this was previous, sir, this --
21 date of admittance -- I guess D-O-A is date of
22 admittance -- 79/01/22, so I guess that's --

23 Q Well '79 is ten years later.

24 A Yeah.

25 Q I want --



1 A But he did go into his history, sir, if that's
2 what you are --

3 Q We'll get to that.

4 A Okay, that's fine.

5 Q Okay. I'm going to suggest to you, and I'll try
6 to help you, --

7 A Okay.

8 Q -- okay, that in reading the material the only
9 suggestion ever of anything of that nature was on
10 one occasion when he was being evaluated he tried
11 to gain attention by striking out at nursing staff
12 in a physical manner, and nothing much came of
13 that?

14 A I believe that's in the material somewhere.

15 Q That's the worst thing I can find.

16 A Yeah.

17 Q Okay? If you can find something worse, tell me?

18 A Okay.

19 Q I'm trying to -- I thought you had a number of
20 nights to look through it, that's why I am a
21 little concerned, but you had other homework last
22 night I know.

23 A Well, this was a couple of nights ago, and I --

24 Q Well let me maybe do this, then, maybe it will
25 speed it up.



1 A Okay.

2 Q I will pick up, bring up a document, 325166. It
3 seems to be a bit of a summary, and maybe it will
4 help us, and it's got notes all over the place.
5 Somebody did this in McDonald's file. You've seen
6 this, have you?

7 A I have, and I'm pleased to announce none of the
8 notes are my handiwork.

9 Q Okay. You haven't seen this? It was given to
10 you.

11 A I said I have seen, sir.

12 Q Okay.

13 A Yeah.

14 Q Okay. This seems to be a summary, and we'll maybe
15 find out who did it, but it comes from McDonald's
16 file.

17 A Okay.

18 Q So let's use this as the base; okay?

19 A All right, sir.

20 Q "Before January 1969 ... Milgaard's only
21 record of delinquency was joy-riding in a
22 truck ...";
23 you see that?

24 A That's right.

25 Q "Shortly afterwards he was admitted by



1 his parents to the Yorkton psychiatric
2 centre. He spent three months there
3 before being discharged for refusing to
4 keep regulations."

5 Okay?

6 A Uh-huh.

7 Q "Yorkton report states: "No overt signs
8 of psychotic behaviour or affective
9 illness." There is also no mention of
10 sexually deviant or aggressive (violent)
11 behaviour."

12 Okay?

13 A Yeah, I see that.

14 Q "At one point, the report says, in order
15 to provoke the staff into moving him out
16 to a foster home he "struck out at
17 nursing staff physically".

18 That's it.

19 A I see that as well, sir.

20 Q "After discharge, he spent some weeks in
21 a foster home at a boys' school, before
22 dropping out and starting to work at odd
23 jobs."

24 Okay?

25 A Yes.



1 Q That is, on McDonald's file, is a summary of this
2 boy before coming out to this murder.

3 A Yeah. I don't, it says "CBC" at the top, I don't
4 know who composed it or anything else, sir.

5 Q I don't know either.

6 A Okay.

7 Q It comes from McDonald's file.

8 A Okay.

9 Q But let's go on.

10 MS. KNOX: Mr. Commissioner, if I can,
11 those documents had on them a covering fax sheet
12 directing them to Eric Malling, who was a
13 reporter at the CBC, and it appears that this may
14 have been a compilation done at CBC, which is why
15 it would have the notation "CBC internal". But
16 these were some documents that were actually sent
17 to the CBC by Dr. McDonald's office, according to
18 the fax cover sheet that Mr. Wolch and I both got
19 with the record, so that may be the answer to
20 that.

21 BY MR. WOLCH:

22 Q Yeah. It does say it comes from Dr. McDonald, but
23 --

24 A Mr. Wolch, just on that, it -- that document is
25 here at 325155, as I read it.



1 Q Yeah.

2 A The one that my counsel just mentioned.

3 Q Yeah, that -- from Dr. McDonald --

4 A Yeah.

5 Q -- to Eric Malling?

6 A It appears that way.

7 Q And how Dr. McDonald is sending out David
8 Milgaard's psychiatric, I don't know exactly, but
9 let's leave it at that for the moment.

10 A Very good.

11 Q Let's carry on then. You can see this, I might as
12 well go through it:

13 "In 1971, Milgaard ...",

14 this is after being convicted, he:

15 "... is in Prince Albert penitentiary,
16 and throughout the year one
17 psychiatrist, Dr. James Grant, notes
18 Milgaard's attempts to adjust to his new
19 prison life.

20 "This frightened young inmate
21 is currently very concerned about the
22 outcome of his appeal ... He claims his
23 innocence vehemently and does not appear
24 to me to be the criminal type. He has
25 no criminal record whatsoever, and he is



1 supposed to have killed a nurse in
2 Saskatoon.

3 "Today ... I learned that his
4 thinking is very much confused in terms
5 of how to function in an Institution
6 such as this.

7 "He is making every effort to
8 be accepted as a hardened criminal and
9 yet his basic nature is not along these
10 lines. As a result there is a dichotomy
11 in his personality which is rather
12 destructive."

13 A I see all that.

14 Q You can understand that, how that would be; right?

15 A I certainly do, sir.

16 Q All right. Just turn the page. He:

17 "... wants to leave Prince Albert for
18 Stony Mountain penitentiary so that he
19 can be closer to his family living in
20 Winnipeg.

21 Dr. Grant: "There is no psychiatric
22 reason that he could not be transferred
23 to Stony Mountain."

24 A Yeah, I see that.

25 Q '71, he:



1 "... is examined by Dr. ... Saldivar,
2 psychiatrist at Prince Albert ...

3 Conclusion: no psychotic or neurotic
4 symptoms."

5 And keep in mind this is a young man who they
6 believe has murdered Gail Miller and raped her.

7 A I understand that, sir.

8 Q With that handicap, this is what they are finding.
9 April '72:

10 "Instead of being transferred to Stony
11 Mountain, Milgaard has ended up far from
12 his family in Dorchester, New Brunswick.
13 He is examined by Dr. Michael Wright,
14 the penitentiary psychiatrist.

15 Conclusion: Schizoid personality
16 disorder. "This kind of disorder can be
17 highly dangerous." "

18 Do you see that?

19 A I see that, sir.

20 Q Right. You've got him, now he is in New
21 Brunswick, now he is schizoid, of course, who else
22 can murder Gail Miller, and we're getting that
23 conclusion. '73:

24 "With two other men, Milgaard escapes
25 from Dorchester and puts up no struggle



1 when arrested the following day. "The
2 subject was not seen to be the
3 instigator of this offence."

4 Now we're in '77:

5 "Milgaard is now in Stony Mountain pen
6 and two reports are prepared by a parole
7 service officer in preparation for a
8 hearing.

9 "Milgaard is not involved in
10 any in-depth counselling ... As he does
11 not admit the offence, he probably sees
12 no use for counselling."

13 You can understand that?

14 A I can, sir.

15 Q "He stated to this officer that perhaps
16 it would be in best interest to plead
17 guilty in hopes that then people would
18 consider him for some form of release.

19 "He is an unknown quantity and
20 it is not felt that any commitment
21 should be made to him with regard to any
22 form of release."

23 Do you see that?

24 A I do, sir.

25 Q And if we could just turn the page:



1 "The second report states:

2 "Confinement occurred at a very
3 crucial stage in Milgaard's
4 developmental years. Incarceration has
5 further debilitated skills Milgaard may
6 have had."

7 Now here:

8 "Surprisingly, subject is not
9 institutionalized. In fact, behaviour
10 record indicative of a lack of
11 adjustment to this milieu.

12 "That is, institutions are not
13 viewed as home to Milgaard, nor are they
14 safe or secure. Therefore, motivation
15 to return to community is high.

16 "This is a difficult case ...
17 As Milgaard needs hope and as he
18 functions better when a clearly defined
19 program plan is established, I ask this
20 board to clearly itemize what is
21 expected of Milgaard and what the board
22 would require and look to for release."

23 Just carry down, now it's August of '78:

24 "At Stony Mountain, Milgaard is examined
25 by ... Rockstro ...",



1 That's the name you mentioned earlier?

2 A Right.

3 Q "... to determine if ...",?

4 he:

5 "... should be sent to the newly-opened
6 regional psychiatric center at
7 Saskatoon.

8 "He was not particularly
9 vehement or bitter but at the same time
10 he made it quite clear to me that there
11 should be no room for supposing that he
12 would change his mind on the issue of
13 his innocence of guilt.

14 "With regard to his present
15 situation, Milgaard displayed the usual
16 amount of impatience for a young person
17 eight years into a life sentence but he
18 showed no hint of aggression or ill
19 feeling toward the ... authorities."

20 Can you imagine? He has been in jail all this
21 time, I won't even go through what he has been
22 through, --

23 A All right.

24 Q -- people will not believe him, and yet he, in
25 those circumstances, he is not even showing



1 aggression; you see that?

2 A I see that, sir, I do.

3 Q In January '79:

4 "Milgaard is again examined by Dr.

5 Rockstro after spending several weeks

6 "...",

7 in Saskatoon'. it's rather pathetic --

8 prophetic, rather:

9 "There is a possibility -- although not

10 in my view a strong one -- that Mr.

11 Milgaard is innocent of the offence ..."

12 Just turn the page.

13 A I see that, sir.

14 Q "Mr. Milgaard is a man of average

15 intelligence, who does not suffer from

16 any of the major psychiatric illnesses.

17 "It may be said, however, that

18 he has a defect of personality and that

19 this defect is of the psychopathic type.

20 He does not demonstrate the features of

21 the psychopathic personality to extreme

22 degree ... has not been violent ... nor

23 did we witness any incidents suggestive

24 of his inability to control aggressive

25 tendencies here."



1 A I see that, sir.

2 Q March of '79:

3 "Milgaard's supervisor of education at
4 Stony Mountain ... Deverell, writes to
5 the parole board that Milgaard has
6 completed the first year towards a BA
7 degree and has worked closely with her
8 on the university advisory committee.
9 She makes the following comments:

10 "He needs to be given a clear
11 set of criteria for when he is being
12 successful and when he is not. It is my
13 impression that no one in this
14 institution feels qualified to assess
15 whether David is imbalanced and sick or
16 not.

17 "Furthermore, it is my
18 impression that no one in this
19 institution is willing to take the risk
20 of saying that he is healthy."

21 You can understand that, they have got a kid who

22 --

23 A Yeah.

24 Q -- supposedly committed the horrible crime,
25 they -- he appears to be okay, but how can you say



1 that.

2 A I see what's -- they are saying, sir.

3 Q "... it is destructive to David to be
4 continually left in the position that no
5 matter what he does it cannot be good
6 enough.

7 "Personally I believe that the
8 rehabilitative work necessary to take
9 David to the street should be begun."
10 After all that time, it's now going to begin.

11 1979:

12 "Dr Philip Haden, of Kingston, reports
13 that he can come to no firm conclusions
14 after examining Milgaard."

15 Just turn the page.

16 "However, it is Dr. Haden's impression
17 that Milgaard suffers from a
18 "schizoid-affective psychosis" that
19 recurs and involves mood alteration. He
20 then says that Milgaard's future is
21 precarious and his potential for danger
22 considerable."

23 Once again, this is a murderer he is talking
24 about. 1980 he:

25 "... is examined at ... Abbotsford ...



1 in British Columbia. Conclusion:
2 schizophrenia in a psychopathic
3 personality."

4 A Uh-huh.

5 Q June of '80:

6 "Parole board member Ken Howland, who
7 has known about the *Milgaard* case since
8 becoming a parole officer in 1970, makes
9 the following note:

10 "It does not appear that he has
11 ever been assessed by an independent
12 psychiatric panel, as is usual procedure
13 for inmates serving life sentences for
14 murder."

15 August of '80:

16 "... *Milgaard* escapes and is at large in
17 Winnipeg and Toronto for three months.
18 He gets a job selling Grolier
19 encyclopedias and shares an apartment
20 with a new girl friend. No offences of
21 any kind are committed during this
22 period."

23 You are aware of the fact, though, that he was
24 shot --

25 A Yeah, I am, sir.



1 Q -- in the back?

2 A That's right.

3 Q "Since his recapture, Milgaard is now in
4 Millhaven and is once again examined by
5 Dr. Haden, who comments:

6 "He showed no signs of
7 psychosis yesterday ...

