

*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  
Bessborough Hotel at  
Saskatoon, Saskatchewan

\*\*\*\*\*

On Wednesday, January 26th, 2005

Volume 9

Inquiry Proceedings



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**Transcript of Proceedings**

*(Reconvened at 10:09 a.m.)*

MR. HODSON: Good morning,  
Mr. Commissioner.

Our witness for today is Dr.  
Harry Emson and, just before he takes the stand,  
I would like to ask the Commissioner to provide  
an order banning publication of any of the Gail  
Miller autopsy photos. It will be necessary in  
parts of Dr. Emson's evidence to refer to autopsy  
photographs that were marked in previous  
proceedings. Some of them are very graphic;  
however, I believe that in my discussions with  
Dr. Emson they are necessary for him to go  
through his autopsy report.

I would ask that you order that  
all autopsy photos of Gail Miller be identified  
as in camera and confidential exhibits and an  
order that they shall not be published, shown or  
disseminated by anyone in any form unless a party  
first applies to the Commissioner and obtains  
permission, and I will ask you for that order  
now, Mr. Commissioner, and then identify for the  
record a list of -- not an exclusive list, but a  
list of those exhibit numbers that I will be



1           referring to today.

2                   COMMISSIONER MacCALLUM:   Your application  
3           is granted.

4                   MR. HODSON:   Thank you.   And for the  
10:10 5           record, I will read a list of these exhibit  
6           numbers.   066724, 066725, 066726, 066727 --  
7           actually 727 right down to 066735 consecutively,  
8           as well, 073506, 073513, 073514, 073510, 073512,  
9           077880 through to 077885 inclusive.   So that is  
10:11 10          an incomplete list, Mr. Commissioner, that's what  
11          I'll be referring to; the order refers to all  
12          autopsy photos.   They will be exhibits, but they  
13          will not be put up on the Commission's web site  
14          as public exhibits unless someone obtains an  
10:11 15          order for you to do so.

16                               So with that, I will call Dr.  
17          Harry Emson to the stand, please.

18          **HARRY EDMUND EMSON, sworn:**

19          **BY MR. HODSON:**

10:12 20          **Q**           Good morning, Dr. Emson.   Thank you for testifying  
21                               before this Commission.   I understand that you are  
22                               a resident of Saskatoon?

23          **A**           Yes.

24          **Q**           And I will get into your curriculum vitae in a  
10:12 25                               moment, but you are a practicing pathologist?



1 A Yes.

2 Q I understand that you conducted the autopsy on  
3 Gail Miller in 1969?

4 A Yes.

10:12 5 Q And as well you testified on four occasions at the  
6 preliminary hearing and trial of both David  
7 Milgaard and Larry Fisher; is that correct?

8 A Yes.

9 Q If I could call up your curriculum vitae which is  
10:12 10 document 255203. Now this is a 1999 version you  
11 will see there, Dr. Emson, and I'll just go  
12 through that in a moment. Can you tell me, in  
13 your career, how long have you been a pathologist  
14 for?

10:13 15 A I qualified in pathology in 1958.

16 Q And can you give me an estimate of how many  
17 autopsies you've performed in your career?

18 A I'm afraid it's a rough estimate, I regret that I  
19 have never kept a running count, but my estimate  
10:13 20 would be very broadly between five and 10,000.

21 Q And can you give me an estimate of how many times  
22 you've testified in court with respect to work  
23 that you've done as a pathologist?

24 A That would be more difficult because the  
10:13 25 individual events don't stay in my mind. It would



1                   probably be in the hundreds.

2           **Q**           And I understand that you've testified in courts  
3                   in Saskatchewan, Alberta, Manitoba, Newfoundland  
4                   and New Brunswick?

10:13 5           **A**           I have been qualified as an expert witness in the  
6                   high courts of those provinces.

7           **Q**           Now, if I can just go through parts of your resume  
8                   here. I think, correct me if I'm wrong, 1952 to  
9                   '55, would that be --

10:14 10          **A**           The 1952 to '53 are equivalent to resident  
11                   positions in Canada. The 1953 to 1955 is  
12                   compulsory military service. We still had  
13                   conscription, the draft in Britain at that time,  
14                   and a physician, a medical student was permitted  
10:14 15                   to qualify and do 18 months resident position and  
16                   then was conscripted into the Royal Army Medical  
17                   Corps for two years.

18          **Q**           So in 1956 you would have commenced your residency  
19                   in pathology at St. Paul's Hospital in Saskatoon?

10:14 20          **A**           I came back from military service to Britain in  
21                   '55, I did another year's residency, and then I  
22                   was resident at St. Paul's in Saskatoon in '56 and  
23                   '57 and at the University Hospital in '57, '58,  
24                   and I think it was November of '58 I took my  
10:15 25                   pathology qualifying examinations.





1 Q Okay. If you could turn to the next page, please,  
2 255204, and again those would be an accurate  
3 listing of your degrees and professional  
4 qualifications?

10:15 5 A Yes.

6 Q If you could go to page 255205, the next page, I  
7 think this is a continuation of professional posts  
8 held, and is that an accurate summary of the  
9 professional postings you held from 1957 through  
10:15 10 until 1996 at least?

11 A Yes. Since 1955, which I think -- no, 1995, I beg  
12 your pardon, I ceased to be head in 1990 of the  
13 department at the university. I continued as a  
14 member of the department until I had to take  
10:16 15 compulsory retirement from the university faculty  
16 and I think that was 1995, but since then I have  
17 continued in the active practice of pathology  
18 first in the Saskatoon Health District and now in  
19 the Saskatoon Health Region.

10:16 20 Q And you are still conducting autopsies today?

21 A Not today, but --

22 Q Or currently, I'm sorry. I should rephrase that.

23 A Yes.

24 Q This week, how's that.

10:16 25 A It depends how long I stay here.



1       Q       Now if we can go to 1969, I think if I just point  
2               out here, you would have been the director of  
3               laboratories at St. Paul's Hospital; is that  
4               correct?

10:16 5       A       Yes. I went to St. Paul's Hospital in 1960 after  
6               Dr. Young moved to the States. I stayed as head  
7               of laboratories there for 15 years until 1975.  
8               Then I went to the university as head of the  
9               department in the University Hospital and the  
10:17 10       College of Medicine in 1975 and I remained as head  
11              until 1990 and then I did not seek renewal as head  
12              after 1990, but continued until my retirement  
13              which I think was '95.

14       Q       Okay. Go to the next page, please, 255206, and  
10:17 15              just point out, I take it from your curriculum  
16              vitae that you served in a number of capacities at  
17              the Royal College of Physicians and Surgeons of  
18              Canada and as well served as president of the  
19              Canadian Association of Pathologists and the  
10:17 20       Canadian Society of Forensic Scientists; is that  
21              correct?

22       A       Yes. I think I should also comment there on  
23               something which I don't believe is in the CV, that  
24               I was responsible for the first setting up of  
10:18 25       examinations in forensic pathology in the Royal



1 College examinations in pathology.

2 Q And do you recall when that would have been?

3 A No.

4 Q Go to page 255207, please, and I take it from  
10:18 5 paragraph 8 that you spent a good part of your  
6 career teaching as well in pathology; is that  
7 correct?

8 A Yes. I was on the university staff from the time  
9 I started at St. Paul's involved as a part-time  
10:18 10 lecturer and then after 15 years I went to the  
11 university full time in 1975 where I was  
12 department head, so I was responsible for  
13 education and research in the department as well  
14 as the service element.

10:18 15 Q Okay. Now if you could skip ahead to 255216,  
16 please, and there are a number of pages,  
17 publications and peer review journals. I don't  
18 propose to go through any of them in detail other  
19 than to ask, over your career as a pathologist did  
10:19 20 you take a keen interest in writing articles on  
21 subject matters relevant to your profession?

22 A Yes, and I think I wrote, published one article  
23 which is not on this list within the last couple  
24 of years. It's in the Journal of Medical Ethics  
10:19 25 and it is not relevant to the present proceedings.



1 Q Now if I could take you back to January of 1969.  
2 At that time approximately how many years had you  
3 been a pathologist? You had been practicing  
4 for --

10:19 5 A Since 1958.

6 Q '58, so 11 years, and you were teaching pathology  
7 at the time?

8 A I was teaching -- I remember I was teaching part  
9 time in the university. I was primarily occupied  
10:19 10 as director of laboratories at St. Paul's.

11 MR. HODSON: Mr. Commissioner, I intend to  
12 ask Dr. Emson about a number of matters relating  
13 to his opinions, not only those opinions he  
14 formed and expressed in 1969, but also  
10:20 15 subsequently. Our Commission is not bound by the  
16 strict rules of evidence. I don't think it's  
17 necessary for me to qualify Dr. Emson as an  
18 expert as I would in a court proceeding, but I do  
19 intend to ask him opinion questions and I expect  
10:20 20 other counsel will as well, and if any counsel  
21 have questions regarding Dr. Emson's  
22 qualifications that they wish to bring out, they  
23 can do so when they are examining. I propose to  
24 proceed on that basis if that is fine.

10:20 25 COMMISSIONER MacCALLUM: That is fine.



1 BY MR. HODSON:

2 Q Dr. Emson, if we could go back to January of 1969  
3 and just some general questions about autopsies  
4 and pathologists. What was the role of the  
10:20 5 pathologist as far as the autopsy in 1969, and if  
6 it's the same as today, then --

7 A The autopsies were performed by a pathologist.  
8 All pathologists worked in hospitals. The  
9 autopsies then and now fall into two categories.  
10:21 10 One is the autopsy on the patient dying in  
11 hospital authorized by the next of kin and  
12 directed to elucidation of the clinical course,  
13 symptoms and their relation to what was found  
14 after death. The second autopsy is the forensic  
10:21 15 or medical/legal autopsy which is ordered by a  
16 coroner under the Coroner's Act, and the Coroner's  
17 Act was revised I think about two years ago and it  
18 states that the coroner may order an autopsy and  
19 this autopsy will be performed by a pathologist as  
10:21 20 defined in the list in the chief coroner's office,  
21 and these are the medical/legal or forensic  
22 autopsies and these now form the greater part of  
23 practice because the number of hospital autopsies  
24 has declined dramatically.

10:22 25 Q Now, again back in January of 1969 --



1 A -- the situation was exactly the same.

2 Q Exactly the same?

3 A Except that the proportion of hospital autopsies  
4 was far greater.

10:22 5 Q And what are the objectives then of a pathologist  
6 in conducting an autopsy of the second kind, one  
7 ordered by the coroner?

8 A Medical or legal autopsy, the objectives are  
9 generally defined, and I'm not sure if this  
10:22 10 definition is in our Coroner's Act or not, but  
11 they are generally defined as to state who the  
12 deceased was and how, where and when he or she  
13 came to his death, their death.

14 Q And what is the role, what was your understanding  
10:22 15 or is your understanding of the role that the  
16 police would play in the autopsy ordered by a  
17 coroner?

18 A The investigation of death is a co-operative and  
19 collaborative enterprise with a number of people  
10:23 20 and agencies each putting their own piece into the  
21 jigsaw puzzle. It is our responsibility to be  
22 collaborative, not competitive, and there is no  
23 jostling for position or power or prestige in  
24 this, we are each trying to relate our piece, and  
10:23 25 it may be necessary to understand what the other



1 participants are doing in order to be able to  
2 collaborate effectively. For example, if I am  
3 autopsying a case with a gunshot wound, it is  
4 necessary for me to know something about  
10:23 5 ballistics and to try and retrieve the missile for  
6 ballistic examination, and so on and so on, so  
7 that we are -- the responsibility for the conduct  
8 of the autopsy is mine, but in major forensic  
9 cases such as homicide, the police are present and  
10:24 10 can ask for particular specimens, make  
11 suggestions, contribute information as to the  
12 nature of the circumstances and in return I can  
13 ask them for information, I can make suggestions  
14 to them and ask for the disposal of specimens  
10:24 15 obtained at the autopsy. It's collaboration.

16 Q I see. Now, do you have a recollection of  
17 conducting the autopsy of Gail Miller?

18 A Yes.

19 Q And do you recall whether there were police  
10:24 20 officers present at that autopsy?

21 A My recollection, and I think my record is that Mr.  
22 Penkala and Mr. Kleiv were present.

23 Q I believe that would be Thor Kleiv and Lieutenant  
24 Joe Penkala; is that correct?

10:24 25 A I think those are their Christian names.



1 Q Yes?

2 A Thor Kleiv and Joe Penkala is how I knew them.

3 Q Now I will call up the autopsy report, it's  
4 document 065372, you'll see it on your screen  
10:25 5 there, and is that your signature where I've  
6 circled, Dr. Emson?

7 A It is.

8 Q And can you tell me just briefly the routine or  
9 how you would go about getting the report prepared  
10:25 10 from the work that you've done, the work that you  
11 did in the -- at the hospital and in the course of  
12 doing the autopsy, did you dictate it, did you  
13 make notes?

14 A The, there are various ways of doing this. The  
10:25 15 way I do it is that I make notes before we start  
16 the autopsy as to what we see, I make notes during  
17 the autopsy on a blackboard because I do not want  
18 to contaminate -- have a contaminated piece of  
19 paper, I make notes after the conclusion of the  
10:26 20 autopsy, when I have washed and degloved, and then  
21 I go away and dictate a report onto whatever  
22 system we are using at the time -- and I can't  
23 remember what we were using in '69 but it was  
24 probably a Dictaphone with a cassette -- and this  
10:26 25 is transcribed by a secretary. The -- it may be





1 added to if the results of other investigations  
2 come in, such as investigation for drugs, if it's  
3 toxicology, things like that, and then it is  
4 corrected for any spelling or grammatical  
10:26 5 mistakes, and the final report is issued.

6 So that it goes through a number  
7 of stages, but basically it's taking notes before,  
8 during, and after the autopsy in the mortuary, and  
9 then it is dictation onto a tape, transcription,  
10:27 10 and final editing.

11 Q I just draw your attention, on this report it  
12 says:

13 "Autopsy Approximately 7 hours after Death",  
14 would that have been based on information that  
10:27 15 the police provided you?

16 A Yes.

17 Q And then, if we could just go through the first  
18 part there:

19 "Stab Wounds and Hemothorax,"

10:27 20 I think there are five items identified. The  
21 first:

22 "1. Stab wounds of chest:"

23 and we'll get to this in a bit more detail, but  
24 is paragraph 1 outlining where the stab wounds  
10:27 25 were located on the body?



1 A Yes:

2 "Left Clavicular Region",  
3 that's below the left collarbone, lower left  
4 chest in front, and the right chest on the side  
10:27 5 and at the back.

6 Q Okay. And so those were stab wounds?

7 A Yes.

8 Q Number 2 is:

9 "2. Lacerations of Anterior Cervical  
10:28 10 Region"?

11 A These were not stab wounds but best described, I  
12 think, as slash wounds, rather superficial, on the  
13 neck.

14 Q Okay. And 3:

10:28 15 "3. Hemothorax - right"?

16 A Bleeding into the chest cavity on the right side.

17 Q And is that what you determined to be the cause of  
18 death?

19 A That was the cause of death though I think one has  
10:28 20 to add to this, though I haven't got it in that  
21 list, that it was a minus 40 degree day, and that  
22 if you lie down unconscious outside on a day like  
23 that, it probably takes 15 minutes to death for a  
24 person who is not otherwise injured. So there is  
10:28 25 always, as well as this, the element of extreme



1 shock from the cold.

2 Q Next, number 4:

3 "4. Positive for spermatozoa - vaginal  
4 fluid"?

10:28 5 A Yes.

6 Q And can you just briefly explain what that means?

7 A It means recent sexual intercourse.

8 Q And 5:

9 "5. Chronic Cervicitis - (Moderate)"?

10:29 10 A That is inflammation of the neck of the womb, and  
11 it does not relate to a sexual assault, but I put  
12 it in because it's there and it shows up in some  
13 of the photographs.

14 Q Okay. If you could scroll down, please, to -- go  
10:29 15 back to the main document and just call out that,  
16 please. And, I'm sorry, is that word "Notanda";  
17 right --

18 A Yes. The notanda is really a narrative account as  
19 to the circumstances surrounding death, and what I  
10:29 20 have been told, and a summary.

21 Q Okay.

22 A This is -- different pathologists will vary  
23 individually on how they do this, but I like to  
24 get in there a short one or two-paragraph  
10:30 25 narrative summary which encapsulates the case.



1 Q So if we look at the:

2 "The autopsy showed:

3 (a) death was due to right-sided hemothorax  
4 resulting from one or several stab  
10:30 5 wounds to the chest"?

6 A Yes.

7 Q And so that am I correct, there, that you are  
8 stating that it was stab wounds to the chest that  
9 resulted in --

10:30 10 A Yes, and as I said, you have always got to add  
11 this element of thermal shock from the extreme  
12 cold.

13 Q "(b) the stab wounds were inflicted by a  
14 narrow-bladed weapon approximately 1.5  
10:30 15 centimetres in width penetrating to a  
16 depth of approximately 7 centimetres."

17 A Yes, we measured these as the size of the knife,  
18 the presumed knife which had inflicted these.

19 Q At the time you conducted this autopsy, sir, did  
10:30 20 you have a knife blade?

21 A No, no, we did not.

22 Q So what is in point (b) would be what you measured  
23 from the body?

24 A I measured the wounds, yes, I measured the size of  
10:31 25 the wound on the skin and the depth of the wound



1           into the lung tissue.

2           **Q**       Okay. And (c) I think you commented on:

3                       "The vagina contained non-motile  
4                       spermatozoa",  
5           right?

6           **A**       Yes.

7           **Q**       And I'll get to that a little later. If we could  
8           go on to the next page, please, and just in  
9           Identification it says:

10:31 10                       "The body was first seen in the  
11                       Emergency Department of St. Paul's  
12                       Hospital at approximately 10:30 a.m. on  
13                       31st January, 1969. At this time the  
14                       following points were noted:"

10:31 15           And if I could just pause there, from my read of  
16           the report am I correct that, after the body  
17           arrived, you waited a few hours before you  
18           conducted the autopsy?

19           **A**       I have no note as to what time the body arrived in  
10:31 20           St. Paul's but I don't think we waited very long.

21           **Q**       Okay.

22           **A**       The photographs showing the body outside are taken  
23           in daylight, and daylight that time of year is not  
24           really established until around 9:00 in the  
10:32 25           morning, so I don't think we waited very long



1 before we started.

2 Q Okay. If you will just go down, I think there are  
3 some other times that might assist us. So you  
4 would have made observations, did you, of the body  
10:32 5 when it arrived, when you first saw it?

6 A Yes.

7 Q And the body, according to paragraph 1, was  
8 frozen, or portions of it were frozen?

9 A Yes.

10:32 10 Q Now paragraph 2 you say:

11 "2. The face was distorted and depressions  
12 were present, in the frozen skin just  
13 lateral to each angle of the mouth. The  
14 skin was not broken or bruised in those  
10:32 15 regions, which each measured about 1.5  
16 centimetres in diameter and 1.5  
17 centimetres in depth."

18 A Yes.

19 Q Can you explain what that may have been or was  
10:32 20 that just an observation?

21 A It's an observation. I can't attribute a cause to  
22 this.

23 Q Number 3:

24 "3. The body was clothed as described  
10:32 25 below."



1 And later on in the report there is a comment on  
2 that, if you could just scroll down to this  
3 paragraph, and it says:

4 "The body was identified to me in the  
10:33 5 morgue of St. Paul's Hospital at 2:40 p.m.,  
6 on 31st January, 1969 by Identification  
7 Officer T.H. Kleiv of Saskatoon City Police,  
8 and an autopsy commenced forthwith on the  
9 order of Dr. S. Fogel, Coroner in and for  
10:33 10 the Province of Saskatchewan.

11 Identification Officer T.H. Kleiv and  
12 Lieutenant J. Penkala of Saskatoon City  
13 Police were present throughout the autopsy."

14 Is that a correct statement, Dr. Emson?

10:33 15 A Yes.

16 Q Yes. If you could go down to External  
17 Examinations, please, or actually just that. Now  
18 in the external examination, would you have  
19 examined the clothing, or what role would you play  
10:34 20 in looking at the condition of the body and the  
21 condition of the clothing when the body arrived?

22 A The -- we look at the condition of the body and  
23 the clothing but I -- my responsibility with the  
24 clothing is to remove it and to hand it to the  
10:34 25 police representatives for further examination. I



1 do not examine the clothing for lesions, for  
2 incisions, for wounds, or anything like that.

3 It's important, when you remove  
4 the clothing, if you have to cut it, to make clear  
10:34 5 what are your cuts and what are any lesions in the  
6 clothing which were there, present, before you did  
7 that, but I don't examine the clothing in detail,  
8 it goes to the police as a specimen.

9 Q And would it be fair to say, then, that, when the  
10:34 10 body arrives at the morgue for you to start your  
11 work, that the clothing would be -- according to  
12 your understanding the body would arrive basically  
13 how the police found it?

14 A That is my presumption, but I have no guarantee of  
10:35 15 that.

16 Q And so, when the body arrives, you and the police  
17 --

18 A Well, for instance, if a body -- if a patient  
19 arrives in hospital and there are attempts at  
10:35 20 resuscitation, there may be a difference between  
21 what is on the body when it was found and what is  
22 on the body when I receive it, and I don't have  
23 detailed knowledge as to the first. I can only  
24 give an account of what I see when I get the body.

10:35 25 If there have been intermediate





1 stages of resuscitation, which there were not in  
2 Gail Miller's case, then there may be a  
3 difference.

4 Q And I understand, sir, that in the course of the  
10:35 5 autopsy, photographs would be taken of the body  
6 throughout various stages; is that correct?

7 A Yes. This is a police responsibility.

8 Q So the police would take photos?

9 A Yes.

10:36 10 Q Did the hospital have their own photographer as  
11 well?

12 A At that time, I think we did, in the laboratory.

13 Q Okay.

14 A We had Mrs. May.

10:36 15 Q Now I'm going to show you a photograph, and this  
16 is a graphic photograph, it is one of the photos  
17 that is subject to the publication ban. If you  
18 could call up 066726, and I would ask you, Dr.  
19 Emson, to identify if that was the condition of  
10:36 20 Gail Miller when you first started your work?

21 A Yes, this was the body as I saw it.

22 Q And so the clothing would still be on the body?

23 A Yes, but very much disarranged.

24 Q Okay. Go back to document 065373, please. Now,  
10:36 25 back here it says External Injuries, if you could



1 just call that part out, please, it says:

2 "External injuries were present as follows:

3 1. On the anterior surface of the neck and  
4 upper chest were a group of incisions  
10:37 5 totalling approximately 15. These  
6 ranged from superficial scratches on the  
7 skin to two incisions which divided the  
8 skin and subcutaneous tissues and  
9 exposed the superficial muscles of the  
10:37 10 neck. The incisions ran in general from  
11 above on the left to below on the right  
12 side, commencing superiorly in the left  
13 intra-auricular region and terminating  
14 inferiorly beneath the right clavicle.  
10:37 15 Some were vertical and a few were angled  
16 from above on the right to below on the  
17 left. They involved the entire anterior  
18 surface of the neck over the thyroid  
19 cartilage and the manubrium sterni.  
10:37 20 Little bleeding appeared to have  
21 resulted from these incisions."

22 Now if I could pause there, a couple of  
23 questions, would those be the slashing marks you  
24 talked about earlier?

10:37 25 A Yes, they were very superficial, only two of them



1           penetrated the subcutaneous tissue. The best I  
2           can describe them is as a slash.

3           Q       Okay. I will show you photos in a moment. Here  
4           it says, when you say here:

10:38 5               "The incisions ran in general from above on  
6               the left to below on the right side..."; --

7           A       Yes.

8           Q       -- would that be the deceased's left --

9           A       Yes.

10:38 10          Q       -- to the deceased's right?

11          A       Yes.

12          Q       And so throughout this report, when you talk about  
13          "left" and "right", you are talking about --

14          A       Left and right sides of the body.

10:38 15          Q       And the fact that:

16                "Little bleeding appeared to have resulted  
17                from these incisions.",

18          did you draw any conclusion from that?

19          A       They may have been inflicted at about the time of  
10:38 20          death, or afterwards, or bleeding may have been,  
21          also been arrested in part by the extreme cold.

22          Q       Okay. Again, I will just have you identify these  
23          slashes, if I could call up photograph 077 -- in  
24          fact, if you could put the autopsy report on the  
10:38 25          left-hand side, please, call up on the right



1 077881. And --

2 A Yes, those are the marks I'm describing, and they  
3 seemed to run from approximately below the left  
4 ear down towards the mid-line of the body in the  
10:39 5 region of the top of the breastbone, and most of  
6 them were very superficial, but two of them divide  
7 the skin and the tissue beneath it. They are --  
8 how -- they are not, in themselves, serious  
9 incisions in terms of causing death.

10:39 10 Q Can you help me out, here, identifying what type  
11 of action would cause that; would that be from a  
12 knife being held to the neck and the victim moving  
13 causing those?

14 A No, I don't think so, I think it's more a knife  
10:40 15 being drawn across the neck. I can't conceive of  
16 a knife being held to the neck and the victim  
17 moving enough to cause that sort of -- that sort  
18 of wound.

19 Q So it was a slashing of the knife?

10:40 20 A I, that's how I interpret it.

21 Q Now if you could just go down and call out  
22 paragraph 2, please, just -- can you zoom in on  
23 that, please, it says:

24 "2. In the region of the left clavicle area  
10:40 25 were three stab wounds. Each of these



1                   was approximately 1.5 centimetres in  
2                   width. They lay over and just superior  
3                   to the left clavicle at approximately  
4                   its mid-point and penetrated downwards  
5                   inferiorly and slightly laterally  
6                   towards the left axilla."

