

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

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

On Wednesday, November 30th, 2005

Volume 101

Inquiry Proceedings



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Ms. Lana Krogan, **for** Government of Saskatchewan
Ms. Catherine Knox, **for** Mr. T.D.R. (Bobs) Caldwell
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Mr. Pat Loran, Esq., **for** the Saskatoon Police Service
Mr. Aaron Fox, Q.C., and Mr. Chris Boychuk, Esq.,
 for Mr. Eddie Karst
Mr. Bruce Gibson and Ms. Rochelle Wempe, **for** the RCMP
Mr. David Frayer, Q.C., **for** Minister of Justice
 (Canada), The Hon. Irwin Cotler
Mr. Alexander Pringle, Q.C., **for** Justice Calvin Tallis
 (Retired)



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- TO BE BROUGHT ON BEHALF OF DAVID MILGAARD

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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Morning.

MR. HODSON: The next witness, Mr.

Commissioner, is Mr. Tony Merchant who is on the
stand.

EVATT FRANCIS ANTHONY MERCHANT, sworn:

BY MR. HODSON:

Q Morning, Mr. Merchant, thank you for agreeing to
testify.

I understand, sir, that you are
a lawyer residing in Regina and practicing in
various parts of this province and in Western
Canada; is that correct?

A Yes, and --

Q And beyond, perhaps?

A Yeah. I'm a member of four law societies,
including Arizona, and three western law
societies.

Q And I understand, sir, that you have practiced law
since 1968, starting your articles in 1967; is
that correct?

A Correct.

Q And, again, the relevant time period for the



1 purposes of our inquiry, I think from 1981 to
2 sometime in the late '80s, perhaps '86, '87 you
3 acted as counsel for David Milgaard and Joyce
4 Milgaard; is that correct?

5 A I'm not sure that it went into the late '80s, but
6 for some, for some period into the '80s.

7 Q So the mid-'80s. And we'll, when we go through
8 the correspondence, I think we'll see perhaps
9 where the engagement or retainer ended, but in
10 that time frame you acted as counsel for David
11 Milgaard and had dealings with Joyce Milgaard; is
12 that correct?

13 A Yes.

14 Q I'm wondering if you could give us just a bit of
15 background on, if we can go back to 19 -- to the
16 '80s, what your areas of practice were, your
17 specialties and your experiences?

18 A When I began to practice I practiced exclusively
19 or almost exclusively in criminal law for a period
20 of four or five years, then I began to do a lot of
21 labour law and criminal law, after that I drifted
22 more into personal injury and family law. I would
23 be best known today for family law, where I sit on
24 three advisory boards, and most of the articles
25 and speeches and so on that I have given have been



1 in the family law area. But I'm also quite
2 well-known for mass torts and class torts and do a
3 lot of work in that regard, so for example a
4 couple of weeks ago I appeared in Court in Quebec
5 over a, over a class action. And so the --
6 there's been a variety of things, but even in the
7 1990s I was still, from time to time, doing
8 criminal law matters.

9 Q And, just for the record, I don't want counsel to
10 think I've now opened up the area of residential
11 schools so that they can ask Mr. Merchant
12 questions about that.

13 A Or donations.

14 Q So back in the early to mid-'80s is it fair to say
15 that you had had extensive experience in criminal
16 law matters?

17 A Yes.

18 Q And we'll see, when we get into your retainer at
19 the time, did you have political connections, for
20 lack of a better word, with the Federal Government
21 during that time period?

22 A Yes. I had been a, a Liberal member of the
23 Legislature, my mother, grandfather were Liberal
24 members of the Legislature, brother-in-law federal
25 cabinet, great uncle a Member of Parliament, and I



1 sat on executives and campaign committees. I had
2 political connections within the Liberal party,
3 and pretty good political connections with the,
4 with the Romanow government particularly.

5 Q Okay. Now just generally, and I'll get into more
6 specifics, but just generally, as far as the
7 people that you dealt with during your retainer,
8 it's my understanding that you would have had
9 fairly significant dealings with Joyce Milgaard on
10 behalf of David; is that correct?

11 A Yes.

12 Q And did she in fact -- I take it your client was
13 David Milgaard; is that right?

14 A My client was David Milgaard, but I was being paid
15 by Howard Shannon, who rather generously I thought
16 was trying to be of assistance to David Milgaard.
17 He had met David previously and -- but acting for
18 David, to a significant extent, involved Joyce
19 being involved and, in a sense, instructing me on
20 behalf of David.

21 Q And Mr. Shannon then, I think you said he paid
22 you, did he provide any direct instructions to
23 tell you what to do, what not to do?

24 A He didn't, and we didn't face the problem, but I
25 don't think I would have been able to allow him to



1 instruct me about somebody else, but it didn't, it
2 didn't come up. He retained me to assist David in
3 whatever way was possible, I would tell
4 Mr. Shannon what was happening to a limited
5 extent, but it's not unusual to have somebody
6 paying, perhaps a family member paying, but you
7 are still acting for somebody else.

8 Q And then what about a fellow by the name of Peter
9 Carlyle-Gordge; did you have dealings with him?

10 A He was a writer who was working in a sort of an
11 investigatory capacity and I had some involvement
12 with him.

13 Q And was he, you say he was a writer, was he
14 assisting David Milgaard in investigating his
15 conviction?

16 A How --

17 Q Was that your observation?

18 A That was my sense, that he was trying to write,
19 but he was also investigating with Joyce and on
20 behalf of David.

21 Q And I understand, sir -- and we'll deal with these
22 in a bit more detail -- that you also would have
23 had a couple of personal meetings with David
24 Milgaard, and some correspondence, and perhaps
25 telephone discussions with him; is that --



1 A Correct.

2 Q So those are the people. Do you recall, was there
3 anybody else that -- apart from witnesses -- but
4 anybody else from the Milgaard group, if I can
5 call it that, that you would have been dealing
6 with as far as instructions and communications?

7 A No. I think there's some indication that I met
8 with Susan but I don't -- I -- I really -- I
9 didn't get instructions particularly from Peter, I
10 -- and there was nobody else other than Joyce and
11 David.

12 Q Yeah. And then as far as the issues, and again we
13 will go through this in a bit more detail, but
14 generally would you agree that likely two issues,
15 the first being to look at David Milgaard's
16 conviction and what might be done or could be done
17 to challenge that or set it aside or have it
18 reviewed; is that generally fair?

19 A Okay, all right.

20 Q Or one of the issues -- and I'll talk about the
21 scope of your engagement and what you did -- but
22 would that be one subject matter that you would be
23 looking at?

24 A Yes, but I wouldn't have characterized it that
25 way. In other words I wasn't -- I wouldn't, if I



1 were describing it I wouldn't say I was instructed
2 to look into the conviction or -- and whether that
3 could be turned aside. I was -- I took the
4 retainer and communicated that I was trying to
5 help with the problem, and I saw the problem to be
6 a combination of has there been a wrongful
7 conviction, and how can I get him out of custody.

8 Q Okay. So maybe I should back up. And so your,
9 that was your, the scope of your retainer; was
10 there a wrongful conviction and how do we get him
11 out of custody, generally?

12 A Forgive me, I'm not happy with the language.

13 Q Well give me your words?

14 A My words would be he had a problem, he was in jail
15 and wanted to be out, and suggested to me that he
16 shouldn't be in jail because he was wrongly
17 convicted. The only reason I'm cherry about your
18 language is it -- I didn't feel I was restricted
19 to work on this or work on that, my problem was
20 David shouldn't be in jail, can you get him out.

21 Q Okay. Now as far as the file materials that --
22 you would have had a file that you kept at the
23 time; is that correct?

24 A Correct.

25 Q And I think we have, at the Commission, received



1 documents from various sources. It's my
2 understanding, Mr. Merchant, that presently you do
3 not have your file; is that correct?

4 A That is correct.

5 Q And that we have provided you with a
6 reconstruction based upon what we have gathered
7 from various sources, and it's my understanding --
8 and please correct me if I'm wrong -- that other
9 than perhaps a few pieces of paper that may not be
10 that significant the majority of the file is
11 there, is that correct, that you have looked at?

12 A Yeah. I can go further than that. I, as I look
13 at it, I don't think there's anything missing, but
14 it's sort of like asking me if the recollections
15 of my living room are correct, has a vase been
16 removed or an ashtray, and so I have no reason to
17 believe anything is missing.

18 Q And again I understand that, to prepare yourself
19 for the testimony at this Inquiry, you have had a
20 chance to at least take a look at the file
21 documents recently; is that fair?

22 A Yes, but only in a cursory way.

23 Q Now let's just go back to just prior to your
24 retainer for David Milgaard, which I think was in
25 1981, and I'll -- I think it was April of 1981



1 that I will go to in a moment. What knowledge or
2 information did you have about David Milgaard's
3 conviction or the Gail Miller murder?

4 A Very little. I grew up in Saskatoon but I had no
5 particular knowledge beyond what the man on the
6 *Clapham omnibus* would know about what happened.

7 Q And as far as the name Larry Fisher or rapes
8 committed in 1968 to 1970, did you have any
9 recollection or knowledge of that, just at the
10 time you were retained by Mr. Milgaard?

11 A No. I might have made -- there was a Fisher
12 decision that was of some significance in criminal
13 law, but I didn't have any interest particularly
14 in this matter, I didn't know anything specific
15 about Larry Fisher or David Milgaard.

16 Q And if we could just -- what I plan to do,
17 Mr. Merchant, is just to go through parts of your
18 file and get a sense of the work that you did and
19 have you comment and elaborate on some of the
20 letters and some of the interviews. If we could
21 go first to document 332564, and I believe this is
22 your file note of April 28th, 1981 regarding the
23 call from Howard Shannon; is that correct?

24 A Yes.

25 Q And I don't need -- it looks as though he would



1 have been the first person who contacted you; is
2 that your recollection?

3 A Yes.

4 Q And then he gives you the name of Peter
5 Carlyle-Gordge and phone numbers, and
6 Mrs. Milgaard, and asks you to meet with the
7 mother and the reporter. And just down at the
8 bottom he says he'll pay a maximum of \$3,000,
9 \$1,500 in trust, and so would this be sort of the
10 start of your engagement?

11 A Yes.

12 Q And I don't know that -- I haven't been able to
13 find any documents but, presumably, you would have
14 then contacted Mrs. Milgaard and/or
15 Mr. Carlyle-Gordge; is that right?

16 A I assume that's the case.

17 Q Did you become aware, at some point, that Gary
18 Young, a lawyer in Saskatoon, had been engaged at
19 or around this time, or prior to this time, to
20 take a look at the file?

21 A I think I came to know that, and I would have
22 thought that I had got his file, but I may be
23 wrong.

24 Q Okay. Now, again, as far as the -- you had
25 described earlier for us what you, what your



1 retainer was or your engagement; was that based
2 upon a discussion with Joyce Milgaard or David
3 Milgaard or how did that come about, that you got
4 your instructions as to what you were to do?

5 A I'm not sure whether Howard had spoken with them
6 in advance, he must have spoken with them to say
7 that he would hire me to be of assistance to
8 David, he called. I had done legal work for
9 Howard before on a civil, a civil nature, a civil
10 ac -- proceedings or corporate work, and I asked
11 him how he knew him, what the relationship was,
12 and David had worked for him when David was
13 illegally at large in Toronto. And Howard, I
14 asked him and he said "I just don't believe that
15 it's possible that he could have done this crime
16 in this way, he's", essentially he said "he's just
17 too nice a person", and he said "I view this as
18 sort of like charity, that I'm -- I'm" -- I asked
19 him because it seemed strange. You look at \$3,000
20 and you think well, that's not very much money,
21 but it was a not-insignificant sum at the time,
22 and I believe he gave more money than that, and
23 he -- I remember his words "I think of this like a
24 charitable" -- you know, he didn't say benevolent
25 or eleemosynary but it was a word like that, so I



1 thought well of Howard for saying that. And I
2 also knew Howard and I -- so I began with sort of
3 this good impression flowing from Howard.

4 I -- my guess is that I then
5 called the Milgaards, and they knew, and then I
6 arranged to meet with them. But my original
7 instructions all came from Howard.

8 Q Now, at the time, we've seen from other documents
9 that at the time that you would have been
10 retained, that Joyce Milgaard and Mr.
11 Carlyle-Gordge had already conducted some
12 interviews, they had reviewed some transcripts, a
13 fellow by the name of Chris O'Brien, a radio
14 reporter, had interviewed some witnesses and
15 looked at transcripts. Do you have a recollection
16 of what -- what I would like to get an
17 understanding of is what work had they done, what
18 work were you going to do -- let's just talk about
19 reviewing the transcripts and the evidence. What
20 if anything were you to do with respect to that?