8 "I consider that he presents
9 more as a mentally ill man than a
10 criminal one and I doubt that any prison
11 is the best place for him ...

12 "The above comments are made
13 with less confidence than I usually have
14 when assessing inmates and there are
15 several uncertainties remaining in my
16 mind."

17 A I see that, Mr. Wolch.

18 Q Just go to the next page. March of '81:

19 "Milgaard complains to Ottawa about the
20 handling of his chase, in particular a
21 plan to start a pre-release program in
22 the social therapy unit of the Penetang
23 mental health care centre, Ontario.

24 Solicitor-General Bob Kaplan
25 replies:



1 "During your assessment period,
2 the psychiatrists could find no evidence
3 of a psychiatric disorder and so
4 recommended a transfer back to ...
5 (Stony Mountain)."

6 January '86:

7 "Eric Malling: "You know, what's the
8 bottom line here? Can psychiatrists
9 tell us whether or not David Milgaard
10 committed that crime?"

11 "Dr. Raymond Denson: "I don't
12 think so. I don't think psychiatry has
13 really much to offer ...".

14 ... Denson recently carried out
15 with Milgaard two narco-analytic
16 sessions at the Saskatoon RPC and
17 concluded:

18 "I would say that the only
19 thing that came out of those two
20 interviews was that he has a very deep
21 conviction that he is innocent."

22 A Yeah.

23 Q "David Milgaard, in his interview with
24 ... Malling, says:

25 "They attribute problems that I



1 have with my behaviour inside the
2 institution to the sort of person that
3 would commit that kind of crime in the
4 first place. Now that's an error in
5 logic ..."

6 Do you see that?

7 A Yeah, I do, Mr. Wolch.

8 Q That creates a picture, correct?

9 A It --

10 Q It's a synopsis of what occurred and --

11 A Yeah, it certainly is, and it appears to be an
12 orderly review of the steps he went through from
13 time to time.

14 Q Right, and I've gone over it many times, these are
15 assessments of a young kid growing up in an
16 institution with a stigma of being a
17 rapist/murderer.

18 A Yeah.

19 Q Now the reports that I don't intend to go through
20 unless you ask me to, because there is a summary
21 in this of the pre-penitentiary time that we went
22 through at the very beginning, now I've gone
23 through a Yorkton Mental Health Clinic Social
24 History, which just for the record -- and I hope
25 it doesn't get public -- is 325175 which goes to



1 325181, it's dated November the 14th, 1968 -- '66
2 I mean, and deals with David Milgaard age 14; I've
3 gone through another document, Social History
4 December 8th, '66 which is -- starts at 325182 and
5 goes to 325189; I've gone through another document
6 called Social History dated December 29th, 1966,
7 325190; another document January 18th, 1967,
8 325191 by a psychiatric social worker; January
9 19th of '67 325192; I have a clinical director's
10 report of somewhere between November and February
11 of '66-'67 --

12 A Is that 192, Mr. Wolch, is it 172?

13 Q 325172.

14 A 72, okay, thank you.

15 Q I've gone through that. A Social History, 325173
16 dated February 13th, '67, from Haden again, it's
17 two pages; I've gone through a case summary,
18 325194, dated, hard to say, but it appears to be
19 January -- no, that can't be right, sorry, I'll
20 try and find a date.

21 A Okay.

22 Q It goes from 325194 to 325200 -- or I'm sorry, it
23 goes further than that -- oh, I'm sorry, is it
24 '79? That would be -- I'm sorry, this report is
25 not of much help because it's after.



1 A Oh, this is 325194 you are speaking of, sir?

2 Q Yeah. I perhaps shouldn't have mentioned it
3 because that's a report after '69 by ten years,
4 so --

5 A Okay.

6 COMMISSIONER MacCALLUM: The 194 is?

7 MR. WOLCH: The last one I mentioned, yes.
8 325194.

9 BY MR. WOLCH:

10 Q It's available but it's -- I'm not concerned about
11 the content of it other than the fact it doesn't
12 help us in the point that I am making. The other
13 ones, as I understand it, were all reports that
14 predate the tragedy for Gail Miller.

15 And I just want to get back to
16 my point, because I don't want to go through all
17 those reports in great detail, but they are lots
18 of pages; my concern is there is nothing in there
19 about violence or anything like that?

20 A Well, Mr. Wolch, I -- I -- I don't doubt you are
21 correct in that you very carefully looked at them
22 and, for this purpose, there's nothing about
23 violence. There's an awful lot of cautionary
24 material about the way he was dealing with his
25 parents, schoolmates, etcetera, which would be



1 enough to, I would think, attract the attention of
2 any professional, but I -- for the sake of this,
3 sir, there may have, if we assume there's nothing
4 in there about violence, I could read it again
5 over noon-hour but --

6 Q Okay.

7 A Yeah.

8 Q Well let me take you to document 036784. All
9 right?

10 A Is that a --

11 Q Just bear with me.

12 A Okay.

13 MR. HODSON: I'm wondering if I could just
14 clarify -- and I apologize for interrupting,
15 Mr. Wolch -- just some clarification on the
16 documents from Dr. McDonald. And there was some
17 suggestion that he may have faxed information to
18 Eric Malling, and that is not the case from what
19 I know, and perhaps, if I could, just a couple of
20 documents that might explain the fax. And
21 Mr. McDonald will be here to testify and he can
22 explain what's in his files.

23 But just a couple of -- the fax
24 document is 325155, if we could just have it up,
25 and again I'm doing this because Dr. McDonald is



1 not here to speak, or his counsel, which he does
2 have, about this. This is the fax to Eric
3 Malling of February of '89 and you'll see that
4 it's three pages on the cover page.

5 If you go to the next page, and
6 you will see that's just a fax transmittal. Then
7 if you can go to 325157, and this is, at the top
8 you will see this is what was actually faxed to
9 Eric Malling, at the top it says the fax, and
10 this is something Dr. Emson prepared to Dr.
11 McDonald, who happened to be the Dean of the
12 College at the time, and I believe the evidence
13 we'll hear is that that's why he was involved in
14 sending information to doctor -- or to Eric
15 Malling. And you'll see in this report -- I'm
16 not sure if we have looked at this before -- Dr.
17 Emson is commenting on Dr. Ferris' report of
18 1988. And in Dr. McDonald's file, this is a
19 two-page document, and just -- this has nothing
20 to do with any of Dr. McDonald's psychological
21 work, it relates to Dr. Emson's review of Dr.
22 Ferris' report.

23 If you could also call up
24 325159, which is also on Dr. McDonald's file,
25 this is a familiar document we have seen before,



1 and so what I believe the evidence that we will
2 hear is to the effect that what was on Dr.
3 McDonald's file was the Ferris report, Dr.
4 Emson's comments, and McDonald then faxed Emson's
5 comments to Malling, and then the remainder of
6 the file is the psychiatric report.

7 The document that Mr. Wolch
8 read through, 325166, if we could just quickly
9 call that up, that document is on Dr. McDonald's
10 file. The evidence I expect that we will hear is
11 that he is not the author of this, and I can't
12 tell you right now whether he can shed any
13 further light, other than that's our information.

14 So, again -- and then I think
15 the balance of the documents that are on there
16 are documents that he had and he provided to us.
17 So if that can clarify that point. And again, as
18 I say, I don't want to preempt Mr. Wolch's
19 question, or what Dr. McDonald would say about
20 it, but I wanted to clarify the fax part of it.

21 COMMISSIONER MacCALLUM: So for the moment,
22 Mr. Hodson, I should just say to everyone be very
23 cautious about presuming what Dr. McDonald did or
24 didn't send to Mr. Malling that is into the
25 public domain, what he did send was something



1 that was unrelated to the point in question, and
2 not to the psychiatric records of Mr. Milgaard.

3 MR. HODSON: That's my understanding of
4 what he was --

5 MR. WOLCH: Yes, and I accept that fully,
6 --

7 COMMISSIONER MacCALLUM: Yes.

8 MR. WOLCH: -- and I make it very clear
9 that I have no allegation of improper behaviour
10 on the doctor at all.

11 MS. KNOX: And I should indicate, since I
12 raised it, I do as well. When Mr. Wolch and I
13 were looking at it they were all attached to the
14 cover sheet, and I think neither he nor I noticed
15 that the fax sheet only said three pages, it was
16 my assumption, and I believe his, that it was all
17 the same package, an unfortunate mistake on my
18 part and on --

19 COMMISSIONER MacCALLUM: Okay. I think,
20 until we get to the -- until we get to the end of
21 the psychiatric records which predate the Miller
22 murder, we should be very, very careful. And
23 Mr. Wolch prefaced his remarks on this subject by
24 saying that "I hope that this won't go into the
25 public domain", and he quoted some doc. ID



1 numbers, so for the time being I want the press
2 to understand that none of this should be
3 reported. We're not finished with the subject
4 yet. But the doc. ID numbers which Mr. Wolch
5 brought up, beginning with 325175 and ending with
6 325173, should, for the moment, remain in camera.
7 All right?

8 MR. WOLCH: Yeah, I appreciate that, and
9 just so I don't mislead anybody at all, I think
10 those documents are relevant, Mr. Commissioner,
11 for the limited purpose of laying a foundation
12 for anybody's belief that David Milgaard was
13 violent or prone to violence.

14 COMMISSIONER MacCALLUM: Oh, yeah, I
15 understand.

16 BY MR. WOLCH:

17 Q I just say, so there's no misunderstanding, those
18 reports contain very sensitive material about the
19 Milgaard family, their relationships, their
20 siblings, illnesses, personal matters that really
21 don't advance the Commission, but if anything in
22 there advances Mr. Caldwell's perception that
23 there is something in David in those reports that
24 is germane to his evaluation of David as being
25 violent or dangerous, I want to hear that.



1 Do you follow what I'm saying,
2 Mr. Caldwell?

3 A Yes, Mr. Wolch, I follow you.

4 Q Okay. And I just want to take you back, then, to
5 067384, and the third page, 86. There's a
6 prediction here he will kill again. Here we are.

7 "In preparing this case, I had the
8 privilege of reading ... the entire
9 psychiatric history which, as it
10 happened, was very well documented since
11 his early youth. He had been in
12 constant trouble since kindergarten
13 days, and the file even contains
14 predictions by social workers who had
15 examined Milgaard, that he would one day
16 kill somebody."

17 A Mr. Wolch, I can explain that, if you will. There
18 was a report by a social worker of two or three or
19 however many pages. The very last paragraph said,
20 I believe, that some day he will kill somebody,
21 but this is just a stab in the dark, that jumped
22 out at -- and it's not on this file, Mr. Wolch, to
23 the best of my -- and I know that existed. I saw
24 it at the time and the particular terminology
25 was --



1 Q All I'm saying to you, sir, is that if you go
2 through all the reports, and as you know most
3 reports review previous reports --

4 A Yes.

5 Q -- it's obviously you are always looking at
6 previous reports --

7 A Yeah.

8 Q -- and the prison psychiatric file which is three
9 or four feet high --

10 A Yeah.

11 Q -- I have never come across anything like that.

12 A Uh-huh.

13 Q And don't know where it comes from, that's all I'm
14 saying.

15 A Mr. Wolch, the one thing I just mentioned, I have
16 known about all the way through, and it was such
17 an unusual terminology, it ended a report in my
18 memory and, you know, was very striking, and to my
19 eye, Mr. Wolch, it's not in this material.

20 Q Well, I've seen it nowhere, that's what I'm trying
21 to get, anywhere I could find it --

22 A Yeah.

23 Q -- plus the fact, as I read to you from the
24 Yorkton report, no signs of psychotic behaviour,
25 no mention of sexually deviant or aggressive



1 violent behaviour. It's hard to imagine writing
2 that and having a report where somebody predicts
3 that somebody is going to kill.

4 A Mr. Wolch, I can assure you that it did exist. I
5 don't know where it is now, I don't know if
6 Dr. McDonald has one or more copies, but my
7 sentence here was based on:

8 "... the file contains predictions by
9 social workers who had examined Milgaard
10 that he would one day kill somebody."

11 It's social worker, singular it should be, and
12 that was what I was referring to, sir, and to
13 that extent I -- unless you wish, I won't keep
14 searching the file for evidence.