7                   What do you mean by, can you explain "superior"  
8                   and "inferior", as you use them in this autopsy  
9                   report?

10:41 10           A           Yes. "Superior" is above and "inferior" is below.  
11                   If you could move that overlay, --

12           Q           Yes?

13           A           -- the wounds are in that picture, there they are.  
14                   Can I point to these?

10:41 15           Q           Okay, you go ahead.

16           A           Actually, you have your ring around them. There  
17                   they are, over the left collarbone, and running  
18                   downwards and slightly to the left side of the  
19                   body towards the armpit.

10:41 20                               I'm sorry about the terminology  
21                   here, but the autopsy reports are written very  
22                   specifically in technical terminology so that they  
23                   cannot be misinterpreted, and it is necessary to  
24                   translate this, as far as one can, into  
10:41 25                   non-technical and colloquial terms, and that's why



1 we're running into this business of --

2 Q Yeah?

3 A -- clavicle/collarbone, axilla/armpit.

4 Q I appreciate that, Dr. Emson, and I'm sure you  
10:42 5 will help us out with some of these terms as we go  
6 along. The left axilla is the armpit; is that  
7 right?

8 A Yes.

9 Q Now if you could go back to page, full screen,  
10:42 10 065374, which is the next page of the autopsy  
11 report, and so just -- we've identified the  
12 slashing marks and we've also, now, identified the  
13 stab wounds on the left collarbone; correct?

14 A Yes.

10:42 15 Q And now, number 3, if you could call that out,  
16 please. It says:

17 "3. On the anterior lower chest ...,"

18 "anterior" meaning what, sir?

19 A I'm sorry?

10:42 20 Q When it says:

21 "3. On the anterior lower chest ...,"

22 is that the front?

23 A Yes, "anterior" is front.

24 Q Yes:

10:43 25 "3. On the anterior lower chest was a group



1 of four stab wounds similar in size to  
2 those detailed above. (#2)"

3 So those would be the stab wounds on the  
4 collarbone we looked at?

10:43 5 A Yes.

6 Q "One of these lay just to the right of  
7 the mid-line inferior to the right breast  
8 ...",

9 which means below the right breast?

10 A Yes.

11 Q "... and approximately 2 centimetres from  
12 the mid-sternal line."

13 And I presume the "mid-sternal line" is?

14 A It's the mid-line of the body, and you should  
10:43 15 locate wounds from a fixed point.

16 Q Okay.

17 A The mid-sternal line is a line, an imaginary line,  
18 drawn down the middle of the breastbone.

19 Q Okay, and then it carries on here:

10:43 20 "It ran in an approximately diagonal  
21 direction from above on the right to  
22 below on the left."

23 Again, this is the deceased's right to left;  
24 correct?

10:43 25 A Yes.



1 Q "The other three stab wounds were grouped  
2 beneath the left breast, the highest of  
3 them approximately 2 centimetres from  
4 the lowest margin of the breast. These  
10:43 5 wounds were approximately 2, 4, and 6  
6 centimetres from the mid-sternal line  
7 respectively and ran transversely."

8 A Yes.

9 Q What do you mean by "transversely?"

10:44 10 A Across the body and horizontally.

11 Q Can I ask you to call up photo 066732, please, and  
12 those would be the three stab marks there --

13 A Yes.

14 Q -- and the one stab mark there; is that correct?

10:44 15 A Yes.

16 Q Go back to the autopsy, 065374, please. Would  
17 those stab marks, those four; did you conclude  
18 that they contributed or caused the death?

19 A No. The only stab wound which was directly  
10:44 20 contributory to the cause of death is the one  
21 which penetrated the right lung and which was in  
22 the back of the right chest.

23 Q Okay. We're getting to that next.

24 A We haven't come to that yet.

10:44 25 Q Yeah. Is it fair to say, though, that, had that





1 stab wound not penetrated the lung, the other  
2 injuries would not have caused death in your  
3 opinion?

4 A Not necessarily, no, they were not deep wounds and  
10:45 5 they were not penetrating vital organs.

6 Q Okay. Next if we could call out paragraph 4,  
7 please, and this says:

8 "4. On the posterior right ..., "  
9 so this is the back chest, is that correct, the  
10:45 10 back/exterior?

11 A The right chest, yes.

12 Q "4. On the posterior right thorax were five  
13 stab wounds. The highest of those by  
14 approximately 2 centimetres ..., "

15 A Lay.

16 Q "... those lay approximately 2  
17 centimetres ..."

18 A That's a typo, I'm afraid, a typographical error.

19 Q "... those lay approximately 2.0  
10:45 20 centimetres from the mid-line and was 12  
21 centimetres below the shoulder line.  
22 The lowest of these lay 2.0 centimetres  
23 from the mid-line and was 27 centimetres  
24 from the shoulder line. The others lay  
10:46 25 respectively 4 centimetres from the



1 mid-line and 27 centimetres from the  
2 shoulder line, 6 centimetres from the  
3 mid-line and 23 centimetres from the  
4 shoulder line, and 16 centimetres from  
10:46 5 the mid-line and 18 centimetres from the  
6 shoulder line. These stab wounds were  
7 approximately orientated each running  
8 from above on the right to below on the  
9 left. They were similar in size to the  
10:46 10 other stab wounds."

11 So, again, when you say "above on the right to  
12 below on the left" --

13 A These always refer to the deceased.

14 Q Right. So the back, if I look at my hand as the  
10:46 15 back of the deceased, it would be from the right  
16 to the left?

17 A Yes.

18 Q If you are facing the back, from the right to the  
19 left; correct?

10:46 20 A Yes.

21 Q If you could call up photo 077884, now you talked  
22 about five stab wounds, I understand that there is  
23 one, two, three, and four on the back; is that  
24 correct?

10:47 25 A Yes.



1 Q And then if you could call up photo 066733, and  
2 that is the stab wound on the side?

3 A Yes.

4 Q And is that the stab wound that penetrated the  
10:47 5 pleural cavity, the lung?

6 A Yes.

7 Q And is that the stab wound, then, that, in your  
8 opinion, caused death?

9 A Yes.

10:47 10 Q If we could go back to the autopsy report, please,  
11 065374, just call out those, please, point 5:

12 "5. On the posterior surface of the lower  
13 right leg were superficial scratches  
14 running from above on the left to below  
10:47 15 on the right."

16 I take it that's just scratches on the back of  
17 the leg; is that --

18 A Yes.

19 Q And --

10:47 20 A Yes. These weren't related to anything that I  
21 knew of.

22 Q And number 6:

23 "6. On the posterior surface of the left leg  
24 just below the popliteal fossa ...", --

10:48 25 A Knee.



1 Q -- which is the knee:

2 "... was an ill-defined superficial  
3 abrasion."

4 I take it that's a bruise on the knee?

10:48 5 A No, a scrape wound.

6 Q A scrape wound. And number 7:

7 "7. The face showed numerous superficial  
8 abrasions of recent appearance on both  
9 cheeks, the chin and the nose."

10:48 10 A Yes. These also appeared to be scrape wounds, but  
11 wounds, lesions of this type do distort very  
12 quickly on freezing, and when the body had been  
13 frozen, essentially frozen and thawed in a fairly  
14 short time, this was how I described them, but  
10:48 15 they -- it wasn't necessarily how they would have  
16 looked fresh.

17 Q Were you able to determine whether there was any  
18 wounds caused by a grabbing of the victim's face?

19 A I couldn't, I couldn't isolate any as such. We've  
10:48 20 described the two depressions on either side of  
21 the mouth, which could have been caused that way,  
22 but they could have been caused in a number of  
23 other ways too.

24 Q Okay. Number 8:

10:49 25 "8. The lips appeared excoriated."



1 A Umm, sore.

2 Q That could be from the cold or from an injury?

3 A I couldn't tell.

4 Q Okay. And number 9:

10:49 5 "9. There was a small superficial abrasion  
6 on the upper left eyelid."

7 Did you --

8 A Again, a fresh injury, but otherwise not  
9 significant.

10:49 10 Q Okay. If you could scroll down, please, to the  
11 next paragraph it says here -- whoops:

12 "The finger and toenails were short  
13 and clean. No foreign matter could be  
14 identified beneath the finger nails and  
10:49 15 there were no lesions on the palms of  
16 the hands."

17 Who would have made the decision to check under  
18 the fingernails?

19 A It's a routine decision, particularly in a case  
10:49 20 like that, if the victim has attempted to defend  
21 herself there may be foreign matter from the  
22 assailant beneath the fingernails. And this is a  
23 routine examination, we conduct it together, and  
24 if there are any, if there is anything beneath the  
10:50 25 fingernails, the scrapings are taken by the



1 police.

2 Q Okay. When you said the word "we" you are talking  
3 about you and the police?

4 A Yes.

10:50 5 Q Would the police have asked you to do this or  
6 would you have made this decision on your own?

7 A I think it would have been a collaborative one, I  
8 -- it's a routine procedure.

9 Q Okay.

10:50 10 A We did it in a case on Monday.

11 Q Okay. Next, if you could just go Clothing, to the  
12 bottom. And I presume, sir, that you are just  
13 identifying the clothing that was on the body?

14 A Yes.

10:50 15 Q Now it talks about, number 1:

16 "1. A black coat into which both arms were  
17 fitted, into the sleeves.

18 2. A brassiere, the right strap of which  
19 was broken.

10:50 20 3. A white uniform of nurses type which was  
21 rolled down around the waist, the arms  
22 of the body being out of the sleeves of  
23 the uniform, which were intact.

24 4. A light girdle."

10:51 25 Would it be part of your duties to look at how



1 the clothing was situated on the body and  
2 identify anything on the clothing?

3 A I think it's part of our responsibility to  
4 describe how the body is clothed when received.

10:51 5 Q But did you check any of the garments for -- and I  
6 think you may have answered this -- did you check  
7 any of the garments for stab wounds?

8 A No.

9 Q Okay. And, in your view, would that be the  
10:51 10 responsibility of the police officers?

11 A It's not my responsibility.

12 Q So, when you take the clothing off the body, what  
13 did you do with it?

14 A The clothing is handed to the police officers and  
10:51 15 it is their decision what is done with it. The  
16 customary, it is customarily retained in a case  
17 like this for examination. I presume this will be  
18 in whichever police laboratory is doing the  
19 examinations at the time, I think in '69 it was  
10:51 20 probably the RCMP lab in Regina, but once I have  
21 removed it and handed it to the police my  
22 responsibility is finished.

23 Q Okay. If you could go to the next page, please,  
24 065375, and just go down to Respiratory System,  
10:52 25 and it says here:



1 "The left pleural cavity was unremarkable.  
2 The right pleural cavity contained an  
3 estimated 1000 millilitres of bright red  
4 blood which was partially clotted. On  
10:52 5 aspiration the stab wounds noted in the  
6 right posterior chest were seen to penetrate  
7 the pleural cavity and there were two small  
8 lacerations in the lower lobe of the right  
9 lung."

10:52 10 If I could pause there, those were the stab  
11 wounds that we identified earlier that you said  
12 caused death?

13 A Yes, always remembering the effect of the --

14 Q Cold?

10:52 15 A -- cold too.

16 Q And can you tell me what -- this type of injury,  
17 you talk about a thousand millilitres of blood in  
18 the lung, would there be much external bleeding  
19 associated with this type of injury?

10:53 20 A It varies a great deal. I can't tell. Whoever  
21 examines the scene has to note that.

22 Q If you go to the next page, please, 065376, and  
23 just call out that paragraph, please, and I  
24 believe that says genitourinary system; is that  
10:53 25 right?





1 A Yes.

2 Q And start right there, it says:

3 "The cervix showed a small erosion running  
4 circumferentially around the external os."

10:53 5 What is that?

6 A Mouth. Latin.

7 Q "The vagina appeared unremarkable. A small  
8 amount of reddish fluid was aspirated from  
9 the posterior fornix of the vagina and on  
10:54 10 microscopic examination showed numerous  
11 non-motile spermatozoa. The external  
12 genitalia showed absence of the hymen in the  
13 presence of --"

14 I'll let you tackle that.

10:54 15 A Carunculae hymenales. I'm sorry, there's no lay  
16 term for that, and these are the little tags left  
17 when the hymen is ruptured.

18 Q It goes on to say:

19 "There was no evidence of injury to the  
10:54 20 vulva, vagina, anal or rectal regions."

21 A No.

22 Q Now just pause there. When we talk about the  
23 vaginal contents, can you tell me what you would  
24 have done to get that sample and what you did with  
10:54 25 it?



1 A Well, it says we aspirated it, so we presumably  
2 removed it with a small Papette, a glass Papette  
3 with a rubber bulb on it, and then a drop would  
4 have been put on a slide, microscopic slide. It  
10:54 5 might have been diluted with saline. A cover slip  
6 would have been placed on it and it was examined  
7 under the microscope, but from the description  
8 here, I presume we did it at that time and the  
9 examination under the microscope showed numerous  
10:55 10 spermatozoa that were not moving.

11 Q And do you know, sir, what happened with that, the  
12 vaginal contents after they were removed?

13 A Well, we have no record of them being kept, so I  
14 presume they were discarded.

10:55 15 Q Can you explain when you look at -- what is the  
16 objective then in examining the vaginal contents  
17 for the non-motile spermatozoa?

18 A Well, in this case, and in 1969, it was to  
19 establish the fact that sexual intercourse had  
10:55 20 taken place fairly recently. Spermatozoa  
21 disappear from the vagina at a variable rate  
22 depending on the age of the female and whether she  
23 was alive or dead and any or a lot of other  
24 conditions, so the rate of disappearance of  
10:56 25 spermatozoa is rather variable, but this



1 established that she had had fairly recent sexual  
2 intercourse.

3 Q You said that after you removed the contents, I  
4 think with a -- would it be like a syringe?

10:56 5 A Well, when I say aspiration, aspiration to me  
6 means we didn't take a smear, that we drew up the  
7 fluid into a little glass tube, a pipette with a  
8 bulb. That's what it suggests we did.

9 Q Would you have put any fluids into the vagina?

10:56 10 A No.

11 Q Just simply take it out and --

12 A No need. We might have done if there, if we  
13 couldn't have seen anything, just to wash it, but  
14 we did find fluid in the posterior fornix of the  
10:56 15 vagina, so we just took it out.

16 Q And if you had used fluid, what would it be,  
17 saline solution?

18 A Yes, we might have used saline as a diluent.

19 Q And then as far as the microscope slide, I think  
10:56 20 you said you may have added saline to that?

21 A We might have done, depending on how thick the  
22 aspirate was.

23 Q Now, can you tell me, Dr. Emson, the specimens  
24 that are saved, who makes the decision as to what  
10:57 25 specimens are saved?



1 A Well, nowadays, today we have a protocol. The  
2 police in general have a protocol for pretty well  
3 everything and were this examination being done  
4 this week, they would produce their sexual assault  
10:57 5 kit which is the same as is used on victims of  
6 sexual assault in life and this requires requests  
7 of a specific number of specimens.

8 In 1969 things were much less  
9 formal. I don't think we had a developed sexual  
10:57 10 assault kit and the decision would have been made  
11 in the individual case as to what to save and the  
12 decision to save would have been made I think on  
13 whether we could foresee anything more to be  
14 gained from that specimen.

10:58 15 Q And let me ask you that. The vaginal contents  
16 then, back in 1969, at that time what value if any  
17 would those contents have had?

18 A I don't think we could have envisaged any future  
19 value. There were no further tests at that time  
10:58 20 to identify the assailant on semen. Now we have  
21 DNA. Then we had virtually nothing.

22 Q Would you have been able, or someone, a lab, have  
23 been able to test the vaginal contents to  
24 determine whether there were blood antigens?

10:58 25 A Yes, a lab would have done, could have done, and



1 the possibility of blood antigens either was -- I  
2 don't know what happened, either was considered  
3 and rejected or was not considered.

4 Q I see. In your view, sir, should the vaginal  
5 contents have been saved?

6 A My reflex now, but I'm a lot older and a lot more  
7 experienced, is that you save everything. You  
8 don't know very often what you are saving it for.

9 Q I see.

10 A But if you discard it at this point it's gone, and  
11 nowadays I would say yes, we should have saved it  
12 even if we didn't know why.

13 Q I see. Can you tell me, just as far as the  
14 process, and we'll talk a bit later about  
15 specimens that were taken by Lieutenant Penkala,  
16 specifically scalp hair, pubic hair, can you tell  
17 me how that happens? Do they say, Dr. Emson, we  
18 want the following things?

19 A The sampling of hair from a sexual assault victim  
20 is pretty routine in the sense that some of her  
21 hair may have been left upon the assailant and  
22 this was routine in 1969.

23 Q Yeah.

24 A So I don't think this required a decision on the  
25 part of anybody specifically.



1 Q Do you recall back in 1969 any discussion with  
2 Lieutenant Penkala --

3 A No, I don't. I can't remember whether there was a  
4 discussion about what specimens to keep or not.

11:00 5 Q Based upon your practice at that time, sir, if  
6 either officer would have asked you for your  
7 opinion as to whether the vaginal contents should  
8 have been saved, what would you have told them?

9 A I don't know. It's very easy to be wise after the  
11:00 10 event and to be 100 percent accurate in  
11 retrospection. I would like to say I would have  
12 said yes, keep it, even if I don't know why. I  
13 don't know if I would have said that.

14 Q Is it possible that the contents were  
11:01 15 inadvertently thrown out?

16 A No, nothing was inadvertently thrown out. We  
17 don't do inadvertent things at this point.

18 Q So is it fair to say that it would be someone's  
19 decision, someone made a decision that we don't --

11:01 20 A A decision which may have been made  
21 collaboratively. I don't know.

22 COMMISSIONER MacCALLUM: Excuse me, doctor,  
23 the question wasn't finished.

24 BY MR. HODSON:

11:01 25 Q Yeah. The question is that someone would have



1 made a decision to discard the vaginal contents?

2 A Yes.

3 Q And you say it could have been collaborative with  
4 you and the police officers?

11:01 5 A Yes. The decisions made at this point are usually  
6 collaborative because we are working together.

7 Q Okay. Can we just go back -- whoops, sorry, the  
8 same paragraph, please, and it says:

9 "A small amount of reddish fluid was  
11:01 10 aspirated from the posterior fornix of the  
11 vagina."

12 Were you able to conclude where that blood would  
13 have, or reddish fluid, whether it was blood and  
14 whether it was from the victim?

11:02 15 A I didn't make any notes as to whether there was  
16 blood in the aspirate which we examined under the  
17 microscope. If it was blood, and it most probably  
18 was because there's no other reason for it being  
19 reddish, the victim, Ms. Miller, did have  
11:02 20 inflammation of the neck of the womb and this  
21 could have contributed a small amount of blood.  
22 When we examined the microscopic sections, the  
23 lining of the womb appeared to be on the verge of  
24 menstruation and she may have been losing a little  
11:02 25 blood at that time at the very commencement of



1           menstruation. These are the two possibilities as  
2           to how her blood might have got into the specimen.

3           Q       Next you talk about the microscopic examination  
4           showed, and it says, "Numerous non-motile  
11:03 5           spermatozoa"?

6           A       Yes.

7           Q       Now, tell me, the significance of that, sir, is to  
8           determine I guess, A, whether Gail Miller had  
9           intercourse recently, and secondly, to try and put  
11:03 10          a time frame on that; is that --

11          A       Well, first of all, the spermatozoa, when  
12          ejaculated into the vagina, are motile, because it  
13          is their function to pass into the uterus and into  
14          the fallopian tubes. The motility is lost quite  
11:03 15          quickly, but here one is talking about a living  
16          person and a warm body. This girl died at or  
17          about the time, or shortly after intercourse, so  
18          that motility may have been lost because the body  
19          cooled and may have been lost earlier. But  
11:04 20          motility in the vagina is lost quickly anyway,  
21          probably within two or three hours. The  
22          spermatozoa are destroyed in the vagina if they  
23          remain there and this is quite variable, and you  
24          can go to the books which in general say -- I  
11:04 25          would say broadly, although I'm not an expert on





1 this, this could be qualified by a real expert,  
2 that spermatozoa would in general be lost from the  
3 vagina over 24 hours and it would be unusual in  
4 the living person to find spermatozoa in the  
11:04 5 vagina more than 24 hours after intercourse, but  
6 here again, this girl died at or shortly after  
7 intercourse and I have found spermatozoa in a dead  
8 body a week after death, so all these are  
9 variables that come in here.

11:04 10 Q A couple of questions from what you said. Are you  
11 saying that in a dead person the spermatozoa will  
12 live longer before they become non-motile than a  
13 living person?

14 A No, they don't live longer, but they are preserved  
11:05 15 longer.

16 Q Preserved in a motile state or --

17 A No, preserved in a non-motile state, but  
18 discoverable.

19 Q And I think you also said that you concluded or  
11:05 20 that Ms. Miller had intercourse shortly before  
21 death?

22 A Well, shortly before again is hard to put a time  
23 frame. I'm not an expert on this, but my very  
24 broad assumption would have been within eight  
11:05 25 hours.



1 Q Within eight hours of death?

2 A Yes. I talked about there being numerous, and I  
3 think if it would have been longer than that they  
4 would have started to disappear and perhaps we  
11:05 5 wouldn't have said numerous.

6 Q So the number of non-motile spermatozoa --

7 A The proportion. The motility is lost quite early,  
8 motility is lost in two to three hours.

9 COMMISSIONER MacCALLUM: Dr. Emson, please  
11:06 10 excuse me. For the sake of producing a coherent  
11 record, it is quite important to separate the  
12 questions from the answers, so please be aware  
13 that counsel must finish his question completely  
14 before you start your answer, otherwise the  
11:06 15 record will appear scrambled.

16 A I apologize, Your Lordship. I'll watch that.

17 BY MR. HODSON:

18 Q Next you concluded or you found that there was no  
19 evidence of injury to the vulva, vagina, anal or  
11:06 20 rectal regions; is that correct?

21 A Yes.

22 Q And is there any significance with respect to that  
23 in relation to whether or not the intercourse that  
24 Gail Miller had was consensual, forced,  
11:06 25 unconscious or dead?



1 A It was unusual to find significant genital injury  
2 in an adult woman from penial sexual intercourse,  
3 from normal sexual intercourse. In a girl before  
4 puberty or a woman after the menopause, there may  
11:07 5 be injury, but in a woman in her fertile menstrual  
6 years, it is unusual for penial sexual intercourse  
7 to cause injury, whether the intercourse was  
8 consensual or not.

9 Q So if intercourse was forced, you are saying you  
11:07 10 would not expect to find injury?

11 A It would be unusual.

12 Q And so is it fair to say that the fact that there  
13 was no evidence of injury to the genital area did  
14 not allow you to reach any conclusions as to  
11:07 15 whether the sex was -- the intercourse was  
16 consensual or forced; correct?

17 A The absence of injury did not to me indicate any  
18 evidence as to whether the intercourse was  
19 consensual or not.

11:08 20 Q And with respect to whether or not the intercourse  
21 took place when she was unconscious or dead, did  
22 your observations allow you to reach any  
23 conclusions?

24 A No.

11:08 25 Q If you could go down to, just scroll down to



1 specimens taken, please, and here I presume you  
2 would make a record, it says:

3 "The following specimens were taken and  
4 handed to Lieutenant Penkala, Saskatoon City  
5 Police:

- 6 1. Scalp hair.  
7 2. Pubic hair.  
8 3. Blood obtained from the right-sided  
9 hemothorax.  
10 4. The clothing removed from the body."

11 Is that correct?

12 A Yes.

13 Q If you could go to the next page, please, call out  
14 under respiratory system, and this says:

11:09 15 "The presence of lacerations in the lower  
16 lobe of the right lung was confirmed. These  
17 were fresh and there was no vital reaction.  
18 A small amount of fibrillar material had  
19 been carried into the depth of one of these  
11:09 20 wounds. This material resembled clothing  
21 fibres."

22 Do I take it from that that you found fibres in  
23 the lung or the pleural cavity?

24 A In the lung tissue.

11:09 25 Q And do you know what happened -- did you retain or



1 did the police retain those fibres do you know?

2 A Oh, these were found on microscopic examination,  
3 they are in a microscopic section on a microscopic  
4 slide. It would not be possible to retrieve them  
11:09 5 from that.

6 Q I see. So these were observed, but there was no  
7 specimen taken; is that right?

8 A These were observed in a section taken from the  
9 lung. We take a portion of tissue, we subject it  
11:10 10 to a processing, then a microscopic slide is cut  
11 and stained from this and examined under the  
12 microscope, and this is at a very considerable  
13 magnification showing a very small amount of  
14 material and --

11:10 15 Q I'm sorry, go ahead?

16 A It would not be possible to retrieve these for any  
17 other form of examination.

18 Q Am I right in, when I read that, that these were  
19 likely from the fibre of her coat picked up by --  
11:10 20 I'm sorry, picked up by the knife going through  
21 the coat?

22 A The presumption from this is that the wound had  
23 passed through a garment and that a portion of the  
24 garment fibres had been carried into the depths of  
11:10 25 the wound.



1 Q If you can scroll down, please, and under  
2 gastrointestinal tract -- actually, just call up  
3 that full paragraph, please.

4 A I'm sorry, this is another typo here.

11:11 5 Q Oh.

6 A This should be genitourinary tract, this isn't the  
7 gastrointestinal tract. I'm sorry, after all  
8 these years this is the first time I haven't  
9 picked it up. This is genitourinary tract.