21 A Well, I wasn't to do anything specific. I was --
22 I wasn't to paw over, I use a verb with pejorative
23 intent, I wasn't to paw through some transcript
24 and wonderful, I see a comma is out of place or
25 what about this, I was, as I said earlier,



1 retained to address -- address the problem, and I
2 came to know that there had been some work done to
3 address how do we prove innocence. I came to know
4 that this had been addressed by others before me.
5 I thought that Peter and Joyce had done some good
6 work at digging for information that might prove
7 innocence.

8 I came, over time, to the sense
9 that Joyce had difficulty understanding that it
10 wasn't a matter of trying to raise a reasonable
11 doubt, one had to have a far more significant --
12 more significant change of view than just this is
13 a little wrong or this is a little wrong and
14 perhaps he ought not to have been convicted. No
15 one ever suggested, it was never suggested to me
16 in any way, I don't think anybody thought that
17 because I had political connections that would
18 make any difference to the way, to the way things
19 would be considered, and I've never heard of that
20 having any impact, I'm sure it doesn't with those
21 kinds of inquiries, so I looked at the work that
22 had been done by Joyce and Peter primarily and
23 worked at that to some extent. I also worked to
24 some extent at David's release through the parole
25 authorities.



1 Q And again, was the amount of work that you were
2 able to put into this matter limited by the
3 retainer from Mr. Shannon?

4 A Yes.

5 Q And can you elaborate a bit further, were there
6 things that if there were more resources, i.e.,
7 money, would you have done other things?

8 A Well, I might have done other things. It would
9 have depended on who was paying. Let me give you
10 an example. I remember an occasion, because Joyce
11 has some strengths and some weaknesses, and I know
12 the public impression is very favourable about
13 her, but she pushes, doesn't matter that she would
14 push me, but it did matter that she would push
15 other people sometimes and cause problems, but an
16 example of her pushing me, I remember her being, I
17 don't know, angry, irate, pushy, I don't remember
18 the sort of motive sense of it, but because I
19 hadn't agonized over the transcript to her
20 satisfaction and I said to her, you know, that's
21 not a good use of money, and I said to her I don't
22 think I'm going to turn a page and find in the
23 written words that Cal Tallis made some mistake
24 and eureka, we can jump out of the bathtub and run
25 to Ottawa, and I was also aware that that kind of



1 inquiry had gone on before me, so there was a
2 combination limitation of how much money was to be
3 spent on this task, and even if money had been
4 unlimited, in my view lawyers sometimes have to
5 pull in the reins on their clients and say, well,
6 you may think endless work is worthwhile, it
7 isn't, and to some extent there was a difference
8 of opinion between us about the degree of
9 sleuthing at the legal end that was worthwhile. I
10 thought sleuthing with the witnesses was
11 worthwhile, but I had my doubts about sleuthing in
12 sort of the past paper.

13 Q And, I'm sorry, if you could just, when you talk
14 about the past paper, are you talking about errors
15 that may have been made at trial?

16 A That kind of thing, yes.

17 Q And then as far as witnesses, are you telling us
18 that following up with some witnesses you were in
19 favour of?

20 A I thought that was worthwhile.

21 Q Yeah. Can we just pause for a moment here, and I
22 know, and we'll see this in some of your letters
23 about the role of the Attorney General of Canada
24 and the ability to set aside a conviction, and I
25 think the section number at the time may have been



1 617, it became 690, and just generally, Mr.
2 Merchant, what was your understanding or thinking
3 at the time as to what would be required to get
4 the Attorney General to intervene and either set
5 aside the conviction or give some remedy?

6 A Well, Joyce and, to an extent, David, and maybe
7 even Peter, seemed to think if you could find a
8 variety of little mistakes, maybe even significant
9 little mistakes, that that would result in kind of
10 a sense that he probably shouldn't have been
11 convicted and therefore it would be opened up and
12 my belief was that having him, David having been
13 found guilty, my sense of the legal requirement
14 and the not political requirement, but the
15 exercise of discretion because that's where it lay
16 with the Attorney General, was that you had to
17 show that a person was probably innocent, not that
18 they were probably "not guilty at law", quite a
19 different -- quite a different thing, so show more
20 reason to believe that the person ought not to
21 have been convicted because he wasn't guilty
22 beyond a reasonable doubt is the first test; show
23 enough that one could say he's probably not guilty
24 would still be a negative. I took it to be you
25 have to get to showing he's probably innocent and



1 that would, that focus is not find errors in the
2 Court process or -- but rather look for recanting
3 of testimony, look for the kind of, the kinds of
4 things that Mr. Wolch actually ultimately turned
5 up, sort of definitive evidence that results in
6 proof that he's not guilty.

7 The precedent in my mind to some
8 extent was Steven Truscott and there was a public
9 opinion overlay to that because the Attorney
10 General gets to decide whether things will be
11 looked at again, so I thought the publicity side
12 had merit, but you still had to look for some
13 boulders of gold and little pieces of gold dust
14 wouldn't do it.

15 **Q** We'll see a bit later in one of the interviews, I
16 think you used the term bombshell as being
17 something that is required. Is that again
18 something significant, is that what your view was
19 at the time?

20 **A** I -- I use those kinds of words with clients
21 trying to make them understand, you know. Legal
22 concepts aren't easy.

23 **Q** Do you recall, Mr. Merchant, as part of that,
24 whether your efforts were directed to trying to
25 find the "real killer" if I can call it that, or



1 someone else who was responsible for the crime?

2 A No.

3 Q And do you recall any discussion about that being
4 something that could be pursued?

5 A I don't recall that. No, I don't.

6 Q Just a couple of points about the Saskatoon City
7 Police files. Do you recall either discussing or
8 considering whether those files should be accessed
9 or reviewed by you or by others?

10 A I don't recall anyone raising with me that I
11 should try to get them or look at them. I didn't
12 try to get them or look at them. Bear in mind
13 this is pre *Stinchcombe* and I'm not, you know,
14 you've got disclosure from prosecutors, but I
15 didn't pursue looking again at those records, but
16 I may have approached it with a view of economy
17 affected by my thinking at the time that Cal
18 Tallis was such a hard working, quality criminal
19 defence lawyer that, and I had worked there and
20 seen it and knew how dedicated he was, that I
21 didn't really approach this with a view that it
22 will be easy to find something that would probably
23 have been missed.

24 Q Did the fact that Cal Tallis represented Mr.
25 Milgaard at trial and at the appeal have any



1 influence on your thinking then in approaching the
2 case?

3 A Yes, it did. You know, I knew how hard he worked,
4 I knew how thorough he was, I knew how thoughtful
5 he was and it just didn't seem likely to me at an
6 economical level that I would follow another
7 lawyer essentially doing all the same things that
8 the other lawyer had done and turn something over.
9 Indeed another time when I spoke with Joyce I said
10 of the prior work that I thought that was not a
11 very good use of money, to agonize over the prior
12 records, that I thought it was useful to look for
13 a recanting by some of the witnesses because I
14 believe there was a good possibility that might
15 happen, particularly knowing what I believed about
16 them from being told by David and Joyce and
17 others, but I think it was an influence to know
18 that the person who had handled the trial did,
19 was, in my personal knowledge, so skilled. If it
20 had been some -- I mean, I'm not saying that a
21 great lawyer can't make mistakes or overlook
22 things and I'm not saying that a lesser lawyer
23 can't do a wonderful job, just as a utility second
24 baseman that bats 195 will sometimes hit a home
25 run and the 380 batter will sometimes, will often



1 strike out, but it was an influence in my
2 thinking.

3 Q And what about contact with the prosecutor, Mr.
4 Caldwell, and I'll take you to some letters later
5 regarding the reward which I think you talked to
6 him, did you consider asking Mr. Caldwell to look
7 at his files, prosecution files or did you see any
8 benefit in that with respect to the work that you
9 were doing?

10 A I believe I talked with Bobs Caldwell. I've known
11 him probably as long as I have memory, five,
12 whenever, but I don't know the degree to which I
13 looked through things.

14 Q If we can just move a bit generally to the issue
15 of you talked about, and again please correct me
16 if I'm wrong, Mr. Merchant, I know you will, about
17 the retainer about getting the solution in getting
18 David out of jail. Is that -- can you tell us
19 about what was important about that and what steps
20 you thought ought to be taken?

21 A I began with issues of finding, to use the word
22 from my letter, finding the bombshell, I began
23 pursuing recanting and some of the witnesses, but
24 the second thing that I thought was important was
25 could we get David out, David had already been in



1 custody for a long time, an unusually long time,
2 particularly in those days, wrongly, I would
3 argue, we've made mandatory sentences longer, and
4 so I thought it would be beneficial if David were
5 out both to assist in the talking to people and
6 investigating and it also would just relieve the
7 pressure on the family if David were out. The
8 problem with getting David out is the wrong-headed
9 view of the parole board that the only way that --
10 it's far more difficult to get out if you won't
11 admit that you've done something and sometimes
12 people won't admit that they've done something for
13 some reason that has nothing to do with whether
14 they are guilty or innocent and sometimes people
15 won't admit that they've done something because
16 they are innocent, at least I assume that, so here
17 was David, probably would have been released,
18 wasn't being released because he wouldn't admit
19 that he had done it, but of course he had been
20 released and had blown it and that's the period of
21 time when he was really on the road to parole and
22 then blew all that away and that's when he met
23 Howard, so I wanted to get him back on that path
24 of being on parole.

25 Q

And just again if you could elaborate a bit on as



1 far as the reopening of the case or setting aside
2 the conviction, what importance if any did you
3 place on the fact that David would be out of jail
4 rather than in jail while you were doing that
5 work?

6 A Well, I thought it would be helpful in relation to
7 his assisting in contacting people, these were
8 people that he knew, and that -- and it would be a
9 lot easier in terms of him instructing,
10 instructing me, and it's hard, as every -- as all
11 of these lawyers know, it's hard even when
12 defending somebody when they are in custody, it's
13 hard to get instructions, you really want them
14 sitting in your office to talk to you if possible,
15 and you're just a lot more comfortable if they are
16 on bail than if they aren't on bail and then the
17 time pressures are off and you can do things
18 better because the time pressures are off and you
19 can do things better because the person is
20 available to you in a more relaxed way and the
21 person is available to you in this case to aid in
22 the investigation to prove his innocence.

23 Q And you also mentioned I think that it would take
24 pressure off the family. Can you explain that
25 comment?



1 A Well, the family, understandably, was very
2 determined that he should be out and to some
3 extent, in Joyce's case, because she believed that
4 David was innocent, when she worked as a sort of
5 an investigator she was over-zealous and sometimes
6 impacted people unfavourably, often impacted
7 people unfavourably, sometimes government people
8 and sometimes witnesses.

9 Q Can you give a -- can you explain that in what,
10 sort of who these are or what circumstances?

11 A I can't give you who I had -- I had parole people
12 say things like that to me, I thought she did some
13 bad, some negative things regarding Nichol John
14 who was a very important possibility. Enthusiasts
15 sometimes make errors.

16 Q And if David Milgaard had been out of jail on
17 parole, would that -- I'm trying to understand,
18 are you saying that that might have changed the
19 approach to some things?

20 A Well, I think it would in a couple of ways, one,
21 it might have been possible to stand Joyce down a
22 bit which might have, which I believe would have
23 been positive, but she was there and capable and
24 anxious to do things. If this had been a sort of
25 unlimited budget, I suppose every contact would



1 have been made by me or some lawyer from our
2 office or some sort of more neutral private
3 investigator, really had to some extent work
4 through Joyce, it would have been better to be
5 working through David.

6 David, incidentally, was really
7 a very sort of almost charming person, so I always
8 thought that he would have been quite effective
9 trying to talk to the people who had been his
10 friends of course, who had through, I don't know,
11 making mistakes or having their testimony twisted
12 or whatever caused them to testify in a way that
13 resulted in him being convicted, I think he would
14 have been quite effective with them.

15 Q If you can just turn now, I think one of the first
16 things that you became involved in after you were
17 retained was the interview of Nichol John?

18 A Yes.

19 Q And we have played that interview, we have a tape
20 of it, we played that interview I believe when
21 Nichol John testified, and I'll take you through
22 parts of this. Do you recall how that came about,
23 that interview, just generally?

24 A My belief is that I contacted her and asked her
25 and talked with her and asked her if she would



1 meet, but it's a long time ago. That's my
2 recollection.

3 Q And I think present at the interview were Nichol
4 John, Larry Leslie and Joyce Milgaard; is that
5 correct?

6 A Yes. I don't know whether anybody else was
7 present, but that -- that for sure, and I think
8 that Larry Leslie was involved because I, to
9 reassure Nichol, had suggested that we would pay
10 for a lawyer for her and I may very well have
11 suggested Larry Leslie, he's a very honest, easy
12 going, good guy and the right sort of calming,
13 calm person, and two benefits to having her have a
14 lawyer; one, it would minimize any thoughts that
15 she was sort of pressured into recanting, and
16 second, it would give her confidence that she was,
17 that she had somebody sort of on her side in the
18 room.