15 Q You aren't going to find it, but here again, I'm
16 constantly troubled, sir, by what I might term as
17 a bit of carelessness in how you draft letters.

18 A Yeah.

19 Q There's quite a difference between social worker
20 and social workers.

21 A Okay. I believe it was a social worker. If the
22 document shows up, it may prove to be workers,
23 plural, in the sense of head of the ward or
24 whatever it was. It certainly existed, sir.

25 Q So you are saying it exists?



1 A Yeah.

2 Q But you have no knowledge of it ever appearing in
3 any subsequent report that anybody can find
4 anywhere?

5 A No. I do know it did exist and I have no idea
6 where it is now, but it conceivably may surface,
7 but my sentence there, Mr. Wolch, however
8 inappropriate, was based on that report, sir.
9 That's what it was based upon.

10 COMMISSIONER MacCALLUM: And the report I
11 think I heard you say also said that this is just
12 a shot in the dark?

13 A Yeah, the language was I think that some day he
14 will kill somebody, but this is a -- I think, sir,
15 it was a stab in the dark.

16 COMMISSIONER MacCALLUM: Okay.

17 A That's what made it sort of stand out, if you
18 will.

19 BY MR. WOLCH:

20 Q That doesn't sound very professional.

21 A Well, it sounds like one of my letters, Mr. Wolch.

22 Q That's what I'm thinking.

23 A Yeah.

24 Q If we could look at 002264? This is another
25 one --



1 A Okay, sir.

2 Q I'm sorry, I thought it was one of your letters.

3 It's not. Is this your letter?

4 A I think it is, sir.

5 Q Okay. Turn to the second page. It is your

6 letter. Okay. And back to the first one.

7 MR. HODSON: 006822. The '77 report?

8 MS. McLEAN: 1977, yeah.

9 MR. HODSON: The one on the screen is the
10 one that we used.

11 MR. WOLCH: Just turn the page. Thank you.

12 COMMISSIONER MacCALLUM: This is to the
13 parole board again?

14 BY MR. WOLCH:

15 Q Yes, Nancy Flintoft Meronek I think.

16 "I have read my letter to Mr. Street
17 over, and I certainly have no reason to
18 change the views set out ... subsequent
19 events in this City have, as a matter of
20 fact, strengthened my views of the
21 danger of a person like Milgaard being
22 allowed out of custody ... The most
23 striking recent example in this City of
24 the inadvisability granting freedom to
25 dangerous persons is the case of David



1 Thrienen, and that case bears a
2 resemblance to this one in that there
3 were adequate warnings ahead of time as
4 to what type of behaviour could be
5 expected from the accused if he had his
6 freedom.

7 I can't over-emphasize the
8 danger which I think Milgaard would
9 present to other persons if he were to
10 have his freedom, even on a short or
11 temporary basis, and we surely do not
12 need any more striking a demonstration
13 ... than Gail Miller."

14 A Yeah. I think, Mr. Wolch, the *Threinen* case had
15 happened in the meantime. It was -- attracted a
16 lot of attention and there was, I suppose, a
17 heightened public view that dangerous persons
18 shouldn't be let out except appropriately, and
19 very awkwardly stated, but that's -- the *Threinen*
20 matter was a matter of the murder of three or four
21 children and it post dated the Miller matter in my
22 memory, and that's why the thing was this way,
23 sir.

24 Q Right. I'm going to suggest to you that when
25 David was charged with the murder, if you went



1 into his background you would see a kid who was
2 restless, bright, couldn't sit still, a bit of a
3 rabble rouser, but who really had no criminal
4 record, may have taken a joy ride once, and was
5 like a lot of kids travelling around like a hippie
6 having a good time.

7 A Yeah.

8 Q And that's it. At the same time, sir, I suggest
9 to you, Wilson, John, Lapchuk, Melnyk had criminal
10 backgrounds, a number had been in jail or were
11 going to jail, and had showed far more antisocial
12 behaviour than David Milgaard ever exhibited and
13 didn't even have a job like he had.

14 A Yeah.

15 Q Do you see the picture?

16 A Yeah. Well, I think my counsel is going to assist
17 me here I hope.

18 MR. WOLCH: Okay. It's time for lunch I
19 think too, but go ahead.

20 MS. KNOX: Mr. Commissioner, I just want --
21 I'm going to refer to two documents, and maybe
22 Mr. Wolch could look at them over lunch, but when
23 it's put to the witness that he had no criminal
24 record, contained in two documents, one of which
25 is part of the social history, at page 325184 is



1 a lengthy recitation of information obtained from
2 a town constable in Langenburg where, and I won't
3 go into the details now because the reports
4 aren't yet part of the record, but also in the
5 statement that David Milgaard gave to Detective
6 Karst, I believe the March 3rd statement, 1969,
7 he opens with giving Detective Karst -- I'm going
8 to say lengthy, not because it was lengthy in
9 terms of the actual size, but a recitation of
10 conflicts that he has had and misconduct that he
11 had engaged in, and I haven't pulled the
12 statement up, but in putting the question to the
13 witness, there was that information in his
14 possession, 1969, 1972, 1974, when these were
15 written. So although formal convictions may not
16 have been registered, there was much information
17 about behaviours that would be characterized as
18 criminal.

19 COMMISSIONER MacCALLUM: Oh, there
20 certainly was that, but I think we're speaking in
21 the context of criminal records and I just
22 wouldn't like to move beyond that.

23 MR. WOLCH: No, I think if we talked about
24 Lapchuk and Melnyk and Wilson and John, about not
25 criminal record offences, we'd be here still.



1 MS. KNOX: No, I'm just talking about the
2 indication that was made by Mr. Caldwell.

3 MR. WOLCH: Well, he answered the question,
4 there was no criminal record. I mean, that's it.
5 A That was my memory of it, Mr. Wolch, and I think
6 that, technically speaking, is correct.

7 BY MR. WOLCH:

8 Q If there was a criminal record and he testified,
9 you would have put it to him probably?

10 A Yes, but he didn't --

11 Q It's something you would have looked at because of
12 that possibility?

13 A Yeah.

14 Q Right? Mr. Commissioner, I note the time. I'm
15 not going to be all that much longer, but it is
16 lunchtime.

17 COMMISSIONER MacCALLUM: Oh, I think we
18 should break, thanks.

19 *(Adjourned at 12:02 p.m.)*

20 *(Reconvened at 1:35 p.m.)*

21 MR. WOLCH: Mr. Commissioner, before I
22 commence questioning, I can indicate that the
23 document ID number of the video that was shown is
24 078510.

25 COMMISSIONER MacCALLUM: 078510?



1 MR. WOLCH: That's correct, 510.

2 COMMISSIONER MacCALLUM: Thank you.

3 MR. WOLCH: I can also indicate that there
4 may be some replacements going on because the
5 original that I forwarded was a colour video.

6 COMMISSIONER MacCALLUM: Oh, okay.

7 MR. WOLCH: So we may come back to colour
8 if we have to play it again. I would certainly
9 prefer to play it in colour at that time or we
10 may have to get a new doc number or whatever, I'm
11 not sure, but I'm sure we'll cross that bridge
12 when we get to it.

13 A Mr. Wolch, something I would like to volunteer to
14 you, sir, is that I found the same entry you did
15 and mentioned this morning, I read over at noon
16 all the Yorkton psychiatric matters, and that was
17 the only entry I could find referring to violence,
18 the one you had already mentioned.

19 BY MR. WOLCH:

20 Q The one that he tried to get out?

21 A Yes, that's the one.

22 Q The reason to be moved I think is what I read.

23 A Yeah, that's correct, struck out at nursing staff,
24 and I read the Yorkton matters and that, I
25 confirm, is the same thing you saw.



1 Q That's the only thing --

2 A He --

3 Q They said he acted up as perhaps an excuse to be
4 transferred out of there.

5 A That's what I --

6 Q That's how they analysed it.

7 A Yes.

8 Q That's it, that's really it; isn't it?

9 A Yeah. I couldn't find anything more.

10 Q In fact, I did a little bit of homework over lunch
11 as well and I just have a question to ask you, if
12 we can get up 332049. Now, these are your notes
13 and, if I have it correct, they are made in
14 regards to your talking to Peter Carlyle-Gordge?

15 A That was my memory of it, sir.

16 Q And were these notes you made for him or for
17 yourself or --

18 A No.

19 Q -- preparing for him?

20 A In effect, preparing for him just so that I knew,
21 if you will, highlights and dates of things from
22 the file.

23 Q Okay. Because if we go to 332051, you see, I'm
24 not sure why you left a gap, but I did get your
25 originals, this is accurate, you say you read



1 95 --

2 A That's civilian statements.

3 Q Civilian statements?

4 A Yeah.

5 Q There's a big long gap and then you have "... a
6 stab in the dark." That's the only place I can
7 find that comment anywhere.

8 A Well, Mr. Wolch, it was never part of my Milgaard
9 prosecution file and that was something I
10 presumably wrote because it was an interesting
11 comment and I didn't want to, you know, forget it.

12 Q No, but a stab in the dark isn't the interesting
13 comment, the interesting comment is the prediction
14 of killing, that's --

15 A Well, Mr. Wolch, what this would bring back to me,
16 this quotation "... a stab in the dark", in my
17 mind I would certainly remember the first half of
18 the sentence, if you will, sir.

19 Q Well, a stab in the dark suggests to me that it's
20 a remote sort of prediction.

21 A That's the common interpretation of it, sir, but
22 it did have that --

23 Q Well, I'm just surprised you didn't write down the
24 actual prediction if there was one.

25 A Well, I didn't -- that I guess was my shorthand



1 for the episode, sir.

2 Q And because I'm now here, I wouldn't mind turning
3 a bit to the next page that I know you've been
4 questioned about.

5 A Okay.

6 Q And "suggest omit", that's to Peter
7 Carlyle-Gordge?

8 A That was strictly for him and it strictly referred
9 to David Milgaard in Calgary, and it, sir, if I
10 may, because I didn't say this I don't think, it
11 clearly was not any reference to Saskatoon sexual
12 assaults, unsolved or solved or otherwise.

13 Q Well, let's get to that.

14 A Okay.

15 Q The first paragraph is bathtub Calgary, young
16 girls, and you've talked about this, and I say
17 it's strange to me that you are telling him to
18 omit it when you are publicizing it yourself,
19 we've been through that, but if you have anything
20 to add, I'm not really seeking an answer to that.

21 A I think I mentioned -- do you want me to -- this
22 morning why I did it that way, sir, if you would
23 like I can --

24 Q Okay, try very briefly.

25 A Okay. Mr. Carlyle-Gordge was a journalist who I



1 later learned was operating under false pretences
2 with me and he -- we got chatting and we've seen
3 that on the screen previously. He -- this thing
4 was to absolutely be sure that he did not do any
5 of these things, print them, whatever, and because
6 I wanted, I just wanted to reinforce that on him
7 and I don't know if I succeeded or anything.

8 Q Can you, and you don't have to, but can you
9 possibly briefly tell me why he could not report
10 this and you could?

11 A Well, Mr. Wolch, whom I reported this to was the
12 National Parole Board who were, you know, a
13 serious governmental agency dealing with people
14 and at that moment of course David Milgaard was
15 the convicted person with respect to the Gail
16 Miller matter. That would be a proper, if you
17 will, business communication. Mr. Carlyle-Gordge
18 was going to write a book on western Canadian
19 murders and there would be no way that this should
20 go into that or any other book in my estimation.

21 Q Well, which publication could do David more harm?

22 A Well, the -- it doesn't do anyone any good if a
23 book is published in X number of copies saying
24 this happened. The National Parole Board matter
25 would do him harm in the sense that they would



1 look at him very carefully, but it was a
2 legitimate concern, sir, I thought.

3 Q What I'm getting at is in the book it's not going
4 to cause a great deal of difficulty. Once you are
5 branded as a rapist/murderer, who cares whether
6 you are thought of a little lower than that.

7 A Well, I didn't know that there was going to be any
8 book branding him in that fashion. I don't know
9 that there was.

10 Q Well, if you are going to write about the murder
11 he's convicted of, but I won't belabour that, but
12 with the parole board who is considering release,
13 that could have impact.

14 A Yes, it certainly could.

15 Q But yet you are saying it's okay to give it, even
16 though it's unsubstantiated, not followed up upon,
17 from an unreliable source, it can go to the parole
18 board but not to a book?