11:11 10 Q I was just going to ask you that, sir. So that  
11 should be the genitourinary tract?

12 A Yes. Sorry about that. These typos escape one at  
13 the time and I've never noticed this in four  
14 previous examinations.

11:11 15 Q I just want to draw your attention to that part,  
16 it says:

17 "Section of the uterus showed an endometrium  
18 in the lato luteal phase with considerable  
19 infiltration of inflammatory cells into its  
11:11 20 superficial portions suggesting that  
21 menstruation was imminent or commencing."

22 And that would have been a conclusion you drew at  
23 the time, sir?

24 A When I examined the section which was several days  
11:11 25 after the performance of the actual autopsy.



1 Q So is it fair to say that you had concluded that  
2 menstruation had either started or was about to  
3 commence?

4 A When I saw the section it suggests that she's  
11:12 5 right at the end of her menstrual cycle of the  
6 average of 28 days and menstruation is about to  
7 commence.

8 Q And would that be consistent with finding reddish  
9 fluid in the vaginal contents?

11:12 10 A It might have contributed a little blood to the  
11 vaginal content.

12 Q Okay. Now, we had identified a number of stab  
13 marks and I think you indicated, or the autopsy  
14 indicates that some of them on the victim were  
11:12 15 from right to left, and are you able to draw, or  
16 were you able to draw any conclusions as to  
17 whether those stab marks were caused by an  
18 assailant who was dominant right-handed or  
19 dominant left-handed?

11:12 20 A It's very difficult because it implies that you  
21 are considering the relative positions of  
22 assailant and victim, but if you consider an  
23 assailant and a victim facing each other, then the  
24 left to right inclination of the lacerations on  
11:13 25 the neck suggest the probability of a right-handed



1           assailant.

2           **Q**       If I could pause you there for a moment then. The  
3                   lacerations then on Gail Miller's neck, I think  
4                   there was 15 of them that we talked about first,  
11:13 5                   went I think from her right ear down to the  
6                   middle, from right to left; is that correct? Did  
7                   you want to go back, Dr. Emson --

8           **A**       Commencing below the left ear.

9           **Q**       Oh, the left ear.

11:13 10          **A**       Yes.

11          **Q**       I'm sorry, I've had it backwards. So her left ear  
12                   down --

13          **A**       -- towards the midline.

14          **Q**       Towards the middle. So you are saying if she was  
11:13 15                   facing the assailant when those lacerations were  
16                   applied or given, you are saying it would be more  
17                   consistent or more probable that it would be a  
18                   right-handed assailant?

19          **A**       Yes. I think this is not a matter of expertise,  
11:14 20                   but of common interpretation. If you raise your  
21                   right hand to somebody in front of you, your hand  
22                   is on their left.

23          **Q**       And just so that I have this clear, because I  
24                   think I stated to you wrong in the first case, the  
11:14 25                   slashes were from Gail Miller's left ear to the





1 center?

2 A Yes.

3 Q So from her left to the right. So then the  
4 assailant would be going from the assailant's  
11:14 5 right to the assailant's left?

6 A Yes.

7 Q And what about the stab marks, would the same  
8 apply?

9 A No. These aren't particularly oriented in any  
11:14 10 direction, they are grouped, and each little group  
11 seems to run in a defined way, but none of these  
12 suggest particular handedness.

13 Q Okay. Now, I understand at some point after the  
14 autopsy the police provided you with a knife blade  
11:15 15 did they?

16 A I have no written report on this, but my  
17 recollection is that I was shown a knife blade and  
18 that I gave the opinion that this was consistent  
19 with a blade that could have inflicted the wounds.

11:15 20 Q I call up document 073509. If you can just zoom  
21 in on that right-hand side. Does that look  
22 similar to the knife they would have shown you?

23 A Yes, this is what I recollect. It was a small  
24 knife, a paring knife type with a reddish-brown  
11:16 25 plastic handle.



1 Q And I think it's got a tape measure there, five  
2 centimetres I believe there?

3 A Yes.

4 Q What kind of testings or what would you have done  
11:16 5 to satisfy yourself that that knife blade could  
6 have caused the injuries?

7 A All I can do is compare its size with the size I  
8 recorded at the autopsy.

9 Q Now -- so your conclusion was that that knife  
11:16 10 blade was consistent, the size of that knife blade  
11 was consistent with the size of the wounds?

12 A Yes.

13 Q Now, were you able to tell from examining any of  
14 the wounds whether more than one knife was  
11:16 15 involved?

16 A No, I was not. The wounds were all of similar  
17 size and there was nothing to suggest in examining  
18 them that more than one weapon had been used.

19 Q Am I to take from that, sir, that it's possible  
11:16 20 that two knives could have been involved, two  
21 knives of similar sizes?

22 A Oh, yes.

23 Q What about -- this is a single-edged knife; is  
24 that correct, the one on the screen?

11:17 25 A Yes.



1 Q Were you ever asked to consider whether a  
2 double-edged knife may have been involved in any  
3 of the wounds?

4 A I can't remember. If I was, it would have been in  
11:17 5 one of the transcripts of evidence, but you have  
6 to consider that double-edged knives are made for  
7 one purpose only which is killing people, they  
8 don't have a civil use, as it were, and they are  
9 very rare in the population. I have never, to my  
11:17 10 recollection, seen a wound inflicted with a  
11 double-edged knife, and the other thing is that  
12 single-edged knives, the back of the knife, the  
13 non-sharpened edge, is not very much thicker than  
14 the sharpened edge, so that while this question is  
11:17 15 often asked, it is not commonly possible to state  
16 with certainty whether a knife wound is single or  
17 double edged.

18 Q So in this case the --

19 A And the probability is always that it's from a  
11:18 20 single-edged blade because single-edged blades are  
21 infinitely more common.

22 Q So with respect to the stab wounds on Gail Miller,  
23 are you saying it's possible that one or more of  
24 them may have been caused by a double-edged knife?

11:18 25 A No, I don't think so.



1 Q You don't think they were?

2 A No.

3 MR. HODSON: Mr. Commissioner, this is  
4 probably as good a place as any to break.

11:18 5 COMMISSIONER MacCALLUM: Okay.

6 MR. HODSON: Dr. Emson, you should not  
7 discuss your evidence with anybody during the  
8 break, please.

9 COMMISSIONER MacCALLUM: 15 minutes,  
11:18 10 please.

11 (*Adjourned at 11:20 a.m.*)

12 (*Reconvened at 11:40 a.m.*)

13 BY MR. HODSON:

14 Q Dr. Emson, I now wish to travel into the area of  
11:38 15 blood secrete, an issue that we see in the  
16 documents here and there, and I'm hoping that we  
17 can have you explain for us -- and I'll maybe just  
18 walk you through with a few questions. There are  
19 four blood types; is that correct, A, B, AB and O?

11:38 20 A Well, first I must qualify and say I am not an  
21 expert in this area. There are many different  
22 types of blood defined by what are termed the  
23 antigens and these are the specific proteins in  
24 the body cells which are expressed on the surface  
11:39 25 of the red blood cells and which may serve to



1 generate an immune response. At the time of this  
2 autopsy; that is, in 1969, we knew the basic four  
3 blood types which I think had been defined around  
4 1910 and these were A, B, AB and O and there were  
11:39 5 also a number of other blood types which were  
6 coming into knowledge at that time and the whole  
7 field has expanded immensely since then and become  
8 a specific branch of pathology, but at that time  
9 we had A, B, AB and O and a number of other  
11:40 10 subgroups. The A, B and AB, these define the  
11 antigens expressed on the surface of the red cell.  
12 In a group A person, the red cells will express A,  
13 in a group B person they will express B, in a  
14 group AB they will express both and in group O  
11:40 15 they will express neither.

16 Q So this is on the red blood cell?

17 A Yes. These antigens will be present in every cell  
18 in the body but where we're interested in them,  
19 and primarily for purposes of compatibility in  
11:40 20 transfusion is their expression on the surface of  
21 the red cells.

22 Q Now, I understand that with some people these  
23 antigens are secreted in their bodily fluids; is  
24 that correct?

11:40 25 A Yes. There is a subgroup, and I don't know what



1 proportion of people this is, termed secreters and  
2 as well as expressing these antigens on their  
3 cells, they will excrete them in body fluids such  
4 as saliva and sperm, and there is another group,  
11:41 5 the non-secreters, who, while they have the  
6 antigens on the surface of the red cells, they  
7 will not express -- they will not express them in  
8 their fluids.

9 Q And it's my understanding that these antigens  
11:41 10 themselves are not visible to the naked eye; is  
11 that correct?

12 A No. They are molecules of protein.

13 Q So that if you see a sperm sample with a red  
14 tinge, that doesn't suggest antigens at all does  
11:41 15 it?

16 A No. You can't see them either grossly or  
17 microscopically. You can do certain reactions  
18 which will define them there, but you can't see  
19 them on the surface of a cell, you can only test  
11:41 20 them chemically.

21 Q So if you had a semen or sperm sample with the  
22 presence of A antigens, you could test for that to  
23 see if A antigens were in that fluid?

24 A If the semen or saliva specimen or other body  
11:42 25 fluid specimen contains the antigen and if it is



1 not contaminated by blood, then this means that  
2 the person is a secreter.

3 Q So if you had a bodily fluid sample that contained  
4 the A antigen, it would be likely from an A  
11:42 5 secreter?

6 A Certainly.

7 Q Is it possible that it could come from a person  
8 with blood type A, a non-secreter, where that  
9 person's blood found its way into the bodily  
11:42 10 fluid?

11 A Yes.

12 Q And back in 1969 do you recall, again within your  
13 area of pathology, whether blood typing by  
14 secreter and non-secreter was used and to what  
11:43 15 degree?

16 A In forensic pathology?

17 Q Yes, in the work you were doing.

18 A Well it would -- it was available, but it is so  
19 uncertain that I don't think it was widely used,  
11:43 20 because if you test a person and don't find an  
21 antigen it could be because they don't have it or  
22 they don't secrete it, and it was never a very  
23 practical or useful tool.

24 Q So are saying, in 1969, that a test would be  
11:43 25 performed by someone on saliva or bodily fluid; is



1           that correct?

2       A       It could have been.

3       Q       And you are saying that that would be imprecise;  
4           is that --

11:44 5       A       As I say, if you do a test and find an antigen,  
6           well you have got it; but if you do a test and  
7           don't find an antigen, then it may be because it's  
8           not there or it may be because it's not secreted,  
9           and you don't know which.

11:44 10      Q       Okay. So, if I have this right, if you tested  
11           saliva of an individual and found no A antigens,  
12           it's possible that that person is an A secretor  
13           but did not secrete antigens in that sample?

14      A       Yes. I'm very glad to say that this has totally  
11:44 15           gone out of use, and now we have the accuracy and  
16           precision of DNA, because this was a very  
17           imperfect tool.

18      Q       Now I understand that, a few days after the  
19           autopsy and Gail Miller's death, that Lieutenant  
11:44 20           Penkala delivered some liquids or frozen material  
21           to you?

22      A       I have no written record of this, but my  
23           recollection is that he brought into the  
24           laboratory at St. Paul's a specimen of snow which  
11:45 25           he asked me to examine to see if there was semen





1 in it, and we melted it, put it on a microscope  
2 slide, and saw spermatozoa in there, and that was  
3 as far as we went.

4 Q And did you then return that sample to Lieutenant  
5 Penkala?

6 A To my recollection, yes.

7 Q And do you recall whether you checked -- were  
8 asked for, or checked for, whether there was blood  
9 in that sample?

10 A I cannot recall whether I was asked and I cannot  
11 recall whether I checked but my memory, at this  
12 considerable distance of time, is that there was  
13 not.

14 Q And I take it, sir, that it would not be your  
15 task, as pathologist, to test that sample for an A  
16 antigen?

17 A No.

18 Q That would have been done by someone else?

19 A No, that's -- that would not have been within our  
20 laboratory's range.

21 Q Do you recall, sir, testifying at David Milgaard's  
22 preliminary hearing and trial?

23 A Not specifically, no.

24 Q I'll show you portions of the transcript. If you  
25 could call up document 008097. And, Dr. Emson,



1           these are transcripts that we have obtained from  
2           other sources. I think this shows your  
3           examination by Mr. Caldwell at the preliminary  
4           hearing, and just before I get into the  
11:46 5           transcripts, can you confirm for me that the  
6           evidence you would have provided at all of the  
7           legal proceedings related to David Milgaard and  
8           Larry Fisher would have been your truthful and  
9           best recollection of events?

11:46 10          A           Of course. I was under oath on all these  
11           occasions.

12          Q           Pardon me?

13          A           I was under oath on all these occasions.

14          Q           Yes. If I could have you go to page 008103, and I  
11:47 15           just wish to go through and point out a few  
16           things, Dr. Emson, and ask some questions.  
17           Question 26 the -- Mr. Caldwell asks you:

18                    "Q   And I believe, Your Honour, that those  
19                           things have not been introduced here, so  
11:47 20                           I'm not able to show them. What did you  
21                           do though with the containers of blood  
22                           when you assembled them?

23                    A   These specimens were handed to  
24                           Lieutenant Penkala.

11:47 25                    Q   And what about the items of clothing you



1 have mentioned?

2 A These were handed to Lieutenant  
3 Penkala."

4 And I take it, sir, that's consistent with what  
11:47 5 you told us earlier, that anything that remained  
6 after the autopsy would go to Lieutenant Penkala,  
7 and everything else would be discarded; is that  
8 correct?

9 A Yes.

11:48 10 Q And then, down at the bottom of the page, question  
11 31:

12 "Q Did you find any significant or  
13 measurable difference in the various  
14 punctures or stab wounds, one from the  
11:48 15 other?"

16 And answer at the top of the next page:

17 "A No, they appeared -- apart from the  
18 difference in angulation, they all  
19 appeared to be approximately the same  
11:48 20 size, they were certainly consistent  
21 with having been made by the same  
22 weapon, there were no major differences  
23 between any of the wounds."

24 I think, sir, that's what you have also told us  
11:48 25 today as well; is that correct?



1 A Yes.

2 Q And --

3 COMMISSIONER MacCALLUM: Just excuse me,  
4 counsel, I'm not sure I understood him to say  
11:48 5 that there wasn't any difference in angulation  
6 today. I have, at least I understood his initial  
7 evidence to be that the stab wounds were similar  
8 in size as well as in the attitude of  
9 penetration, now he's apparently said something  
11:49 10 different?

11 BY MR. HODSON:

12 Q Go back, just read that again, call it out.

13 Perhaps, Dr. Emson, you can tell  
14 me what you mean by "angulation?"

11:49 15 A The position relative to the body or relative to  
16 the planes of the body, to the mid-line, as to  
17 whether they are angled to the right or to the  
18 left or up or down.

19 Q So when you say there at the preliminary:

11:49 20 "... they appeared -- apart from the  
21 difference in angulation ...,"  
22 You are saying some were right to left, some were  
23 not?

24 A Yes.

11:49 25 Q "... they all appeared to be



1 approximately the same size, they were  
2 certainly consistent with having been  
3 made by the same weapon, there were no  
4 major differences between any of the  
11:49 5 wounds."

6 And it may be that those were referring to the  
7 stab wounds as opposed to the lacerations?

8 A This is referring to the stab wounds, it certainly  
9 does not refer to the neck lacerations.

11:50 10 Q Okay. Is that, sir --

11 A I think, sir, we have seen this today in the  
12 pictures that the, all the wounds, stab wounds,  
13 are approximately the same size.

14 Q Okay. Does that answer your question,  
11:50 15 Mr. Commissioner?

16 COMMISSIONER MacCALLUM: Umm, well not  
17 exactly. Of course, in earlier examination the  
18 object was to demonstrate whether or not the stab  
19 wounds could show right to left or otherwise in  
11:50 20 the way in which they were inflicted, and I  
21 understood the doctor to say, at that time, that  
22 that could not be shown.

23 His present evidence when he  
24 speaks of angulation of the wounds, of course,  
11:50 25 tells me that they demonstrated the direction of



1 penetration.

2 MR. HODSON: I think that maybe I can  
3 clarify it this way.

4 BY MR. HODSON:

11:51 5 Q Dr. Emson, I think what I asked you is the wounds,  
6 the stab marks themselves, you were able to  
7 identify that some were angled left to right on  
8 the victim; is that correct?

9 A Yes.

11:51 10 Q And some were not?

11 A They are all described in the report with regard  
12 to their position on the body, their relation to  
13 the mid-line, and their relation to the planes of  
14 the body, yes.

11:51 15 Q And I think the question with respect to the stab  
16 marks that I asked you was whether you could tell,  
17 from the angle of the stab marks, whether it was a  
18 right-handed or left-handed dominant assailant?

19 A You can't tell this from any of the stab wounds.

11:51 20 Q Okay. And I believe you said, sir, that the  
21 lacerations on the neck, you said it was more  
22 probable from a dominant right-handed person if  
23 that person was facing the victim; is that  
24 correct?

11:51 25 A It's more consistent with this, but, of course,



1           there are a number of other probabilities which  
2           can be suggested.

3       **Q**       Such as?

4       **A**       Well, the relative position of the assailant, if  
11:52 5           he was behind the victim.

6       **Q**       If we go to page 008107, just call out, starting  
7           at question 49. I just want to go through here,  
8           Dr. Emson, your evidence at the prelim regarding  
9           the estimate of time of intercourse:

11:52 10           "Q    Did you examine the vagina for the  
11                presence of spermatozoa?

12           **A**    Yes. The vagina contained a fluid  
13                which showed various non-motile, that  
14                is they were not moving, spermatozoa.

11:52 15           **Q**    And what, in this instance, could you  
16                say about the quantity of spermatozoa  
17                that you found?

18           **A**    Spermatozoa in the vagina disappear  
19                relatively fast, after 12 hours they  
20                are certainly starting to  
21                disintegrate, so that the presence of  
22                large numbers of readily-identifiable  
23                spermatozoa would indicate that  
24                intercourse has taken place within  
11:53 25                probably the previous 12 hours.



1 Q And are you referring, Doctor, to 12  
2 hours previous to examination?

3 A Yes, pre-examination.

4 Q As opposed to pre-death?

11:53 5 A Yes."

6 Now is that -- Dr. Emson, I think earlier you  
7 said that -- did you say 8 or 12, does that  
8 evidence you gave at the preliminary hearing, is  
9 that your opinion today?

11:53 10 A Umm, I haven't been asked these questions for a  
11 long time and I would have to go and look it up,  
12 but to the best of my recollection these figures  
13 are approximately accurate.

14 Q Right. So, and I think at this time the autopsy  
11:53 15 started at about 2:30 in the afternoon, so you are  
16 saying within the previous 12 hours, so 2:00 a.m.?

17 A That is a very broad estimate and, as I said,  
18 there were a number of complicating factors,  
19 including the cold, and if I -- if you wanted a  
11:54 20 really accurate estimate on this I would have to  
21 go back to textbooks now.

22 Q No, I'm just -- your evidence at the preliminary  
23 hearing, I think -- I think, when I asked you  
24 before we got into the transcript, I think you  
11:54 25 said "within eight hours of death", if I recall





1 correct, and now you are saying within --

2 A The question -- I'm not quite clear where we're  
3 going on this, but I think the question is does  
4 disintegration start at death, or does it -- is it  
11:54 5 postponed a short while. The answer, I think, is  
6 relative to the temperature of the body. If the  
7 body stays warm after death, then disintegration  
8 will proceed quite quickly; if the body is rapidly  
9 chilled, then the process may be arrested, and in  
11:54 10 this particular case we have virtual freezing at  
11 the time of death, so I think any process of  
12 disintegration of spermatozoa would be arrested at  
13 that time.

14 Q Okay. If you could go to page 008109, question  
11:55 15 64, you are asked:

16 "Q Now from your findings, and I'm not  
17 asking you to come to a specific opinion  
18 on this, but would it be -- first of  
19 all, I take it, it's inescapable that  
11:55 20 sexual intercourse had taken place,  
21 involving the deceased, within some  
22 period which you have spoken of already?

23 A Yes.

24 Q I presume, this goes without saying,  
11:55 25 that this could be during life and by



1 the consent of the deceased, as far as  
2 you can see?

3 A As far as I can see, yes.

4 Q Is there, in your opinion, any manner in  
11:55 5 which intercourse could have taken place  
6 during the life of the deceased and  
7 assuming it to be without her consent,  
8 and against her will, and end up with  
9 the situation in which you found no --  
11:56 10 nothing in the way of injuries?

11 A She could have been unconscious.

12 Q And is that possible from your point of  
13 view?

14 A From the physical findings this is  
11:56 15 perfectly possible, I can't say  
16 anything for or against that, it's  
17 quite possible."

18 And the next question and answer:

19 "Q And it is possible, again from what you  
11:56 20 saw, of the body and what you found,  
21 that the intercourse could have taken  
22 place after death?

23 A Yes."

24 And I believe that's what you have told me  
11:56 25 earlier, is it Dr. Emson, that, based on your



1 examination of the genitals, you could not say  
2 whether intercourse was with consent, without,  
3 unconscious, or dead?

4 A Yes.

11:56 5 Q Now down at question 71 -- actually, sorry, go up  
6 to question 70, if you go back to the full  
7 document, please, just call out that portion. And  
8 here's where Mr. Caldwell is asking you, question  
9 70:

11:57 10 "Q Is it your field, Doctor, can you tell  
11 the court, are the conditions under  
12 which human blood can get into, if I may  
13 put it that way, into seminal fluid or  
14 spermatozoa, I'm speaking now of blood  
11:57 15 as opposed to constituents of blood?

16 A Are you speaking now of the male or  
17 the female part?

18 Q I'm speaking of a male person?

19 A Yes, blood can be present in seminal  
11:57 20 fluid from a male person, either from  
21 local injury to the genitals, or from  
22 disease of the internal genitalia, or  
23 I believe, although I'm not an expert  
24 on this, on occasion, without obvious  
11:57 25 cause.



1 Q And you are speaking now -- as I  
2 understand it -- at least my question's  
3 intended to speak of blood as opposed to  
4 any constituents of blood?

11:58 5 A Yes."

6 And is a "constituent of blood", is that an  
7 antigen?

8 A It could be anything, it could be a specific type  
9 of blood cell, it could be a chemical in the  
11:58 10 blood, but the constituent is just part, and it  
11 could be anything.

12 Q Okay, and then it says, question 73:

13 "Q And are you familiar to some extent,  
14 Doctor, with the matter of persons who  
11:58 15 are called secretors or non-secretors in  
16 that field in a general way?

17 A Yes."

18 And then, if I can skip ahead to page 008115 --  
19 now, sorry, just back on that last part that I  
11:58 20 read you, was it -- is it common for a  
21 non-secretors male to have blood in their seminal  
22 fluids?

23 A It's not common for any male to have blood in  
24 their seminal fluid.

11:59 25 Q Okay. So the portion I read about local injury to



1 the genitals or from disease, is that something  
2 that could cause blood of a non -- blood to be in  
3 seminal fluid?

4 A Yes.

11:59 5 Q And is that common?

6 A Umm, that would be a question for another expert,  
7 but I don't think so.

8 Q And at page 008115, please, and this is Mr. Tallis  
9 cross-examining you, if I could just call out,  
12:00 10 starting at question 23:

11 "Q I see. And then what was done with the  
12 sample after you did that?"

13 Actually, I should go up, go back up. Sorry, I  
14 should have asked the question previous.

12:00 15 Question 22, we won't go to that page, it says:

16 "Q Yes, well, that's fair enough. Then I  
17 take it you conducted a test at the  
18 hospital for the presence of  
19 spermatozoa?

12:00 20 A Yes, this was examined microscopically  
21 for spermatozoa by myself.

22 Q I see. And then what was done with the  
23 sample after you did that?

24 A It was discarded.

12:00 25 Q And I take it that no portion of that



1 sample was turned over to the police at  
2 all?

3 A No, it was not requested as an  
4 exhibit, and it was not saved."

12:00 5 Does that assist you, Dr. Emson, in identifying  
6 what happened with that, the vaginal contents, at  
7 the time?

8 A I take it that all this refers to the vaginal  
9 aspirate?

12:01 10 Q Yes.

11 A And?

12 Q And my question is, it says here, question 24 your  
13 answer was:

14 "No, it was not requested as an exhibit,  
12:01 15 and it was not saved."

16 And my question is does that assist your  
17 recollection of whether it was your decision, the  
18 police decision, or a joint decision about  
19 whether the vaginal contents would be saved?

12:01 20 A Well, I have said here it was not requested, so  
21 the presumption from this is that this was a  
22 police decision.

23 Q Okay. And then down at question 25, and again  
24 we're talking about the same aspirate, it says:

12:01 25 "Q I see. And I take it that this sample



1 was not tested for blood grouping?

2 A No, the note was made that it was  
3 blood stained. I'm still uncertain as  
4 to whether this was -- there are three  
12:01 5 possible causes here, there is blood  
6 from the male, the girl did have  
7 slight inflammation of the neck of the  
8 womb, which is not uncommon, this  
9 could have led to bleeding, and there  
12:02 10 is a possibility that she was starting  
11 to menstruate, which again could have  
12 led to a little bleeding, so between  
13 those causes we were not able to  
14 determine the ..

12:02 15 Q .. the source of the reddish colour in  
16 the fluid?

17 A No.

18 Q But these are all very real  
19 possibilities, that you have cited?

12:02 20 A Yes.