19 Q And if we can call up 048643, and this is a
20 transcript of the tape recording, Mr. Merchant,
21 and I believe this, it says edited conversation.
22 I believe this was actually prepared by the RCMP
23 in 1993 based on the tape, and as I said, we
24 played the tape. Just before we go through parts
25 of this, and again, we've heard much evidence on



1 this, that Nichol John had given a sworn statement
2 to the police saying she eye witnessed the murder
3 and then at the prelim and trial did not repeat
4 it, and again, I think at this time, I don't think
5 there's any record of her having repeated sort of
6 the eye witness account again, and can you just
7 tell us generally, what were your thoughts about
8 Nichol John, where did she fit in in what you were
9 trying to do and what was the objective of this
10 interview?

11 A My sense was that Nichol really wondered whether
12 what she had said was true, she had great doubts
13 about what she had said was true and she was happy
14 to cooperate. At the end of this meeting with her
15 I believed we had diminished the benefit of our
16 cards, that we had a better hand as regards Nichol
17 when we went into the meeting than we did when we
18 came out because she had come in not on the
19 defensive and I think, taken all together, she
20 came out a bit on the defensive.

21 Q And why -- why did that happen? What were your
22 observations in that regard?

23 A Well, this is an occasion of Joyce, of Joyce being
24 over-zealous and sort of pressing to the point
25 where the person clammed up a little and just sort



1 of listened instead of talking. Whether it would
2 have been better without Joyce or not I don't
3 know. I think it would have been better without
4 Joyce with hindsight, but I didn't know that at
5 the time, didn't know that going in, that's my
6 sense coming out. Joyce had this huge recall of
7 facts and information, so she's, she should have
8 been more useful than she was. She was useful in
9 some ways and she was, she did a disservice to the
10 campaign to some extent.

11 Q And in what way?

12 A Well, because she would be over-zealous. This is
13 an example where she just pushed too hard and so
14 Nichol -- but even so, Nichol continued to be
15 prepared to be questioned under drugs, which was
16 really an act of sort of generosity of spirit I
17 thought by Nichol. Most people would say heck no,
18 I don't want to go under drug therapy to answer
19 questions, pretty kind of her to do that, so it
20 was another example of -- even coming to the
21 meeting, so Nichol always struck me as great
22 potential for some -- for a nugget of gold, if not
23 a boulder.

24 Q And again, just as far as what you were hoping to
25 accomplish in the interview, can you tell us what,



1 again what the objective was or what you were
2 hoping to get from the interview with her?

3 A Well, I hoped we were on the road to her recanting
4 and saying not just no, that's not true, but also
5 confirming what I believed which was that the
6 police had sort of pressured Nichol and others
7 into providing a story that conformed with what
8 the police thought the story ought to be and I
9 put -- I put that in the perspective of the day,
10 so even in 1982, 1983, you know, 22 years ago, our
11 sense of the entitlement of what police could do
12 and should do is quite different from today and we
13 were talking about something that had happened a
14 long time before 1982, 1983, so certainly the idea
15 that the police would drill somebody and say isn't
16 it true, isn't it true, I want you to say, I want
17 you to say, I didn't take that and say, oh, no
18 policeman would ever do that, because I knew from
19 my practice the police were doing that fairly
20 regularly, and I had been told, I can't say that
21 Nichol told me or whoever told me, but I had been
22 told that the witnesses were threatened
23 essentially that they would be charged with
24 accessory after the fact of murder or implicated
25 or -- so I was looking not only for Nichol to say



1 no, it's not true, but also to recall more details
2 of it and say it's not true and here's why, here's
3 why I said what I said, or something to that
4 effect, but of course at this point all we were
5 doing was trying to get into her memory and I
6 accepted that she didn't remember and I accepted
7 she didn't remember because all the descriptions
8 were that this was a pretty -- pretty druggy
9 weekend, or pretty druggy period in a druggy month
10 in a druggy year.

11 Q Did you have a sense -- and I'm only asking, Mr.
12 Merchant, for your observations based on the
13 interview -- did you have the sense that she was
14 telling the truth and being truthful?

15 A Yes.

16 Q And, again, you had commented about -- and I'm not
17 sure what word you used -- about your belief or
18 theory or thought that the police maybe had
19 influenced her in giving this statement, or
20 something like that; is that correct?

21 A Yes.

22 Q And what caused you to think that? I mean you've
23 talked a bit about your experience and that, was
24 there any specific piece of information, or was it
25 just a sense of, well, if David is innocent then



1 somehow she made a statement she shouldn't have,
2 or can you explain that?

3 A Well, nothing specific, other than lengthy
4 interrogation. I don't have notes to confirm a
5 recollection of these threats, but that's my
6 memory of it.

7 Q And when you talked I think you said you thought
8 you had more cards going in than when you came
9 out; can you explain that a bit further? What
10 happened that caused you concern about -- let me
11 go back. When you went into the interview what
12 cards did you have that you didn't have when you
13 finished the interview?

14 A Well, first, permit me to return to a question
15 that you just asked, --

16 Q Yes.

17 A -- "did I think she was truthful?", and I did
18 think she was truthful. And second, as I said, I
19 thought it showed good spirit and good will that
20 she spoke with me, that she came, that she dealt
21 with Mr. Leslie. He came in -- I use these words
22 again -- good spirit, good will, so -- but the
23 task was how to get her to remember what she's not
24 remembering. And the aim, Joyce Milgaard's aim
25 would be to get her to remember what Joyce



1 Milgaard wanted her to remember, my aim was to get
2 her to remember whatever was true. I actually
3 thought that remembering whatever was true might
4 be beneficial to David even if it showed that he
5 were guilty, because it would be of assistance to
6 him, you know, if he were guilty -- and I didn't
7 think he was -- but if he were guilty he would be
8 better off to sort of be confronted with it and
9 get on with the parole and get on with the
10 reforming his life.

11 So my sense of better cards when
12 we went in than when we came out was I thought we
13 clammed her up a bit, I thought we made her more
14 defensive than before, maybe we had too long a
15 meeting, maybe we pressed her too hard, and so
16 collectively I thought our potential with Nichol
17 was better before than it was afterwards.

18 Q And again, we have been through this and I don't
19 propose to go through the entire transcript, but
20 it appears that, for the first significant part,
21 that Mrs. Milgaard would have questioned and then
22 you questioned, and was that something you talked
23 about going in or how did that come about?

24 A I don't remember. I mean my -- with hindsight, I
25 would have handled it better, and limited



1 Mrs. Milgaard a bit more.

2 Q If we can go to 048650 from the transcript, and
3 here's just the questioning about or discussion
4 about -- if we can call out the bottom part --
5 Nichol John, and Mrs. Milgaard is talking about
6 her being terrified. And there's parts here where
7 Nichol -- and here's one where:

8 "Go ahead.",

9 and tell me, or Mrs. Milgaard says:

10 "They told about ah the fact that you
11 were you see I have my own impressions
12 of what happened and."

13 And then she says:

14 "Go ahead."

15 And then Mrs. Milgaard says:

16 "You know and ah they told that you were
17 taken to a cell in the women's part of
18 the jail ...",

19 and then on to the next page, and about these
20 incidents about her treatment in the jail, and
21 Nichol says:

22 "I don't remember that."

23 Is that, again, is that the type of information
24 that you had, Mr. Merchant, at the time that
25 influenced your thinking that maybe Nichol was



1 coerced by the police in giving this statement?

2 A Yes. And lawyers too can speak out of both sides
3 of their mouth, so let me, permit me to do that
4 for a moment.

5 This is an example of the good
6 and bad of Joyce Milgaard. I mean she had this
7 full and impressive memory and recall which she
8 could present, which she could present well, and I
9 did not then believe, nor now, that she was making
10 this up. I mean she wasn't saying to Nichol John
11 "can I put these thoughts into your mind", she had
12 -- she knew these things to be true and she was
13 trying to assist Nichol to remember the things
14 that were actually true, which she would have
15 gleaned from other information in some other way.
16 So you have this combination of she's being
17 helpful by assisting Nichol to maybe trigger
18 memory, you see, --

19 Q Yes.

20 A -- but at the same time it was having the negative
21 effect of making Nichol a little defensive.

22 Q Yeah. If we could just scroll down, it looks that
23 after this exchange about that Nichol asked to
24 stop and leave the room, and again coming back on
25 Mrs. Milgaard apologizes, Nichol says "okay". Now



1 do you have any recollection of there being
2 anything that -- and again it's difficult from
3 looking at the transcript and even looking at the
4 tape -- or listening to the tape, pardon me, about
5 the dynamics; do you have any recollection that
6 might assist us, Mr. Merchant, about what was
7 going on in the room?

8 A I remember that I wouldn't say it ended poorly but
9 it ended with this "I've absorbed enough" or "I
10 have been subtly pressed enough", and maybe we
11 just tried to pack too much into one shot. Here's
12 Mrs. Milgaard, she's come from -- she's come a
13 significant distance to be here for, to be in
14 Regina for an important meeting, and it's
15 understandable that she'd like to pack as much
16 into it as possible, but Nichol, the very problem
17 with Nichol was a fragile, fragile mind and
18 approach. You know, Mrs. -- I'm not sure
19 precisely why Joyce was apologizing, but the clear
20 sense was that Nichol had been pressed, and I
21 don't remember whether Nichol cried or not, but I
22 sort of think she did.

23 Q If we can then go to 048662. And, again, this is
24 questioning by Mrs. Milgaard, and again I don't
25 propose to go through, Mr. Merchant, there's lots



1 of questions about the details and recollections,
2 but here's a question about -- actually if we can
3 just scroll up a bit -- and I think Mrs. Milgaard
4 is, you know:

5 "Did the police ever suggest to you at
6 any time that well you know you were
7 there, you were involved with it, you
8 could, you know, you could be charged
9 with this ...",

10 etcetera, and Nichol says:

11 "My impression of my to to do with the
12 police was that they treated me good,
13 O.K.? That ah they no. I don't think
14 they ever believed that I had anything
15 to do with it."

16 And question:

17 "And they treated you very well"?

18 "Yes. As much as I can remember."

19 And, again, I'm wondering what your reaction was
20 to that, if any, about -- sort of I think your
21 view was that somehow her involvement with the
22 police might have had, or how she was treated by
23 the police might have had something to do with
24 her statement, and at this point she seems to be
25 saying, at least at this part of the transcript,



1 that "lookit, I was treated well".

2 A Mr. Justice M.A. MacPherson was trying to help me
3 one day with a witness, and he was genuinely
4 trying to help me, and he got involved and asked a
5 couple of questions of the witness and then he
6 turned to me and said "she's not giving me the
7 right answers", and that's what was going on here.

8 I had a sense that something was
9 different, if that's -- but Nichol's impression
10 was good, which wouldn't have been helpful. So
11 even if she recanted we then would have this
12 problem of, you know, what caused her to -- what
13 caused her to do what she'd done in the first
14 place.

15 Q Now in fairness, if we can go to the next page, I
16 think she is then asked and she says:

17 "... there's too much that I don't
18 remember. There's too much I don't want
19 to remember."

20 And again, I think we'll see in your subsequent
21 letters, did you get the view that there was
22 something there that she either couldn't remember
23 or didn't want to remember?

24 A Yeah, but I didn't get the sense that that had to
25 do with her general impressions of the way she'd



1 been handled by the police, so this was the -- you
2 know, what she saw in relation to the murder
3 itself.

4 Q And if we could go to 048673, and there is a
5 discussion here between Mr. Leslie, Mrs. Milgaard,
6 and Nichol about -- and I think Nichol had asked
7 whether Mrs. Milgaard had a son Chris, and he was
8 coming into Bartleby's asking is Nichol -- and
9 then Mr. Leslie says:

10 "Chris O'Brian's actions in my mind are
11 actionable."

12 And then Mrs. Milgaard says:

13 "He was a radio announcer that had ah
14 had tried to help ...",

15 and Mr. Leslie says:

16 "Unfortunately, Tony, he ... did it."

17 Then, if we go to the next page, Mr. Leslie says:

18 "He tried to intercede for Mrs. Milgaard
19 but he, the very tone, and unfortunately
20 he's done it writing and we have it, the
21 very tone of his intercession was
22 threatening. If you don't do this, if
23 you don't phone Mrs. Milgaard, I'm going
24 public, I'm going to do this. This is
25 going to happen to you. We'll expose



1 you." ,

2 and then some action line program. And it
3 appears -- do you have a recollection of how this
4 came about or what effect it might have had on
5 the interview?

6 A No, I don't remember how it came about, and I
7 hadn't known about it in advance, but it -- you
8 know, the -- Joyce and I shared the view that some
9 sorts of publicity might be beneficial, and I
10 mentioned this sort of Truscott thinking, but --
11 and I also thought that Larry -- that it was good
12 that Larry Leslie was -- I wanted Joyce -- I
13 wanted Nichol to have confidence in Larry Leslie
14 so I thought it was good that there was some
15 advocating by him on her behalf.