19 A Well, Mr. Wolch, I saw the, as I think I said, the
20 parole board as a proper institution dealing with
21 people who were imprisoned and may or may not be
22 getting out, that was my reason for writing them,
23 and I was, after all, involved in the trial.

24 Q Can you just very quickly tell me again, "- n.b.
25 other rapes where he suspect," what you are



1 talking about?

2 A There was some -- that, sir, referred to the
3 suggestions in this hearing that there had been
4 some sexual attention forced upon Nichol John,
5 other young woman in Regina in a similar fashion,
6 the woman named Sharon Hall in Edmonton.

7 Q I think you mean Sharon Williams.

8 A I'm sorry, Sharon Williams, and somewhere in there
9 there was, one of these was reported I think by
10 the Regina person who was supposed to have hung
11 Cadrain out the window by his heels, they were all
12 about things that Milgaard could be accused of,
13 nothing to do with --

14 Q Why should that be left out?

15 A Pardon me?

16 Q Why would that be left out?

17 A Well, he -- I don't think that that's a proper
18 thing to be publishing. You can't say this John
19 Smith is, you know, suspect of rape and then go on
20 with the rest of the story, I would assume that's
21 libelous, but I don't think that, sir, about
22 communications with the parole board.

23 Q You are saying this does not refer to the ones
24 that were on your file among the 95 statements you
25 read, that's not what you are concerned about?



1 A That's right, Mr. Wolch.

2 Q Okay.

3 A I think I said that before and I wanted to be sure
4 that you understood that was my position on it
5 because that's what it was.

6 Q I hear what you are saying.

7 A Yeah, okay.

8 Q Whether I understand it or not is another matter,
9 but I hear what you are saying.

10 A Very good, sir.

11 Q I would like to just ask you one more question and
12 then I'll leave that. We've heard, and we know
13 from the evidence, that Larry Fisher has committed
14 many, many sexual offences, came within an inch of
15 killing (V10) (V10)-, killed Gail Miller. Have
16 you or any other prosecutor written to the parole
17 board about him?

18 A Well, Mr. Wolch --

19 Q It's a yes or no and then I'll ask more, okay?

20 A No, I didn't.

21 Q Okay.

22 A Because I was not involved with any of Fisher's
23 prosecutions.

24 Q But you don't know of any letter being written?

25 A I don't know of any, sir. Now, I -- heaven knows



1 what the situation is from the North Battleford
2 matter. I would assume something would have been
3 followed up. That was my reason why I didn't
4 write.

5 Q Okay. I would like to briefly touch on your
6 contact with Eugene Williams.

7 A All right, sir.

8 Q If I understand it, you were kind of helping to a
9 degree?

10 A I was in the limited extent of -- I was able to
11 tell Mr. Williams and/or Sergeant Pearson possibly
12 which policemen were still on duty, which
13 civilians were still around, all the witnesses
14 from the trial, which people may have retired and
15 moved and all that, what I would call sort of
16 basic leg work, you know, to save them the
17 trouble, if you will.

18 Q Okay. We know that you were giving them documents
19 and files and things like that, but were you from
20 time to time expressing opinions to them as to
21 how -- what you felt about the case?

22 A I don't think so, sir, because in one of these
23 statements, if you will, of mine to the RCMP, at
24 some point I pointed out that I had, in effect,
25 bent over backwards to avoid trying to influence



1 them about the case. I think I said words to the
2 effect of that I knew that wouldn't be welcome and
3 wouldn't be proper, I said that as part of dealing
4 about that same topic, sir.

5 Q Sir, are you saying you tried not to express
6 opinions?

7 A That's what I said in my statement to the RCMP and
8 that's what I did.

9 Q Okay. I know from time to time you say this is
10 what I said then, this is -- I'm trying to ask you
11 now what you are telling us.

12 A Okay. What I'm telling you, sir, is at some point
13 when the investigation was going on I was asked
14 about my contacts with Mr. Williams and Sergeant
15 Pearson. I repeated the business about basic leg
16 work and specified in that statement that I bent
17 over backwards not to -- to try not to influence
18 them in what they thought about the case, I had
19 said that I knew that would be unwelcome and I
20 didn't do it, and that's in print somewhere, sir,
21 I hope a little more briefly than my version
22 today, but --

23 Q Well, did you feel you were on the same side?

24 A No, I didn't, sir. I was employed with Federal
25 Justice at that time as I recall and I was --



1 Mr. Williams knew I had to do with the case, he
2 was in Ottawa, I was in Saskatoon. I tried to
3 assist in that fashion.

4 Q I would like to refer to a document and I'm
5 having, once again, my usual trouble reading the
6 number, but it looks like it's 150883. The first
7 eight could be wrong. It's a letter from yourself
8 to Mr. Williams.

9 A All right, sir.

10 Q If I have it right. It could be 683. I just
11 can't see it, sorry.

12 MS. BOSWELL: What's the date of it?

13 MR. WOLCH: The date is October 31st, '89.
14 The 150 appears correct and the 83 at the end
15 appears correct. The eight or the six in the
16 middle is a bit blurry.

17 MR. HODSON: 150975, October 31.

18 MR. WOLCH: I'm not that blind.

19 MR. HODSON: It's 150983.

20 BY MR. WOLCH:

21 Q 983, sorry. This is a letter that you wrote to
22 Eugene Williams, and I think we saw it in direct
23 examination, but I want to focus on a different
24 part.

25 A All right, sir.



1 Q Just the part down here.

2 A Okay.

3 Q "I have also received, and enclose an
4 excerpt from the book entitled "Winnipeg
5 8 - The Ice-Cold Hothouse", which has at
6 pages 115 through 151 a story by Peter
7 Carlyle-Gordge concerning the mother of
8 the accused and her efforts on his
9 behalf."

10 A I see.

11 Q Turn the page.

12 A Okay.

13 Q "You may wonder if you are reading about
14 the same murder currently under review."
15 Do you see that?

16 A I do see that, sir.

17 Q Okay. I start by saying I wonder, if you are
18 putting that in print, what you are saying
19 verbally to the man; but does that not suggest to
20 him that the views expressed by Mrs. Milgaard are
21 unworthy of acceptance?

22 A What I meant, or meant it to say, was that when
23 you read the account in that book of the matter
24 presumably attributed to Mrs. Milgaard, it would
25 be difficult to think it was the same offence, is



1 what I am trying to say.

2 Q But why are you offering an opinion? You just
3 told us that you didn't want to be offering
4 opinions, you thought it was improper for you to
5 be suggesting a view of the evidence, and here you
6 are --

7 A Okay.

8 Q -- making unfavourable comments about
9 Mrs. Milgaard's version of the event?

10 A Yeah, I've -- that's essentially it, sir, and I
11 think it may be an example of bad judgement on my
12 part, among others, I mean among other examples
13 of --

14 Q Other mistakes of judgement?

15 A That's right, as opposed to --

16 Q This time you are admitting it was just plain
17 wrong to do that?

18 A Yeah, I think that was just unfortunate, yeah.

19 Q Okay. The next item I have some real difficulty
20 with is you stated, as I understand it, that you
21 understood you were going to be a witness at the
22 Supreme Court?

23 A That's my recollection, sir.

24 Q And your recollection is that Mr. Williams
25 indicated to you that you weren't going to be



1 called because counsel for David Milgaard had been
2 informed that, should you be called, you would be
3 recounting the alleged remarks of Nichol John
4 outside the courtroom?

5 A Hmm. Mr. Wolch, this -- first of all, I did go to
6 Ottawa, I did phone Mr. Williams at that point,
7 you know, assuming I might be testifying. At some
8 point it was rightly or wrongly suggested that you
9 were the person who wanted me to attend Ottawa
10 but, in any event, I did. I phoned Mr. Williams,
11 asked him what was going on, and he advised that
12 the Crown -- or in the correct order -- that you
13 had indicated that you wished to call me, sir, to
14 talk about disclosure, which I thought was the
15 idea in the first place; and that the prosecutor,
16 whoever that was, replied that if you did that he
17 would be asking me about the corridor statement by
18 Nichol John, is in effect -- that's how I -- in
19 other words, that would be potentially negative
20 towards Mr. Milgaard, of course, that last --

21 COMMISSIONER MacCALLUM: You referred to
22 'the prosecutor'; who, exactly, was that, sir?

23 A Well it was Eugene Williams, Mr. Commissioner, but
24 I -- there were a couple of Regina Crowns there.

25 MR. WOLCH: Murray Brown and Eric Neufeld.



1 A Yeah, I think it was one or other of those, sir.

2 COMMISSIONER MacCALLUM: But they weren't
3 acting as prosecutors, they were simply
4 government representatives, were they?

5 A No.

6 MR. WOLCH: If I can help, Mr.
7 Commissioner, at the Supreme Court Saskatchewan
8 was represented --

9 COMMISSIONER MacCALLUM: Yes.

10 MR. WOLCH: -- by Murray Brown and Eric
11 Neufeld, and the Federal Government was
12 represented by Ron Fainstein and I believe Robert
13 Frater, --

14 COMMISSIONER MacCALLUM: Yes?

15 MR. WOLCH: -- and Larry Fisher was
16 represented by Brian Beresh.

17 COMMISSIONER MacCALLUM: I realize all
18 that. So it's, I'm just quibbling about the term
19 'prosecutor', it's really Saskatchewan?

20 MR. WOLCH: No, I think it felt that way,
21 but I'll go --

22 MS. KNOX: It might just be because
23 Mr. Brown and Mr. Neufeld are prosecutors within
24 the Department of Justice Prosecution Service.

25 COMMISSIONER MacCALLUM: Yes.



1 MS. KNOX: So Mr. Caldwell would know them
2 as prosecutors and refer them as prosecutors in
3 their full-time --

4 COMMISSIONER MacCALLUM: I just didn't want
5 a false impression of the nature of the
6 proceedings to be left, That's all.

7 A It was an appeal, Mr. Commissioner.

8 BY MR. WOLCH:

9 Q Well, no, it wasn't an appeal.

10 A Okay, I'm okay.

11 Q Let's try and avoid that. What I am getting at is
12 this, and I find this whole notion disturbing, and
13 I cannot give evidence from the podium, --

14 A Okay.

15 Q -- but I do wish to understand if you understand
16 what you are saying.

17 A Very good.

18 Q I mean, to me, this sounds exceptionally unethical
19 and I want to know if you would look at it that
20 way; "if you call this witness we're going to have
21 Mr. Caldwell give evidence that he can't possibly
22 give", and I don't get that?

23 A Well the evidence I was to give, Mr. Wolch, was on
24 disclosure. That was the point of me being down
25 there.



1 Q No, but --

2 A Why could I not give that?

3 Q Well, listen to me.

4 A Okay.

5 Q Okay. Disclosure of this comment?

6 A No, no, of the -- what had happened on disclosure
7 in the *Milgaard* case.

8 Q Okay, fine, we'll get into that in a little bit.

9 A Okay.

10 Q But disclosure, we know about disclosure, the
11 issues of providing Mr. Tallis with proper
12 disclosure, --

13 A Uh-huh.

14 Q -- we've gone through it here at length.

15 A Uh-huh.

16 Q But I'm talking about the suggestion that a member
17 of the bar would tell another one that "if you
18 want to go into this, we are gonna bring in
19 something through Mr. Caldwell that is not
20 admissible"?

21 A Well, sir, in the best order I can get this in,
22 the -- when Sergeant Pearson --

23 COMMISSIONER MacCALLUM: Just a minute,
24 this, I want to hear the objection first.

25 A Okay.



1 MS. KNOX: Mr. Commissioner, before the
2 witness answers -- and I'm drawn to speak because
3 of the use of the word "inadmissible" --

4 COMMISSIONER MacCALLUM: Yes?

5 MS. KNOX: -- and I particularly have a
6 recollection of reading in the public
7 prosecutions file, on the Sunday that I went
8 through all the boxes, a great deal of
9 correspondence between the provincial prosecutors
10 office, Mr. Brown, the federal prosecutors
11 office, and I don't know if it also included
12 Mr. Wolch's, about concerns about a great deal of
13 information that was being put forward at that
14 hearing that would ordinarily be inadmissible.
15 And I raise it only for that concern, my -- I
16 wasn't there, I don't know the process, but my
17 understanding was the rules of evidence were very
18 much relaxed.