21 Q Was there apparently enough blood in  
22 this fluid to have enabled one to test  
23 it for blood grouping?

24 A Yes, there would have been."

12:02 25 So that's correct, is it Dr. Emson, does that --



1 A Well, that last question is, the answer to that  
2 one would be that you could have tested it for  
3 blood grouping, but if the blood had been from the  
4 victim and if the assailant had been a secretor,  
12:02 5 you would be in a problem there because you would  
6 have antigens from both the victim and from the  
7 assailant. It would have been possible to test  
8 it, I think, but one might have got inexplicable  
9 and confusing results.

12:03 10 Q Would it be fair to characterize it this way, Dr.  
11 Emson, that, depending upon the blood type of the  
12 victim and the assailant, you may have been able  
13 to do blood grouping to identify the blood type  
14 and the secretor status of the assailant?

12:03 15 A You might have been, but it would have been a  
16 result very, very difficult to interpret.

17 Q I see. So, just so I understand this, the -- for  
18 example, if the victim and the assailant had the  
19 identical blood type and were both secretors,  
12:03 20 would it be fair to conclude that testing the  
21 vaginal contents wouldn't have told you anything?

22 A No.

23 Q Do you agree with that?

24 A Yes.

12:03 25 Q If the victim had a different type of blood, the





1 victim was a non-secretor and the assailant was a  
2 different type of blood secretor, is it possible  
3 that testing the vaginal contents would have  
4 identified the blood type and secretor status of  
12:04 5 the assailant?

6 A Yes. But I think you also have to consider, here,  
7 the possibility, as I say, that this might have  
8 been a mixed specimen, with blood from the victim  
9 and spermatozoa from the assailant, and one would  
12:04 10 not have been able to tell from which of these  
11 components your results came.

12 Q Would you be able to test the victim's -- you  
13 would know the victim's blood type?

14 A Yes.

12:04 15 Q And know whether the victim was a secretor?

16 A I don't know, I don't know if you could test for  
17 secretor status after death, whether the antigens  
18 would continue to be present.

19 Q If you had two different blood types in the  
12:05 20 sample, would you be able to conclude that one  
21 came from the victim and one came from the  
22 assailant?

23 A Not necessarily, because if you had let us say  
24 both A and B there, you wouldn't have been able to  
12:05 25 tell whether there were two people, one A and one



1 B, or whether there was one person who was an AB.  
2 You could have checked this against them if you  
3 had the specimens in life but, as I say, it would  
4 have been a very confusing set of results.

12:05 5 Q Yeah. And I think, as I have said earlier and I  
6 think you agreed, it would depend upon the blood  
7 types and secretor status of the victim and the  
8 assailant?

9 A Yes.

12:05 10 Q Okay. If I could now go ahead, please, to the  
11 trial transcript, 075974 -- just bear with me for  
12 a moment, Dr. Emson. If you could go to page  
13 075990 and just confirm this, Dr. Emson, I think  
14 you touched on this earlier about examining the  
12:06 15 knife, but Mr. Caldwell asks:

16 "Q If I could possibly just pause there,  
17 Doctor, and show you P.12 a knife blade.  
18 From what you saw of the stab wounds  
19 both externally and internally what  
12:06 20 would be your opinion as to whether a  
21 blade of that dimension could have been  
22 responsible for the stab wounds?"

23 Answer, the next page:

24 "A Yes, it could.

12:06 25 Q And does the length of this blade appear



1                   sufficient to you to reach the depth to  
2                   which you found the wounds in this body?

3                   A     Yes, it does."

4                   And so I think you told me earlier, sir, that you  
12:07 5                   had in fact examined the knife, and your  
6                   measurements, and concluded that they were  
7                   consistent; is that right?

8                   A     Yes.

9                   Q     If I could refer you to page 076000, please. And  
12:08 10                   I asked you earlier, when I referred to your  
11                   preliminary hearing evidence, about how common it  
12                   was for a non-secretor to have blood in their  
13                   fluids, and I just want to read you some evidence  
14                   here:

12:08 15                   "Q    Are there conditions under which human  
16                   blood as such can get into seminal fluid  
17                   or spermatozoa in the male person?

18                   A     Yes.

19                   Q     Could you tell the court what they are  
12:09 20                   please?

21                   A     One would be local injury to the male  
22                   genitals.

23                               A second and quite common  
24                   occurrence would be any inflammation  
12:09 25                   either internal or external of the



1 male genitals.

2 Q Are there any other causes?

3 A There are rarer conditions but I think  
4 the injury and the inflammation are  
12:09 5 the most common ones.

6 Q You understand my question to be  
7 speaking of blood as such as opposed to  
8 any constituent of blood?

9 A Yes -- blood cells."

12:09 10 So, again, I think you told me earlier that those  
11 are causes where blood of a non-secretor could be  
12 in the bodily fluids, but you are saying it  
13 wouldn't be very common; is that right?

14 A I said, on the previous page, "quite common," I  
12:09 15 think I was wrong there at that time, I think  
16 these would be rather uncommon causes.

17 Q Okay. So at the time, in 1969, you understood  
18 that it was quite common for a non-secretor to  
19 have blood in bodily fluids, such as seminal  
12:10 20 fluid?

21 A At that time, in this evidence, I said it was  
22 quite common to find blood in seminal fluid from  
23 internal causes in the male. I would vary that  
24 now, I don't think I was correct at that time, I  
12:10 25 would say uncommon.



1           Q           Thank you. And the page 076010, and this is  
2                       Mr. Tallis cross-examining you, sir, and this  
3                       relates to the coat, and I think you have touched  
4                       on this earlier, that you did not have much to do  
12:11 5                       with the garments, but the question is:

6                       "Q   And I take it, Doctor, that from your  
7                       examination of the body of the deceased  
8                       there was nothing from it you could form  
9                       any conclusion as to whether the  
12:11 10                      re-insertion of the arms into the coat  
11                      took place before or after death?

12                     A    I have no evidence as to this."  
13                     So I take it that from your work, sir, you were  
14                     not able to determine whether Miss Miller's arms  
12:11 15                     were put into, back into her coat before or after  
16                     death?

17           A           I had no way of telling.

18           Q           Okay. And again to page 076011, and this is your  
19                       trial evidence, sir, about the vaginal contents,  
12:11 20                       and I'll just read this to you. It says:

21                      "Q   And this particular sample ..., "  
22                      actually let's go back up and I'll just show you  
23                      where it talks about the vaginal fluid. Start  
24                      right here, it says:

12:12 25                      "Q   I see; now, you told my learned friend



1 in evidence that you obtained some fluid  
2 from the vagina of the deceased?

3 A Yes.

4 Q And subsequently tested this particular  
12:12 5 fluid for the presence of spermatozoa?

6 A Yes.

7 Q And this of course was done as I  
8 understand it right in the hospital?

9 A Yes.

12:12 10 Q And this particular sample of fluid that  
11 you had was characterized by a reddish  
12 colored tinge?

13 A Yes.

14 Q Now, what was done with that particular  
12:12 15 sample after you tested it for  
16 spermatozoa?

17 A It was discarded.

18 Q I see; I take it that no portion of it  
19 was turned over to the police?

12:12 20 A No.

21 Q And as a matter of fact to be fair about  
22 it to ..., "

23 next page:

24 "... to be fair about it to you it was  
12:12 25 not requested by any of them?



1           A     It was not suggested at the time, no."  
2           If I can pause there, Dr. Emson, does that assist  
3           your recollection about whether or not it was you  
4           or the police, or a combination of both, that  
12:13 5           made the decision not to retain the vaginal  
6           contents?

7       A     No, I have no memory of that, but I would presume  
8           it was a decision taken between us.

9       Q     And just to carry on there, it says:

12:13 10           "Q    Yes; and now I take it that there wasn't  
11           sufficient blood in this fluid to have  
12           enabled one to test for blood grouping  
13           if a request had been made?

14           A     Yes."

12:13 15           And I think we had just earlier, when we looked  
16           at the preliminary hearing transcript, and your  
17           evidence was that there was, there was enough  
18           blood grouping to do a grouping, but that there  
19           were -- I don't know what term you used -- there  
12:13 20           were issues that might arise, you may not be able  
21           to get anything out of it but you could still  
22           test it; is that fair?

23       A     As I said, I think it could have been done, but  
24           the results would have been very difficult to  
12:14 25           interpret.



1 Q Okay. I think that's what you said, yes.

2 A And I may say I have changed my opinion in general  
3 since then and in principle it is always better to  
4 do a test even if you know the result is going to  
12:14 5 be impossible to interpret or irrelevant rather  
6 than not to do it because of that. It's always  
7 better to have some results. Now, that's an  
8 opinion formed over the course of years and  
9 experience and I hadn't formed it then.

12:14 10 Q Now, in 1969, sir, I don't believe DNA testing was  
11 being done, DNA matching? I'm not sure of the  
12 correct term.

13 A No, DNA was not available. I don't know the  
14 precise date at which DNA became practicable in  
12:14 15 forensic work, you would have to ask another  
16 specialist about that, but my recollection would  
17 be not more than 10 or 15 years ago.

18 Q I see. And the vaginal contents then that were  
19 aspirated from Gail Miller, if those had been  
12:15 20 retained would that sample have provided the basis  
21 for a DNA test later on?

22 A If they had been retained in proper condition in  
23 deep-freeze, yes.

24 Q And at the time in 1969 did you have any knowledge  
12:15 25 of DNA science and DNA matching that might require





1           those contents to be saved?

2       A       No. We had -- I can't recollect when Watson and  
3           Crick first described the double helical structure  
4           of DNA, but it was certainly after 1969, and  
12:15 5           before that it was just, there wasn't even a  
6           hypothesis. All these dates would be in the  
7           reference books somewhere, but I don't have them  
8           in my head.

9       Q       It was a number of years after 1969?

12:16 10      A       Yes, certainly.

11      Q       Now I would like to skip ahead, Dr. Emson, to some  
12           letters that were written in the late '80s by  
13           other forensic pathologists about your work and I  
14           have a few questions about those. The first, if  
12:16 15           you could call up 002486, and this is a letter  
16           dated September 13th, 1988, Dr. James Ferris to  
17           Mr. Wolch, counsel for David Milgaard. Do you  
18           know Dr. Ferris?

19      A       Not intimately, but we've certainly met from time  
12:16 20           to time.

21      Q       And he is in the same profession as you, sir?

22      A       I'm not sure what he's doing now. He was either  
23           retired or semi-retired and I know there was a  
24           possibility of him going to New Zealand the last  
12:17 25           time I talked to him, but this was some years ago



1 and I really don't know where he is or what he's  
2 doing now.

3 Q In 1988 or in the late '80s were you aware that he  
4 was practicing in the area of pathology?

12:17 5 A Oh, yes.

6 Q Now if you could go to page 002488 of this letter  
7 and if you could just -- actually, go to the  
8 previous page, please, 2487, and this is where he  
9 comments about pathology evidence, Dr. Emson, I  
12:17 10 just want to read you a portion of this. Dr.  
11 Ferris states in the letter:

12 "I think there is absolutely no doubt that  
13 Gail Miller died as a direct result of stab  
14 wounds inflicted on January 31, 1969 at or  
12:18 15 around 0700 hours. It may be important,  
16 however, to note that none of the stab  
17 wounds penetrated any of the major blood  
18 vessels or the heart and that Dr. Emson in  
19 his evidence states that the cause of death  
12:18 20 was the actual loss of blood into the chest  
21 cavity, the "shock intendant upon this and  
22 the embarrassment of breathing" (page 1146  
23 transcript). While there is no question  
24 that these injuries are fatal, the speed  
12:18 25 with which an individual becomes immobilized



1 as a result of injuries such as this is  
2 relatively slow. Since death is as a result  
3 of bleeding from the lung tissue into the  
4 chest cavities, the speed with which  
12:18 5 unconsciousness will occur is also  
6 relatively slow. It would be my opinion  
7 that the stab wounds as described by  
8 Dr. Emson were neither immediately fatal nor  
9 even immobilizing. In my experience  
12:18 10 individuals with this type of injury may  
11 live for several minutes following the  
12 injuries. It is possible that in fact she  
13 could have survived for at least 15 minutes  
14 following the injuries."

12:19 15 Do you agree, sir, with Dr. Ferris' opinion  
16 stated there?

17 A I don't think Dr. Ferris is taking into account  
18 the very severe degree of thermal shock which I've  
19 mentioned from being partly unclothed at minus 40,  
12:19 20 and minus 40 is the same on both the Fahrenheit  
21 and Centigrade scales, and also from the shock  
22 resulting from a presumptive sexual assault. In  
23 general he's correct, but he's only considering  
24 one of a set of circumstances.

12:19 25 Q In your opinion, sir, can you -- do you have an



1 opinion as to how long Gail Miller would have been  
2 alive from the moment the fatal wound, the fatal  
3 stab wound punctured her lung until her death?

4 A I think Dr. Ferris is probably right as a maximum  
12:20 5 of about 15 minutes, but I think under the  
6 circumstances, and I've seen the scene  
7 photographs, that she would have been very  
8 unlikely to have moved very far.

9 Q So you are saying it could be 15 minutes before  
12:20 10 death; however, what condition would she be in,  
11 would she be able to run?

12 A Oh, no, I don't think so.

13 Q Walk?

14 A Stumble possibly.

12:20 15 Q So from the moment of the fatal stab wound until  
16 her death, she would have been seriously hampered  
17 by her injury?

18 A I think -- it's impossible to be certain, but I  
19 think she would have been essentially immobilized.

12:20 20 Q Next paragraph, Dr. Ferris goes on to say:

21 "If this is the case and if as we know from  
22 the examination of the clothing she was  
23 wearing her coat at the time that the  
24 injuries were inflicted, then it is highly  
12:20 25 likely that she was alive at the time of the



1           apparent rape. This would tend to indicate  
2           that her inner clothing had been removed  
3           before the injuries were inflicted. While  
4           this would explain the apparent absence of  
12:21 5           knife wounds to the nurse's dress, it also  
6           suggests that the circumstances of the  
7           rape/murder were complex, probably  
8           prolonged, and in my opinion, incapable of  
9           having occurred within the time frame  
12:21 10          suggested by the evidence at the trial."

11          Do you agree with Dr. Ferris' opinion stated  
12          there?

13          A       Well, I don't know because I've never had  
14          described to me or seen the lesions to the  
12:21 15          clothing. He's had a lot more information here  
16          than I've ever had.

17          Q       So for the purposes of the trial, you did not look  
18          at, or you did not get into looking at the  
19          clothing, knife wounds, et cetera?

12:21 20          A       No.

21          Q       The next paragraph, please:

22                 "I note from Dr. Emson's evidence that some  
23                 issue was made as to the apparent presence  
24                 of blood mixed with semen in the vagina. It  
12:22 25                 was suggested by Dr. Emson that the most



1           likely cause of this would have been  
2           staining with menstrual blood, however, he  
3           failed to find any evidence of menstruation  
4           at postmortem examination."

12:22 5           If I could just pause there. I thought we had  
6           gone through your autopsy report and you had made  
7           mention that she was commencing or about to  
8           commence menstruation?

9        A       Yes. We have been into this and I have said that  
12:22 10       the appearances of the lining of the uterus  
11       suggested that she was on the verge of  
12       menstruation and it is quite possible that a  
13       little blood could have been lost from this. I  
14       think Dr. Ferris is quite wrong here. Either he  
12:22 15       hadn't read that bit in my report or also he  
16       hadn't understood it.

17       Q       So where he says that you failed to find any  
18       evidence of menstruation at postmortem  
19       examination, you say that's wrong?

12:22 20       A       Yes. I've described it in the microscopic  
21       examination of the endometrium in the autopsy  
22       report.

23       Q       Now next to the bottom paragraph, please, it says:  
24                "Dr. Emson was unable to give a description  
12:23 25       of the type of knife used and whether or not



1           this knife was single-edged or double-edged.  
2           Although sometimes it is not possible to do  
3           this, a detailed examination of stab wounds  
4           and certainly in any case where there are  
12:23 5           multiple stab wounds, it would be very  
6           unusual not to be able to see from the  
7           examination of the skin wounds whether or  
8           not the pattern was one of a single edged or  
9           a double edged knife. I have not had an  
12:23 10          opportunity to examine photographs taken  
11          during the postmortem examination. It might  
12          be interesting for someone to review these  
13          photographs and see whether or not the shape  
14          of the knife can be determined from the  
12:23 15          photographs alone."

16           Do you agree with Dr. Ferris' statement there?

17        A       No. I have said that I have never, in the course  
18               of my experience, to my recollection, seen an  
19               injury from a double-edged knife and that with the  
12:24 20              narrowness of the blade of a single-edged knife,  
21              even on the side which is not sharpened, I have  
22              frequently been asked to demonstrate whether a  
23              wound was from a single-edged or a double-edged  
24              knife and found it very difficult to do so.

12:24 25        Q       Okay.



1           A           To do so means that there must be a very  
2                       considerable difference between the sharpened edge  
3                       and the blunt edge and looking at most knives made  
4                       of modern steel, there isn't.

12:24 5           Q           And again to page 002491, and again this is Dr.  
6                       Ferris' -- if you could just call out that last  
7                       part, and he says:

8                       "The general circumstances of the scene  
9                       would tend to indicate to me that the  
12:25 10                      offence may have taken place elsewhere and  
11                      that the body had been dumped."

12           If you go to the top of the next page:

13                      "Nevertheless, there is no clear evidence to  
14                      support this opinion. Of course the timing  
12:25 15                      of the whole event would also seem to make  
16                      this an unlikely scenario."

17           Do you agree with Dr. Ferris' -- I think it's an  
18           opinion or statement -- that the offence may have  
19           taken place elsewhere and that the body had been  
12:25 20           dumped? Are you able to provide any comment on  
21           that?

22           A           Well, I've never examined the whole evidence on  
23                       this, on the scene or anything else, so I'm not  
24                       able to give a valid opinion, but taking into  
12:25 25                      account the circumstances of a minus 40 morning,





1           it would appear at least a possibility that the  
2           sexual assault had taken place elsewhere and the  
3           body had been dumped afterwards. I find it very  
4           difficult to imagine a sexual assault outside at  
12:26 5           minus 40.

6           **Q**       Apart from that, Dr. Emson, was there anything in  
7           your autopsy that would address the issue of  
8           whether or not the sexual assault and murder,  
9           and/or murder took place outside or in a vehicle  
12:26 10           or elsewhere?

11          **A**       No, there was nothing in my examination to  
12           indicate this. I was not asked the question at  
13           the time, but from the report of the autopsy,  
14           there's nothing to indicate this at all.

12:26 15           MR. HODSON: Mr. Commissioner, I see it's  
16           approaching 12:30. This is probably as good a  
17           time as any to break. I will be about another  
18           half hour to an hour with Dr. Emson.

19           COMMISSIONER MacCALLUM: Thank you, and you  
12:27 20           will establish with counsel the order of  
21           cross-examination if you haven't done so already?

22           MR. HODSON: Yes, I will, Mr. Commissioner.

23           *(Adjourned at 12:28 p.m.)*

24           *(Reconvened at 2:00 p.m.)*

02:02 25           COMMISSIONER MacCALLUM: Before you begin,



1 Mr. Hodson, counsel, I just wanted to deliver a  
2 friendly admonition to counsel for parties with  
3 standing. Please ask your clients not to discuss  
4 with the media evidence that a witness is giving  
02:03 5 before that evidence is concluded. We warn  
6 witnesses during adjournments not to discuss  
7 their evidence because we want their independent  
8 recollection. A witness hearing of, reading or  
9 viewing a media interview of a party with  
02:03 10 standing concerning his or her testimony before  
11 it is finished could be influenced indirectly by  
12 that party. Thank you.

13 BY MR. HODSON:

14 Q Thank you, Mr. Commissioner. Dr. Emson, we talked  
02:03 15 before lunch about antigens and secretor status.  
16 At the time of David Milgaard's trial in 1969,  
17 1970, do you recall whether you were aware of  
18 whether David Milgaard, of his blood type or  
19 whether he had tested as a secretor or a  
02:04 20 non-secretor?

21 A I've never been informed of this in any official  
22 way. I've had hearsay and I've seen press  
23 accounts, but I've never been informed or  
24 consulted about this.

02:04 25 Q And again back at the time of Mr. Milgaard's trial



1 in 1970 or the prelim, do you recall having any  
2 discussions with any police officers or the  
3 prosecutor about David Milgaard's blood type or  
4 secretor status?

02:04 5 A No.

6 Q The next document is 001256 and just some  
7 questions. Are you familiar with a fellow by the  
8 name of Dr. Peter Markesteyn.

9 A Oh, yes, I've known him for a long time. He was a  
02:04 10 professor at the University of Alberta and then he  
11 was chief medical examiner for the Province of  
12 Manitoba. He's in retirement, but like myself he  
13 does consultation work and he's been involved in  
14 investigation of multiple deaths in Bosnia.

02:05 15 Q I see. So -- and I'm referring to a letter from  
16 him, June 4, 1990. At that time Dr. Markesteyn  
17 would have been practicing in the same area of  
18 medicine as you to your knowledge?

19 A He's recorded here, it's on the letterhead of the  
02:05 20 chief medical examiner of Manitoba.

21 Q Yes. And just a couple of items in this letter.  
22 If you could go to page 001259, please, and this  
23 is 1990, and just call out that paragraph. Dr.  
24 Markesteyn says -- actually, maybe just go back up  
02:05 25 to the paragraph before. Actually, go back to the



1 full page, please. I think just -- if you can  
2 call out that, I'm sorry, and he's talking about  
3 blood from the accused, and the first paragraph  
4 says:

02:06 5 "The other source of blood, from the  
6 accused's genitals, could be the result of  
7 injury or inflammation of the genito-urinary  
8 tract. However, no evidence was produced to  
9 indicate that Mr. Milgaard at the time of  
02:06 10 the assault had any injury or inflammation  
11 to his internal or external genitalia or  
12 urinary tract."

13 And if I pause there, sir, you don't recall  
14 looking at anything of that nature back in 1969  
02:06 15 or 1970 with respect to David Milgaard?

16 A Any specimen from Mr. Milgaard?

17 Q Yes.

18 A No. It's not that I don't recollect, I never did.

19 Q Right, thank you. It then goes on to say:

02:06 20 "I have addressed this matter with some  
21 detail in that it is my impression, for what  
22 it is worth, that some inference could well  
23 have been drawn that the blood and semen  
24 mixture in the vagina and the so-called  
02:06 25 blood and semen mixture retrieved from a



1 snowbank several days later were somehow  
2 linked together."

3 And my question is do you have any explanation as  
4 to how they may be linked together as Dr.  
02:07 5 Markesteyn suggests?

6 A I was never informed. I was presented with the  
7 snowbank material as a separate specimen and  
8 reported on it verbally, but never I think in  
9 writing, and the assumption was that it was in  
02:07 10 some way linked with the assault, but I was never  
11 told how.

12 Q And did you do any tests, any further tests other  
13 than identifying the spermatozoa?

14 A No.

02:07 15 Q It then goes on and says:

16 "In any event, there was insufficient blood  
17 there to be typed."

18 And I think you told me earlier this morning that  
19 there was in fact sufficient blood in the vaginal  
02:07 20 contents to be typed; is that correct?

21 A Well, Dr. Markesteyn does not make it clear what  
22 "there" means in that last sentence because he's  
23 discussing two specimens. Is he referring to both  
24 or one of them.

02:08 25 Q Very fair point, Doctor, so let me restate two



1 questions to you. Firstly, the vaginal contents,  
2 I think you told me this morning that there was  
3 sufficient blood to be typed?

4 A There might have been. The techniques in those  
02:08 5 days were not as subtle as they are now. There  
6 might have been. I don't know.

7 Q Now secondly, and you raise a fair point, the  
8 blood and semen mixture retrieved from the  
9 snowbank several days later, was there blood,  
02:08 10 sufficient blood in that sample to your knowledge  
11 to be typed?

12 A I have no recollection of there being any blood at  
13 all. I merely reported on the presence of  
14 spermatozoa. I can't remember whether we looked  
02:08 15 for blood and I can't remember whether we reported  
16 it.

17 Q Is looking for blood, is that something that a lab  
18 would do or is that something that you would do?

19 A It's something that you could have done under the  
02:09 20 microscope. When you are looking for spermatozoa,  
21 human red cells in spermatozoa are in the same  
22 range of size and if you could have seen one, you  
23 could have seen the other.

24 Q If you can just scroll down, please, and maybe  
02:09 25 have the next page at the bottom, top and bottom



1 here, please, and Dr. Markesteyn says, and I'll  
2 just read that:

3 "I disagree with Dr. Emson's testimony that  
4 shedding blood in semen is a quite "common  
02:09 5 occurrence" as the result of inflammation to  
6 penis, urethra, prostate and/or bladder. I  
7 disagree with Dr. Emson's thought expressed  
8 at that time that it was "accepted medical  
9 knowledge that small amounts of blood  
02:09 10 commonly find their way into seminal fluid  
11 of males of any age beyond puberty." I have  
12 been informed that the forensic laboratory  
13 in Winnipeg has never seen such a case.  
14 Other investigators also have failed to  
02:09 15 confirm this impression of Dr. Emson's."

16 If I stop there, I think you told me this morning  
17 that -- or let me ask you this. Would you agree  
18 with Dr. Markesteyn's comments there?

19 A He's right and I was wrong.

02:10 20 Q Just down at the bottom of this page, please,  
21 under knife wounds, and Dr. Markesteyn says:

22 "It is unlikely that all the knife wounds  
23 would be the name five-eighths of an inch in  
24 width. I am sure that the estimated depth  
02:10 25 of penetration of the knife blade took into



1 account the thickness of the coat (not  
2 stated) as to the possible length of the  
3 knife blade. In passing, I find it  
4 difficult to explain why the knife blade was  
02:10 5 broken in view of the fact that no bones  
6 were struck."