16 Q If we can go to 048676, and I think this is where,
17 at the bottom, where I think you start
18 questioning, and you say:

19 "Mrs. Milgaard, your theory is about
20 what happened ...",

21 and then:

22 "(Unintelligible)",

23 and then:

24 "I would like to ask ... some questions
25 ...",



1 and then if we go to the next page there's some
2 questions about memory, and actually then to the
3 next page. It looks as though, again at least
4 from the transcripts, that you advised
5 Mrs. Milgaard not to say anything; can you tell
6 us what that was about?

7 A Umm, I don't have an independent memory, but I
8 infer from what's here that I was trying to cool
9 her out a little.

10 Q Now there is also, if we can go to 048679, and I
11 think in the course of your questioning to Nichol
12 she indicates -- actually, if we can go back to
13 048678.

14 A It's a pretty neat system, I'll bet it's an
15 expensive, I should use it on all my trials.

16 Q It's patented.

17 A Oh.

18 Q 048678, at the bottom, you ask some questions
19 about her relationship with David, and then she
20 says:

21 "May I tell you something?"

22 And then she says:

23 "Which I don't think I even told you.

24 O.K.",

25 and I assume she's talking to Mr. Leslie, and



1 I'll paraphrase this, but she goes on to say --
2 actually go to the next page where she says --
3 no, actually page 79 where she talks about her
4 encounter with David before the trip and says:

5 "We went up to his room and he raped me,
6 all right?"

7 And then you carry on:

8 "But then you went to Calgary with him?"

9 And then question, and if you go to 048683, I
10 think you ended up questioning her and she ended
11 up saying that rape was the wrong word, and I
12 think you had questioned her about the fact that
13 after this incident he went on the trip with her.
14 Again, do you have a recollection of where, if
15 any, where this figured on trying to figure out
16 why Nichol John had made this statement or was
17 acting the way she was?

18 A Well it wasn't important in relation to him being
19 guilty of a sexual assault or not being guilty of
20 a sexual assault, it was only important in
21 relation to her attitude towards David and whether
22 she would continue, in this good will way, to try
23 to be of assistance. So it would have been
24 extremely easy for her to just say "well I'm, I'm
25 not going to talk to you and it's behind me", and



1 I worried that it might be that she was building
2 herself up to "well that's, I'm -- I won't talk to
3 you any more because, after all, he sexually
4 assaulted me". So I wanted to -- I wasn't
5 addressing it in terms of whether he had done this
6 thing or not, I was -- it was a part of calming
7 her down and keeping her prepared to do the right
8 thing out of good will, because there was no
9 reason for her to be there other than good will.

10 Q And as far as her, did you have any thoughts as to
11 whether her relationship with David Milgaard, or
12 perhaps anger with him, might somehow be connected
13 to the statements she gave?

14 A I didn't really think that. I did think it was
15 indicative of sort of a druggie time in a druggie
16 year.

17 I know lots of women where I
18 could ask them "did you have sexual relations with
19 somebody in the back seat of a car while somebody
20 else was driving to Calgary" and their answer
21 would be "yes" or "no", but their answer wouldn't
22 be "gee, I don't know, I can't remember". So I
23 thought all of that was sort of indicative of her,
24 to use the '70s phrase, spaced-out kind of period
25 and a lack of recall.



1 Q If we could then go to 048684. And this is a
2 comment, Mr. Merchant, I think this is towards the
3 end of the interview where you are talking to her
4 about:

5 "Having Mr. Leslie ah arrange perhaps
6 with me that the doctor or hypnotist
7 probably take you back through this."

8 And then you say:

9 "As I understand it I don't think that
10 that that then creates ah problems for
11 you. They, whatever is in the
12 sub-conscious if it's creating problems
13 for you, it's creating problems for you
14 whether you, whether you work on it or
15 not."

16 And then you go on to talk to Mr. Leslie. And I
17 take it from this that, coming out of this
18 interview, the subject matter of having Nichol
19 John hypnotized or attending a doctor to try and
20 get a repressed memory or figure out why she
21 couldn't remember what was purported to be in the
22 statement -- and maybe I'm not paraphrasing -- I
23 guess figuring out her state of mind is maybe a
24 better way; that was raised with her and
25 Mr. Leslie; is that right?



1 A Yes.

2 Q And I think if we can then go to 173964, and this
3 is a transcript, Mr. Merchant -- it's not a very
4 good copy, we'll just bring up the top part -- and
5 it appears that this is a transcript of a tape
6 recording perhaps at, I think at your home with
7 Joyce and Peter, and there is also reference later
8 on to a Susan who I think is Mrs. Milgaard's
9 daughter; do you have a recollection of meeting
10 with -- and there's some comments in here that --
11 let me just scroll down and point it out to you
12 before I ask the question. T is you -- and let me
13 just find it, I'm sorry, here it is -- here is
14 where you say:

15 "Because of the time. Did you listen to
16 the tapes this afternoon? Leslie
17 volunteered that he didn't think it was
18 the same girl."

19 And I think you are talking about the interview
20 of that day so I'm assuming this was the same day
21 as the interview with Nichol John. Do you have a
22 recollection of meeting or talking with
23 Mr. Carlyle-Gordge or Joyce Milgaard either in
24 your home or someone's home?

25 A It wouldn't have been in someone 's home, it would



1 have been my home or no one's home. I meet with
2 clients often at home, particularly on weekends
3 and statutory holidays and at night. Umm, I
4 remember a meeting but I don't have much of an
5 independent memory of it.

6 Q And, again, do you recall the meeting being taped?

7 A No, I don't recall the meeting being taped.

8 Q And would you have agreed to be -- have your
9 conversation taped?

10 A Yeah, I probably would have, I mean I probably
11 would have. I've -- I've never -- I never say
12 things that I don't mind the whole world knowing,
13 but I don't remember, really.

14 Q There's just a couple of comments in here, and
15 again, I don't think we're able to find the actual
16 tape of this, but here's the comment, maybe just
17 at the start, and where -- what's attributed to
18 you is:

19 "I don't think you've got anything
20 there, much. You see, we're not
21 fighting the case again. Unless we had
22 some real bombshells, you wouldn't have
23 any real chance of fighting the case
24 again. That's what I meant earlier.
25 It's not a matter of deciding whether he



1 should have been convicted of the crime
2 the last time or not, and whether there
3 were significant inconsistencies which
4 should have resulted in his not being
5 convicted the last time, or not. The
6 question is whether things can be so
7 significant that the A*G of Canada would
8 authorize a new trial or some
9 investigation into the matter. Those
10 kinds of things -- the time factor of
11 driving the car -- that'd be fine if we
12 could get by the bombshell, the
13 requirement for the bombshell. And
14 certainly she didn't say anything that
15 gives you any bombshell."

16 And I presume you are talking about what Nichol
17 John said at the interview and about some of the
18 details. And, again, is this the type of thing
19 that you said earlier this morning, Mr. Merchant,
20 about what -- and I appreciate what you said,
21 that "bombshell" might be a word you used with
22 clients, but that -- communicating what you
23 needed to get the Attorney General to look at
24 this?

25 A Yeah. I probably said it better then, when I



1 didn't know I was being taped, than I did today.

2 **Q** Well you are being taped today as well, Mr.
3 Merchant.

4 **A** I didn't authorize that.

5 **Q** Down at the bottom, and I think Mr. Carlyle-Gordge
6 is asking for your impressions of Nichol and about
7 fear, that she's afraid of David now, and you say:

8 "She didn't appear that way. I said to
9 her something about I apologize for
10 anything that Chris has done, that he or
11 none of us feel that you deliberately
12 did anything to get them into any
13 trouble, in fact they had to drag
14 evidence out of you -- that sort of
15 thing. She seemed to accept that at
16 face value. She seemed genuine. It
17 wasn't as though she kind of heaved a
18 sigh of relief and said 'gee, I'm glad
19 you feel that way.' It was more 'I
20 would expect you to feel that way.'"

21 And then question from Peter:

22 "Do you feel she had a mental block when
23 she couldn't remember?",

24 and you say:

25 "She did.",



1 and Joyce says:

2 "You really believe she's sincere in not
3 remembering?",

4 and you say:

5 "I think it was, on some occasions, her
6 inability to express herself adequately;
7 it made her reluctant to answer specific
8 questions. She wasn't going to wait
9 till she could form the kinds of answers
10 that will make it possible for her to
11 really discuss it with you. But I think
12 by and large she has a mental block."

13 And, again, is that something that you thought at
14 the time, then, --

15 A Yeah.

16 Q -- is that a fair descriptor?

17 A Yeah, and what I think now.

18 Q Yes. And then it looks as though you expressed --
19 if we could just scroll down -- and your comment
20 on Mrs. Milgaard's questioning, you say:

21 "Actually, you did a fairly good job of
22 that. As a questioning technique I was
23 getting irritated with the fact that you
24 kept putting up what you thought, and I
25 didn't say anything. It went on for an



1 hour, and then it became apparent to me
2 that she liked that, and she was
3 interested in what you thought. And she
4 was kind of looking for some kind of
5 explanation too."

6 And Mrs. Milgaard:

7 "That's the feeling I felt I had to go.
8 When I first started I was questioning.
9 Then I realized I wasn't getting
10 anywhere, and that she was still as
11 hostile as when she started.",

12 and etcetera. And so I take it you and
13 Mrs. Milgaard would have had a post-interview
14 discussion about what had happened?

15 A Well, and I would have thought more important than
16 our difference of view is the words that followed,
17 'I don't think she was hostile, I think she's just
18 sort of afraid', and then Joyce:

19 "Well, fearful."

20 So my --

21 Q And --

22 A And perhaps my impressions of Nichol came through
23 to Nichol and maybe Joyce's impressions of Nichol
24 came through.

25 Q And your comment here, the next one, is:



1 "Not fearful of us, or even fearful of
2 David. I just think fearful of herself,
3 fearful of the process, fearful of
4 something she's tried to forget."

5 And I take it, sir, that would be something you
6 thought then and think now?

7 A Yeah. She was -- I'm sorry to keep using the same
8 words, I wish I could be more creative -- but
9 Nichol really was of good spirit. When I look
10 back on somebody being prepared to do -- to come,
11 to talk, and I -- my sense was that she, deep down
12 she knew something wrong had happened, that -- in
13 David's conviction, or something wrong had
14 happened and she wanted to get to it but sort of
15 couldn't get to it.

16 Q Okay. And then if we can go to --

17 A She wasn't, I don't think she was in any way
18 fearful or even embarrassed about having been a
19 part of David being convicted, so it wasn't --
20 there wasn't a reluctance to change her view or
21 her evidence and then be sort of caught out as
22 being a part of something going wrong, I think she
23 was, umm, umm, you know, sort of genuine and
24 child-like in all the positive senses of that
25 word.



1 Q Okay. If we could then go ahead to 173973, just
2 call out the bottom part, and this is again a bit
3 further on in the discussion, there's much more
4 discussion in there about the Nichol interview,
5 but then here we switch to Cadrain.

6 A This is a good system to record everything I say,
7 maybe President Nixon should have done it.

8 Q Joyce here says:

9 "One of the steps we thought we could
10 take with Shorty Cadrain ..."

11 And you say:

12 "Where is he?"

13 "In Saskatoon ..."

14 And then you say:

15 "Why don't you get a tracing service.
16 They're excellent. Empire Skip Tracing
17 ..."

18 Etcetera, and then we'll see a bit later where on
19 a number of occasions you would send in requests
20 to I think Empire and then there's another firm
21 after trying to locate these people; is that
22 correct?

23 A Yes.

24 Q And I take it, sir, you used these people before
25 or had used them in finding people who maybe



1 didn't want to be found?

2 A Yes.

3 Q And the next page, and again there's a discussion
4 about approaching Mr. Cadrain, and then you say:

5 "It's that, but when I deal with ..."

6 I think it's,

7 "... do-do baskets, and if I write them

8 a letter asking them to take a positive

9 step and phone me, it's very difficult."

10 Let me just pause here, and I think this is a

11 discussion about who should approach Albert

12 Cadrain and how should you approach him, whether

13 it should be you or Mr. Carlyle-Gordge, and then

14 you say:

15 "It's a whole lot better if I phone

16 them. And I think if you had a tracing

17 service find out where he works and what

18 he does, and if you then want to impress

19 with him some novelty, you could be in

20 Manitoba and phone with a conference

21 call. I can be on the other end, and

22 then he gets a telephone call at work,

23 saying will you please stand by for a

24 conference call --"

25 And then Peter:



1 "Take him by surprise."

2 And then onward, and it talks about -- and I
3 think there's one comment down here about Mr.
4 Carlyle-Gordge talking to him, and what I think
5 we know from the record is that ultimately,
6 although it was about a year and a half later, it
7 was Mr. Peter Carlyle-Gordge who actually showed
8 up at Mr. Cadrain's house in Dalmeny after you
9 had located an address and interviewed him as a
10 reporter. Do you have a recollection of that
11 discussion and setting that up or being involved
12 in the set-up of that?