19 COMMISSIONER MacCALLUM: Yes.

20 MR. WOLCH: We'll deal with that in a
21 second.

22 COMMISSIONER MacCALLUM: And inadmissible
23 where?

24 MR. WOLCH: Let me ask this.

25 BY MR. WOLCH:



1 Q Mr. Caldwell?

2 A Yes.

3 Q The comment, the hearsay comment would have been
4 one that you may have heard from Albert Cadrain,
5 is that right?

6 A What's that now, sir? No, it -- yeah, Albert, and
7 at the time when two other people were there.

8 Q No, but you heard it from either Albert or one
9 other person?

10 A No, sir, Albert or Mary Marcoux or Mrs. Miller.

11 Q Well, we'll deal with that.

12 A Okay.

13 Q Actually, two people. All right. The comment was
14 allegedly made by Nichol John; correct?

15 A Oh, I'm sorry, you are right.

16 Q Right?

17 A That's correct.

18 Q She was a witness?

19 A That's right.

20 Q She was a witness in the Supreme Court?

21 A That's my understanding.

22 Q Well she would be the best source of that
23 evidence?

24 A That may be, sir.

25 Q If she made it, she is testifying, "Nichol John,



1 did you say this", anybody could put that to her;
2 correct?

3 A I would assume that's right, but --

4 Q The next closest to doing anything is Albert
5 Cadrain, he was a witness; correct?

6 A That's correct.

7 Q He could have been questioned, "Albert, did you
8 hear this or didn't you hear it"; right?

9 A About that hallway thing, --

10 Q Yeah?

11 A -- he could, yes.

12 Q Yeah. Well, how do you become a witness when they
13 are already there, you don't even know who told it
14 to you?

15 A Well, sir, I went down there with the expectation
16 that I would be testifying about disclosure. Now
17 before doing that, right around that time,
18 Sergeant Pearson and I had been to Regina. One of
19 the things we were -- or the only thing we were
20 looking into was disclosure. It seems to me that
21 we found that the witness statements from the
22 prosecution file had been sent to Ottawa, as I
23 recall I think there's evidence of that, and
24 eventually they faxed them back to I think either
25 Regina or Saskatoon. We determined that, and it



1 would be after that I went to Ottawa, I think.

2 Q Would it be correct to say that you don't even
3 know whether it was Mary Marcoux or Albert Cadrain
4 that supposedly told you that?

5 A Yeah, it was one of the three, sir, --

6 Q Well --

7 A -- I can't even tie it down to those two.

8 Q Well let's look at 301003.

9 A Okay.

10 Q You are not very sure of that, you say to --

11 A Okay.

12 Q You say here:

13 "At the Preliminary Inquiry, one of the
14 witnesses, Mary Marcoux, or Albert
15 Cadrain, or both of them, advised me
16 that they, plus Mrs. Miller ..."

17 A Mrs. Miller.

18 Q "... all heard Nichol John say ..."

19 So you say, at the preliminary, one of them told
20 you and you don't know which one yet?

21 A I said "one or both", and I said "plus
22 Mrs. Miller", they are all --

23 Q No, you say they advised you that they were there,
24 you don't say any one of the four said it?

25 A Oh, I see what you mean, all right.



1 "... who was present at the hearing

2 ...",

3 and it says:

4 "... all heard Nichol John say, ...",

5 etcetera.

6 Q Yeah. So Mary Marcoux, or Albert Cadrain, or both
7 of them --

8 A Uh-huh.

9 Q -- told you that everybody heard this?

10 A That's how I'd read this, --

11 Q Okay, all right.

12 A -- yeah.

13 Q And your files indicate no statements from Mary
14 Marcoux, Albert Cadrain, or any of these people
15 that they did hear this?

16 A Not from them, that's correct.

17 Q Well where else would you get that statement?

18 A Where I got it, sir, was from the notes I made
19 when they relayed this to me.

20 Q But you interviewed Nichol John three times; --

21 A Yeah.

22 Q -- would you not put that to her?

23 A I did not do that, sir. There is two different
24 places in the prosecutor's file where I recorded
25 that quotation, to the best of my knowledge no one



1 else did that.

2 Q But it's a quotation; you can't even say who said
3 it?

4 A I couldn't say who said it because this is how it
5 was presented to me, it was one of those three,
6 and it does not say --

7 Q Well did they say it to you or to somebody else?
8 I mean I don't understand "how it was presented to
9 me"?

10 A Okay, just a minute. Yeah, that's right, how it
11 happened is that:

12 "... one of the witnesses, Mary Marcoux,
13 or Albert Cadrain, or both of them,
14 advised me that they, plus Mrs. Miller,
15 Gail Miller's mother, who was present at
16 the hearing, all heard Nichol John say,
17 ..."

18 etcetera, sir. That's how it happened.

19 Q I'm not disputing that. All I'm saying is you
20 don't know whether it was Albert Cadrain -- not
21 the most reliable person in the world -- or Mary
22 Marcoux, who said it to you. Now let me pause
23 there. Are you satisfied that one of them said it
24 to you, or said it to somebody else who told you?

25 A No, no, I was -- I was in that hallway when they



1 brought this to my attention, I recorded it very
2 quickly.

3 Q But you don't know which one brought it to your
4 attention?

5 A Okay. One --

6 Q Is that --

7 COMMISSIONER MacCALLUM: Just let him
8 finish, he is trying to answer.

9 A "... one of the witnesses, Mary Marcoux,
10 or Albert Cadrain, or both of them,
11 advised me that they, plus Mrs. Miller,
12 Gail Miller's mother, who was present at
13 the hearing, all heard ..."

14 her say that:

15 "I was right there, and saw it all, but
16 I'm not going to say nothing."

17 I copied this down immediately and incorporated
18 it so, you know, that's what happened, Mr. Wolch.

19 BY MR. WOLCH:

20 Q But you don't know who said it to you?

21 A Not --

22 COMMISSIONER MacCALLUM: He does. That's
23 not quite -- he said it was either one of them,
24 either Mary or Albert Cadrain.

25 MR. WOLCH: Well --



1 COMMISSIONER MacCALLUM: Mary or Albert,
2 yes, that's all he's telling you.

3 BY MR. WOLCH:

4 Q Well you couldn't have written it down that
5 moment?

6 A I did.

7 Q Well how could you write down A or B, I mean --

8 A Oh, no, that part.

9 Q Why wouldn't you write down who said it?

10 A Yeah. Well, Mr. Wolch, I copied the quote down,
11 and later the -- my concern was to get down the
12 quotation which seemed to be, you know, seemed to
13 be damning if you will.

14 Q Okay. But you never followed it up with Nichol
15 John?

16 A I didn't with Nichol John, as it happened. This
17 was -- this was at the preliminary inquiry.

18 Q Lots of time?

19 A Yes, that's so, but I didn't follow it up with
20 her, clearly. I may have felt I --

21 Q Mrs. Miller, Mary Marcoux; you never followed it
22 up with either one of them?

23 A No. Mrs. Miller was a somewhat older lady and
24 Mary, as I now realize, was a younger child, but I
25 didn't -- I never --



1 Q You never followed it up?

2 A I don't think so, sir.

3 Q Okay. And the comment is "I don't know why he
4 didn't kill me too"?

5 A "I was right there, and saw it all, but
6 I'm not going to say nothing.",
7 to quote her.

8 Q Now, obviously those words might not be exactly
9 what she said, if she said it?

10 A Oh, yeah, they were what they told me exactly, but
11 --

12 Q Well they came from Albert Cadrain, this is the
13 same guy who heard David say he wants to kill the
14 witnesses in Calgary; right?

15 A Well it was Albert, that much is right, sir.

16 Q Okay. So sort of consistent with some of the,
17 perhaps, falsehoods he has told?

18 A I don't -- I don't believe that, Mr. Wolch. I
19 thought I had a good knowledge of Albert and he
20 seemed to be leveling with me. He obviously said
21 a couple of far-out things later, and much later
22 he was accused of mental difficulties, but that
23 was, I think, quite a bit after all these events.
24 But --

25 Q Might --



1 A Okay, sorry.

2 Q Might it be that, if she said something like this,
3 the meaning she was conveying, now that we know
4 what's really going on, --

5 A Uh-huh.

6 Q -- is "if he is such a killer, and I saw a murder,
7 why didn't he kill me"?

8 A Well I, sir, couldn't read that into this set of
9 words I'm afraid.

10 Q Well now, with hindsight, that we know --

11 COMMISSIONER MacCALLUM: Just a minute.

12 MS. KNOX: Mr. Commissioner, I don't have
13 before me the transcript of Peggy Miller, but my
14 recollection is there was some testimony from
15 Peggy Miller that she was in the hearing -- here
16 at the Inquiry, that she was in a waiting room
17 when this was said, except she characterized
18 Nichol John's tone of voice, or something to that
19 effect, as being flippant or something. And I
20 would have to check, and I don't know that
21 Mr. Wolch was here, --

22 MR. WOLCH: Yeah.

23 MS. KNOX: -- but it seems to me that we
24 had testimony at this Inquiry from a witness who
25 heard the comment but perhaps put a different



1 interpretation on it, but I would have to go back
2 and check the transcript.

3 MR. WOLCH: I thought she testified she
4 didn't hear it.

5 COMMISSIONER MacCALLUM: Well, I can't
6 remember, but --

7 MR. WOLCH: Or maybe I -- maybe counsel can
8 help?

9 MR. HODSON: Peggy Miller testified that
10 she heard the comment by Nichol John in the
11 hearing room, the words were a bit different, we
12 can -- I can find the transcript. They weren't
13 exactly this, but she did give evidence, --

14 COMMISSIONER MacCALLUM: Yeah.

15 MR. HODSON: -- and I can find it for you
16 very quickly.

17 COMMISSIONER MacCALLUM: But -- thank you
18 very much. I'm just a little mystified, at the
19 moment, as to why we're spending so much time on
20 this point?

21 MR. WOLCH: I --

22 COMMISSIONER MacCALLUM: It was -- I take
23 it that it all began by you suggesting to the
24 witness that, if an arrangement like that had
25 been made at the Supreme Court, that is to say



1 you wouldn't call this witness to -- on the
2 business of disclosure if the government wouldn't
3 call Nichol John on the business -- or ask this
4 witness about Nichol John's declaration?

5 MR. WOLCH: That's right.

6 COMMISSIONER MacCALLUM: But are we still
7 on that subject?

8 MR. WOLCH: I --

9 COMMISSIONER MacCALLUM: You seem, now, to
10 be challenging that this declaration was ever
11 made?

12 MR. WOLCH: No, I'm trying to get through
13 it quickly, but with all due respect I -- the
14 answers are sometimes longer than my questions,
15 instead of "yes" or "no" I go off on tangents,
16 but I'm trying not to, I'm trying to focus.

17 The point, I expect Mr.
18 Williams will testify, and I want to find out if
19 this was actually said. I want to challenge this
20 witness, that is "if, if Mr. Caldwell is
21 called --"

22 COMMISSIONER MacCALLUM: Yes?

23 MR. WOLCH: "-- he is going to testify to
24 this", because I think -- and I may be disagreed
25 with -- that that is a very serious suggestion



1 because it shows, on the Department of Justice, a
2 biased to protect, "let's not get this Crown,
3 this guy on the stand", and it also shows a very,
4 I think, improper, improper challenge that "if
5 you want to talk about disclosure we're going to
6 put in evidence like this through this witness
7 --".

8 COMMISSIONER MacCALLUM: Uh-huh, well --

9 MR. WOLCH: "-- when we could have put it
10 in through John, Cadrain, or we could have called
11 Mary Marcoux or Miss Miller who testified here,
12 we're not going gonna put it in that way, we're
13 gonna put it in through this witness if you dare
14 have him under oath."

15 Now I don't know if that
16 happened or not, but I will put it to Mr.
17 Williams when he gets here, and I just want to be
18 clear that this witness is confident that this is
19 what he was told by Mr. Williams, and I'm having
20 trouble getting there. That's all my point is.