7 I have two questions. First, Dr. Markesteyn says  
8 that the estimated depth of penetration of the  
9 knife blade took into account the thickness of  
02:11 10 the coat, and I believe you told me this morning,  
11 sir, that you in fact did take the thickness of  
12 the coat into account in measuring the depth?

13 A Yes, I did, and there was also the fact, you  
14 remember, that there were fibres at the bottom of  
02:11 15 the wound indicating that the knife blade had  
16 passed through a garment.

17 Q Thank you. And the last sentence:

18 "I find it difficult to explain why the  
19 knife blade was broken in view of the fact  
02:11 20 no bones were struck."

21 The first question, do you recall in your autopsy  
22 whether any bones were struck by the knife?

23 A It's not recorded in the autopsy report and I  
24 don't recollect any being struck, and may I make  
02:11 25 another comment, please?





1 Q Yes, yes, you may.

2 A It is unlikely that all the knife wounds would be  
3 of the same five-eighths of an inch in width.  
4 Now, we have the photographs which show in fact  
02:11 5 that all of the stab wounds were of the same size  
6 very closely, so if Dr. Markesteyn's has seen  
7 this, then it is not unlikely it is in the  
8 material, it is in the evidence.

9 Q Yes.

02:12 10 A And the second thing is that if you have a  
11 relatively short knife and at each blow it is  
12 thrust in to its full length, then the knife  
13 wounds would be the same size.

14 Q And so is what you are saying, Dr. Emson, that all  
02:12 15 the knife wounds were the same five-eighths of an  
16 inch in width, the stab wounds?

17 A Yes, we measured them, they were, and it's in the  
18 pictures, and Dr. Markesteyn is wrong in this  
19 contention.

02:12 20 Q Now just down to the fact that Dr. Markesteyn says  
21 it's difficult to explain why the knife blade was  
22 broken in view of the fact no bones were struck.  
23 Do you have the same difficulty explaining it as  
24 he does or --

02:12 25 A Well, I don't recollect that I was presented with



1 a broken knife. I think the picture I've been  
2 shown here is of an intact knife.

3 Q And I believe, sir, your evidence this morning is  
4 that when you did the autopsy you were not  
02:13 5 provided with a knife blade?

6 A Not at that time, no. The knife was brought to me  
7 later. I can't remember how much later.

8 Q And do you recall whether you were either provided  
9 with the blade or advised by the police that the  
02:13 10 blade and handle were found separately?

11 A I can't remember.

12 Q To page 001261, just call out that paragraph,  
13 please, Dr. Markesteyn states:

14 "Human semen does not freeze into a  
02:13 15 yellowish stain at minus 40 degrees  
16 Fahrenheit. In fact, it is white and  
17 difficult to spot in snow other than through  
18 special techniques such as ultraviolet light  
19 exposure, etc. One of the two yellowish  
02:14 20 lumps was found to contain semen; the other  
21 one, although it looked the same, did not  
22 contain semen or any other human material in  
23 that it did not contain, we are informed,  
24 blood, sweat, tears or saliva. Dr. Emson  
02:14 25 examined the material prior to having it



1 sent to the crime laboratory in Regina. He  
2 has informed me that he was sure it was  
3 semen, but, that he could not say from what  
4 species it originated. The Serology Section  
02:14 5 determined it to be not only semen but of  
6 human origin. In order to reach a firm  
7 scientific conclusion whether the semen  
8 retrieved from the snowbank four days after  
9 the assault was indeed human one needs to  
02:14 10 review the methodology used by the  
11 serologist at that time and thus one needs  
12 to review the notes that were made at that  
13 time."

14 Now, do you agree with Dr. Markesteyn's comments  
02:14 15 there or do you have any --

16 A Well, to take them in order, I have no experience  
17 with freezing human semen so I can't comment on  
18 his first statement.

19 The second one, "did not  
02:15 20 contain, we are informed, blood, sweat, tears, or  
21 saliva ," I presume, there, that this was a  
22 chemical reaction and probably investigation by  
23 what is termed antihuman globulin, which is a  
24 react -- will react with any human protein and,  
02:15 25 thus, show whether virtually any material is of



1 human origin or not.

2 "Prior to having it sent to the  
3 crime laboratory;" I did not have it sent to the  
4 crime laboratory, this was a decision of somebody  
02:15 5 else. I examined it and gave it back to Mr.  
6 Penkala, and I, I just want it clear that that was  
7 not my decision or my authority.

8 I could not say from what  
9 species it originated; yes.

02:15 10 I don't know what methods were  
11 used by the Serology Section, this is presumably  
12 on record, and I would suspect that this, again,  
13 was the application of the antihuman globulin,  
14 which was a well-developed technique at this time  
02:16 15 in blood banking.

16 Q Now when they talk here about the Serology Section  
17 I think you said earlier this morning that lab  
18 testing at this time would have been done by the  
19 RCMP; is that your understanding?

02:16 20 A I have -- I can't remember for sure, but the  
21 probability, I mean in my mind -- and this can  
22 easily be established -- this says it was done in  
23 Regina, and this would be the RCMP lab at the  
24 Regina RCMP Depot.

02:16 25 Q Yes.



1 A And where they send what specimens has changed  
2 several times since then.

3 Q No. In fairness, sir, there are documents, and we  
4 will be hearing from members of the RCMP lab.

02:16 5 A Yes.

6 Q From your perspective am I correct, sir, that what  
7 you did with the frozen lumps were examine it for  
8 spermatozoa and then give it back to Mr. Penkala?

9 A That's all I did.

02:17 10 Q And you did not check whether it was human or not?

11 A This would not have been easy in my laboratory at  
12 the time, we were not set up for this type of  
13 test.

14 Q And you were not asked to, nor did you do that?

02:17 15 A No.

16 Q If you can then go to page 001263 and call out  
17 that paragraph, please, Dr. Markesteyn states:

18 "If, to everyone's satisfaction, it was  
19 established that the origin of the yellowish  
02:17 20 patch was unadulterated, uncontaminated  
21 human semen, then the presence of the  
22 A-antigen in this specimen clearly, from a  
23 serological point of view, could not be  
24 Mr. Milgaard's."

02:18 25 I'm wondering if you have any comment or whether



1           you agree with that?

2       A       Well, I don't know whether Mr. Milgaard's secretor  
3           status was established or not, I've never been  
4           informed of this.

02:18 5       Q       If Mr. Milgaard was not a secretor would, then,  
6           you agree with Dr. Markesteyn's statement?

7       A       Yes.

8       Q       And if Mr. Milgaard was a secretor?

9       A       It could have been.

02:18 10      Q       If Mr. Milgaard was a secretor would you agree  
11          with Mr. -- Dr. Markesteyn's statement?

12      A       No, because if Mr. Milgaard was a secretor, this  
13          could have been his specimen.

14      Q       Okay.

02:18 15      A       It could have been a specimen from any other A  
16          secretor too.

17      Q       Okay. Next, if you could go to 002483, and this  
18          is a memo to file from Eugene Williams, June 12th,  
19          1990. Do you recall talking at all to Eugene  
02:18 20      Williams? He's with the Criminal Prosecution  
21          Section of the Federal Department of Justice at  
22          the time.

23      A       No.

24      Q       If I could refer you to page 002485, and again,  
02:19 25      this is Mr. Williams' memo, Dr. Emson, so I just



1           wanted to ask you, he says here:

2           "The often quoted paragraph in Dr. James  
3           Ferris report:

4           On the basis of the evidence that I have  
02:19 5           examined, I have no reasonable doubt  
6           that serological evidence presented at  
7           the trial failed to link David Milgaard  
8           with the offence and that in fact, could  
9           reasonably be considered to exclude him  
02:19 10          from being the perpetrator of the  
11          murder..."

12          And then he goes on to say:

13          "... is perhaps best summed up by Dr. H.E.  
14          Emson during a recent interview. The latter  
02:19 15          noted:

16          Dr. Ferris provided a re-interpretation  
17          on the evidence on what we now know to  
18          be a fallacy."

19          Do you recall having that discussion?

02:20 20         A          No, not at all.

21         Q          Are you able to shed any light as to what that  
22                      comment means that was attributed to you?

23         A          I could only presume that there was some dispute  
24                      or variance over Mr. Milgaard's secretor status.

02:20 25         Q          Perhaps if I could just carry on to the next



1 paragraph, I should have read that to you, and  
2 this is Mr. Williams says:

3 "Very little, if any weight can be given to  
4 a conclusion that blindly ignored the  
02:20 5 obvious contamination of the samples that  
6 were collected. The conclusion is also  
7 wrong because an essential fact upon which  
8 it is based, namely, David Milgaard's status  
9 as a non-secretor, has not been  
02:20 10 established."

11 Is that -- are you able to tell me, sir, is that  
12 what you are referring to?

13 A I don't know what he means, that "obvious  
14 contamination of the samples."

02:20 15 Q I'm sorry, Dr. Emson, I want to go back to the  
16 comment --

17 A Sorry.

18 Q -- that's attributed to you and whether you are  
19 able to explain to me what you were referring to?  
02:20 20 Now I appreciate someone else recorded this  
21 comment.

22 A I'm sorry, we're back here to secretor and  
23 non-secretor, and I do -- I cannot remember what  
24 my statement quoted here was based upon.

02:21 25 Q Okay. That's fine.





1       A       I don't have a written record of this and I can't  
2               remember.

3       Q       Okay. Next, I would like to call up a document  
4               040497, and this is a report dated October, 1991  
02:21 5               by Neil Boyd, a Professor At the School of  
6               Criminology and Kim Rossmo, a Ph.D. candidate, and  
7               I would like to draw your attention to page 040513  
8               and just call up the last part there, please. And  
9               I'll just read this to you, Dr. Emson, and then I  
02:22 10              have a question for you. In this report the  
11              authors state:

12                    "At trial, the theory of the Crown was that  
13                    there was blood in the sample - blood from  
14                    David Milgaard. This theory was bolstered  
02:22 15                    by Dr. Emson's claims that blood within  
16                    ejaculate would be "a quite common  
17                    occurrence". Dr. Emson now indicates that  
18                    he would have to vary that testimony from  
19                    what he said at trial. He now knows that  
02:22 20                    such shedding of blood into the urethra is  
21                    not a common event."

22              And then footnote 29 refers to:

23                    "Personal communication, Dr. Emson,  
24                    Saskatoon, September, 1991."

02:22 25              Do you recall having a discussion with either



1 Neil Boyd or Kim Rossmo in 1991?

2 A No.

3 Q Is what they have reported you saying here  
4 accurate?

02:22 5 A Oh yes, this is what I have said before at this  
6 hearing, that my initial statement was wrong.

7 Q Yeah. And so it's possible that they did talk to  
8 you and you don't recall?

9 A If he says he talked to me, he presumably did, but  
02:23 10 I don't remember it.

11 Q And what he reports you having said, you say, is  
12 what you would have said?

13 A Yes.

14 Q Thank you. Next document 045652. And this  
02:23 15 refers, Dr. Emson, to some work the RCMP did in  
16 1993 in an investigation, and I'll show you  
17 specifically some comments, but do you remember  
18 talking to RCMP officers in 1993 about this  
19 matter?

02:23 20 A No.

21 Q Just call out this question 1 and I'll just read a  
22 portion of it here. I don't have the name of the  
23 officer at the bottom, I can't read it, but it  
24 says question 1:

02:23 25 "Q Why was what Dr. Emson obtained and



1 examined not turned over to the police?

2 A To answer this question I contacted  
3 Dr. Emson by telephone this morning  
4 and discussed this issue with him. In  
02:24 5 response to my question Dr. Emson  
6 advised that he does not know why the  
7 fluid that was aspirated from the  
8 vagina or the potential for any  
9 further fluid to have been aspirated  
02:24 10 from the vagina was not obtained and  
11 in turn turned over to the police. It  
12 could have been a case where the  
13 police simply did not directly ask for  
14 or take possession of this particular  
02:24 15 item that was subject to his findings.  
16 This was not a case where Dr. Emson  
17 specifically recalled off the top of  
18 his head whether or not he did or did  
19 not turn over such an exhibit. Dr.  
02:24 20 Emson pointed out that it is his  
21 practice to record in the autopsy  
22 report what exhibits he turns over to  
23 the police and as can be noted in his  
24 report, it is not referred to as being  
02:24 25 an exhibit handed over to the police."



1 Now that's what an RCMP officer wrote about a  
2 conversation with you, Dr. Emson, and my question  
3 is would that be accurate as to what you were  
4 thinking at that time, or your thinking today?

02:25 5 A Yes. And it is my practice always, was then and  
6 is now, to record what specimens were turned over  
7 to the police so that, if this material had been  
8 turned over, it would have been recorded.

9 Q And if you could turn to the next page, please,  
02:25 10 045653, and there is a question and answer here  
11 that I just wish to read, Dr. Emson, then have a  
12 question. And this relates to information the  
13 RCMP obtained from their Biology Section, and the  
14 question is:

02:25 15 "Q Had the fluid that was aspirated from  
16 the vagina been taken as a exhibit,  
17 would our lab ...,"

18 and, again, this is the RCMP lab:

19 "... have been able to examine it and  
02:25 20 been able to draw any further  
21 conclusions beyond that which Dr. Emson  
22 had already made in his examination?  
23 ie: determined a blood grouping that  
24 could point towards her assailant."

02:26 25 And the answer is recorded as:



1 "A As a result of a conversation with Jean  
2 Roney of our Biology Section this  
3 morning, I learned that a potential  
4 examination could have been done,  
02:26 5 however, such an analysis would not  
6 necessarily have produced conclusive  
7 results. Apparently where one is  
8 looking at a stain or fluid that  
9 involves both semen and in this case  
02:26 10 fluid from the deceased, the results  
11 could be such that the deceased's own  
12 bodily fluid could be so overpowering  
13 that it would mask a possible grouping  
14 of the human semen. In that case a  
02:26 15 grouping other than that of the  
16 assailant's may be determined. In other  
17 words, one could end up identifying  
18 Miller's own blood grouping. The lab  
19 would not be able to conclusively say  
02:26 20 that the Group O results are from Miller  
21 even though it would be a reasonable  
22 assumption under the circumstances."

23 And my question, Dr. Emson, is that consistent  
24 with what you told me this morning about, I can't  
02:26 25 recall the words you used, but concerns about



1           what type of blood grouping you could have done  
2           with the vaginal aspiration had you saved it?

3           A       What I said earlier today, I think, was  
4           approximately the same; that if the tests had been  
02:27 5           done the results would probably have been so  
6           confusing as to be inconclusive.

7                       But I would also say now, today,  
8           I know better; that it is better to do a test and  
9           then explain why its results are inconclusive than  
02:27 10          it is not to do one because its results would be  
11          inconclusive. It is always better, as a matter of  
12          defensive pathology, to do the test.

13          Q       Right. Next, if you could turn to page 045659 of  
14          this document, and these are notes that an RCMP  
02:27 15          officer took purportedly of a conversation with  
16          you, Dr. Emson, and I think you told me you don't  
17          recall any such conversation but I want to read a  
18          couple parts here and ask you whether this is --  
19          whether you agree with the statement that's  
02:28 20          attributed to you. And it says:

21                       "- Had Gail Miller had intercourse before  
22                       midnight the sperm would not have been  
23                       present. (This refers to consensual  
24                       intercourse)

02:28 25                       - had Gail Miller had consensual intercourse



1 after midnight the sperm would be present.

2 (Non-motile spermatozoa found as a result of  
3 the autopsy could be from her assailant)"

4 Do you agree with that statement?

02:28 5 A I think, now, I would stretch time more. If she  
6 had had intercourse before midnight, this would  
7 still have been within a 12-hour time frame to her  
8 time of death, and survival of spermatozoa, as I  
9 have said, is variable and not easy to predict,  
02:28 10 but I think this is a little bit too tight in  
11 timing; that sperm from an act of intercourse  
12 before midnight might have survived until her  
13 death.

14 Q Okay. Now this was recorded in 1993, Dr. Emson?

02:29 15 A Yes.

16 Q So is it possible that that's what you would have  
17 thought and told them at the time?

18 A It's possible, yes. I keep on learning.

19 Q Okay. Next, if I could call up document 105103,  
02:29 20 please. And this is a letter May 31, 1994 to the  
21 Chief of Police, Mr. Maguire, it -- that's your  
22 signature at the bottom, is it, right there?

23 A Yes.

24 Q And I'll just call that portion out. And it's:

02:29 25 "re; Regina vs Milgaard (murder) and



1 Mr. Fisher",

2 it says:

3 "You will remember the case in which Mr.  
4 Milgaard was convicted of the murder of Gail  
02:29 5 Miller and its subsequent evolution. I am  
6 the pathologist who performed the autopsy on  
7 Miss Miller. The case was later linked with  
8 Mr. Fisher, and it was suggested that he and  
9 not Mr. Milgaard committed the murder.

02:30 10 Mr. Fisher has just been released from  
11 prison having served his sentence for  
12 another rape and attempted murder. From his  
13 history it seems likely that he will rape  
14 again and possibly commit murder, and you  
02:30 15 have commented publicly on this issue.

16 I write to ask that, if you become aware  
17 of another murder which Mr. Fisher is known  
18 or suspected to have committed, in this or  
19 another jurisdiction, I may be informed. I  
02:30 20 should be most interested to compare my  
21 records of Miss Miller's autopsy with those  
22 of any murder which Mr. Fisher is suspected  
23 or alleged to have committed. Miss Miller's  
24 mutilation was unusual and I have only seen  
02:30 25 similar injuries in one or two other





1 homicides with a sexual element. Comparison  
2 with any future homicide in which Mr. Fisher  
3 is suspected to be involved, might throw  
4 interesting light on whether or not he might  
02:30 5 have been Miss Miller's assailant."

6 Now I take it you would have written that to the  
7 chief of police?

8 A I think that -- who was this addressed to?

9 Q Yeah, Mr. Maguire.

02:31 10 A Yes.

11 Q Yeah. Do you recall if you ever received anything  
12 back from them?

13 A No, I didn't, and my idea in this circumstance was  
14 what is termed, I think, modus operandi or M.O.,  
02:31 15 the general picture of an assault, and assailants  
16 do tend to repeat themselves.

17 The mutilating injuries, as  
18 opposed to the stab wounds on Miss Miller, I have  
19 only seen perhaps two or three times, other times,  
02:31 20 in my working life, and in those cases there was  
21 always a sexual element, and I wanted to know if  
22 any other case that was linked to Mr. Fisher,  
23 potentially, had similar injuries, because this  
24 would have been a very interesting discovery of a  
02:31 25 repetition of the same pattern. I never, in fact,



1 did get such information.

2 Q I see. And when you talk "Miss Miller's  
3 mutilation," is that -- are you referring to those  
4 lacerations on her neck?

02:32 5 A I'm referring to the slash wounds across the neck.

6 Q And when you say "... I have only seen similar  
7 injuries in one or two other homicides with a  
8 sexual element.", what were you referring to  
9 there?

02:32 10 A The same type of injury, the same type of injury,  
11 which is not apparently designed to kill but to  
12 mutilate.

13 COMMISSIONER MacCALLUM: What was the date  
14 of that letter, Mr. Hodson?

02:32 15 MR. HODSON: I'm sorry, the date of that  
16 letter is May 31, 1994.

17 BY MR. HODSON:

18 Q If you could then go to document 068604, please,  
19 and this is a letter July 19th, '97 from I believe  
02:32 20 it's Constable Little, but I'm guessing at the  
21 signature, but it's -- it relates to an interview  
22 with you at your home on July 19th, 1997. And I  
23 believe, if my dates are correct, that would be  
24 within a few days after the DNA evidence was  
02:33 25 released from England regarding the Gail Miller



1 sample. And it says here, and I just want to ask  
2 you about comments that are attributed to you,  
3 sir, it says:

4 "- Dr. Emson went on to make some other  
5 comments regarding this matter:

6 - since the Gail Miller homicide he has done  
7 either one or two other homicide autopsies  
8 where there were what he describes as  
9 similar cuts to the victims. He is  
10 referring to the superficial slashing cuts  
11 which he states are meant more to disfigure  
12 than to kill. He couldn't remember which  
13 cases these were other than one was a  
14 homosexual homicide. He felt that these  
15 were similar in style rather than the work  
16 of the same person, and were of interest  
17 because of that."

18 If I could pause there, and I think that's what  
19 you just told me, is that right?

02:34 20 A Yes. These injuries, it seemed to indicate a  
21 particular type of psychological pattern. Now I'm  
22 not a psychiatrist, and this isn't my specialty,  
23 but they are -- appear to be inflicted with a  
24 desire to disfigure, to demean, to denigrate the  
02:34 25 victim, rather than to kill.



1 Q Now on to the next paragraph -- now let me pause  
2 there. Dr. Emson, would you have had that same  
3 opinion back in 1969-1970?

4 A No, I don't think so, because I think -- I don't  
02:34 5 think I had ever seen a similar case, and I have  
6 only seen two or three in a practicing lifetime,  
7 but they stick in one's mind as a pattern in  
8 sexual assault. A sexual assault rape, we're  
9 told, is not a crime of sexual desire but a crime  
02:35 10 of hatred.

11 Q The next comment attributed to you is:  
12 "- Dr. Emson also states he has always felt  
13 that the body was dumped in the lane after  
14 the murder. He says he never visited the  
02:35 15 scene, but has seen the photographs. His  
16 belief is based on the outside temperature  
17 at the time and he was not concerned by the  
18 lack of blood at the scene. He went on to  
19 say that he was told there was no evidence  
02:35 20 to support the his theory."

21 Do you recall making comments like that to the  
22 officer?

23 A No, but I may well have done, and I would vary it  
24 now, to "always felt" to "always suspected the  
02:35 25 possibility". "Felt" is very strong, "suspected



1 the possibility" has always been my mind.

2 Q And this last comment here that says:

3 "He went on to say that he was told there  
4 was no evidence to support ... his theory."

5 Or:

6 "... the theory."

7 Do you recall anybody telling you that, that  
8 there was no evidence to support that, or --

9 A I must have discussed this, I think, with the  
02:36 10 police representatives, and they knew more than I  
11 did, they had been to the scene, I hadn't; they  
12 got all the other evidence, I didn't; and it may  
13 have been, again, that my suspicions were  
14 unfounded.

02:36 15 Q Okay. Next, Dr. Emson -- and we're nearing the  
16 end here -- you testified at Larry Fisher's  
17 preliminary hearing and trial; correct?

18 A Yes, I did.

19 Q I will just call up, for the record, the  
02:36 20 transcript of the prelim, 315606, and there's only  
21 one section I want to refer you to. Do you  
22 recall, Dr. Emson, being asked, I think by  
23 Mr. Beresh in cross-examination, about whether or  
24 not you saw a bite mark on Gail Miller when you  
02:37 25 did the autopsy?



1       A       No, I don't recall being asked, but if it is in  
2               the transcript I was.

3       Q       Okay. Maybe I'll just refer you to 315646, and if  
4               you could just call out 193, it says:

02:37 5               "Q   Fair enough."

6               And this is Mr. Beresh:

7               "Q   ... I take it, sir, that you had been  
8               exposed to individuals who had suffered  
9               bite wounds in the past, prior to '69?

02:37 10       A    A very -- I can't remember. Certainly  
11               not a significant number, because bite  
12               mark analysis was certainly not well  
13               developed by 1969."

14               and the next page, please, and then:

02:37 15       "Q   But clearly when you examined the body  
16               you found no evidence of any bite mark  
17               on her body?

18       A    No. We examined the body carefully,  
19               because this was -- in addition to  
02:38 20               being, I hope, a competent  
21               pathologist, this was obviously a  
22               homicide and was going to -- likely to  
23               finish up in court. And under such  
24               circumstances one is particularly  
02:38 25               careful. I found no evidence of



1                   significant other injury except a  
2                   number of bruises and grazes which are  
3                   recorded in the report.

4                   Q     Right. And none of those were  
02:38 5                   suggestive to you, in your expertise, of  
6                   being bite marks or --

7                   A     No

8                   Q     -- having been caused by teeth?

9                   A     No."

02:38 10                  Do you recall that exchange, Dr. Emson?

11                  A     No, but if it's there, --

12                  Q     Okay.

13                  A     -- it probably would have occurred.

14                  Q     And I'm going to show you a couple of photographs,  
02:38 15                  and I think it was either at the prelim or trial,  
16                  I believe it was Mr. Beresh may have put these to  
17                  you and asked whether you could identify them as  
18                  bite marks. The first is photograph 066731,  
19                  please, and if you could just zoom in on that  
02:39 20                  area, please. And this was exhibit 14 at trial.

21                  Do you see that round mark? Do you recall looking  
22                  at a photograph and being asked whether that  
23                  looked like a bite mark?

24                  A     No, I don't recall it, but it's certainly a valid  
02:39 25                  question.



1 Q Perhaps I will show you another photograph that  
2 may show it, 073514 please, and if you could zoom  
3 in on that photo, please, and in that area.  
4 That's not going to work. If we could go back,  
02:39 5 we'll try another photo, 066732. And you will  
6 see, do you see that mark there, if we could just  
7 -- yeah, that's fine, you will have to back out,  
8 that's too close.

9 A I think it's better in the larger photo.

02:40 10 Q That's fine, if it's like that, how's that?

11 A To me it's not so clear, I -- it may be my own  
12 eyesight, I prefer the full-length photo. The  
13 demark is there. We're talking -- can I point to  
14 this thing?