13 A No.

14 Q As far as Mr. Carlyle-Gordge's position of a
15 writer, did that provide you with, maybe tool is
16 the wrong word, but some ability to get in and
17 talk to some people who might be reluctant to talk
18 to a lawyer, for example, or to Mrs. Milgaard?

19 A I didn't think that anyone would talk to him and
20 wouldn't talk to me, but I had a lot of good
21 success over time calling complainants, and heck,
22 I've had -- I've asked rape victims to, alleged
23 rape victims to come to my office, and they do, to
24 be interviewed by me before preliminaries kind of
25 thing, so -- but I did view Peter as being, one,



1 capable, and two, available, and without cost and
2 neutral, a bit neutral and a good questioner, so I
3 thought he was an appropriate vehicle to get
4 information, and he was -- he was, you know, he
5 was a zealot with a capacity to control his
6 enthusiasm, so I sort of -- you asked about Mrs.
7 Milgaard, and there were some downsides there, the
8 mother arrives, even the most neutral person
9 would, might, that might scare them off a little,
10 so I had no concerns about Peter being involved,
11 but I wasn't invited at quarterback either, I
12 wasn't given -- I wasn't given, nor did I seek,
13 the opportunity to control the process, they were
14 going to do whatever they were going to do. They
15 might tell me -- I might have been able to say
16 please don't do that and they might have not done
17 it, so -- but I thought well of Peter.

18 Q But were you aware in 1983 that Peter
19 Carlyle-Gordge did interview Albert Cadrain?

20 A I don't think I was, but I don't think -- I don't
21 recall in advance saying yeah, that's a good idea.
22 He may have told me what happened after he did it.

23 Q And what about, were you aware that he also
24 interviewed Bobs Caldwell and looked at his file
25 in 1983?



1 A No.

2 Q Were you aware of that?

3 A No, I was not, and, you see, Bobs would have been
4 fine because just another mind going in and
5 talking to him would have been fine as far as I'm
6 concerned, but -- and I thought in my dealings
7 with Bobs he was, I thought, pretty open and I
8 assume he would have been with Peter or anybody
9 else. I'm surprised he wouldn't have said heck,
10 I'm not going to talk to you, but with Shorty, if
11 I had known in advance, I think I might have said,
12 well, maybe it would be better if I talked to him,
13 but I don't know.

14 Q And --

15 A I can't reconstruct now.

16 Q And why would that be, would you have concerns
17 with Mr. Carlyle-Gordge doing it rather than you?

18 A I'm sorry, I have a lot of confidence in my own
19 ability to communicate and ask questions and be
20 neutral, so I might have -- I might have said
21 don't tromp on the tulips, let me have the first,
22 give it the first cut through the pasture.

23 Q How am I doing so far? Don't answer that.

24 Actually, this is probably an appropriate spot to
25 break before Mr. Merchant does answer.



(Adjourned at 10:27 a.m.)

(Reconvened at 10:46 a.m.)

BY MR. HODSON:

Q If we could go back to the transcript, 173964,
which is the transcript of the meeting we think on
May 9, '81. If we can go to 173974 and just at
the bottom, Mr. Merchant, there's a comment here
about Mrs. Milgaard, it says:

"Is it, in your thinking -- I have a
feeling that maybe the door was open
enough, that Nichol might even sit down
again for another meeting with us."

And you say:

"Oh I think she would. But I don't
think it's very valuable. I don't think
she's going to open up any more. And I
think that you may wear out your
welcome, whereas right now we've
titillated her interest; for whatever
reason she's blocking things out, she's
now interested in having the blocking
opened up."

And again, that would have been your view at the
time, sir?

A Yes.



1 Q And then if we can go to page 173976, and again
2 just at the top there's a reference here to, just
3 at the top to Mrs. Milgaard saying -- I think
4 she's talking about an interview they had with Ron
5 Wilson earlier, and I don't want to go through all
6 the transcript, but there's a discussion about
7 what they've learned from Ron Wilson about seeing
8 Kool-Aid or something, not blood, and you say:

9 "I guess I'd want to see all your
10 interviews if I were making a petition,
11 but not right now."

12 So I take it you would have been aware that they
13 were interviewing other people at the time and
14 it's something that you maybe put on the back
15 burner; is that a fair --

16 A I was aware they had done interviews and that
17 other interviews might take place, but there
18 wasn't any purpose in my reviewing the interviews
19 unless they said here's something significant.

20 Q I see. If we can go to page 173977, and there's a
21 discussion here about a fellow by the name of
22 Mahar, and he was a fellow who was, I think he was
23 convicted or there was maybe insanity involved in
24 a murder in around '68, '69 in the area and he may
25 have talked to a priest in the neighbourhood, and



1 I think we'll hear from Mr. Young tomorrow that he
2 was a person that the Milgaard group was pursuing
3 as someone who may have committed this crime, and
4 I'm just wondering here, there's just a comment
5 about following up with Mahar, etcetera. Do you
6 have any recollection of that being something that
7 you were involved with or --

8 A No.

9 Q And then if we could just scroll down, I think
10 they talk about Gary Young and what he had done
11 and read the transcript and Peter says:

12 "He's read the transcript, apparently.
13 He provided a bit of info on Cadrain,
14 which didn't turn out to be accurate."

15 And then you say:

16 "Frankly, I spent a couple of hours on
17 transcripts and I'll spend some more
18 time, then I'll send it back to you.
19 But if there was something that could
20 have acquitted him in the transcript,
21 the court of appeal would have noticed
22 it. I don't really think he did you
23 great favors by reading the transcript.
24 He's not going to find something that
25 Tallis and the Chief Justice missed."



1 And again I think that's similar to what you've
2 told us this morning. Was that your view at the
3 time, sir, and today?

4 A Yes.

5 Q If we can go ahead to document 156673, and this is
6 a letter May 13th, 1981 from David Milgaard to
7 you, just call that out, just a couple of points
8 here. One, he asked that you approach Mr. Tallis
9 and gives you authorization to do that, and
10 secondly indicates:

11 "My mother is responsible for the
12 coordination of this overall project,
13 but I would appreciate specifics as they
14 become available."

15 And again, would that be a fair characterization
16 of how David would be involved and how Joyce
17 would be involved in giving you instructions?

18 A Well, Joyce gave me instructions on behalf of
19 David. I didn't have any reason to believe there
20 was any difference in their views. She was there
21 working and David didn't know what she knew
22 really.

23 Q I wonder if we can go to 332565, and again I just
24 want to go through in somewhat of a chronological
25 fashion some of the things that you did, and this



1 is May 15, 1981 and this is Mr. Carlyle-Gordge
2 sending you a memo and talks about tracers, Albert
3 Cadrain, and then again if we can just scroll
4 down, he talks about the conference call idea:

5 "I'll prepare questions and listen in,
6 but don't want to be heard unless it
7 fails; in that case, I'll approach him
8 independently as an author and try to
9 flatter him that way."

10 Again, do you recall any discussions about using
11 Mr. Carlyle-Gordge in that way?

12 A This is -- this is Peter saying he would prepare
13 the questions for me to ask?

14 Q Yes.

15 A I don't recall doing that. I'm not positive I
16 would have done that.

17 Q Yeah, no, and I think in fairness, I think this is
18 his first letter to you saying help us find
19 Cadrain and here's where Mr. Carlyle-Gordge is
20 saying, and I think at the earlier meeting this
21 idea about a conference call with Mr. Cadrain to
22 try and get him to talk, and I think here's where
23 he's saying lookit, let's try that, I'll prepare
24 the questions and listen in, but don't want to be
25 heard. Now, this never happened, I think what



1 happened is Mr. Carlyle-Gordge went out and
2 interviewed him.

3 A Yeah, I was proposing that, that it might flatter
4 him to involve a writer and now we could speak
5 together. I may not have responded to this, but I
6 can't imagine that I would have set up a call, you
7 know, this is Tony Merchant, I'm a lawyer, I want
8 to -- and then have somebody listening in where I
9 didn't disclose that the person was listening.

10 Q And then again if we can go to the next page, and
11 I think you've already told us there were some
12 names and some tracers that you would, I take it,
13 on behalf of Peter Carlyle-Gordge or Joyce
14 Milgaard, find people that they wanted to talk to?

15 A Yes, I tried to do that.

16 Q And then here he says on the hypnosis of Nichol:

17 "I am taking your word for it that she
18 wasn't doing an elaborate con job of
19 poor memory. I've had to re-adjust my
20 thinking a little since I was sure she
21 was protecting Ron Wilson and lying at
22 first."

23 Let me pause there. And again, is that accurate?
24 He's writing down what he says you told him, that
25 she wasn't doing an elaborate con job of poor



1 memory, and was that your view at the time based
2 on your interview with Nichol John?

3 A No, and I don't think I used those words. I think
4 that's his characterization of my sense that she
5 was genuine, so he's writing back to me, he's
6 putting it in his, he's processing my view the
7 way, in the sort of pejorative context of his
8 prior beliefs.

9 Q And then down at the bottom he says:
10 "Nichol is highly strung, but also
11 suggestible and easily dominated."
12 Would you agree with that assessment?

13 A Well, I didn't think she was highly strung
14 particularly. I don't know whether -- I don't
15 know whether he's talking about was suggestible at
16 the time which was sort of our theory, but she was
17 prepared to cooperate which, you know, it sort of
18 is going back to the language of the '60s, is the
19 person -- is the person generous or a mark, so
20 suggestible? She would listen, I wouldn't have
21 used that word, and easily dominated? I don't
22 know. So they had -- Peter had a view, Joyce had
23 a view, it's not uncommon for people to have a
24 view and they express it to lawyers and lawyers
25 have their own view. I thought they were both



1 doing good work, you know, so I wasn't arguing
2 with them.

3 Q If we can just go to the next page, just get your
4 comment on again the mental block, I think Mr.
5 Carlyle-Gordge says:

6 "The mental block --"

7 Talking about Nichol,

8 "-- could stem from: Fakery; witnessing
9 the real murder; whatever the police
10 said or did to her in May 1969. None is
11 ruled out. I'm rather keen or cause 3,
12 though I have no axe to grind."

13 And again, is that sort of generally what the
14 view was, lookit, there's three scenarios, one is
15 she could be faking it and lying, two, she could
16 have witnessed a real murder and can't remember
17 it or has blocked it out, or three, the police
18 said or did something to her in May of 1969 that
19 caused it, and again, would that be generally the
20 three main possibilities?

21 A Yes.

22 Q Then go ahead to 216045, and this is a June 3rd,
23 1981 letter, and I think this might be a follow-up
24 on the tracer requests, and you say:

25 "I only had authorization to expend



1 money to find Mr. Cadrain.

2 I suppose I have the freedom to
3 use the funds in my possession as I see
4 fit. I would like you and Mrs. Milgaard
5 to discuss whether I should be spending
6 \$75.00 on each, and I require the kind
7 of information that you gave me re:
8 Cadrain in order to instruct a trace on
9 the others."

10 And then down at the bottom:

11 "P.S. My meaning may have lacked
12 clarity. If you and Mrs. Milgaard
13 consider the expenditure of money to
14 trace these people to be necessary, then
15 I will spend it, but the source of my
16 funds is limited."

17 That's self-explanatory. Is that what you were
18 telling us about a bit earlier this morning, that
19 there's only so many things you can do and pick
20 wisely?

21 A It's an example.

22 Q And then go to 219531, this is a letter of May
23 16th -- or sorry, May 26, '81 to Mrs. Milgaard
24 that you ask for a letter indicating everything
25 you know about Shorty and then go on to detail the



1 information.

2 "I will then attempt to find out where
3 he is."

4 And again, would this be an example where you
5 would be helping them find people?

6 A Yes.

7 Q Then if we can go to 216040, this is a letter May
8 26, 1981 from you to Mr. Caldwell, and it appears
9 that you had a few -- that you had a brief meeting
10 with him and then you ask for the person who
11 received, or the names of the people who received
12 the reward out of the police fund and then go on
13 to talk about full disclosure, etcetera. Do you
14 recall the circumstances, and I appreciate this is
15 long ago, about what would have been the
16 discussions with Mr. Caldwell?

17 A I don't recall other than generally I remember
18 speaking with him and having, you know, a
19 favourable impression of him talking with me.

20 Q And just for the record, I should point out, Mr.
21 Merchant has located his, would they be day
22 planners or -- from this time frame, is that the
23 correct, or calendars, is that the correct term?

24 A I call it a diary.

25 Q Diary. That indicates --



1 A But that's because I don't have anything
2 interesting to write in a real diary.

3 Q And again, we have not scanned those or anything
4 and I think they, Mr. Merchant may need them from
5 time to time to assist where he was or what he
6 might have done on a specific day.

7 Just back on the reward, can you
8 tell us what would be the reason to find out who
9 got the reward or where did that inquiry stem
10 from?