21 COMMISSIONER MacCALLUM: Well, there's
22 another problem here, the best evidence of
23 whether or not that happened would come from
24 Neufeld, or Brown, or you; would that --

25 MR. WOLCH: Well, that's correct, or



1 Mr. Asper.

2 COMMISSIONER MacCALLUM: But doesn't that
3 put you in an invidious spot?

4 MR. WOLCH: No, Mr. Asper would know, and I
5 don't know --

6 COMMISSIONER MacCALLUM: Well how would
7 Mr. Asper know?

8 MR. WOLCH: Well he was counsel with me
9 there.

10 COMMISSIONER MacCALLUM: Oh.

11 MR. WOLCH: But that's not the point. I
12 mean, I can't answer until somebody else,
13 corroborates this. I mean, if somebody is going
14 to say they told him that, I want to hear that
15 from somebody. This is all news to me. But I
16 just want to make sure the witness is clear of
17 what Mr. Williams said to him and then we will
18 explore it with Mr. Williams, sir.

19 COMMISSIONER MacCALLUM: Well, I thought he
20 had been clear enough to begin with, yeah.

21 MR. WOLCH: Oh, I'm just trying to
22 understand, and I think it's --

23 COMMISSIONER MacCALLUM: I just don't, I
24 mean, think this is a place for you to be
25 attacking the very happening that -- in question,



1 you know, even indirectly through
2 cross-examination.

3 BY MR. WOLCH:

4 Q Well let me ask you this, then, Mr. Caldwell. I
5 was unclear when you testified that you conveyed
6 this, well, evidence or whatever it is to
7 Mr. Beresh, and I'm really unclear as to the
8 timing of that?

9 A At this point I am too, sir. I did tell him about
10 that hallway statement, I know that was in
11 Saskatoon, he -- because I thought it might be,
12 you know, important evidence on a case. But the
13 thing that I have told you about here was very
14 brief, and essentially that was all the discussion
15 was, and then it was indicated they wouldn't be
16 needing me, either then or before, sir. Shortly
17 thereafter I phoned Murray Brown to ask him how
18 the case was proceeding, I was in Ottawa but not
19 at the building, I was in a hotel at that time.

20 Q No, but I'm a little concerned. You say you are
21 not in the, in the litigation, you are -- you say
22 you feel it's almost improper for you to be
23 offering opinions or jumping in, and I can perhaps
24 see you trying to help Mr. Brown or Mr. Neufeld,
25 but helping counsel for Larry Fisher strikes me as



1 somewhat beyond?

2 A Well, Mr. Wolch, I -- the presumption of innocence
3 applies to Fisher as well as all other kinds of
4 people. He was charged, and at some stage of the
5 game I relayed to Mr. Beresh that hallway
6 conversation, because I didn't know if he had
7 heard it and might make use of it.

8 The other thing is that, on
9 this, I was very likely subpoenaed to go to
10 Ottawa, I was told to go to the airport and there
11 would be a voucher, flew down by commercial
12 airline, the night before this phoned Mr. -- Mr.
13 -- I shouldn't say the night before this -- the
14 night I got there I phoned Mr. Williams, and
15 Mr. Brown after that, and I never physically did
16 go, even the next day or indeed any other time, to
17 the Supreme Court.

18 Q No, but would there be any doubt in your mind that
19 Mr. Brown, Mr. Neufeld, and Mr. Williams would all
20 know about your notes?

21 A Would there be any doubt that -- they knew about
22 my notes, --

23 Q Okay?

24 A -- because you were rightly or wrongly quoted as
25 saying that you intended to call me on disclosure,



1 which would be, of course, very normal I would
2 have thought.

3 Q Well --

4 A And then there was rejoinder by one or more of
5 them was that, if that happened, they would call
6 the evidence of the hallway conversation. And
7 Mr. Wolch, pardon me Mr. Wolch, I realize myself
8 that the evidentiary rules there were very much
9 relaxed, for whatever that may be.

10 Q Mr. Caldwell, please listen to my question.

11 A Okay, sir.

12 Q Exactly the same question, a "yes" is probably all
13 it requires: Is there any doubt in your mind that
14 Brown, Neufeld, and Williams knew of this piece of
15 evidence?

16 A Well, it seemed they did, because you were quoted
17 as saying --

18 Q Sorry --

19 COMMISSIONER MacCALLUM: That's, he has
20 given his reason, "seemed to anyway".

21 BY MR. WOLCH:

22 Q Okay. Well, I mean obviously they would be the
23 first person you would go to if you thought they
24 didn't know it?

25 A About the hallway conversation?



1 Q Hallway, yes.

2 A Yeah. Well, sir, I -- I was there strictly to
3 talk about disclosure. That was my understanding.

4 Q No, Mr. Caldwell, please listen to me.

5 A Okay.

6 Q This is really simple.

7 MS. KNOX: If I may, and I don't know if I
8 will help matters or I will aggravate matters,
9 but I don't have readily in front of me -- and
10 maybe Mr. Wolch does because he was a key party
11 to it -- the scheduling of the Supreme Court of
12 Canada hearings, the dates when witnesses
13 appeared.

14 What we do have before us, and
15 what was brought up on the screen, is a part of a
16 statement taken from Mr. Caldwell somewhere
17 during the course of the -- I can't even say it
18 -- the Supreme Court of Canada proceeding. There
19 is a date on it that I believe is March 20th.
20 What that statement does is that a police officer
21 who was assisting in the 690 review, Sergeant
22 Pearson who we'll hear from next week, attended
23 at Mr. Caldwell's residence and he canvassed with
24 him three particular areas, as I recall.

25 One of the things he canvassed



1 with him was to show him a copy of this, one of
2 his handwritten notes, so clearly there was some
3 discussion going on that was brought to Sergeant
4 Pearson that he was asked to take to Mr. Caldwell
5 to seek some input, clarification, assistance.

6 Now I don't know what part
7 Mr. Wolch played in that, I don't know if the
8 records will show us what part he played in it,
9 but somewhere in the course of the Supreme Court
10 of Canada hearing itself this became a live
11 issue, and my memory of the materials that we
12 have is that Mr. Caldwell was questioned on these
13 matters, he gave that statement to Sergeant
14 Pearson, there is a letter from Sergeant Pearson
15 in our materials where he shipped it to Ottawa,
16 and it was subsequent to that that Mr. Caldwell
17 was sent a voucher and asked to attend.

18 So I think, in order to get a
19 context for these questions and to assist in the
20 answering, we need to get a chronology that would
21 perhaps be of assistance to all of us, and that's
22 what I was whispering in Mr. Hodson's ear, trying
23 to do it.

24 MR. WOLCH: Well I can help with that, Mr.
25 Commissioner, but I really think we're making a



1 very simple issue very complex.

2 BY MR. WOLCH:

3 Q And what I am saying to you, I'll rephrase the
4 question and please listen to the question: Why
5 did you feel you had to bring it to Mr. Beresh's
6 attention when it would have been in the knowledge
7 of the authorities involved in the reference?

8 A Well this -- I wasn't seeing him, I -- as I
9 recall, at the time of the reference, Mr. Wolch,
10 necessarily.

11 Q I'm sorry, Mr. Caldwell, but that's not a hard
12 question.

13 A Okay.

14 COMMISSIONER MacCALLUM: I think he is
15 trying to say there is two different times
16 involved here.

17 MR. WOLCH: Okay.

18 COMMISSIONER MacCALLUM: When he told
19 Beresh it was at a time not necessarily at -- in
20 connection with that hearing at the Supreme
21 Court.

22 BY MR. WOLCH:

23 Q Okay. Is that correct, Mr. Caldwell?

24 A That's -- that's my impression now, and it did
25 lead to, indirectly if you will, to me going to



1 Yorkton, as you know, to testify on the Fisher
2 matter.

3 Q Okay. But I'm just wondering why you felt you
4 would be the person to convey it to Mr. Beresh?

5 A Well it would be -- it's a, I thought a
6 significant, or could be a significant piece of
7 evidence. I didn't feel that there was any reason
8 of any description why I shouldn't tell him that
9 if I knew it of, essentially, my own knowledge.

10 Q You see the irony, given the disclosure problems
11 in David's case, how out of the way you are going,
12 when you are not even the prosecutor, to assist
13 Mr. Fisher?

14 A Well, Mr. Wolch, what I did, assisted Mr. Fisher
15 in a very small way was as a defence witness. I
16 was not anything to do with the Crown on that, I
17 was a defence witness.

18 Q Okay, I'll leave it, sir.

19 A Oh.

20 Q We will deal with this with the other
21 witnesses, --

22 A Okay.

23 Q -- who maybe they made notes or whatever, but --

24 MR. HODSON: Sorry, I just would like --
25 before you move on, the reference to Peggy



1 Miller's evidence is at page 7687 of the
2 transcript, and her evidence was she was shown
3 the specific note of Mr. Caldwell's, she had used
4 the word 'arrested' instead of 'killed', but then
5 went on to say that 'yes' -- let me just find the
6 comment. The question was these words:

7 "Q These words here, "I don't know why he
8 didn't kill me too," do you recall those
9 words being --

10 A That could have been, it could have
11 been either killed or arrested.

12 Q Arrested, okay. And so the rest of
13 what's recorded here ...",

14 which was Mr. Caldwell's notes:

15 "... is that close to or accurate as to
16 what you heard in that room but from
17 Nichol John?

18 A Yes."

19 So that's at page 7687, on April 13th, of Peggy
20 Miller's evidence.

21 COMMISSIONER MacCALLUM: Thanks.

22 MR. WOLCH: I might point out, if I read it
23 right, that Mrs. Miller was not in the room?

24 MR. HODSON: Yes. And I also asked her the
25 question whether her mother was in the room at



1 the time, and she said "no" -- sorry -- "and was
2 her mother", she said "yes" -- I'm sorry, it was
3 "her mother", I think it was Mary Marcoux's
4 mother there.

5 COMMISSIONER MacCALLUM: "Your mother",
6 line 12 and 13.

7 MR. HODSON: "Was your mother in the room
8 at the time?

9 A No she was not."

10 MR. WOLCH: So whatever it says.

11 MR. HODSON: Do you have it up there?

12 Okay.

13 MR. WOLCH: I'm trying to move along.

14 Okay.

15 BY MR. WOLCH:

16 Q Mr. Commissioner, I hadn't intended to do this,
17 but it might be a bit helpful given some of the
18 difficulties we're having. There is a letter that
19 I might refer to that might be of some assistance
20 as to the Supreme Court itself and what was going
21 on there.

22 A Okay, sir.

23 Q And the letter was 158496, and before I go into
24 the letter, sir, I'm going to suggest to you that
25 disclosure and the conduct of the investigation



1 was a very minor part, if any, of the Supreme
2 Court reference, the only area of disclosure was
3 (V4)---- (V4)--- caused a little bit of concern,
4 but really it wasn't, and the record will disclose
5 that I believe the reference was ordered in
6 November, Mr. Hodson can correct me, but I think
7 it was November of '91 and somehow we were in the
8 Supreme Court in December calling evidence in
9 January, so it moved along very, very quickly, and
10 in talking about the Supreme Court, given your
11 normal -- or your background, sir, you might agree
12 with me that time in all courts, and in particular
13 the Supreme Court, is very precious?

14 A Yeah, that's right. Mr. Wolch, one thing, very
15 briefly, I hadn't realized these dates, but as of
16 the 1st of October, 1991 I was no longer with
17 either Department of Justice.

18 Q Okay.

19 A Just so that that's --

20 Q Okay.

21 A I was unemployed.

22 Q But you agree with me, you recall we discussed
23 this morning that leave to appeals are limited to
24 15 minutes?

25 A I believe that's right.



1 Q You know, in fact, I think you've been on the
2 stand here about half the length of the reference,
3 if you want to put it in perspective, how time is
4 so limited --

5 A Yeah --

6 Q -- in the Supreme Court and what you can do and
7 what you can't do?

8 A I follow you, sir.

9 Q But I want to go through this a bit just to set
10 the framework, it's a letter to the Chief Justice:

11 "Since our last meeting -- "

12 And I'm going to go through it quickly,

13 "-- counsel have been working diligently
14 to bring this matter before the Court
15 ..."

16 "... there have been meetings between
17 Beresh and ourselves ... with all
18 counsel with the exception of Justice
19 Ottawa ... lengthy conference calls ..."

20 "It was during the last conference call
21 as a result of the difficulty we were
22 having with direction that we suggested
23 that Mr. Fainstein, with the blessing of
24 all of us, perhaps attend upon yourself
25 for some further guidance."