02:40 15 Q Yes, you may.

16 A We're talking about this mark here, in this  
17 region, aren't we?

18 Q Yes. This mark right here.

19 A Yes.

02:40 20 Q Yes.

21 A It's certainly semi-circular, and there are  
22 vagaries here, sometimes the oddity is that you  
23 don't see a lesion on examination but some fluke  
24 of the film will, or the type of film, will bring  
02:40 25 it up in later photographs, I think we're all





1 familiar with this, and that might not have been  
2 apparent -- as apparent at the initial examination  
3 as it was when the photograph was taken.

4 Q If you like, Dr. Emson, I actually have the  
02:41 5 original trial exhibit photograph, if -- would you  
6 rather look at a --

7 A No, it's -- the point is that the photographs, the  
8 emulsion on the photograph may be sensitive to  
9 something that your eye isn't as sensitive to --

10 Q Yeah.

11 A -- and, indeed, if you take different photographs  
12 with different films you may get totally different  
13 results.

14 That is certainly a suggestive  
02:41 15 mark now, it is a semicircular mark, it is  
16 approximately the size of the human jaw. But in  
17 1969, I had certainly seen very few or no bite  
18 marks before, and we did not at that time have a  
19 College of Dentistry or anybody doing forensic  
02:41 20 dentistry in the province, that I can recollect.

21 Q Do you recall, in 1969 or 1970, any discussion  
22 with anybody about whether or not there was a bite  
23 mark on Gail Miller?

24 A No, I don't.

02:42 25 COMMISSIONER MacCALLUM: Mr. Hodson, I



1 would like to see that photograph, if you could  
2 hand it up, please. Thanks. You say this was an  
3 exhibit at the trial?

4 MR. HODSON: Yes.

02:42 5 COMMISSIONER MacCALLUM: At the Milgaard  
6 trial?

7 MR. HODSON: Yes, and the number --  
8 actually, if you look on the front page of the  
9 booklet, it has the exhibit number, and then  
02:42 10 number 15 is the photograph number.

11 COMMISSIONER MacCALLUM: So that what I am  
12 looking at now is a black and white photograph of  
13 what has been marked in this inquiry as number  
14 066732, and it was marked in the Milgaard trial  
02:43 15 as Exhibit 15, and would you hand that, Madam  
16 Clerk, to Dr. Emson.

17 MR. HODSON: If you like, Dr. Emson, I  
18 actually have, there may be one other -- while  
19 you are looking at that, Dr. Emson, if you could  
02:43 20 call up 077880, please, and this is a, it might  
21 be the same -- it might be a colour photograph of  
22 the same.

23 COMMISSIONER MacCALLUM: 077 what? Oh,  
24 880.

25 BY MR. HODSON:



1       Q       Yeah, no, I'm sorry, that's the same photo. I'm  
2               just seeing if there might be a better -- okay.  
3               If you can go back to the previous photograph,  
4               please.

02:44 5                       Dr. Emson, does examining the  
6               original exhibit photograph assist you in any way?

7       A       No. The mark is there, it's a semicircular mark,  
8               it's compatible with the size of a human jaw.  
9               This is the first time to my knowledge we've  
02:44 10              commented on it specifically in regard and I can  
11              only say now what I think I would always have  
12              said, it's suspicious, but it's not conclusive.

13      Q       Next if you could call up document 313838 and just  
14               confirm that this is the transcript of your  
02:44 15              examination at Larry Fisher's trial. You recall  
16              being a witness at that trial?

17      A       I do, and I would point out that my name is  
18               wrongly spelled in this.

19      Q       Would that be the Edmond?

02:45 20      A       Yes. It's U-N-D.

21      Q       That was the only question I had for you on that  
22               transcript, sir. A couple of final questions. If  
23               you were doing Gail Miller's autopsy today,  
24               Dr. Emson, what if anything would you do  
02:45 25              different?



1 A Well, first of all, we would have had -- we would  
2 have, if we did it tomorrow, a great deal more  
3 specialized police assistance. We would have  
4 people who specialized as major crime  
02:45 5 investigators, there is a unit in the Saskatoon  
6 City Police, we would have had specialized  
7 identification officers and we would have had a  
8 great deal more accumulated expertise over the  
9 intervening, what is it, 35 years?

02:46 10 Q Yes.

11 A The whole science of crime investigation has  
12 developed exponentially in that period as has most  
13 other science. We've had a lot more experience  
14 and we've learned a lot more from other people's  
02:46 15 experience and we've got a lot more equipment.  
16 The second thing is in terms of the sexual  
17 assault, the police would deploy a special sexual  
18 assault kit which has a protocol and a requirement  
19 or request for various specimens so that we're not  
02:46 20 left to our own initiative on this. We have a  
21 great deal of again accumulated experience over  
22 what to obtain and of course a tremendous range of  
23 techniques over what can be done, and then more  
24 important than anything else, we have DNA evidence  
02:47 25 which we can use specifically to identify a given



1 individual out of I think the world population,  
2 the individuality is as specific as that apart  
3 from identical twins.

4 If I were doing it, I've got 35  
02:47 5 years more experience and the experience of the  
6 police, the combined experience of the police  
7 officers would be a great deal greater, but  
8 basically speaking, these same procedures would  
9 have been followed. When people produce an  
02:47 10 autopsy report 35 years old, one is a little  
11 worried. I'm not in the least ashamed of this  
12 one. I think it was a competent autopsy at the  
13 time and place and I think we can pick minor holes  
14 in and around it now, but basically speaking, the  
02:48 15 right things were done, and what I would do  
16 tomorrow would be essentially the same, but with  
17 the 35 years' increase of experience and  
18 technology that we have since then.

19 MR. HODSON: Thank you very much,  
02:48 20 Dr. Emson. Those are all my questions. Counsel  
21 for other parties will have some and I think they  
22 will introduce themselves and who they represent  
23 when they come forward.

24 **BY MR. LOCKYER:**

02:48 25 **Q** Good afternoon, Dr. Emson. I'm here representing



1 Mrs. Milgaard and I want to begin by just spending  
2 a little more time on the sample that you took  
3 from Ms. Miller's vagina which you then destroyed,  
4 or discarded I think is a word that has been used.  
02:49 5 First of all, do I understand that it was likely  
6 discarded on the day of the autopsy?

7 A Yes.

8 Q And you've told us that, I think you said at the  
9 preliminary hearing, and it has been read to you,  
02:49 10 back in 1969 that you seized about two cubic  
11 centimetres of material; is that right?

12 A I don't recollect the volume being recorded, but  
13 that would be about right.

14 Q And am I right, sir, I go back pre DNA days just  
02:49 15 as you do, that -- in the profession that is --  
16 that back prior to DNA in sexual assault-type  
17 cases, forensic scientists regularly examined  
18 semen seized from scenes to see whether they could  
19 identify the perpetrator as a secretor or a  
02:50 20 non-secretor or even give, if the perpetrator was  
21 a secretor, give a blood type within the ABO  
22 system of the assailant; is that right?

23 A I didn't do it, but if it was regularly done in  
24 the forensic laboratories at that time I don't  
02:50 25 know.



1 Q Because the irony in this case, sir, is that you  
2 having destroyed or discarded what you seized,  
3 just a few days later we have the RCMP lab in the  
4 person of a Mr. Paynter looking without really any  
02:50 5 success at all, some minor success perhaps on the  
6 panties, for semen on Gail Miller's clothing, so  
7 he's trying to replicate what you have discarded  
8 just a matter of days before. Did you know that?

9 A I'm sorry, is that a question?

02:50 10 Q Yes, it is. Did you know that?

11 A No.

12 Q Whereas if what you had discarded had been kept,  
13 he would have been off to a very good start  
14 without even having to go to the clothing in the  
02:51 15 first place; right?

16 A He would have had more sample tests, certainly.

17 Q And if we take the now known facts of this case,  
18 sir, which is that the deceased Gail Miller was a  
19 type O and her killer, Larry Fisher, was an A  
02:51 20 secretor, under those circumstances what you  
21 discarded, it could have been really quite useful  
22 even back in those days in identifying the  
23 perpetrator, the results?

24 A Yes.

02:51 25 Q Right?



1 A Yes.

2 Q And obviously by the time we get into the late  
3 '80s, perhaps '88, '89, '90, somewhere around  
4 there when DNA starts becoming available, DNA  
02:51 5 typing becomes available to forensic labs,  
6 obviously that sample that you discarded may well  
7 have produced a result back in those years, the  
8 late '80s, certainly at the very latest the early  
9 '90s; is that right?

02:52 10 A Yes, if it had been stored so long.

11 Q So was it a regular practice back then to destroy  
12 samples of that nature in a sexual assault case  
13 without even trying to type them in the first  
14 place?

02:52 15 A Well, I don't know because I saw very few  
16 homicides where sexual assault was involved. They  
17 were and are a considerable rarity. I can only go  
18 back and presume, this is an assumption, that at  
19 the time of the autopsy we discussed whether there  
02:52 20 was a further use for this specimen and we were  
21 not aware or we did not realize that there was a  
22 further use for it.

23 Q One of the things that has come out of previous  
24 inquiries of this nature, sir, is retention  
02:53 25 policies, so, for example, at the Morin Inquiry,





1           which you are certainly familiar with -- you've  
2           heard of anyway; right?

3           A       Yes.

4           Q       The recommendation that was made by the  
5           Commissioner there, it's recommendation 29 of the  
6           Morin Inquiry under the heading post-conviction  
7           retention of original evidence, the Commissioner  
8           recommended the following, and I quote:

9                    "That the ministers of the attorney general  
10                   and solicitor general, in consultation with  
11                   the defence bar and other stakeholders in  
12                   the administration of criminal justice,  
13                   should establish protocols for the  
14                   post-conviction retention of original  
15                   evidence in criminal cases."

16           You understand the recommendation?

17           A       Yes.

18           Q       Which has, incidentally, since been followed  
19           through on by the solicitor general's office, or  
20           by the ministry in Ontario. Presumably you  
21           would -- perhaps I should just ask you. Would you  
22           feel such a recommendation would be a good idea in  
23           this province as well, sir?

24           A       I would go rather further than that, that I have  
25           learned over the years that it is always better to



1 retain everything if you can because more and more  
2 we do not know what techniques will be available  
3 in the future. We cannot predict in '05 what  
4 techniques are going to be available in '15 and  
02:54 5 for this reason, as I say, over the years of  
6 experience, really formed the opinion it is better  
7 to retain almost everything, everything you can  
8 even if you don't know what you are retaining it  
9 for.

02:55 10 Q Commissioner Cory at the Sophonow Inquiry, sir,  
11 was more specific, he recommended, and I quote:

12 "That exhibits should be stored for at least  
13 20 years from the date of the last appeal or  
14 expiry of the time to undertake that  
02:55 15 appeal."

16 Would you think that's a pretty good  
17 recommendation as well?

18 A If you are setting a time frame, yes. The problem  
19 always arises in this sort of instance as to what  
02:55 20 space you've got and where, but that's a matter  
21 for administration. In principle I think now you  
22 should always keep everything.

23 Q And there's no such retention policy in this  
24 province at the moment; is that right, sir, as far  
02:55 25 as you know?



1 A I'm not aware.

2 Q And you probably would be if there was one?

3 A No, not necessarily. The police and the  
4 department of justice can have policies of which I  
02:55 5 am not aware.

6 Q Did you see your job back in 1969, sir, as in any  
7 way being a reconstructionist-type job, where you  
8 were to try as best you could, for the assistance  
9 of the police, to reconstruct the crime?

02:56 10 A No.

11 Q Okay. Would you see that as being one of the  
12 roles of the pathologist today?

13 A It would be very difficult in my circumstances  
14 where I may be dealing with homicides from a site  
02:56 15 200 miles away. I am very rarely aware -- well,  
16 never aware of all the significant circumstantial  
17 evidence, and as I have said earlier in this  
18 inquiry, my job is to put my piece of the jigsaw  
19 in and to make as sure as possible that it is  
02:56 20 congruent with the neighbouring piece.

21 Q In this case, sir, you conducted the autopsy how  
22 far from the scene of the murder?

23 A I'm not sure. I think it was within a mile.

24 Q And did you ever give consideration to going to  
02:57 25 the scene, sir?



1 A I was never asked to.

2 Q Well, true, we all do things sometimes that we  
3 aren't asked to do, we sometimes act on our own  
4 initiative. Did you consider that, sir?

02:57 5 A No, I didn't. I don't think my acting on my  
6 initiative to intervene in a police investigation  
7 would be, then or now, welcome.

8 Q So you don't think even today that it would be  
9 helpful or an idea for you to say to the police  
02:57 10 what do you think of me attending the scene and  
11 help you reconstruct this crime?

12 A Under our present system of administration I would  
13 want that suggestion to come from them.

14 Q I'm sorry, I didn't hear you.

02:57 15 A Under our present system of administration I would  
16 want that suggestion to come from them.

17 Q Why?

18 A Because our spheres of influence are defined. I  
19 do not welcome a direction from anybody else as to  
02:57 20 how I shall conduct an autopsy and equally another  
21 participant in the investigation may not welcome  
22 an intervention from me.

23 Q Surely we're not dealing with individual  
24 sensibilities here, sir. Why wouldn't you just  
02:58 25 say to a police officer as a matter of course what



1 do you think of the idea of me attending the scene  
2 of the crime?

3 A It would have to be established as a normal  
4 practice. I have a number of homicides currently  
02:58 5 in my files awaiting one form or another of legal  
6 procedure arising within two or three miles of the  
7 hospital where I work. In none of these have I  
8 been asked to go to the scene of the crime. It is  
9 not I think within my scope as a pathologist  
02:58 10 working under the Coroner's Act to suggest this.  
11 It is a matter for the police or the other  
12 investigating officers to decide that this might  
13 be useful.

14 Q Let me ask you this. Do you think in some cases  
02:58 15 it would be helpful, sir, for you as the  
16 pathologist to attend the scene of the crime?

17 A I don't know about the scene of the crime, but it  
18 certainly would be helpful in some of the cases I  
19 investigate, but --

02:59 20 Q I'm not sure what you mean by investigate. As a  
21 pathologist you mean?

22 A I'm thinking of other things which are not  
23 criminal like death from epilepsy which may result  
24 in very peculiar positions and circumstances which  
02:59 25 are hard to explain. Sometimes one gets a good



1 account, sometimes one doesn't, but as things  
2 stand, no, I would not suggest this to the police.  
3 If this suggestion is going to come, it's going to  
4 have to come from someone else.

02:59 5 Q You lost the question, sir. Let me do it again.

6 Do you think in some cases, sir, that you've  
7 conducted as a pathologist, some homicides on  
8 which you've worked as a pathologist, it would  
9 have been helpful for your work and potentially  
02:59 10 for the case as a whole if you had gone to the  
11 scene of the crime?

12 A I can't think of any at the moment.

13 Q You don't think it would have been helpful in this  
14 case?

03:00 15 A Not from the scene photographs I've seen, no.

16 Q Do you think it would have been helpful, sir, to  
17 the investigation if you had conducted a more  
18 detailed examination of the clothing and worked  
19 out the significance of where there were tears or  
03:00 20 rips in the clothing or cuts in the clothing and  
21 where there weren't?

22 A I've never heard any suggestion that this would  
23 have raised more pertinent evidence.

24 Q Well, were you -- did you ever become aware, sir,  
03:00 25 I don't know to what extent you ever got into this



1 case in depth, but let me ask you this at a very  
2 superficial level in this case, did it ever  
3 become, did you ever come to know that in essence  
4 the police and prosecutorial theory of culpability  
03:01 5 on David Milgaard's part depended on a conclusion  
6 that the assault, rape and murder had all taken  
7 place in the outside essentially right where she  
8 was found dead?

9 A I was aware of this.

03:01 10 Q You were?

11 A I was aware that that was their conclusion.

12 Q Okay. Let me -- I'm not sure if we're on the same  
13 wavelength here. Were you aware, sir, that that  
14 had to be the conclusion if they were to pin  
03:01 15 responsibility on David Milgaard?

16 A No.

17 Q You didn't know that?

18 A No.

19 Q Did you know that up until I just put it to you?

03:01 20 A No. I was not and am not aware of all the  
21 circumstances of the police investigation, of them  
22 establishing in their belief that all the events  
23 took place at the same site.

24 Q In the open?

03:01 25 A Yes.



1 Q You never knew that until I just pointed it out to  
2 you?

3 A No.

4 Q Okay. Which raises a further point, sir, as to  
03:02 5 did you ever feel in the '80s and the '90s when  
6 this case is getting as much publicity as it is  
7 and you know that David Milgaard is protesting his  
8 innocence, both himself and through members of his  
9 family and others, did you ever feel that there  
03:02 10 was an obligation on your part, sir, to review the  
11 case yourself to see whether you could assist in  
12 determining whether he had been wrongly convicted?

13 A A little earlier in my evidence there was a letter  
14 produced which I had written to the then chief of  
03:02 15 police asking that if Larry Fisher was ever  
16 involved or suspected of being involved in a  
17 similar event, that I should be informed because I  
18 would like to compare the *modis operandi* in the  
19 two, so to that extent I was sensitive.

03:03 20 Q That's two years after David had been set free by  
21 the Supreme Court of Canada. If we can go pre '92  
22 when he was set free by the Supreme Court of  
23 Canada, did you ever feel that you, as the  
24 pathologist on the case, should pay an interest  
03:03 25 and review the case yourself from the perspective





1 as one of the, really the only independent expert  
2 who had been involved in the case from the outset?

3 A I don't know what I could have reviewed. My  
4 findings were pretty straightforward and did not  
03:03 5 specifically point to anybody, and what more I  
6 could have done in the 1980s I do not know.

7 Q Well, throughout the 30 odd years, or 30 plus  
8 years of the case, you always seemed to have  
9 expressed the same opinion, that you believed that  
03:04 10 the sexual assault most likely took place inside,  
11 not outside; is that right?

12 A Well, that was because of the sheer, to my mind,  
13 improbability of a sexual assault occurring  
14 outside at minus 40, but the information I had  
03:04 15 then and have now is that all the circumstantial  
16 evidence pointed to all the events having occurred  
17 at the same place. I was not in possession, nor  
18 am I in possession, of all that other  
19 circumstantial evidence.

03:04 20 Q Well, the only circumstantial evidence of that,  
21 sir, so to speak, was premised on the assumption  
22 that David Milgaard had committed the crime,  
23 because it had to have happened that way for him  
24 to have committed the crime. Do you understand?

03:04 25 A I can understand that, but it appears to me to be



1 reasoning in the wrong direction.

2 Q Well, that's true, and I'm just thinking, sir, and  
3 I'm really not meaning to be critical of you here,  
4 sir, understand that, it just seems to me that if  
03:05 5 you had got involved in this case when it was  
6 becoming as notorious as it was post conviction,  
7 in the '80s and -- '70s, '80s and '90s, that  
8 perhaps you had a valuable contribution to make in  
9 terms of your view that it seems quite unlikely  
03:05 10 that this crime took place in the open air.

11 A I don't know how I could have been involved  
12 further, and that opinion had already been  
13 expressed to the investigators.

14 Q I'm wondering if you feel, sir, that from a  
03:05 15 systemic point of view, that in the future in a  
16 case like this someone in your position should  
17 perhaps have a duty to get involved in reviewing  
18 the case and studying it, it might be very helpful  
19 to exposing miscarriages of justice in the future?

03:06 20 A One of the possibilities in this is the  
21 involvement of another forensic pathologist and  
22 indeed I have been involved since the Milgaard  
23 case in another case of wrongful conviction where  
24 the initially convicted man was subsequently, at a  
03:06 25 later retrial, acquitted, so that to that extent I



1 think one of the possibilities you suggest is the  
2 bringing in of another forensic pathologist or  
3 indeed the possibility of a panel of forensic  
4 pathologists sitting in review on such a case, but  
03:07 5 what, I repeat, what more as an individual I can  
6 or should have done in this case I do not know.

7 Q I'm going to come to the case you just referred to  
8 shortly and talk more about your panel idea, sir,  
9 but do you think that perhaps in the pre '92  
03:07 10 period, that it might have been helpful if the  
11 powers that be, who were trying to uphold David's  
12 conviction, had consulted with you for some  
13 opinions on the case, because they didn't, did  
14 they?

03:07 15 A No.

16 Q No.

17 A And I was not asked to appear at the Supreme Court  
18 either.

19 Q Do you think it might have been a good idea if  
03:07 20 they had, sir, if only so you could tell them that  
21 you always had problems with the idea that this  
22 crime was committed in the open?

23 A I would be very willing to be re-consulted on any  
24 of my cases if there is a suspicion or a doubt as  
03:08 25 to the validity of the conviction. I do not like



1 being involved in miscarriages of justice, but in  
2 this case, as I say, examining my conduct, I do  
3 not know what more I could or should have done.  
4 If some authority had consulted me, of course I  
03:08 5 would have given them all the help I could.

6 Q Well, insofar as this case sort of ever got moving  
7 in the direction of ultimately exonerating David,  
8 sir, it was through Dr. Ferris who really got  
9 things moving, so to speak, back in the '80s, a  
03:08 10 man of your profession, and I can't help noticing  
11 that, or pointing out that when you were asked  
12 about Dr. Ferris some years later by the RCMP, you  
13 referred to him as a grandstander. Do you  
14 remember that?

03:09 15 A No. It would be a very improper comment to make  
16 on a fellow pathologist and indeed a more improper  
17 one to record.

18 Q Mr. Commissioner, it's at 034488 that that  
19 appears. This is an interview of you, sir, on the  
03:09 20 12th of February or the 2nd of December, I'm not  
21 sure which, of 1993. It's not an interview of  
22 you, it's a report of an interview of you I think  
23 is probably a better way of putting it, and you'll  
24 see in the passage that I've just circled there  
03:10 25 that the following is written:



1 "In a report to Hersh Wolch, he --"

2 Meaning Dr. Ferris -- sorry:

3 "In Dr. Ferris' report to Hersh Wolch, he  
4 refers to the pathology evidence of  
03:10 5 Dr. Emson. During the interview of  
6 Dr. Emson on the 10th, a copy of Dr. Ferris'  
7 report was shown to Dr. Emson.

8 Dr. Emson is fully comfortable  
9 with his autopsy and findings based on the  
03:10 10 resources available to him in 1969 and feels  
11 he did an admirable job. He describes the  
12 conflict of opinion of Dr. Ferris in his  
13 report as erroneous to some degree and  
14 described him as being a 'grandstander'."

03:10 15 Do you remember that, sir?

16 A No, I don't. By whom is this report made or  
17 signed?

18 Q Well, it's an RCMP officer by a name of -- well,  
19 two of them, Williams and Jorgenson.

03:10 20 A No, I don't remember this, and it seems to me, I  
21 hope unlikely, that I would have described my own  
22 report as admirable, and if I described Dr. Ferris  
23 as a grandstander, it was quite wrong of me. I  
24 don't remember doing it and it would be a term I  
03:11 25 would not willingly employ in a comment upon



1 another professional, but if these people have  
2 written it down, then they must have heard it.

3 Q When and how did you first hear of Larry Fisher,  
4 sir?

03:11 5 A I can't remember.

6 Q Can you remember how?

7 A No. I can only presume in some media publication.

8 Q And did you ever form, prior to July 17th, 1997  
9 when the DNA results became public, indeed it was  
03:11 10 the day of the results too, did you -- had you  
11 ever formed an opinion in the meantime about David  
12 Milgaard's innocence or guilt, sir?

13 A No.

14 Q Because certainly your 1994 letter to Chief of  
03:12 15 Police Maguire that was shown to you, the May  
16 31st, '94 letter that was shown to you by  
17 Commission Counsel, you know the one I mean --

18 A Yes.

19 Q -- a reading of it would suggest that you had  
03:12 20 drawn the conclusion that Larry Fisher had likely  
21 committed the crime by 1994; is that right?

22 A No, certainly not. What had been suggested was  
23 that he might have been involved and as Mr. Fisher  
24 was a serial sexual criminal, it appeared possible  
03:12 25 that he had a specific pattern of action, a *modus*



1           *operandi*, as such people often do repeat  
2 themselves. What was in my mind is that if there  
3 was any record or any subsequent involvement of  
4 Mr. Fisher, that it would have been, as I think I  
03:12 5 said in my letter, of interest to compare this  
6 with the Miller findings.

7       **Q**       The fact that you never got a reply to that, sir,  
8 is, at least to me, a little disturbing. When you  
9 wrote that letter were you still working for the  
03:13 10 Government of Saskatchewan?

11       **A**       I don't work for the Government of Saskatchewan.

12       **Q**       I don't mean -- don't take offence. I'm not quite  
13 sure what your capacity is.

14       **A**       At that time I was professor and head of the  
03:13 15 department of pathology in the University of  
16 Saskatchewan. At present I am an independent  
17 practicing pathologist performing autopsies under  
18 the Coroner's Act as, I understand, a specialist  
19 physician. I do not work for a government.

03:13 20       **Q**       All right. Well please take the annoyance out of  
21 your voice, sir, and let's just carry on, because  
22 what I want to know, the reason I ask the question  
23 is this: Is there any reason in principle why  
24 Chief Maguire wouldn't have responded to you --

03:13 25       **A**       No.



1 Q -- that you can think of in the context in which  
2 you are asking the question?

3 A No.

4 Q All right.

03:14 5 A But I had thrown out the suggestion and my only  
6 presumption would be if anything had come up, I  
7 would have been informed. As it is, I do not know  
8 of another similar case in which Mr. Fisher has  
9 been implicated.