11 A I don't know the genesis of my inquiry, but
12 some -- if the reward went to Nichol John, I knew
13 it hadn't, but just to pick a name, that might be
14 suspicious.

15 Q If we can go to 216041.

16 COMMISSIONER MacCALLUM: What was the last
17 doc ID, please, the letter to Caldwell?

18 MR. HODSON: The letter to Caldwell was
19 216040.

20 BY MR. HODSON:

21 Q Now here is a May 26th letter, 1981, to
22 Mr. Leslie, it's 216041, and this would be a
23 couple of weeks after the interview with Nichol
24 John, and I just want to go through parts of this
25 letter, you say:



1 "I met with Dr. Charlie Messer about ten
2 days later, specifically for the purpose
3 for discussing the situation. I know
4 that Dr. Messer is extremely busy and I
5 am satisfied that he would not misdirect
6 us for the purposes of increasing his
7 workload."

8 Tell us, Dr. Messer, what was his specialty or
9 area and what was it that you were looking for
10 him to do?

11 A Charlie Messer is an eminent psychologist. I used
12 to do a radio open-line program for three or four
13 years and I would have him fairly regularly on my
14 program, every three or four months, which I
15 developed a bit of a friendship, because to get
16 him to do this kind of innovative work would be
17 anticipated by me not to be simple and that's why
18 you see that I went over to see him because I can
19 persuade strong-armed people to do things better
20 if I'm in their office pleading instead of on the
21 telephone. He -- what I wanted him to do was to
22 assist in interviewing Joyce -- or to interview
23 Nichol through drugs, under drugs, and as a result
24 of him, of that meeting where he agreed, which I
25 thought was kind of him, and I should say



1 additionally he's interested, he was always
2 interested in criminal issues, he testified on a
3 number of occasions about impact on people facing
4 criminal charges, he's fairly well known in this
5 regard as well, so in the course of meeting with
6 him to get his agreement to do the therapy with
7 Nichol, he did exactly what I'm doing now, you ask
8 a simple question, you get a long answer, and I
9 was reporting to Larry Leslie the information of
10 this long, this long answer because Nichol was in
11 the pasture, but she wasn't in the corral yet. I
12 mean, she agreed to do this, but there are many
13 slips twixt cup and lip, so I wanted to continue
14 to have Larry understand what was going on and
15 this is a recounting of what Charlie Messer said
16 to me.

17 Q I just want go through this paragraph and I'll
18 read it for the record. You write:

19 "He has indicated that it would be
20 relatively easy for a person to continue
21 to suppress a factual situation,
22 notwithstanding hypnosis if the person
23 was subconsciously frightened or
24 reluctant to indicate what was seen. He
25 indicated that the reasons for your



1 client's suppression of a memory, could
2 be that she was in a rage about Mr.
3 Milgaard, she could fear Mr. Milgaard,
4 she could fear the other person involved
5 if there is someone else involved, there
6 could be a repression because of the
7 displeasure of what she saw, or because
8 she felt manipulated or used in some way
9 and is subconsciously getting back at
10 Mr. Milgaard or someone else."

11 And again, I take it, sir, that's what Dr. Messer
12 would have told you?

13 A Yes.

14 Q And would this -- and again some of the reasons
15 that he gave for the suppression of memory, would
16 it be fair to say that some of those would point
17 to Mr. Milgaard being involved in the crime and
18 some would point to him not being involved in the
19 crime?

20 A Correct.

21 Q And I think you had said earlier your objective
22 was to get whatever it was that Nichol John had
23 suppressed, be it good or bad; is that fair?

24 A Correct, and Peter too, you know, Peter too I
25 think was a bit objective about let's find out.



1 Q And then you go on to talk about the lie detector
2 test and I think you indicate that, and you say
3 here -- I'll read the whole thing, you say:

4 "One of the investigative techniques
5 related to the use of a lie detector and
6 similar equipment would certainly not be
7 of assistance. He has no doubt, and
8 neither do I, about the fact that your
9 client is telling the truth because she
10 remembers it and the lie detector
11 equipment goes no further than to
12 protect against perfidy. It is not an
13 aid to drawing forth responses which
14 would have otherwise been suppressed."

15 And again, that's fairly self-explanatory as far
16 as -- I think lie detector had been raised by
17 Mr. Leslie at the interview or by somebody; is
18 that right?

19 A I don't remember.

20 Q And then the next page, you state that Dr. Messer,
21 you say:

22 "He is prepared to undertake the
23 counselling and attendances which would
24 be required to draw forth her memories
25 of the incident. This is not, however,



1 going to be a quick matter. He believes
2 that he might have to see her on a
3 number of occasions."

4 And then you say:

5 "I expect that having suppressed her
6 memories, she does suffer from some
7 psychiatric disability and that
8 unblocking her memory will assist her in
9 the long run, though it won't be
10 pleasant to have those memories
11 unblocked. She did indicate that she
12 would like to know what she really
13 remembers, and I am sure that
14 subconsciously she wants to end the
15 suppression just as much as the
16 Milgaards want her to open up about the
17 matter."

18 And I take it that's getting at outlining for
19 Mr. Leslie what benefits and what -- costs is
20 perhaps the wrong word, but what impact it might
21 have on Nichol to go through this. Is that what
22 Dr. Messer would have told you?

23 A That's what he told me, and if you remember the
24 meeting with Nichol, I had sort of pitched her a
25 little bit on the benefits of really knowing as



1 well.

2 Q And then you carry on:

3 "The question as far as the Milgaards is
4 concerned is whether she made the
5 initial statement to the police because
6 it was true or because she was pressured
7 into making a statement over the period
8 of time that they had her in custody."

9 And let me pause there, and I think the initial
10 statement to the police would be the statement
11 where she said she witnessed the murder; is that
12 fair?

13 A Yes.

14 Q And then you say:

15 "We know that the period of time in
16 custody was a very difficult one for
17 her. From other information, it is
18 granted she was hysterical for
19 significant periods of time, she
20 actually had to have someone go into the
21 cells to sleep with her, and the police,
22 then under a lot of pressure regarding
23 the series of murders, used her state of
24 mind to compel a statement. Whether
25 that statement was truthful or not



1 remains to be seen."

2 I'm wondering if you are able to tell us what
3 other information, or where you got the
4 information about Nichol John's treatment by the
5 police as you've outlined in the letter?

6 A I cannot, I'm sorry. I can see where that would
7 be interesting. I obviously believed it when I
8 wrote it, and I believe it now.

9 Q Do you think that's something you would have got
10 from the transcript or from Mrs. Milgaard or Mr.
11 Carlyle-Gordge or are you able to tell us what
12 sources you might have had for it?

13 A Well, your speculation would be as good as mine,
14 so I'm really not able to, not able to tell you,
15 and as you've noted, that's inconsistent with what
16 Nichol herself said, but the specificity of my
17 words would indicate to me that I had been told
18 this and I didn't -- I didn't have occasions where
19 Joyce or Peter told me things which I then found
20 to be untrue, so when they said here's -- they
21 tended to have done a very thorough job of getting
22 facts together.

23 Q And in fairness, Mr. Merchant, I think it's not in
24 dispute on the record that Nichol John did in fact
25 spend I think two nights before she gave the



1 statement in police cells and there's various
2 evidence as to what and why, but that I don't
3 think is in dispute, that she was in police cells
4 before -- or pardon me, in the matron's -- I
5 better be careful here. She was in the police
6 station, so there is some evidence of that. If I
7 can just go down to the bottom, you say that --

8 A May I just --

9 Q Yes?

10 A -- say -- and if it is true that during that
11 entire period of time they were saying to her "we
12 don't suspect you've committed any crime and
13 there's nothing, you are not" -- I mean then why
14 did they hold her? But that's for somebody else
15 to think about, not me.

16 Q You then say in your letter:

17 "I neglected to mention earlier that
18 Dr. Messer's recommended treatment
19 includes the use of small doses of
20 pentathol. I understand that this is
21 fairly common treatment in such
22 circumstances and that there are no
23 problems regarding the use of the drug."

24 And I think that you had earlier, said earlier
25 that part of this treatment involved putting Ms.



1 John under the effect of a drug, and is that a
2 truth drug or something, are you able to -- I
3 think I have seen this elsewhere that it's a --
4 are you able to shed any light on what that is?

5 A I don't know.

6 Q And I'll go through some of the letters, but just
7 generally is it fair to say that you spent some
8 time with Mr. Leslie trying to arrange this
9 session between Dr. Messer and Nichol John, and
10 that it never did in fact happen; is that correct?

11 A Correct.

12 Q And again, we'll go through some of the
13 correspondence, but did that take -- that went on
14 for a number of months, is that right, those
15 efforts?

16 A Yeah. She was prepared to do it at the time of
17 the meeting, all the indications was she was
18 prepared to do it and I was just to set this up,
19 and then there seemed to be a bit of a backing
20 away.

21 Q Okay. If we can go to 332571. And this is your
22 first letter, June the 8th of 1981, to Mr. Justice
23 Tallis, who at this time is residing in
24 Yellowknife, is that correct, was a Judge of the
25 Supreme Court of the Northwest Territories?



1 A I have seen his picture at the courthouse there.

2 Q Yes. And so you indicate:

3 "I'll contact you by telephone. I have
4 been retained to look into the matter
5 and I would appreciate you answering one
6 or two questions."

7 And we'll see a few other letters throughout the
8 year. Did it take -- was it difficult to get to
9 Mr. Tallis and to get to talk to him?

10 A I don't think I spoke with him promptly after June
11 8th so there must have been some problem reaching
12 him.

13 Q And I think it was in November of 1990 -- or
14 pardon me -- 1981, and I'll take you to a note a
15 bit later where you in fact did talk to him, is
16 that right?

17 A Yes.

18 Q And was the fact that he was in Yellowknife as
19 opposed to Regina; did that make it a bit more
20 difficult?

21 A It meant that I couldn't meet with him. I met
22 with him subsequently when he was in Regina.

23 Q In we can go to 025339.

24 A I couldn't meet with him economically.

25 Q Yeah. 025339, and this is not a very good copy,



1 and this is June 10th, 1981, and this is a letter
2 that you may not have seen unless it was a part of
3 the package that we gave you, and it's a letter
4 that Mr. Leslie wrote to the chief of police in
5 Saskatoon a month after your meeting. And it
6 says:

7 "We've corresponded before regarding
8 Nichol Demyen ..."

9 And just to give you some background, earlier in
10 1981 there was correspondence, I think Gary Young
11 had written to the chief of police looking for
12 addresses for witnesses, the police got in touch
13 with the witnesses who said "no, don't disclose
14 them", and so there was communication. So I
15 think that's what that refers to. And then he
16 says here:

17 "We ultimately had forced upon us an
18 interview with Mrs. Milgaard and her
19 lawyer, Tony Merchant of Regina."

20 And then they:

21 "... spoke for about an hour and a half
22 ..."

23 And I'm just wondering; your comment about
24 whether the interview was forced upon her or
25 whether she came voluntarily?



1 A The interview was not forced upon her, she came
2 voluntarily, as I've -- I'm surprised to hear this
3 characterization. And not only did she come
4 voluntarily, but there were all the indications
5 that she would voluntarily be questioned under
6 drugs. I wouldn't have taken a fairly
7 considerable amount of time to arrange to see Dr.
8 Messer, go and see Dr. Messer, write a detailed
9 letter to Mr. Leslie, if I had had any doubt about
10 what was going to happen.

11 Q If we could just carry on here, he writes:

12 "I think you should be aware that
13 Mr. Tony Merchant is now handling this
14 file. He is attempting to have our
15 client go through a hypnotic study so
16 that she can ascertain what is in the
17 back of her mind. It is assumed by Mrs.
18 Milgaard and Mr. Merchant that she has
19 rejected certain things into her
20 subconscious because they were repugnant
21 to her. It is the position of
22 Mrs. Milgaard that a convicted murderer
23 was seeing a priest in a nearby church
24 at the time of the incident.
25 Mrs. Milgaard alleges that this



1 convicted murderer then committed this
2 particular act and not her son."

3 Again, I think that's the Mahar matter. And then
4 if you can scroll down:

5 "Because of co-operation that we have
6 had with you and with Detective Sgt.
7 Karst, I thought it was imperative that
8 I pass this information on to you. Mr.
9 Merchant seems to be well versed
10 regarding police involvement with Nichol
11 Demyen prior to the taking of a
12 statement from her. He seems to be
13 alleging that the Saskatoon City Police
14 Department coerced a statement out of
15 Nichol Demyen which may not have been
16 the truth."

17 And, again, I'm just wondering if you can comment
18 on that, Mr. Merchant? And again, I appreciate
19 that this is Mr. Leslie writing to someone else
20 about what his perception was, but are you able
21 to comment on whether you seemed to be well
22 versed regarding police involvement and whether
23 you had the view that the police had coerced a
24 statement out of her which may not have been the
25 truth?