1 "The evidence to be considered by the
2 Court seems to fall into basically four
3 general areas. It would appear to be
4 preferable to attempt to have the
5 witnesses pertaining to each area called
6 as closely in sequence as possible. The
7 four areas would appear to be:"

8 The young people accompanying David, the motel,
9 expert evidence, Fisher evidence. One of the
10 difficulties is determining which area we should
11 commence with. We talk about expert evidence.
12 This area might be the easiest as it is
13 non-contentious. If we can just turn the page.

14 COMMISSIONER MacCALLUM: Is this you
15 speaking, Mr. Wolch?

16 BY MR. WOLCH:

17 Q Yes.

18 "... it was felt that this might be the
19 best area. The difficulty we have is
20 that requests have been received from
21 both Justice in Ottawa and Justice in
22 Saskatchewan to provide further blood
23 samples from Milgaard and a sample from
24 Fisher. Apparently Ottawa is aware of
25 some testing techniques in England, and



1 Saskatchewan is aware of some testing
2 techniques in Texas. It is somewhat
3 frustrating to us that in his original
4 application, Milgaard indicated that he
5 would provide any samples requested of
6 him, and in fact this is consistent with
7 his behaviour right back to the time of
8 his arrest, and this is the first such
9 request. In any event, Mr. Milgaard is
10 willing to provide samples, but given
11 issues such as continuity and his
12 current incarceration, we are simply in
13 the process of facilitating the
14 requests."

15 And I'll skip the next paragraph as it deals with
16 what became later on obviously very important,
17 the DNA and the possibilities of DNA.

18 Direct witnesses.

19 "It would appear that this would be the
20 most logical starting point. Many of
21 the witnesses who testified as to times,
22 places, findings, etc. would simply be
23 accepted from the trial. Their evidence
24 is not particularly in dispute, and
25 clearly with the passage of time could



1 not have improved.

2 The witnesses who have to be
3 called from our point of view would be:"
4 Number 1, Ronald Dale Wilson, and this talks
5 about his need, I won't go through it, need for
6 counsel.

7 Next page, David Milgaard:
8 "It has always been our intention to
9 have David Milgaard testify. The
10 difficulty we are having right now is
11 with David's emotional state.

12 After being convicted, David
13 underwent numerous bouts of depression
14 and emotional difficulties. This
15 continued over the many years of
16 incarceration, and we have brought this
17 to Justice's attention numerous times as
18 it is well documented, and in fact the
19 Prime Minister himself at one point
20 expressed concern. All penal
21 authorities and experts that we have
22 spoken to have told us that David's
23 reintroduction into society will be very
24 difficult to say the least. Those fears
25 are being realized. Much of David's



1 time in jail was focused on proclaiming
2 his innocence, helping others and
3 correcting injustice. For approximately
4 twenty-three years, nobody has ever
5 listened to him. Now everybody wants to
6 listen to him, and he has achieved
7 almost celebrity status.

8 Unfortunately, but
9 understandably, he does not have a great
10 deal of faith in the justice system.
11 What we are faced with now is that
12 David's main interest is to start
13 experiencing living, and also rectifying
14 the various ills in society. We are
15 having a great deal of difficulty having
16 David even focus on this reference. We
17 have enlisted the aid of Dr. Stanley
18 Yaren, the chief psychiatrist in the
19 Province of Manitoba, who has had a long
20 standing relationship with David. Our
21 understanding is that Dr. Yaren will be
22 meeting with David and his family this
23 week. Dr. Yaren may be called as a
24 witness to explain David's mental
25 state."



Justice Tallis:

"In connection with David's evidence, Mr. Fainstein advised the Court may be interested in hearing from Mr. Justice Tallis. David has indicated a willingness to waive privilege, and with that in mind, we attended in Regina last weekend to meet with Justice Tallis. We understand Justice Tallis does not have his files, although he has searched for same, and he indicated to the writer that he has been deliberately avoiding the publicity and emerging evidence in order it keep his memory as unaffected by recent developments as possible. Justice Tallis expressed certain concerns, and in particular felt that the sanctity of solicitor/client privilege is so important, he was concerned that the public would be given the wrong impression. He was clear that the privilege belonged to David, and if it was to be waived, it should be as objectively and fairly done as possible."



1 I'll skip over that, but it talks about Justice
2 Tallis, and I'll try to go through it fairly
3 quickly. I'm sorry, can you just go back to the
4 other page at the bottom:

5 "The other witnesses who fall into this
6 category are more logically called by
7 other parties."

8 If we can turn the page.

9 "Clearly we would not be interested in
10 calling Cadrain or Nichol John. In the
11 event that Cadrain or some of his family
12 members aren't called to testify, we
13 would certainly wish to call Dennis
14 Cadrain, and would want him likely
15 called in any event, although he would
16 likely follow the others in sequence.
17 Nichol John would likely be called by
18 Justice in Ottawa, but in terms of
19 commencing with her, we understand that
20 she is still undergoing some medical
21 assistance in order to revive her
22 memory."

23 I'll -- I'm sorry, here:

24 "The calling of these witnesses may lead
25 to the calling of police witnesses as to



1 the method of taking statements. This
2 of course would not be our
3 responsibility."

4 You see that? Then we get the motel room, Larry
5 Fisher. I'll skip motel room, just go down to
6 this part here. It talks about the witnesses who
7 could be called and it goes through the Fisher
8 evidence. Just go further down.

9 "Another witness who would likely have
10 to be called is Ms. (V4)---- (V4)---.
11 Ms. (V4)--- gives rise to potentially
12 other witnesses, and the question of
13 disclosure or lack of same becomes
14 rather important. It is inconceivable
15 that if it were known that another lady
16 was attacked at roughly the same time as
17 Gail Miller, and within blocks, that
18 would not have surfaced at trial if it
19 were disclosed."

20 That is the issue I had mentioned earlier of
21 where disclosure focused on (V4)---- (V4)---.
22 The above is not exhaustive and there may be
23 additional witnesses.

24 "We will be influenced by who is being
25 called by the parties with status and



1 your guidance.

2 We should add that it is also
3 our intention to file additional
4 material with the Court. Since our last
5 meeting, we would guesstimate that we
6 have received approximately 5,000 pages
7 of material that we have not seen
8 before. Our sources of material have
9 been the Department of Justice in
10 Ottawa, the Department of Justice in
11 Saskatchewan and the Parole Board. We
12 are trying to work it down as to what is
13 relevant and not duplicitous."

14 Turn the page.

15 "Another difficulty which requires some
16 assistance from the Court is the matter
17 of public access to information.
18 Earlier we made reference to a new
19 witness --"

20 And I'll skip over that, but that's Launa
21 Edwards, we're not too concerned about her.

22 "There are also matters in David
23 Milgaard's personal life, and we are
24 speaking in particular during his
25 incarceration, that are very sensitive.



1 Clearly, the effect of his current
2 mental condition is important for the
3 Court to know; on the other hand, they
4 are matters which Dave has never shared
5 with even his siblings, and are matters
6 that are extremely private.

7 Furthermore, if released while David is
8 in jail, they are matters that could be
9 perceived as breaking an inmates code of
10 silence, and could put David in
11 jeopardy. We query how we can put this
12 material before the Court without
13 causing tremendous sensationalism and
14 great personal harm.

15 Having said all the above, we
16 are still optimistic that we may proceed
17 fairly expeditiously, and we hope the
18 above will be of assistance to other
19 counsel in determining needs and
20 requirements. Our suggestion is that we
21 have to pick one section of the evidence
22 and proceed, and try to call all of the
23 witnesses relevant to that area. The
24 most obvious is the area of the "eye
25 witnesses". We should immediately



1 address the problems of Mr. Wilson and
2 his counsel, Justice Tallis' situation,
3 and we would appreciate some guidance as
4 to whether or not David Milgaard is
5 expected to testify at the very
6 beginning. If so, that does create
7 problems. We can assure the Court it is
8 not a matter of preparing him for Court
9 since our experience is that he is
10 absolutely impossible to prepare in any
11 event."

12 And it then goes on about a Mr. Douzenko who was
13 a witness.

14 That may clarify some of the
15 background, but I'm suggesting police conduct,
16 Crown counsel conduct, disclosure, were not at
17 the forefront of this Inquiry.

18 A From your letter, sir, I would agree with you. I
19 can't see them being stressed or necessarily even
20 mentioned in your letter.

21 Q Right.

22 A So I, you know --

23 Q As counsel you can appreciate the focus, and the
24 only focus was on the innocence or not of David
25 Milgaard, --



1 A Uh-huh.

2 Q -- that was the focus, and if police acted
3 improperly, it doesn't matter.

4 A Yeah.

5 Q It doesn't matter, it's the truth of the evidence
6 that counts. You see that?

7 A Yeah, granted, Mr. Wolch.

8 Q Which then leads, at the end of the inquiry, to
9 your press conference that we went over earlier,
10 do you recall -- when the DNA came out, I'm sorry.

11 A Oh, yeah, the end -- the time the civil action was
12 discontinued?

13 Q That's right.

14 A Yeah, that was, to my knowledge, the only -- the
15 press conference involving Mr. Kujawa, our
16 counsel, Mr. Halyk, and myself.

17 Q Yes, at 332039, and if we can just turn to the
18 next page, and I think your knowledge of the law
19 is such that you have found with time that courts
20 are very careful in how they choose their words.

21 A I believe so, sir.

22 Q And you also know that courts are very careful in
23 making findings or suggesting findings on issues
24 that are not before them?

25 A I would assume so, sir.



1 Q You can appreciate even in the last couple of
2 days, Mr. Justice Gomery, there are those concerns
3 about attesting to blame or pointing fingers is a
4 real fine line that courts have to walk?

5 A I follow you, sir.

6 Q Yeah. In fact, Gomery is actually looking at
7 misconduct, the Supreme Court wasn't, and even
8 Gomery was limited is what I'm getting at.

9 A Okay.

10 Q So their words are carefully chosen, and if you
11 look at your quotation from the Supreme Court:

12 "It is appropriate to begin by stating
13 that in our view David Milgaard had the
14 benefit of a fair trial in January,
15 1970, we have not been presented with
16 any probative evidence that the police
17 acted improperly in the investigation of
18 the robbery, sexual assault and murder
19 of Gail Miller or in their interviews
20 with any of the witnesses."

21 You see that?

22 A Yeah.

23 Q We have not been presented with any evidence of
24 that.

25 A Okay.



1 Q They are not saying it didn't happen, they are
2 saying they never had evidence of it. You see
3 that?

4 A Yeah, I do, sir. This is the -- part of the
5 judgment and I would certainly, the language "we
6 have not been presented" etcetera, I don't see
7 where that -- I don't think you can suggest that
8 means there was such evidence and it wasn't
9 presented to them. How could that be?

10 Q I suggest it means neither. They never heard from
11 Sergeant Mackie did they?

12 A Well, that I don't know, sir, but --

13 Q Well, take it from me.

14 A Very good.

15 Q They didn't hear from you, you know that?

16 A That's right.

17 Q Right?

18 A Yeah.

19 Q They didn't have your candid admissions here about
20 the disclosure you never gave to Mr. Tallis?

21 A Well, sir, that's so, and it very well may, at
22 that time, it very well may be that I did not know
23 or realize they were failures to disclose, if you
24 follow me.

25 Q I'm just trying to emphasize, but I'll carry on.



1 A Okay.

2 Q "Nor has evidence been presented that
3 there was inadequate disclosure in
4 accordance with the practice prevailing
5 at the time."

6 There was no evidence presented at that, correct,
7 but you know, I read you the letter, 5,000 pages,
8 now, it's a bit misleading to say, we have
9 300,000 pages, but surely we have numerous
10 documents here that are relevant, such as, I
11 think it's Rasmussen and Edmondson's RCMP report,
12 that has only surfaced here and wasn't present
13 there.

14 A Well, sir, that's true, and as we know, which did
15 not come to my office.

16 Q Oh, I'm only saying in the global picture --

17 A Okay.

18 Q -- we are discovering, and I'm sure at the end
19 Commission Counsel can point out what disclosure
20 came here that's important that wasn't even
21 present at the Supreme Court reference, let alone
22 at the trial.