03:14 10 Q If we could go to 033006, please.

11 COMMISSIONER MacCALLUM: Mr. Lockyer, just  
12 be conscious of an appropriate interval to stop.

13 MR. LOCKYER: Why don't I just do this, Mr.  
14 Commissioner, and that would be a good time.

15 MR. COMMISSIONER: Right now?

16 MR. LOCKYER: Sure, unless they are having  
17 trouble finding it.

18 MR. HODSON: What document?

19 MR. LOCKYER: 033006.

03:15 20 COMMISSIONER MacCALLUM: There you are.

21 BY MR. LOCKYER:

22 Q Page 2 of the document, please. This is a memo,  
23 sir, from Mr. Fainstein who was the department of  
24 justice lawyer who opposed Mr. Milgaard's  
03:15 25 application to set aside his conviction in the





1 Supreme Court of Canada and he's here sending a  
2 memo to a man called Dave Werrett who is one of  
3 the people in the, at the Forensic Science  
4 Centre -- sorry, the Forensic Science Services in  
03:15 5 England at the time they were in the midst of  
6 doing the DNA testing in 1997 that ultimately led  
7 to David's exoneration and Larry Fisher's arrest.  
8 Are you with me?

9 A Yes.

03:16 10 Q It was written just actually a day before, if not  
11 the day of, but before the DNA results had been  
12 obtained. Do you understand?

13 A Yes.

14 Q Mr. Fainstein is trying to give some information  
03:16 15 to the Forensic Sciences Service to assist them in  
16 comprehending the case background, if you like,  
17 for the purposes of their testing. Do you  
18 understand?

19 A Yes.

03:16 20 Q And you'll see if we focus in at the bottom of  
21 page 2 -- it's page 1 in a sense -- Mr. Fainstein  
22 writes:

23 "Here are a few observations that I hope  
24 will assist your understanding of the case.

03:16 25 Dr. Emson testified at the trial, as



1 follows, about the clothing:

2 A When we started the examination the body  
3 was clothed most externally in a black coat  
4 with both arms fitted into the sleeves.

03:17 5 Below the coat there was a white uniform of  
6 the type which nurses wear; this had been  
7 rolled down around the waist so that the  
8 arms of the body were out of the uniform but  
9 reinserted into the sleeves of the coat.

03:17 10 There was a brassiere off of which the right  
11 strap was broken, and a light girdle."

12 And further:

13 "There was a pair of white stockings pulled  
14 down around one ankle, and a single boot on  
03:17 15 the left leg."

16 And that was your trial testimony; understand,  
17 sir, or part of it?

18 A Yes.

19 Q Go to the next page. Sorry, I can't read the top  
03:17 20 line.

21 A Do you want me to try to --

22 Q Can you help me?

23 A "Dr. Emson also testified that toward the  
24 end of his examination, around 4 or 5 p.m.,  
03:17 25 he found a large quantity of --"



1 And then -- that's how I read it.

2 Q Right, I think you are right:

3 "-- non-motile sperm and fluid taken from  
4 the vagina. (The body was found at 8:30  
03:18 5 a.m. in the morning. The killing took place  
6 after the victim left for work. She was  
7 required to report at the hospital at 7:30  
8 for an 8 a.m. shift). Unfortunately,  
9 Dr. Emson discarded the fluid after his  
03:18 10 examination for sperm."

11 Okay, we now go on, and this is Mr. Fainstein,  
12 the prosecutor speaking:

13 "Gail Miller was killed in Saskatoon,  
14 Saskatchewan on January 31st, 1969. It was  
03:18 15 bitterly cold that morning. (I forget the  
16 exact temp. but it was somewhere in the  
17 range of minus 30 to minus 40, the latter  
18 being the point where Farenheit and Celsius  
19 scales converge). I believe that she was  
03:18 20 raped in a car, then pulled on her coat  
21 without taking the time to put her arms back  
22 through the sleeves of her dress, tried to  
23 flee down a lane way, then was caught and  
24 stabbed by her assailant. This would also  
03:18 25 explain why she was stabbed through her



1 coat, but not through her dress."

2 You see that, sir?

3 A Yes.

4 Q What's interesting about that is if Mr. Fainstein  
03:19 5 believed what he wrote he believed there, he is  
6 acknowledging before the DNA results that he  
7 thinks David Milgaard is innocent, in effect,  
8 because that's an impossible scenario if David  
9 Milgaard was the killer. Do you understand, sir?

03:19 10 A No, I don't, because I'm not --

11 Q I'm putting it to you as a statement of fact, if  
12 you will, and I'm asking you if you understand  
13 that as I statement of fact.

14 A I understand it as a statement of fact.

03:19 15 Q That's all I'm trying to do. And I think it's  
16 fair to say, sir, that in coming to that  
17 conclusion he has relied, certainly to some  
18 extent, on the evidence that you gave, because he  
19 just quoted it, at the trial; do you follow, in  
03:19 20 the same memo. Do you understand me?

21 A He -- his -- I don't have a -- are you saying that  
22 he is relying on the evidence that her arms were  
23 back in the sleeves in her coat but her dress was  
24 still rolled up?

03:20 25 Q Certainly, that would be a part of it one would



1 think, yes?

2 A Yes.

3 Q So do you see, sir, Dr. Emson, how your  
4 intervention in the 690 process may have been of  
5 assistance to the cause of justice if you had  
6 intervened back in the '80s and '90s?

7 A I still don't know how I could have intervened.

8 Q But do you see how it might have been helpful if  
9 Mr. Fainstein, who had apparently drawn this  
10 conclusion before the DNA results come along, if  
11 he had consulted with you before the Supreme Court  
12 of Canada reference where he so determinately  
13 opposed David Milgaard's conviction being set  
14 aside?

15 A Everybody else had the same information.

16 Q This is a good time, Mr. Commissioner.

17 Mr. Commissioner, I have to  
18 catch a plane leaving at 4:15; could we shorten  
19 the break by ten minutes, five minutes? I may not  
20 make myself very popular with that request, but --

21 COMMISSIONER MacCALLUM: I will be here  
22 five minutes early.

23 MR. LOCKYER: Thank you. So will I.

24 (*Adjourned at 3:21 p.m.*)

25 (*Reconvened at 3:32 p.m.*)



1 BY MR. LOCKYER:

2 Q Just going back to one issue that I was asking you  
3 about before the break, Dr. Emson, in this.

4 Do you think it would be helpful  
5 if the Commissioner were to make a recommendation  
6 somewhere along these lines: That the police and  
7 the pathologist, in an apparent homicide, should  
8 always discuss between themselves whether it would  
9 be helpful for the pathologist to attend the scene  
10 of the crime?

11 A Well that is a, it's a little out of chronological  
12 order, because it is the police, when they are  
13 called to the scene of a homicide, who have to  
14 decide what they are going to do about it. Now if  
15 you read all of the established forensic texts,  
16 they all say that the pathologist or the Medical  
17 Examiner should attend at the scene of the crime.

18 Q They do indeed.

19 A And in my own practice, with cases from up to 200  
20 miles away, this is, of course, impossible.

21 Q Right.

22 A Whether, in fact, the pathologist should attend at  
23 the scene of a crime in a case of a city is a  
24 possible recommendation, and I would certainly not  
25 wish to preempt his Lordship's recommendations.



1 One would have to see how justice might better be  
2 served, and one would also have to examine the  
3 position of the pathologist, who at the moment  
4 is -- or at the present time is only involved  
03:34 5 under the *Coroner's Act* after the Coroner has  
6 issued a warrant for the examination of a body,  
7 which customarily takes place rather late in the  
8 sequence of proceedings.

9 So, medically, the investigation  
03:35 10 system, at the moment, is not set up for this.  
11 Whether, in fact, it would be of use, I do not  
12 know.

13 And, also, one would have to  
14 investigate the -- consider the legal position,  
03:35 15 and indeed the remuneration of the pathologist, if  
16 he or she is going to be called out a dozen times  
17 a year, sometimes in the middle of the night.

18 Q I want to move on, sir, and talk to you about the  
19 role that has been played by pathologists, not in  
03:35 20 this case because I don't suggest it happened in  
21 this case, but in other cases of wrongful  
22 conviction. Because there is no doubt, am I right  
23 sir, that your profession has, on perhaps more  
24 occasions than any of us would like, been  
03:36 25 responsible for wrongful convictions having taken



1 place; is that right?

2 A One is always regretful of any wrongful  
3 conviction, but the number of these that I'm aware  
4 of in Canada which depend upon inadequate  
03:36 5 pathological examination of evidence is, in fact,  
6 rather few --

7 Q It's --

8 A -- and the number that's -- of investigations, I  
9 think, that are done is quite large.

03:36 10 I think the major portion of  
11 forensic pathology in Canada, as far as we know,  
12 is well and competently done, and we do everything  
13 we can to increase this, but I am aware that there  
14 are cases where it has not been rather competently  
03:36 15 done.

16 Q Well there is two fairly recent cases in our  
17 country, sir, where it might fairly be said that  
18 pathology, bad pathology, was the cause of a  
19 wrongful conviction; the *Clayton Johnson* case in  
03:37 20 Nova Scotia and the *Ronald Dalton* case in  
21 Newfoundland; correct?

22 A Well *Dalton* I was personally involved in, the  
23 other one I am not aware of the details of.

24 Q But you are aware that it was a case where  
03:37 25 pathology suggested a death had been caused by





1 homicide when, in fact, it had been caused as a  
2 result of an accident?

3 A I --

4 Q Falling down the stairs.

03:37 5 A I have heard of this, I have read of it, but I  
6 have no detailed knowledge.

7 Q And in Ronald Dalton's case, the one you were  
8 involved in, sir, which was a 1988 death of  
9 Mr. Dalton's wife; is that right?

03:37 10 A Yes.

11 Q And she died as a result of an obstruction in her  
12 throat caused by aspiration of food; is that  
13 right?

14 A Yes.

03:37 15 Q And at the trial of her husband the pathologist,  
16 Dr. Charles Hutton, testified that in fact she had  
17 been the victim of manual strangulation; is that  
18 right, sir?

19 A Dr. Hutton misinterpreted the findings at autopsy  
03:38 20 as being of manual strangulation when, in fact,  
21 the injuries to the throat were caused by rather  
22 inexperienced attempts at resuscitation.

23 Q And Mr. Dalton, as a consequence, spent about  
24 eight years in jail for a crime he didn't commit?

03:38 25 A Yes.



1 Q Or a crime that never happened, to be more  
2 precise?

3 A Yes.

4 Q And you were consulted during the appellate  
03:38 5 proceedings by Mr. Dalton's counsel; is that  
6 right, sir?

7 A I don't know what happened legally to the defence  
8 for eight years, but at some point -- and I cannot  
9 put a date on it at the moment -- I was consulted  
03:38 10 by the then-defence counsel, Mr. Kennedy, and gave  
11 my opinion as to these injuries. As a result of  
12 this the case went, as I remember, to the  
13 Newfoundland Court of Appeal, which set aside the  
14 conviction and ordered a new trial, and at the new  
03:39 15 trial, which was in the year 2000, Mr. Dalton was  
16 acquitted.

17 Q And his case is now the subject of a public  
18 inquiry very like this one being conducted by  
19 Commissioner Lamer, the Former Chief Justice of  
03:39 20 the Supreme Court of Canada; is that right?

21 A I am not aware of the details, but I'm aware that  
22 it is being reviewed.

23 Q Along with two other cases at the same time?

24 A Yes.

03:39 25 Q And that particular case, sir -- and I'm quoting



1           you as you were quoted by the Newfoundland Court  
2           of Appeal so hopefully they got it right -- this  
3           was a quote -- Mr. Commissioner, the judgement in  
4           this case can be found at 1998 NJ number 131 if  
03:39 5           anyone wants to find it -- you are quoted, sir, as  
6           saying:

7                     "Dr. Hutton seems to have formed his opinion  
8                     from the beginning and all he did was  
9                     support it."

03:39 10          Do you remember saying words to that effect, sir?

11        A          That was certainly the impression I got, that he  
12                   seemed to have gone into the case with a preformed  
13                   conviction.

14        Q          "He operated under a preconception of murder  
03:40 15                   and his forensic inquiry was prejudiced by a  
16                   proclivity to substantiate his hypothesis."

17        A          That's, if I said that, that was very good, yes.

18        Q          In fact, sir, Dr. Hutton used to have an  
19                   expression -- or probably still does for all I  
03:40 20                   know -- that he liked to think dirty when he did  
21                   an autopsy; have you heard that expression, sir?

22        A          I believe he did say that.

23        Q          Yes. And that notion of thinking dirty, in other  
24                   words conducting an autopsy on the basis that you  
03:40 25                   are likely looking at a homicide rather than an



1 accident or a suicide or some other cause of  
2 death, is really contrary to the scientific  
3 method; is that correct?

03:41 4 A I think the pathologist, in an approach to an  
5 autopsy, first of all may be conditioned to some  
6 extent by the circumstantial evidence he has been  
7 provided with by the police and the Coroner.  
8 After that, you must have an open mind and be  
9 neutral, and be guided by what you find. I don't  
03:41 10 have preconvictions, I may have suggested lines of  
11 approach or suggested things to look for, because  
12 of the circumstantial evidence.

13 Q Now am I right, sir, that in your profession as --  
14 of pathology, there is no supervisory body other  
03:41 15 than, I suppose, the Royal College of Physicians  
16 and Surgeons; is that right?

17 A No.

18 Q I'm wrong?

19 A Yes.

03:41 20 Q Okay. Go ahead?

21 A My licence to practice pathology, or practice  
22 medicine in any form, is subject to renewal each  
23 year by the College of Physicians and Surgeons of  
24 Saskatchewan. My privileges to practice pathology  
03:42 25 in the Saskatoon Health Region are reviewed and



1 renewed or modified each year by the governing  
2 body of the region. I'm subject to annual renewal  
3 by my peers, and by my administrative superiors,  
4 and I am always subject to review on that.

03:42 5 Q Okay. What is the governing body; who is on the  
6 governing body?

7 A Well the governing body for the province is the  
8 College of Physicians and Surgeons who licence me  
9 to practice.

03:42 10 Q All right, who are not pathologists as such?

11 A It is an elected body with defined representation  
12 under the Act from the medical profession itself,  
13 we're a self-governing body with appointed lay  
14 representatives, it's not specifically  
03:42 15 pathologists.

16 Q All right. So there isn't a supervisory body  
17 which contains your peers, meaning pathologists,  
18 only?

19 A It may or may not depending on who's elected to  
03:43 20 it. We're a part, we're a small specialist --  
21 we're a small specialty within the practice of  
22 medicine.

23 Q Because, as a practicing lawyer, one of the things  
24 that I think probably Crowns and defence are all  
03:43 25 very familiar with is that, in many homicide



1 trials, you hear pathologists taking completely  
2 opposing views in the same trial on the same  
3 issue; is that right?

4 A It's very possible. I have been a participant in  
03:43 5 this.

6 Q Uh-huh?

7 A What it usually involves is the facts are  
8 established, as in the *Dalton* case in  
9 Newfoundland, where the find -- the physical  
03:43 10 findings were not disputed but their  
11 interpretation is subject to differences.

12 Q And pathologists play a very significant role in  
13 homicide cases, perhaps as significant a role as  
14 any profession, with the exception of police  
03:44 15 officers; would you agree?

16 A Yes.

17 Q And do you feel, sir, that there is a satisfactory  
18 and adequate supervisory process to ensure that  
19 pathologists, as they testify on a daily basis,  
03:44 20 are doing a proper and appropriate job?

21 A I don't know that I would say a supervisory  
22 process, but I can hypothesize and believe in a  
23 review process, or a process in which a defence or  
24 other opinion was put by a known expert or,  
03:44 25 indeed, by a panel of experts.



1 I have suggested this from time  
2 to time, that particularly in a very small  
3 jurisdiction like my own, we should have perhaps a  
4 greater input of people from the wider world.

03:44 5 Q And, in fact, I think in an article as recently as  
6 April of last year you were quoted as saying that;  
7 is that right?

8 A Quite possibly.

9 Q And then could you be a little more specific as to  
03:45 10 what you think would be a helpful supervisory body  
11 to supervise pathologists?

12 A Well, this is very difficult, because it goes  
13 against the construction of law in Canada, which  
14 is provincial, and when I think of Newfoundland  
03:45 15 and I think of Saskatchewan I think essentially of  
16 what we need, as for instance in the *Dalton case*,  
17 where not only was the pathologist appearing for  
18 the Crown wrong but that the pathologist appearing  
19 for the defence was also incompetent.

03:45 20 Q That's Dr. Hoffman (ph) from the U.S.?

21 A Well, he didn't do anything useful. And in such  
22 cases, and in particular in a small province, it  
23 would be advantageous if we had some form of  
24 national panel of accepted -- perhaps the Chief  
03:45 25 Medical Examiners of those provinces which have



1           them -- but it's difficult to see how, under the  
2           present Canadian system of administration of the  
3           law, that this would be possible. But in a very  
4           large country with a relatively small population,  
03:46 5           it's what we should be looking at, and in fact  
6           these things are going to get more and more  
7           important as we deploy more and more scientific  
8           resources.

9                           The days are long gone of the  
03:46 10          generalist who knows everything.

11        **Q**       And a pathologist is, in fact, perhaps one of the  
12           last survivors of the generalist approach; is that  
13           fair?

14        **A**       No, I don't think so. I think more and more we're  
03:46 15           finding, and certainly I could particularize this  
16           in Saskatoon, that our pathologists are in fact  
17           more and more subspecialists, which is why it is  
18           difficult to find people to do what I am doing,  
19           which is the regular Coroner's work.

03:46 20        **Q**       Which is generalist work?

21        **A**       Essentially, yes.

22        **Q**       Yes, and that's what I am saying, pathology is one  
23           of the last survivors of the generalist --

24        **A**       Most forensic pathology doesn't need an expert,  
03:47 25           but in this province, with perhaps 30 to 35





1 homicide cases a year, we do.

2 Q So a supervisory body of some sort, sir, perhaps  
3 even at a national level?

4 A I'm not saying supervisory, I'm saying  
03:47 5 consultative or available, or some term like that.

6 Q So that for example, and let's look at it from a  
7 supervisory point of view if I may, although you  
8 don't like the term, if -- take an example, if you  
9 will, from what's come out of the Morin inquiry.

03:47 10 There's that kind of body now exists, sir, for the  
11 Centre of Forensic Science which is located in  
12 Toronto and Sioux St. Marie, a supervisory body  
13 that one can complain to as a defence lawyer for  
14 example, if it's a defence lawyer wants to make a  
03:47 15 complaint, or as a prosecutor if you want to make  
16 a complaint about an individual scientist's skills  
17 or lack of skills and expertise.

18 A Well, I wasn't aware of that, but --

19 Q It came out of the inquiry and now it exists.

03:48 20 A Well, you see, it will be difficult to establish a  
21 body like that in Saskatchewan or Newfoundland or  
22 New Brunswick because of the sheer problems of  
23 size and administering the resources available to  
24 a million people or fewer.

03:48 25 Q So --



1       A       But if such a body had been available on a  
2               national basis, then possibly the -- Mr. Dalton  
3               would not have spent eight years in maximum  
4               security.

03:48 5       Q       Indeed. And to move along from there, you were  
6               talking earlier about the idea of a group of  
7               pathologists -- or it doesn't have to be  
8               pathologists but let's focus on them because  
9               that's what your profession is -- could be  
03:48 10       assigned to look at a case where a wrongful  
11              conviction may have occurred as a result of bad  
12              pathology, such as in the *Dalton case*, rather than  
13              go through the kind of process that Ronald Dalton  
14              had to go through where it took him eight years of  
03:49 15       prison before he was ultimately set free?

16       A       Well --

17       Q       Could you elaborate on that idea?

18       A       One would be hopeful that such a process might  
19               intervene before a wrongful conviction. It's --

03:49 20       Q       In an ideal world, yes, but --

21       A       Well, we're not in an ideal world, but being human  
22               beings we all strive towards it.

23       Q       Can we look at it as from a post-conviction  
24               point of view, because if you catch it beforehand  
03:49 25       it's -- usually you are not going to catch



1 something like that, probably, until afterwards,  
2 but you could certainly catch it a lot quicker if  
3 you had a better process to catch, don't you  
4 think, where expert evidence is potentially the  
03:49 5 cause of the wrongful conviction?

6 A Well certainly from my point of view, it looks  
7 that way, but I'm not an expert or, indeed, even  
8 knowledgeable in the administrative structure of  
9 the law, which is where it would have to come  
03:50 10 from.

11 Q Well we're talking recommendations arising out of  
12 this inquiry, which is why I'm getting into this  
13 with you, sir; you think it would be a good idea,  
14 the mechanics of setting it up is, of course, for  
03:50 15 other people to consider?

16 A It's a good idea. I don't think this applies to  
17 our present case but certainly, in *R v. Dalton*, it  
18 would have been a very good idea if such a panel  
19 review had been -- in fact, if it had been  
03:50 20 available at the original trial, I don't think  
21 there would have been a conviction. It was only  
22 the -- oh, dear, this is going on record -- it was  
23 only the combined mistakes of both prosecution and  
24 defence pathologists that allowed that conviction  
03:50 25 to take place, and that's why I think the



1 intervention might, should have been at that  
2 level, but it should certainly have been available  
3 at the level of an appeal.

4 And if, say, a panel of three  
03:50 5 Chief Medical Examiners from across Canada had  
6 been consulted in *R v. Dalton* post-conviction, I  
7 don't think the conviction would have been upheld.

8 Q And, tell me, would a case like *Dalton* be  
9 well-known in your profession --

03:51 10 A No.

11 Q -- now, sir?

12 A It wouldn't? It might be amongst a very small  
13 body of forensic pathologists who specialize in,  
14 forensic pathologists in Canada, we probably don't  
03:51 15 number more than 20. But it's not, certainly, a  
16 prominent, high-profile, publicly-known case.

17 Q Okay. But would it be known, well-known, amongst  
18 your profession as such?

19 A I don't know. I don't circulate much amongst my  
03:51 20 profession and I don't know how many people know  
21 about *R v. Dalton*. I don't know, for instance, if  
22 he's well-known in British Columbia. I doubt it.  
23 There isn't a mechanism for reporting this sort of  
24 case in the medical literature as there is in  
03:51 25 legal profession.



1 Q It might be, actually, because as I recall Ferris  
2 was involved in it and he was in British Columbia  
3 at the time.

4 A No.

03:52 5 Q But that's by the by. Perhaps, just so we  
6 understand the scope of this, sir, how many  
7 forensic pathologists are there in Canada,  
8 roughly; are we talking hundreds?

9 A Depends how you define a forensic pathologist,  
03:52 10 but --

11 Q Someone who does autopsies on a reasonably regular  
12 basis?

13 A I don't know, but my estimate would be less than  
14 50.

03:52 15 Q Less than 50?

16 COMMISSIONER MacCALLUM: Just a minute, I'm  
17 not sure I know what either one of you means.

18 You mean forensic pathologist  
19 in the sense of a pathologist who investigates  
03:52 20 potentially criminal deaths?

21 MR. HODSON: I think, if you do autopsies,  
22 you are almost inevitably going to be  
23 investigating, potentially, homicides. So yes, I  
24 mean, so --

03:52 25 COMMISSIONER MacCALLUM: Well, I mean, as



1           opposed to a hospital pathologist. A  
2           pathologist, Dr. Emson -- excuse me for  
3           intervening --

4                   MR. LOCKYER: No problem.

03:52 5                   COMMISSIONER MacCALLUM: -- a forensic  
6           pathologist, Dr. Emson, is one who is a  
7           specialist in that field but he might be doing  
8           hospital work and nothing but, whereas a forensic  
9           pathologist you would, I gathered earlier from  
03:53 10          your remarks, is one who is involved in the  
11          criminal investigation of sudden death?

12          A        Autopsies, My Lord, are only a part of pathology,  
13          and a diminishing part, and no pathologist now --  
14          there are not enough hospital autopsies to keep  
03:53 15          anybody busy.

16                   COMMISSIONER MacCALLUM: No?

17          A        Most of the pathology I do, I think 95 percent of  
18          my cases are referred from Coroners, and I think  
19          this would be probably the average across Canada.

03:53 20                   Now if you take the pathologists  
21          who are doing most of those, of which the vast  
22          majority turn out to be death from natural causes,  
23          my estimate would be that perhaps there are fewer  
24          than 50 people who are doing a significant number  
03:53 25          of those. In those provinces with a Medical



1 Examiner system, they would be easy to identify;  
2 in those province with a Coroner system they would  
3 be less easy to identify.

4 COMMISSIONER MacCALLUM: Thank you.

03:54 5 Mr. Lockyer?

6 BY MR. LOCKYER:

7 Q We've talked, sir, about two cases in Canada, two  
8 recent cases, where pathologists have turned  
9 non-homicides into homicides, so to speak, and  
03:54 10 just so we understand the -- that that's not  
11 unique to Canada, you are aware of similar cases  
12 south of the border, is that right?

13 A Not specifically, but I'm sure it occurs.

14 Q Yeah, and in the U.K. as well?

03:54 15 A The U.K. has quite a distinguished history of  
16 this.

17 Q Quite a distinguished history of doing that?

18 A Of wrongful convictions based on --

19 Q Indeed.

03:54 20 A -- rather variable evidence.

21 Q From pathologists?

22 A Sometimes.

23 Q Yes. Have you ever heard of the *Nichols (ph)* case  
24 as an example, sir?

03:54 25 A I can't identify.