1 A I had the view that the police had -- I had the
2 view but needed to substantiate -- I had the
3 opinion but sought to substantiate that the police
4 had coerced a statement out of her, which may not
5 have been the truth. I think that's -- the "which
6 may not" is all accurate.

7 I wouldn't have said that I was
8 well versed in everything that the police had
9 done, I knew something of what the police had
10 done. I suppose his characterization is I, you
11 know, I -- I was -- I knew more than 999 out of
12 1,000 Saskatchewan residents, maybe, but that's
13 not the level of inquiry that you'd want.

14 Q Go to 216051. And this is Mr. Leslie's reply of
15 June 10th regarding your letter about Dr. Messer,
16 and just the one comment here, if you can call
17 that out. He says a couple of things:

18 "... assumed that there would be at
19 least two meetings ...",
20 and then he says:

21 "We are not happy about a number of
22 meetings and we are not too happy about
23 the question of drug useage."

24 So I take it that Mr. Leslie was expressing some
25 concerns about those two parts of Dr. Messer's



1 treatment?

2 A Yeah.

3 Q And we'll see a bit more about that later on.

4 216052 is Mr. Caldwell's June 18th letter back to
5 you, and he simply says -- this is on the reward
6 issue -- saying that we can't -- he can't give it,
7 it's the Police Commission, and then ultimately
8 you get a letter from the Police Commission saying
9 "we can't tell you who it is" or "we won't tell
10 you who it is", and again wondering if any of
11 that -- whether that raised concerns or suspicions
12 with you, or do you recall anything about that?

13 A Well concerns, suspicions, yeah, it raised
14 suspicions. This is 1981, police were even less
15 cooperative then than they are now. In -- I, in
16 my experience it was always a -- as I said before,
17 this is pre-*Stinchcombe*. It maintained the
18 inquiry in my mind of who had started this process
19 and was there something to be gained, but it
20 didn't cause me to go into a fury, because that's
21 the way defence counsel got treated.

22 Q So was it expected, then, that response; is that
23 --

24 A No, I wouldn't say it was expected, but it wasn't
25 shocking either.



1 Q Yeah.

2 A Why they wouldn't tell, I mean why wouldn't you
3 tell me, you wouldn't tell me because you've got
4 something to hide, that's the inference, that's
5 the natural inference to be drawn.

6 Q Okay. We now know that it was Albert Cadrain that
7 got the reward; do you remember whether you became
8 aware of that during your time on the file?

9 A No, this is the first I've ever heard of it.

10 Q If we go to 216050.

11 A How much was the reward?

12 Q \$2,000.

13 A Hmm.

14 Q 216050 is your letter of June 25, 1981 to Mr.
15 Tallis and it just says:

16 "Thank you for talking with me on June
17 16.

18 I would appreciate hearing from
19 you after you have refreshed your memory
20 and possibly receiving copies of the
21 written instructions or such relevant
22 matters dealing with the subject matter
23 that we discussed."

24 And, again, do you have any -- I had asked you
25 this earlier, but -- about did Mr. Tallis or



1 Justice Tallis have a reluctance to talk to you
2 about matters?

3 A Yes.

4 Q And did he say why or did you have any sense of
5 why?

6 A My memory, my clear memory is the time when I met
7 with him at the courthouse, and -- in Regina --
8 and he said "I've just made it a rule never to
9 talk about this and I'm not going to talk about
10 it", and I pressed him a little, umm, to the
11 extent that a junior, a junior who worked for a
12 guy presses a senior, and to the extent that
13 somebody who thinks wonderful things of the senior
14 presses the senior, but I pressed him, and to the
15 extent you can push a Court of Appeal judge that
16 you respect, and he said "I've always just said
17 no", and I said "but don't you have to answer,
18 here are instructions from the client, don't you
19 have to, don't you have to answer", and he, you
20 know, he, in a very nice, powerful way that he
21 does things he said "well I just don't see it that
22 way and I'm -- don't want to answer any
23 questions", so that was it, you know.

24 Q And I'll refer --

25 A And "have a nice day".



1 Q If we can go to 3 -- or pardon me -- 216054. And
2 this is July 23rd, '81, and it's a letter to Dr.
3 Messer, and so this is about a month after your
4 exchange with Mr. Leslie.

5 A I did a lot of work for \$3,000. I was better
6 value in those days.

7 Q You are opening up an area that some counsel may
8 wish to question you, Mr. Merchant, but --

9 A I had to make up for it later.

10 Q You talk here about:

11 "The girl, Nicol Demyen, appears to have
12 repressed knowledge about the murder
13 incident. You will also recall you
14 indicated that that pointed to the
15 likelihood of fear on her part. The
16 question is whether she is afraid of Mr.
17 Milgaard or afraid of something related
18 to the matter which has nothing to do
19 with Mr. Milgaard."

20 Then it goes on to talk about Larry Leslie and
21 having him present, I think, to protect
22 solicitor/client privilege during the interview,
23 and you say:

24 "I know this is somewhat unusual but it
25 is important to our clients that the



1 discussion proceed and it can only
2 happen if Mr. Leslie is allowed to sit
3 in with you."

4 And I take it that was a condition that he put
5 forward, that he be there to protect the
6 privilege?

7 A Uh-huh.

8 Q Is that correct?

9 A Yes.

10 Q And then, as well, you indicated that:

11 "... Mrs. Milgaard wants to meet with
12 ...",

13 Dr. Messer:

14 "... so that she may advise you of the
15 subject areas to be plumbed. She will
16 come to Regina for that purpose ...",
17 etcetera. And so I take it from that that Dr.
18 Messer needed some background facts to be able to
19 conduct the interview of Nichol John; is that a
20 fair assumption?

21 A Well I don't know whether he needed it, but he was
22 going to get it, if he continued.

23 Q And why do you say that?

24 A Well, umm, you know, my view with hindsight is --
25 was better than my view as time -- as I was



1 working through things, so on the one hand I was
2 very impressed with Joyce Milgaard's work and
3 knowledge and memory, and I think very likely
4 she's the reason that this wrongful conviction was
5 discovered and overturned, but looking back on it
6 to have -- to suggest that Charlie Messer would
7 see her, he wouldn't like that, for sure he
8 wouldn't like the idea that Larry Leslie was going
9 to sit in. These are -- you know, I had persuaded
10 him because he was a friend, I don't think I ever
11 would have been able to persuade any other
12 psychologist/psychiatrist to do this sort of
13 paying them well, and I doubt we were going to do
14 that. So whether it would have been useful for
15 him to get the facts, sure, if he were going to
16 become really involved as sort of an investigatory
17 psychiatrist, but I don't think he was undertaking
18 that degree of involvement so --

19 Q Was Mrs. Milgaard's attendance to Dr. Messer, was
20 that her idea, your idea, or Dr. Messer's idea?

21 A Well it certainly wouldn't have been Dr. Messer's
22 idea, and I don't think it was my idea, but the
23 fact that I didn't say "no" may have been a
24 combination of the client directs and, as I said,
25 I thought she was doing good things.



1 Q If we can then go ahead to 156674, and just to
2 identify again, this is September 8th, 1981. And
3 just chronologically it appears, Mr. Merchant,
4 that things are not happening at Nichol John's end
5 or Mr. Leslie's end about getting the interview
6 done; is that fair?

7 A Right.

8 Q And so this is a letter asking what needs to be
9 done to get it going; is that correct?

10 A Yeah.

11 Q If we can go to 216060, and this is a letter
12 September 18th, 1981 from Ken Howland who is a
13 board member with the National Parole Board, and I
14 take it at this time you knew Mr. Howland; is that
15 right?

16 A Yes.

17 Q And what did you know of him or what dealings had
18 you had with him?

19 A I knew Ken before he became a member of the
20 National Parole Service and had had some ongoing
21 relationship with him. He came from Regina, and
22 on the national parole he was in Saskatoon, so I
23 didn't see very much of him. And I had called him
24 for advice and asked him what I should do and how
25 I could assist David regarding parole, and he said



1 "I will help you", and I was sort of surprised.
2 But I didn't really understand how the parole
3 system worked particularly, I had some inkling,
4 but -- and but, you know, I -- and then he
5 volunteered, in this telephone conversation he
6 said "he's innocent you know", and I was
7 surprised. And I said whatever to get him to do
8 whatever, and I said "how do you know that", and
9 he said "the cons know". I'm not -- "he's
10 innocent you know" is a quote, I'm positive those
11 are the words he used, even though it's a long
12 time ago, because, one, I've sort of anecdotally
13 repeated it to a number of people over time, and
14 two, it just struck me as amazing. And it turns
15 out he was 20 years ahead of his time. He told me
16 that -- but this isn't a quote -- but "the cons
17 know", and I said "what do you mean", and he said
18 "they know when people are innocent and they know
19 he's not", -- you know, -- "they know he's
20 innocent". He didn't use the word "not guilty",
21 he used the word "innocent". And so I was sort of
22 tickled by this, that I had somebody who was
23 really prepared to kind of go to bat for David,
24 and then I began dealing with him, I met with him,
25 and I found the reference in my diary and put a



1 yellow sticky there, and the yellow sticky isn't
2 there any more, so I can't find the reference.

3 Q We'll maybe come back to that. But just again on
4 this letter, this is September 18, '81, and it
5 looks as though Mr. Howland has been informed by
6 David Milgaard that you are acting for him, and
7 then Mr. Howland talks about a conversation he had
8 with David when he was first incarcerated, and I
9 think goes on to say in the letter what you have
10 told us he told you in the telephone call, is that
11 right, that the inmates did not act or react
12 negatively towards him because they knew he was
13 not guilty? And then Mr. Howland says:

14 "I must say that the possibility that he
15 should not have been convicted of murder
16 has haunted me since that time."

17 And, again, that's similar to what he had told
18 you, then, in your discussion?

19 A Yes.

20 Q And the fact that this was coming from a National
21 Parole Board member, I think you said that it was
22 helpful or --

23 A Well not just --

24 Q "Tickled", I think, were your words?

25 A Well not just a National Parole Board member,



1 really a dedicated, respected, educated, capable,
2 highly-regarded -- I knew he was
3 highly-regarded -- yeah, tickled, very, very
4 pleased, and reassuring of the view against all
5 odds, sort of, by evidence that David was
6 innocent.

7 Q Did Mr. Howland's comments then influence your
8 thinking about Mr. Milgaard's guilt or innocence?

9 A No. I didn't -- I think it moved me, moved me
10 further towards 'David is innocent', but lawyers
11 are skeptics by --

12 Q Yes.

13 A -- by training if not by birth.

14 Q If we could then go to 213626. And we'll just
15 skip back to the Dr. Messer and I think, Mr.
16 Merchant, this would have been a memorandum or a
17 note from, I presume Brenda is someone in your
18 office at the time that would have taken down the
19 following message from Dr. Messer; is that
20 correct?

21 A Brenda Delnea, yeah.

22 Q And the message says that:

23 "Dr. Messer called regarding Milgaard
24 and left the following message:

25 He met with Mrs. Milgaard and



1 her reporter friend on Sunday, September
2 13/81 for approximately 2 - 2 1/2 hours.
3 During that time Mrs. Milgaard contacted
4 Larry Leslie and asked if and when Dr.
5 Messer could meet with Leslie and his
6 client Demyen. Larry Leslie indicated
7 to Mrs. Milgaard that he did not wish to
8 discuss anything about the case with Dr.
9 Messer at that moment. Dr. Messer heard
10 Mrs. Milgaard's end of the conversation
11 and he feels that Leslie is reluctant to
12 get involved (he feels Leslie knows more
13 than he wants to know)."

14 A Yeah, I'm not sure that I would -- he is saying
15 that, Dr. Messer is saying that?

16 Q Well Dr. Messer heard Mrs. Milgaard's end of the
17 conversation and he feels --

18 A Oh.

19 Q But just back on as far as Mrs. Milgaard
20 contacting Nichol Demyen's lawyer, was that
21 something that you were aware of or had authorized
22 or had concerns about?

23 A I wasn't aware of it. It wasn't up to me to
24 authorize or not. I would have had concerns in
25 advance. And this is an example of the zealous



1 overaction that created problems.

2 Q And then it goes on to say:

3 "Also Mrs. Milgaard had contacted Demyen
4 and had set up a meeting with her in
5 Saskatoon (Messer doesn't know the exact
6 day of the meeting but indicates it was
7 just this week) and when Mrs. Milgaard
8 went to meet Demyen at the place agreed
9 upon she was greeted by two anti-social
10 thugs who threatened to beat her up if
11 she didn't leave Demyen out of it. Also
12 Messer says that Leslie implied to
13 Mrs. Milgaard that Demyen "was not in
14 town anymore". "

15 And, again, do you have any recollection of
16 following up on this or being involved in any of
17 that?

18 A No, because the task was to get Nichol to a
19 meeting, and that seemed to be a butterfly flying
20 off to Mexico.

21 Q If we can then go to 216059, and I apologize for
22 jumping around on subject matters but I'm trying
23 to do this chronologically, and this is a letter
24 of October 5, 1981 again to Mr. Tallis. And just
25 for your assistance, I think November 29th is when



1 you have some notes of actually talking to him,
2 but you say:

3 "... I write to remind you that I'm
4 particularly interested in the
5 instructions given by Mr. Milgaard and
6 the reason why he did not testify. If
7 he in fact admitted that he committed
8 the crime, then I would like to know."