23 A Yeah. I believe, Mr. Wolch, that we are in fact
24 finding things out that did and didn't happen in a
25 large measure as the Inquiry goes on. I presume



1 that's legitimate.

2 Q Absolutely, but I noted there was some excitement
3 when it was raised the other day that the Supreme
4 Court somehow said disclosure was adequate or no
5 misconduct. That's not what they said, they said
6 there was no evidence presented of it.

7 A Well, I must say, Mr. Wolch, the way I would read
8 that is the former despite what the words say. In
9 other words, if I read this, I would take that as
10 being the same as saying, you know, there was no
11 evidence of police improprieties or inadequate
12 disclosure, that's how I would read it. It's a
13 double negative almost.

14 Q Well, no, I now begin to realize why you have so
15 much problem with your letter writing. Can't you
16 look at the plain wording?

17 A I can see it, sir, it says we have not been
18 presented with any probative evidence the police
19 acted improperly, etcetera.

20 Q And you interpret that to mean that there is no
21 probative evidence out there?

22 A I would not think that they would write that if
23 they meant to say the next time this happens we
24 trust you will put in probative evidence that you
25 knew you had.



1 COMMISSIONER MacCALLUM: I've got it
2 written down, Mr. Wolch, and I can interpret it.

3 MR. WOLCH: Do you accept my --

4 COMMISSIONER MacCALLUM: I know what you
5 mean. I take your point.

6 MR. WOLCH: I thank you. I could be here
7 all day if you didn't. Okay. I'm just about
8 concluded, Mr. Caldwell.

9 COMMISSIONER MacCALLUM: I hope you won't
10 allow modesty to prevent you reading the next
11 line.

12 MR. WOLCH: Oh, I'm sorry, that's
13 Mr. Tallis I think.

14 COMMISSIONER MacCALLUM: Oh, I see.

15 MR. WOLCH: It was jealousy, sir, not
16 modesty.

17 COMMISSIONER MacCALLUM: If you are almost
18 finished, I'll wait, but I feel the need of a
19 break coming only.

20 MR. WOLCH: That's fine, Mr. Commissioner,
21 if we take a short break. I have about 10
22 minutes to go.

23 COMMISSIONER MacCALLUM: All right. 15
24 minutes.

25 (Adjourned at 2:39 p.m.)



(Reconvened at 2:58 p.m.)

BY MR. WOLCH:

Q Mr. Caldwell, I only have a couple of questions for you. I want to take you to the day before the DNA results came to your attention.

A Okay, sir.

Q Okay. Am I correct that on that day you would have been firmly convinced that David was guilty?

A That -- until they came out, sir, I was.

Q So the day before you were firmly convinced?

A Yeah.

Q So let me just ask you this. First of all, you would agree with me, I'm sure, that David was innocent the day before the DNA?

A Absolutely, in that sense.

Q Yeah.

A He certainly was.

Q The DNA didn't change anything in terms of his innocence or guilt, he was always innocent?

A That is correct, sir, as we now know.

Q Yeah. Let me ask you this. The day before the DNA, if you looked at the case implicating him, and I'm going to do this in generalities --

A Okay.

Q -- you saw the film version, we saw it today?



1 A Oh, today, yeah.

2 Q Yeah. The film version, you know that Wilson has
3 recanted, you know that even with hypnosis Nichol
4 John hasn't progressed, you know that by then
5 Cadrain is, has serious mental difficulties, see,
6 you look at the end of it, and then you look at
7 the Fisher part where you know he was the serial
8 rapist in the very area, that his method of
9 operation was exceptionally similar, you know he
10 lived in the Cadrain basement, you know his own
11 wife thought he did it and contributed evidence to
12 that part, and you know that (V10) (V10)- was
13 attacked years later almost identically like Gail
14 Miller and had Fisher tell her he had done it
15 before. When you put that picture together on one
16 hand and the other, I'm trying to understand why
17 you would, on that day, be convinced of David's
18 guilt when you hear what I have to say. Can you
19 help us?

20 A Yeah, Mr. Wolch, and not to sound facetious, I
21 don't, at this point don't recall exactly when and
22 in what sequence all those various things
23 happened. I assumed they had all happened by
24 then, one way or another, including Linda Fisher's
25 complaint. If I had known that whole picture, if



1 indeed it had all, let's say, happened by then,
2 and if I were aware of it, part 2, I would
3 certainly be, I think, wondering what was
4 happening.

5 Q Well, she had testified in the Supreme Court many
6 years before. I'm talking the day before the DNA.

7 A Uh-huh.

8 Q You clearly were convinced of the guilt of David.
9 Do you think you made the appropriate effort to
10 try and look into the case further to satisfy
11 yourself that that belief was well founded?

12 A In the meantime you mean, sir?

13 Q Yes.

14 A I think I certainly had the belief, I thought it
15 was well founded and I can't say how much effort I
16 made, if you will, in the meantime to revisit or
17 relook into the case.

18 Q Do you agree with the proposition that I've heard
19 several times, that a prosecution's worst
20 nightmare is getting a conviction on an innocent
21 person?

22 A I think that's a -- certainly a valid statement.

23 Q So I'm just wondering, as time went on and you
24 learned about Larry Fisher and you learned about
25 the evidence pointing in his direction --



1 A Uh-huh.

2 Q -- why you wouldn't take an active role in trying
3 to really assess whether you had convicted the
4 wrong person, whether there was a mistake and
5 really getting to know the case.

6 A Well, Mr. Wolch, I think that's a genuine concern.
7 I was, for what it's worth, no longer with either
8 provincial justice, Saskatchewan Justice, nor with
9 the federal Department of Justice. I had been --
10 with respect to the province my position had been
11 abolished and I would be somewhat doubtful if they
12 would welcome me back offering, if you will, to
13 help with solving this case.

14 Q No, no, I'm not talking about that, sir, I'm not
15 talking about you as a prosecutor or a lawyer, I'm
16 talking about you as a human being. You have to
17 be worried that an innocent person may have been
18 put to jail for 23 years for a crime he didn't
19 commit?

20 A Yeah, as a human being, sir, that makes sense to
21 me.

22 Q So I'm just wondering why you wouldn't, as a human
23 being, try to look into the facts carefully that
24 maybe you could lend support to the Milgaards and
25 say look, this Fisher evidence causes me grave



1 concern, or I really see that this boy could be
2 innocent. Like, why wouldn't you do that instead
3 of just maintaining he did it, he did it, he did
4 it?

5 A Well, Mr. Wolch, again I can't, and I'm sure you
6 can't either, you know, put dates on exactly when
7 things happened and when they worked up. I didn't
8 feel that, if I had that sentiment, I didn't feel
9 either that I would be welcome in the, you know,
10 anywhere near the Milgaard camp because they were
11 very upset with me. I mean, what could I do.

12 Q Obviously if the prosecutor said that he thought
13 it may be a wrongful conviction he would have been
14 embraced I would think.

15 A Well, I can understand that.

16 Q No, but I'm just wondering, you didn't choose to
17 read the Supreme Court transcripts or try to know
18 what they said?

19 A I certainly didn't read the transcripts, sir.

20 Q I'm just wondering why you wouldn't have made the
21 effort to really satisfy yourself of this boy's
22 guilt as time transpired.

23 A Well, do you mean innocence, or either way?

24 Q Innocence or guilt, yes.

25 A Okay. Well, sir, I was -- I suppose at that



1 time -- what time did the DNA happen?

2 Q 1997.

3 A Come out?

4 Q That's about five years after the Supreme Court.

5 A All right. It's of no -- I was acting as a relief
6 judge at that time and that was, you know, keeping
7 some of my time tied up that I might otherwise
8 have used, but I can't say, Mr. Wolch, that it
9 ever, you know, clearly occurred to me that I
10 could be any use.

11 Q Not a matter of use, sir, it's a matter for your
12 own self.

13 A Yeah.

14 Q Your own satisfaction, to say to yourself look, if
15 on the balance this young man was innocent, I want
16 to know that, I don't want to allow this
17 conviction to be maintained, and I have peculiar
18 knowledge of it because I was there, and I'm
19 wondering why you wouldn't do that.

20 A I don't know, Mr. Wolch, what more I can say. I
21 certainly don't like the idea of anyone being
22 convicted, imprisoned improperly.

23 Q No, I understand that.

24 A Yeah. I didn't feel in this case that that had
25 happened.



1 Q Would it be fair to say, and I don't say this, you
2 know, in trying to embarrass or make you feel
3 criticized unduly, but would it be fair to say
4 that you didn't really want to know, that if you
5 found it out it was so horrific that you didn't
6 really want it to be the case?

7 A Not that exactly, sir. I must say that I was, if
8 you will, thoroughly, I guess, exhausted by the
9 case in general, if you will. In other words, I
10 was very -- I was tired of hearing about it in
11 whatever manner virtually every second day of my
12 life.

13 Q I understand that, tired of hearing about it, but
14 there is still the prospect of this young man in
15 jail.

16 A Yeah.

17 Q If you are tired of it, you can imagine what he is
18 23 years down.

19 A Yeah.

20 Q But what I'm saying is, I'm suggesting to you that
21 the prospect that you prosecuted an innocent
22 person and put in jail was something that weighed
23 so heavily on you you didn't want, you didn't want
24 to hear that, you just hoped you had the right guy
25 and anything that might dissuade you you didn't



1 want to hear.

2 A It I think was a little more, I don't think I
3 hoped I had the right guy, I felt, you know, based
4 on everything that happened, that it was a proper
5 conviction. It may well be that as things
6 pointing toward his innocence came in, I may have,
7 you know, been reluctant to accept them, if that's
8 the same thing as you are putting to me, because
9 of the -- umm, what should I say, the huge tide of
10 publicity that had gone on and the actual effort
11 that had gone into the trial itself, of course,
12 years before, but had I -- I don't think it ever
13 came into focus for me, Mr. Wolch, about that
14 time, that this person is, in all likelihood,
15 innocent, if I can put it that way.

16 Q Okay. And your reaction to the DNA was what?

17 A Well, it was shock, it was a total vindication of
18 Milgaard, of course, and very shortly thereafter,
19 you know, the damning of Fisher.

20 Q I'm just trying to understand why, given the
21 balance I told you earlier, the Fisher case, the
22 Milgaard case, why you would be shocked?

23 A Well, because, sir, I had no earthly reason to
24 think that any DNA -- first of all, it was still
25 around, but second, that it would, if tested,



1 would prove that it belonged to another person.

2 Q So you are not saying your shock was to the fact
3 it was Fisher, your shock was the fact that it
4 could be done?

5 A No, no, no. I was shocked that the DNA
6 conclusively proved that Milgaard was not the
7 right person, there's no doubt about that.

8 Q Okay.

9 A Not that it could be done. I think it was a new
10 science then, but it was done, apparently very
11 validly.

12 Q We won't get into that, but anyway, Mr. Caldwell,
13 those are all the questions I have for you.

14 A Thank you, sir.

15 MR. WOLCH: Mr. Commissioner, if I may,
16 during the break I spoke with Ms. Knox who says
17 she has a matter to address with you and I also
18 spoke to Mrs. Caldwell who is here who approached
19 me and I think I and Commission Counsel join her
20 in the remarks she's going to make.

21 COMMISSIONER MacCALLUM: Okay.

22 MS. KNOX: Mr. Commissioner, the only
23 person that we haven't discussed this with is Mr.
24 Caldwell, but counsel, and in consultation, as
25 Mr. Wolch indicated, with Mrs. Caldwell, I



1 undertook to them that I was going to ask that we
2 adjourn at this time. We can't possibly finish
3 today. My client I believe is both physically
4 and mentally exhausted. Mr. Wolch has a flight
5 that he would like to catch and, for all kinds of
6 reasons, if you would agree, then I think we
7 would all prefer that we adjourn today to come
8 back on Monday, although it's about 45 minutes
9 short of our usual closing time.

10 COMMISSIONER MacCALLUM: Oh, of course, I'm
11 always receptive to a reason like that. I just
12 don't want people to get the idea that we'll
13 adjourn early every week. I'm very anxious, as
14 you can imagine, to not waste time before life
15 expectancy becomes an issue in this case.

16 MS. KNOX: And certainly I appreciate the
17 fact that you would give special consideration in
18 this circumstance. Thank you.

19 COMMISSIONER MacCALLUM: Yes, thank you.

20 *(Adjourned at 3:11 p.m.)*



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