1 Q You don't know the *Nichols case*. But certainly,  
2 if you go south of the border, there's been -- and  
3 I don't wish to stain your profession, I'm much  
4 more ready to stain my own profession to be quite  
03:55 5 honest with you, but you are the witness today --  
6 there's been some pretty notorious pathologists  
7 south of the border; have there not?

8 A I'm not very well versed in this.

9 Q All right. Fred Zain is a familiar name, I'm  
03:55 10 sure?

11 A Who?

12 Q Fred Zain, Z-A-I-N?

13 A No.

14 Q Oh. All right. Tell me, back in 1969, sir, how  
03:55 15 were you paid for an autopsy?

16 A I was paid a fee on -- I was paid a salary by the  
17 hospital and I was paid a fee under the *Coroner's*  
18 *Act* for doing Coroner's autopsies.

19 Q And was the fee the same regardless of how long or  
03:55 20 how short the autopsy -- how much or how little  
21 time the autopsy took?

22 A As far as I remember, yes.

23 Q Is that still true today?

24 A No.

03:55 25 Q Because it certainly doesn't encourage one to





1 cover all the bases, so to speak, that kind of  
2 fee-for --

3 A Well, it's a matter of conscience and professional  
4 integrity --

03:56 5 Q Of course.

6 A -- that you do the job, you do what the job needs.

7 Q But, presumably, a system that doesn't pay a fee  
8 by the body, so to speak, is a system that's not a  
9 good system; would you agree?

03:56 10 A Oh, I don't think so, I think good work can be  
11 done either within or without a fee-for-service  
12 system. A lot of this depends on the individual  
13 integrity of the person doing the work.

14 Q Of course. Are you aware, sir, that certainly in  
03:56 15 some provinces, including the one I come from,  
16 that they still have that system in some places,  
17 of a payment regardless of how long the autopsy  
18 may take?

19 A I wasn't aware of it, because I'm not aware of the  
03:56 20 fee structure in other provinces, I know what  
21 we've got here.

22 Q Tell me this, sir; back then would I be right in  
23 saying that you were not -- you were rarely, if  
24 ever, made aware of the purpose to which the  
03:57 25 prosecution at a trial intended to put your



1 evidence?

2 A I'm sorry, I don't quite understand that. My  
3 evidence goes in in the form of a written  
4 report --

03:57 5 Q Right.

6 A -- and an examination on that report.

7 Q And testimony --

8 A Yes.

9 Q -- at trial; right?

03:57 10 A Yes.

11 Q And would you necessarily know, sir, what it was  
12 that the prosecutor planned to do with your  
13 evidence in terms of trying to convince the trier  
14 of fact, the jury, as to why they should come in  
03:57 15 with a particular verdict?

16 A A prosecutor, then and now, will discuss my  
17 evidence before the trial --

18 Q Right?

19 A -- and show how he, she or he, means to present  
03:57 20 it, and look at any points which may be difficult  
21 to interpret or which may be contentious.

22 Q But do they advise you, sir, as far as you know,  
23 as to what they intend to do with your evidence  
24 after you have given it?

03:58 25 A No.



1 Q No? And do you feel, sir, you are under an  
2 obligation, when you discuss an aspect of your  
3 evidence with a prosecutor, do you feel you are  
4 under an obligation to communicate that  
03:58 5 conversation to the defence?

6 A No, but there is no property in a witness, the  
7 defence can always approach me.

8 Q But you don't feel it's your job to approach them?

9 A It's not my job to approach the defence any more  
03:58 10 than it's my job to approach the prosecution.

11 Q But in reality, sir, as a pathologist conducting  
12 autopsies, you are usually viewed as being a  
13 witness for the prosecution rather than a witness  
14 for the defence?

03:58 15 A I am called by the prosecution, my evidence is for  
16 the court, it does not vary according to who calls  
17 me.

18 Q I understand that, sir, but in the real world you  
19 are viewed as being primarily a witness for the  
03:59 20 prosecution and not for the defence; is that  
21 right?

22 A I don't know how the real world views me, but I  
23 know how I view it.

24 Q Well, I think most of us do know how the world  
03:59 25 views us, sir, but you just don't pay attention to



1 it or what?

2 A I have spoken and written and lectured on this  
3 throughout the life, throughout my life --

4 Q Uh huh.

03:59 5 A -- and I have always made it clear that a  
6 pathologist is an expert witness called to bring  
7 his or her expertise to the assistance of the  
8 court in the hope that it may assist in forming a  
9 just conclusion. He is not a representative of  
03:59 10 either side and his or her evidence cannot differ  
11 according to who calls it, or her. I'm not an  
12 advocate.

13 Q Tell me this, since you raise whether or not you  
14 are an advocate, have you ever formed any opinion  
04:00 15 as to the practice in this province and indeed in  
16 most of Canada where forensic work, the daily  
17 forensic work conducted in homicides is carried on  
18 by a lab run by the RCMP?

19 A I've never formed an opinion that it is in any way  
04:00 20 other than -- any way other than impartial.

21 Q You are aware, sir --

22 A I'm aware of administrative problems and technical  
23 difficulties in the system, but not of prejudice  
24 in favour of the prosecution.

04:00 25 Q So are you aware, sir, for example, of the



1 problems that have arisen certainly in some  
2 jurisdictions in that regard?

3 A No.

4 Q That as a consequence of public inquiry in the  
04:00 5 United Kingdom the forensic science services were  
6 taken away from being under the supervision of the  
7 police and placed into a non-profit organization?

8 A I wasn't aware of that.

9 Q So you don't know anything about the constitution  
04:01 10 of the Forensic Science Services in the UK?

11 A No. I haven't practiced in the UK since 1956 and  
12 I've not been in very close contact with them.

13 Q You must have heard of the Forensic Science  
14 Service?

04:01 15 A No, I haven't.

16 Q And are you familiar with the Centre of Forensic  
17 Science, sir, in Ontario, that it's not a part of  
18 the RCMP?

19 A As far as I remember, it's a part of the  
04:01 20 department of justice isn't it?

21 Q It's part of the Ministry of the Solicitor  
22 General.

23 A Ministry of?

24 Q Solicitor General.

04:01 25 A I'm sorry, I still can't catch that.



1 Q Solicitor General.

2 A Thank you. Okay.

3 Q Let me read to you, sir, something that the Deputy  
4 Attorney General of Ontario wrote recently in a --  
04:01 5 and it came out, it was publicly released just  
6 yesterday, the document, by the attorneys general  
7 across the country as well as the federal minister  
8 of justice, and this is what the Deputy Attorney  
9 General of Manitoba wrote. He wrote:

04:02 10 "The risk that scientific evidence may  
11 mislead a court has several dimensions.  
12 Organizationally a forensic laboratory may  
13 be too closely linked with law enforcement  
14 and the investigative function causing  
04:02 15 scientists to feel aligned with the police."

16 Has that thought ever occurred to you in the  
17 context of the RCMP labs that are used in  
18 Saskatchewan, sir?

19 A It's a general possibility, but I've never had  
04:02 20 occasion to apply it specifically.

21 Q The deputy goes on:

22 "Forensic labs should be independent from  
23 the police. Ideally that means an  
24 independent stand-alone organization with  
04:02 25 its own management structure and budget."



1           Would you agree with that, sir?

2           A       Independence is a relative thing. A forensic  
3           laboratory is going to be funded by somebody and  
4           if it's not funded by the police, it will be  
04:03 5           funded by the government, and the same  
6           possibilities with political overtones will apply.

7           Q       So you, Dr. Emson, yourself have no worries, no  
8           concerns about the fact that the majority of the  
9           forensic work for the prosecution in this province  
04:03 10          is done by people employed by the RCMP?

11          A       I have no problem with that in principle. I have  
12          problems with the fact that our, most of our work  
13          goes to Halifax, a proportion of it goes to  
14          Ottawa. The reports received are slow and the  
04:03 15          distribution to me is variable, but apart from  
16          those specifics, I don't have any problems with  
17          them.

18          Q       You don't have any problem with it in principle at  
19          all?

04:03 20          A       You can always state a problem in principle, but  
21          everybody is responsible to somebody and everybody  
22          is constrained by somebody's budget and I don't  
23          know whether I would rather be constrained by the  
24          RCMP or the department of the solicitor general.

04:04 25          Q       Have you ever -- have you ever -- perhaps I won't



1 ask that. One of the things, sir, that was  
2 recommended at the Morin Inquiry that I want to  
3 ask you about is this, that juries tend to place a  
4 lot of weight on expert evidence. Do you agree  
04:04 5 with that?

6 A I don't know. I don't know how anybody knows what  
7 juries place evidence on. It's never been  
8 reported.

9 Q And one of the things recommended by Commissioner  
04:04 10 Kauffman, Dr. Emson, is that jurors should be  
11 specifically instructed that when experts testify,  
12 the jurors should not be in any way influenced by  
13 the aura of scientific infallibility. Would you  
14 agree with that, sir?

04:05 15 A If I thought anybody now believes science was  
16 infallible, I would agree with it.

17 Q Well, it's easy to be sort of humorous with your  
18 answers.

19 A No, it's not humour.

04:05 20 Q Don't you think, sir, that there is a tremendous  
21 danger that a jury listening to you after 50 years  
22 of pathology may feel that you have an aura of  
23 infallibility and that your opinions, therefore,  
24 should be followed? Has that never troubled you,  
04:05 25 sir?





1           A           I'd like to think so, but after the jurors have  
2                        listened to my cross-examination, I doubt whether  
3                        any of them ever think I'm infallible. My problem  
4                        with jurors is first of all knowing what does  
04:06 5                        influence, and secondly, trying to translate a  
6                        complex scientific report into lay terms  
7                        comprehensible to somebody with neither medical  
8                        nor scientific training. My problem with jurors  
9                        is not that they believe everything I say, but  
04:06 10                      getting them to understand what I am saying.

11          Q           So let me read to you a recommendation, sir, it's  
12                        recommendation 5 of Justice Kauffman's, and it  
13                        reads as follows:

14                      "Where hair and fibre comparison evidence or  
04:06 15                      other scientific evidence is tendered as  
16                      evidence of guilt, the trial judge should be  
17                      well advised to instruct the jury not to be  
18                      overwhelmed by an aura of scientific  
19                      authority or infallibility associated with  
04:06 20                      the evidence and to clearly articulate for  
21                      the jury the limitations of findings made by  
22                      the experts. In the context of scientific  
23                      evidence this is of particular importance,  
24                      that the trial judge ensure that counsel,  
04:07 25                      when addressing the jury, do not misuse the



1 evidence, but present it to the court with  
2 no more and no less than its legitimate  
3 force and effect."

04:07 4 Would you advance that as a good recommendation  
5 for this province, sir?

6 A No. It's far too general a statement. Hair and  
7 fibre evidence is notoriously and very much a  
8 matter of individual opinion. Other forms of  
9 scientific evidence can be presented as numerical  
04:07 10 values such as blood alcohol levels which are  
11 known to correlate fairly specifically with human  
12 behaviour and to lump all scientific evidence  
13 together in a grab bag like that is quite  
14 inaccurate.

04:07 15 Q So you don't think that that kind of instruction  
16 for the evidence of a pathologist, sir, in a  
17 criminal trial, is -- at least if the  
18 pathologist's evidence is in contest -- I mean,  
19 obviously, for example, the fact that there's 12  
04:08 20 stab wounds in this case has never been put into  
21 issue -- but if a pathologist is giving evidence  
22 that's in issue, sir, and his expertise is in  
23 issue, do you think that's a helpful kind of  
24 instruction for a trial judge to give, or do you  
04:08 25 think you just leave it to the jury to sort it out



1 for themselves?

2 A I think that one of the problems in pathology, as  
3 I've mentioned before, is the distinction between  
4 fact and opinion and that a set of facts such as a  
04:08 5 set of injuries or bruises can be -- or a  
6 haemorrhage into the brain can be subjected to  
7 different opinions as to that causation and I  
8 think a number of the cases on which I've been  
9 called for the defence have hinged upon this:  
04:08 10 That the autopsy findings have been competently  
11 done and are not in dispute. The interpretation  
12 of them can be variable.

13 Q Time of death, for example?

14 A Notoriously one of the hardest things in the world  
04:09 15 to determine.

16 MR. LOCKYER: All right, thank you.

17 Mr. Commissioner, if I can be excused, I have to  
18 catch a plane.

19 COMMISSIONER MacCALLUM: Certainly. Mr.  
04:09 20 Beresh?

21 MR. WOLCH: Sorry --

22 COMMISSIONER MacCALLUM: Oh, sorry, Mr.  
23 Wolch. I forgot you switched places.

24 BY MR. WOLCH:

04:09 25 Q Thank you, sir. Doctor, I'm David Milgaard's



1           counsel and you'll be pleased to know that  
2           Mr. Lockyer and I discussed this matter at quite a  
3           bit of length before and decided he would go first  
4           and I wouldn't duplicate hopefully what he has  
04:09 5           done, so I'll be fairly brief.

6                        Doctor, can you help me a little  
7           bit on the question of the assailant being  
8           right-handed? Just -- I'm not going to take you  
9           to documents, but what was the basis for you  
04:10 10          forming that likely opinion?

11        A           It's a question simply of a presumed assailant and  
12           victim facing each other and the assailant  
13           administering these marks which I've described as  
14           slashes across the neck which go, in general, from  
04:10 15          above on the left to below on the right, and that  
16           is the natural approach of a right-handed person,  
17           but it depends on the assumption of a particular  
18           relationship and stance between the victim and the  
19           assailant and is only an opinion. The wounds are  
04:11 20          fact. The interpretation of them, as I've just  
21           been saying to your learned friend, is an opinion.

22        Q           So that would be, if they are facing and the knife  
23           is in the right hand --

24        A           Yes.

04:11 25        Q           -- it would be going from the assailant's right to



1 left?

2 A But it's all assumption.

3 Q I appreciate that, but if that very same person  
4 attacked the victim from the back --

04:11 5 A Precisely.

6 Q -- wouldn't the wounds go the same direction?

7 A Probably.

8 Q So then the assailant was likely right-handed  
9 whether he attacked from the front or the back?

04:11 10 A It's a probability, that's all.

11 Q Oh, I appreciate that, but --

12 A It's the more likely probability, most likely  
13 probability of a number.

14 COMMISSIONER MacCALLUM: Just a minute. I  
04:11 15 want to be clear that he understands your  
16 question.

17 MR. WOLCH: Please.

18 COMMISSIONER MacCALLUM: Was it that if the  
19 attack was from the back, the wounds inflicted by  
04:12 20 a right-handed assailant would go the same way?

21 A If Your Lordship, you imagine yourself behind  
22 somebody who is facing away from you, grasping  
23 them with your left hand and drawing a knife  
24 across them --

04:12 25 COMMISSIONER MacCALLUM: With your right



1 hand is what you demonstrated.

2 A Then the wounds will run from above on the left to  
3 down on the right.

4 COMMISSIONER MacCALLUM: That's what I  
04:12 5 wanted to be sure you were --

6 BY MR. WOLCH:

7 Q Yeah. So what you are saying is basically, and I  
8 know there can't be certainty in this, but in all  
9 likelihood, regardless of positioning, the  
04:12 10 assailant was right-handed?

11 A It appears to be the probability.

12 Q That's all I'm asking. Now, another fact, Doctor,  
13 that you talked about, and I must confess, every  
14 time I stand outside in the cold I think the same  
04:12 15 thing, 40 below zero weather, do I take it that  
16 you had always some doubt that this could have  
17 happened outdoors?

18 A It appears to me to be an improbability to perform  
19 a sexual attack under those conditions, but I am  
04:13 20 only aware of what I see at the autopsy. I was  
21 not called to the scene, I do not have the  
22 circumstantial evidence that all the acts were  
23 performed in the same place, so that is my -- and  
24 that is not a matter of professional expertise,  
04:13 25 it's a matter of personal experience.



1 Q Or lack of same?

2 A Well, stepping outside on a minus 40 morning in  
3 the dark to go to work, it is difficult to form  
4 the idea of a sexual assault at that time.

04:13 5 Q Yeah, true.

6 A And that is the only thing. If -- I am not in  
7 possession of all the evidence and if the rest of  
8 the evidence points to the act having happened at  
9 that time and place, then that is what was  
04:14 10 presented. I'm only a piece of the jigsaw.

11 Q And you might agree with me that as we stand here  
12 or sit here indoors, we can't even imagine what  
13 that feeling of 40 below outside feels like when  
14 you are there?

04:14 15 A I can imagine it very well. It was happening a  
16 couple of weeks ago.

17 Q I waited for a cab, I know. In any event -- now,  
18 is that something that you would have discussed  
19 with the police or the prosecutor?

04:14 20 A I might have raised it, but as I say, they are in  
21 the position of having all the evidence, I'm not.  
22 That's not part of my job.

23 Q And Mr. Lockyer did touch on this, and maybe I  
24 will a little bit. Going to the scene or knowing  
04:14 25 more about what's alleged or what happened,



1                   wouldn't that be useful?

2           A           It's what's recommended in all the textbooks, it's  
3                   what's put down in all the textbooks, and in  
4                   Saskatoon it doesn't happen. Now, a part of this  
04:14 5                   is because, as I say, some of my cases are from  
6                   200 miles away, but there is no pattern in the  
7                   city practice of the pathologist being called to  
8                   the scene, and in fact if I were to be called to  
9                   the scene on a significant number of occasions, I  
04:15 10                   would want to re-examine the fee structure under  
11                   which I'm doing so.

12          Q           Oh, no, and that's quite fair.

13          A           There is no set-up and there never has been in the  
14                   almost 50 years I've been in this city, there is  
04:15 15                   no set-up for that and there never has been. Now,  
16                   that's a matter for the organization of the law,  
17                   not primarily for me.

18          Q           Now, what if I or back then Mr. Tallis had come to  
19                   you and said, Doctor, can you come down and look  
04:15 20                   it over with me and give me some help, would you  
21                   have felt obliged to go, not to go? What's the  
22                   relationship?

23          A           To the scene?

24          Q           Yes.

04:15 25          A           Well, first of all, it is unlikely that you or





1 Mr. Tallis would have been involved at that point.

2 Q I apologize.

3 A The people who were there were the police and the  
4 coroner.

04:15 5 Q Or later I mean.

6 A Re-examining a scene later is probably not very  
7 much use when it has been thoroughly gone over by  
8 the police and investigated for trace evidence and  
9 the rest of it. I have on occasions, when I was  
04:16 10 on sabbatical practice in London in the east end  
11 in 1985-'86, I was sometimes asked to visit scenes  
12 by the police, but it doesn't happen here.

13 Q But I would like to focus a little bit on defence  
14 counsel. If defence counsel came to you and said,  
04:16 15 you know, Doctor, this temperature business and  
16 the clothing and disarray and everything else, I  
17 want to talk to you about that, would you normally  
18 talk and sit down and --

19 A There's no property in a witness.

04:16 20 Q I appreciate that, but would you as a matter of  
21 course just do it? Would you check with the  
22 prosecutor first, the police first or would you do  
23 it?

24 A I would probably state to the prosecutor first  
04:16 25 that I had been approached by the defence, and I



1 don't know what the technicalities of the law are  
2 in this respect, they might both wish to be  
3 present at the same time, but I don't think the  
4 prosecutor can place any limitations on what I say  
04:17 5 to a defence counsel, but it might be wise under,  
6 if these circumstances occurred, to establish with  
7 both sides of a case what they wanted and what was  
8 reasonable.

9 Q Except that if the prosecutor wanted to talk to  
04:17 10 you, you wouldn't check with the defence first?

11 A No.

12 Q So --

13 A Because I'm in general being called by the Crown,  
14 and in fact I expect to be called by the  
04:17 15 prosecutor before a case to discuss any -- his or  
16 her idea of the presentation of the evidence.

17 Q But why do you feel you have to check with the  
18 prosecutor --

19 A I don't have to check with the prosecutor.

04:17 20 Q Why would you check with the prosecutor if the  
21 defence counsel said I want to have a private  
22 conversation with you, confidentially between you  
23 and I?

24 A Because it's an unusual circumstance and because I  
04:17 25 am not aware of the technicalities of the law as



1 to whether there is anything that prevents or  
2 limits this.

3 Q So do you view yourself -- leaving aside your  
4 integrity, do you view yourself as a Crown  
04:18 5 witness?

6 A I have stated here and I will state again, at the  
7 risk of boring you, that I am not a witness for  
8 anybody. I am an independent expert called, I  
9 hope, to assist the court to come to a just  
04:18 10 conclusion, but I am not the property of either  
11 side.

12 Q I --

13 A And the evidence I give does not depend on who  
14 calls me.

04:18 15 Q Please understand me --

16 A I wish the media hadn't gone.

17 Q That's my fault, sir. Please understand me, I am  
18 not questioning your independence or your  
19 integrity, but surely there is an appearance when  
04:18 20 you will talk to the Crown attorney any time, but  
21 defence attorney, if you talk to the Crown first  
22 and it's okay or he agrees, that you are on the  
23 Crown's side?

24 A No. I have tried to say that the only reason I  
04:19 25 would consult, in the relatively rare



1           circumstances where I was asked to talk with the  
2           defence attorney, is to establish what my legal  
3           position is in this. I am not aware of the  
4           particularities of the law and I do not know if  
04:19 5           there is anything that restrains or restricts me  
6           in so doing.

7           Q       Okay.

8           A       That's why I would ask. I don't want  
9           subsequently, having talked to a defence attorney,  
04:19 10          to be told that I've done something wrong in law.

11          Q       Okay. But wouldn't it be wiser then to check with  
12          your own counsel --

13          A       I don't have a counsel.

14          Q       -- or get a counsel to give you independent advice  
04:19 15          as to who you should talk to, --

16          A       No.

17          Q       -- not one of the sides?

18          A       No. I don't see the necessity of being  
19          independently advised on this. I would trust the  
04:19 20          Crown and the defence to work it out between them.  
21          I may be unduly trustful, but I would.

22          Q       And you think maybe the Crown attorney should be  
23          there when you talk to the defence?

24          A       That is a matter for the technicalities of the  
04:20 25          law. I don't know.



1 Q Now, would anybody, and I'm thinking maybe of the  
2 Crown or police, have talked to you about what  
3 might have happened here or how it happened, why  
4 the clothes are as they are with a knife wound  
04:20 5 through the coat and not through the dress or what  
6 actually happened, did anybody discuss this with  
7 you or --

8 A I can't remember it, but it was a long time ago.  
9 I don't think the specifics were discussed with  
04:20 10 me, no.

11 Q Let me very quickly put a suggestion to you and  
12 tell me if this would make any sense to you. Gail  
13 Miller leaves her, where she lives at  
14 approximately 20 to seven, she walks up O Street.  
04:21 15 Larry Fisher, who knows where she's going, has a  
16 car down the lane, waits for her to come by the  
17 lane, drags her into the lane, assaults her in the  
18 car in the way he always does, she runs out of the  
19 car, he chases and kills her. Is there anything  
04:21 20 in your medical findings that wouldn't be  
21 consistent with that?

22 A No.

23 Q Pretty simple isn't it?

24 A As you put it, yes. It's a valid hypothesis.

04:21 25 Q Are you aware a car was seen there at the time?



1 A I believe there had been some suggestion of this  
2 in the media reports, but I don't read them very  
3 thoroughly.

4 Q And a man going in front of the car?

04:22 5 A I have not read that.

6 Q But that theory does sound pretty reasonable?

7 A It sounds like a valid hypothesis. I don't know  
8 whether it's supported by the other evidence.

9 Q Has anybody shown you the similar acts that Fisher  
04:22 10 had and how he had attacked other women?

11 A No, but that's why I wrote that letter to the  
12 chief of police really suggesting we should look  
13 at Fisher's *modus operandi*.

14 Q Well, I won't do it now, Doctor, but I might in  
04:22 15 closing commend you, if you wish, or you have  
16 time, to take a look at the victim in this case  
17 named Ethel Steel.

18 A I'm sorry?

19 Q Ethel Steele is a victim in this case, she's a  
04:22 20 victim of Larry Fisher.

21 A Yes, uh huh.

22 Q And there are photographs, she's an exceptionally  
23 brave lady, and if you look at the photographs,  
24 you might wish to as a matter of professional  
04:23 25 curiosity, and compare her wounds to Gail Miller,



1 if you are interested.

2 A I would be quite willing to do so. I have always  
3 wanted, hoped I could see some of the wounds on  
4 Fisher's other victims.

04:23 5 Q You might if you have a chance, I'm sure  
6 Commission Counsel will assist you, if you would  
7 look at the photographs of that poor lady and  
8 compare it to Gail Miller and you see the marks  
9 around the face and the mouth of both victims, it  
04:23 10 might be of interest to you as a professional and  
11 might explain the clothing and why the position of  
12 the clothing and everything else, it does make a  
13 bit of sense. I leave that to you if you wish to  
14 do that.

04:23 15 A Well, it would certainly be of interest to me, but  
16 I have to leave it to His Lordship and counsel as  
17 to whether or how this is brought into this  
18 inquiry.

19 MR. WOLCH: I'll leave it to them too, but  
04:24 20 I do thank you. Thank you, Mr. Commissioner.

21 COMMISSIONER MacCALLUM: Mr. Beresh, it's  
22 seven minutes from quitting time, so we'll  
23 adjourn now.

24 MR. BERESH: Please.

04:24 25 COMMISSIONER MacCALLUM: 10 o'clock



1 tomorrow.

2 (*Adjourned at 3:25 p.m.*)

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**OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:**

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Official Queen's Bench Court Reporter

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Donald G. Meyer, CSR

Official Queen's Bench Court Reporter



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