9 And that's fairly self-explanatory, but that's
10 what you were trying to find out from Mr. Tallis
11 to assist you in what you were doing?

12 A Yes.

13 Q And did the fact that he did not testify; did that
14 cause you some concern?

15 A Yes. Umm, the theory largely was in criminal
16 law -- and Justice Tallis had probably said those
17 words to me -- if you are in front of jury you
18 really have a huge problem if you don't, if the
19 accused doesn't testify, so while the jury is not
20 supposed to take that into consideration and a
21 judge alone isn't supposed to take that into
22 consideration somebody speculating from the
23 outside would take that into consideration, and I
24 knew that the failure to testify would be a
25 significant issue under a 617 application.



1 Q And again, it may be evident, but would be what;
2 the Attorney General's office would say "why
3 didn't he testify"?

4 A Sure. I mean "if he is innocent why didn't he say
5 he's innocent", so this was a -- this wasn't just
6 an 'I'm interested because if there were anybody I
7 could tell I'd tell them', this had to do with
8 something real that eventually there will be
9 inquiries, "well what, why wasn't he there denying
10 it, explaining".

11 Q If we can then go to 216062, and this is again
12 September 20th, '81 from Mr. Leslie to you
13 indicating he received a surprise phone call from
14 Nichol Demyen:

15 "She advised that she was prepared to
16 undergo the hypnosis with Doctor Messer.
17 However, her time is limited."

18 It then goes on to set the dates, and I believe
19 the document suggests that a date and time were
20 set up for this to happen in December; is that
21 correct?

22 A Yes.

23 Q And if we go to 216063, and this is just a note
24 from Brenda of your office to you confirming that
25 the flight out of Kelowna -- and I take it



1 Mrs. Milgaard or your office, or maybe it was your
2 office or Mr. Shannon, then, who was paying the
3 cost to have Nichol Demyen fly in to have this
4 conducted; is that right?

5 A I know that, my recollection is that Larry Leslie
6 was being paid, all the expenses were being paid,
7 Dr. Messer was being paid, I -- but I don't
8 remember by whom or how.

9 Q Then if we can go to 217482.

10 A What I meant of course was being paid by sort of
11 our side of the equation.

12 Q Actually, if I can just go back, if we can go to
13 332577, which is part of 332575, and this is an
14 account, this June 4th of 1982, but I think this
15 just gives us some dates and some entries, and
16 we've gone through most of this. If we can go to
17 the next page and we had talked about I think in
18 November these arrangements for Dr. Messer and
19 then here we see December 23, telephone attendance
20 upon Mr. Howland of the parole board. So does
21 that assist you at all? I take it you recalled a
22 meeting with him or was it a telephone call?

23 A Well, I had a telephone call, but I also think I
24 had a meeting. I don't remember the meeting, I
25 only think I had a meeting because I found the



1 words Ken Howland in one of these diaries and
2 then, in an example of efficiency, can't find it
3 again, so -- but I don't have any memory of
4 meeting with him, I only remember the telephone
5 call.

6 Q Then go to 216067 and this is your letter of
7 February 9th, '82 to Mr. Leslie and you'll
8 recall --

9 A Excuse me.

10 Q Yes?

11 A Can you -- that was December 23 of what year?

12 Q Of 1981.

13 A Okay, thanks. Yeah, thank you.

14 Q And this is a letter, February 9th, a couple of
15 months after, and you say:

16 "I gather Nichol simply did not show
17 up."

18 And is that in fact what happened, that
19 arrangements were made for her to fly to Regina
20 and be interviewed and she didn't show?

21 A Yes.

22 Q And then again -- did you ever get an explanation
23 from her or Mr. Leslie or anybody about why not?

24 A No, and of course it mattered a lot more to me to
25 try to get her there than to Larry Leslie who --



1 but I couldn't push her, I couldn't push,
2 persuade, cajole in the same way that I would have
3 been able to if he hadn't been involved, so his
4 being involved was good because it gave her
5 confidence and sort of comfort, but his being
6 involved was bad because I couldn't -- I couldn't
7 stay on her case.

8 Q Right. Couldn't deal with her directly?

9 A Yeah, couldn't say come on, you know, I would have
10 said come on, Nichol, you kind of gave your word.
11 I would have pressured, persuaded or tried to do
12 something. Who knows, I mean, Charlie Messer is
13 such a good guy I might have been able to persuade
14 him, particularly then, I might have been able to
15 persuade him to get on a plane. I mean, he was
16 kind of interested in the whole concept of maybe
17 there's something wrong here, so --

18 Q Do you recall if he ever expressed a comment to
19 you about what might be an explanation for Nichol
20 John's behaviour?

21 A No, nothing other than what I -- just speculation.
22 He wouldn't know without seeing her.

23 Q And then at the bottom it looks as though you are
24 again asking, or advising Mr. Leslie that Dr.
25 Messer is available and let us know when she may



1 come back?

2 A Yeah.

3 Q Again 216068, just to go through a couple of
4 documents here for the record, his letter back,
5 and simply saying that he's written to his client
6 and that he hasn't heard anything. Go to 219492,
7 and I think this is March 1, 1982, I think this
8 letter is suggesting that it was Mrs. Milgaard who
9 gave you the money, \$1,200 to have Nichol Demyen
10 come out, and this is the letter where she's
11 asking for the money back if she's not coming out;
12 is that correct?

13 A That's what the letter says.

14 Q Yeah. Do you have any recollection of -- I think
15 you said before someone put up the money; is that
16 right?

17 A Yes.

18 Q And then if we can, 218146, and I won't propose to
19 go through this, but this is a letter, it's
20 undated, but I think it is March 1, 1982 based on
21 a letter I'll show you in a moment, it's a letter
22 from Mrs. Milgaard to Mr. Leslie, and again trying
23 to get him to get Nichol John to meet with Dr.
24 Messer, and if I can call up 216069, this is
25 Mr. Leslie saying he got the letter on March 1,



1 '82, we received it on March 4th, and then if you
2 can just scroll down, he says I don't think I
3 should write to your client, etcetera, and again,
4 did you have -- the fact that Mrs. Milgaard was
5 writing to Mr. Leslie, I think you said before you
6 didn't have any concerns at the time with her
7 talking to him. What about in writing letters to
8 him, did you have any concerns at the time?

9 A No, I've never -- I've candidly never cared if my
10 clients harass other people's lawyers, but -- and
11 very likely I wouldn't have cared at all about
12 this because we were now sort of with the dying
13 embers trying to stir a fire back up and we could
14 only push through Larry Leslie, so maybe he would
15 have responded favourably to pushing.

16 Q Go to 213623, we're now into July of '82, and a
17 letter to Mr. Tallis, this is now in Regina, so I
18 think since the last letter he was appointed to
19 the Court of Appeal in Regina, and you say:

20 "The one thing that I did want to know
21 was whether he at the time admitted the
22 crime and if possible, wanted copies of
23 some of your initial file notes of
24 attendances upon him."

25 And so would it be fair, there's a note later



1 that's just got November 29th on it which I'm
2 assuming was 1982, that would have been after
3 this letter. Are you able to verify that? It
4 looks like at this time you are still trying to
5 get to talk to him.

6 A Yeah, and of course you are noticing that I've
7 written similar letters and apparently hadn't
8 talked with him.

9 Q And November 29th of 1982, and I'll take you to
10 that note in a moment, Mr. Merchant.

11 A Uh-huh.

12 Q I'm not sure that much turns on whether it's '81
13 or '82, but it looks as though at this time, July
14 of '82, you are still trying to get some
15 information from him; is that fair?

16 A Yes.

17 Q And then if we can go to 219528, this is September
18 of '82, and this is a letter to the registrar
19 asking that the letter be brought to
20 Mr. Justice -- and it indicates that Mr. Tallis
21 had indicated to you:

22 "... some time ago that he would, on the
23 instructions of my client Mr. Milgaard,
24 obtain copies of his notes of interviews
25 with Mr. Milgaard and advise me on the



1 nature of the story given to him by
2 Milgaard at the time."

3 And then you say:

4 "Mr. Milgaard is likely to be out on
5 parole by June of next year. He
6 maintains his instructions that he was
7 not guilty and wants the matter pursued
8 further."

9 Just on the issue of parole, do you recall, this
10 would be September of '82, so June of 1983, what
11 caused you to say that he would likely be out on
12 parole by June of next year?

13 A I don't know the timing, and we found one occasion
14 when I met with David at Millhaven, but to the
15 extent it's possible, I thought I had a deal that
16 he would be released and that's essentially what I
17 was told. I'm not sure I was told that by Ken
18 Howland or by somebody else, but everything was
19 kind of arranged for --

20 Q When you say -- that he would be out on parole?

21 A Yeah.

22 Q Day parole or do you remember?

23 A No, it was to be more than day parole. My -- I
24 don't know that it was explained to me in that
25 kind of detail, it might have been a short period



1 of day parole, but, you know, in the language of
2 the street, I sort of thought everything was fixed
3 up and ready to go and nothing inappropriate about
4 this, that's the way they do things, they kind of
5 prejudge, prethink and then they go to the
6 meeting.

7 Q And so again, when you say you thought you had a
8 deal, would that be with the National Parole
9 Board?

10 A Yeah.

11 Q Or through the parole board?

12 A Yes.

13 Q And that would be that Mr. Milgaard would be
14 released?

15 A Correct.

16 Q And what happened?

17 A Well, I went, the second occasion, to see David,
18 and the first time I had been -- I just arrived
19 and I had been, I arrived at Millhaven and sort of
20 "hi" and I remember to my surprise I was walking
21 through population and I wasn't even guarded
22 particularly, I was silly, maybe I was in danger,
23 and I met with David and as I told you earlier I
24 found him to be really quite a charming guy and
25 talked about various things and, you know, there



1 was the benefit of receiving instructions
2 directly. Many of us are suspicious that from
3 time to time, I don't know about prisons, but from
4 time to time police may be taping conversations
5 from people in custody, which of course they can't
6 use in evidence, but they use to prove things that
7 they discover through listening to the tapes,
8 so -- or listening to the conversations, so I was
9 able to discuss some things with him that I would
10 not have discussed with him by telephone, and I
11 left comfortable in, and continued the task of
12 parole.

13 I visited him a second time and
14 this was, on this occasion I was greeted and told
15 to wait, and I'm not the world's most patient
16 person anyway and I am quick to anger with the
17 idea of the right to counsel, interruption of the
18 right to counsel, because often that's
19 significant. Defence counsel get into the habit
20 of feeling if you won't let me talk to my client
21 when I want to talk, why is that, and often we
22 find, in experience, it's because they are
23 grilling them right then, so you get a little
24 jumpy. I don't know, there's lots of defence
25 counsel here, I don't know how they feel.



1 So I was getting jumpy about
2 this and angry and arguing why am I being
3 restricted, and they told me the warden wanted to
4 see me, and 10 or 15 minutes later I said, "I
5 don't want to speak to the bloody warden," I was
6 delayed about 40 minutes, and the warden came and
7 the warden was really very apologetic and said,
8 you know, I started off, "I want to see him, I
9 want to see Mr. Milgaard," you know, I was mad.
10 >Please, Mr. Merchant, please could I talk with
11 you." "I don't want to talk with you." I didn't
12 say you haven't got anything that interests me,
13 but, "I don't want to talk to you, I want to see
14 him."

15 He persuaded me to talk with
16 him. He was apologetic, he said, "Look, he's high
17 on drugs, he's been -- he's been really zonked for
18 weeks," a couple of weeks I got the impression, he
19 said, "We can't get him down sort of." I said
20 something like how does he, you know, can't you
21 control the drugs or stop the drugs, and he
22 implied that I might be the dumbest defence
23 counsel on earth to not know that it's easier to
24 get drugs in the jail than -- anyway, I don't
25 have -- I think we talked, all of those things I



1 have a very clear recollection, I think we talked
2 about why isn't he in, can't you put him in
3 solitary or do something, and he explained that we
4 can't really take action because if we take
5 action, then it goes on his parole record, then
6 that's something they look at, and he said, you
7 know, we know that he's got a parole hearing
8 coming and we, sort of we know he's going to be
9 released or we thought he was going to be
10 released, that was the sense that he had, so he
11 said you can see him and try to do your best with
12 him, maybe you can get him to stop, so I did see
13 him.

14 I have not -- I missed the
15 opportunity of a drug life and, you know -- but
16 I've represented a guy who had a \$2,000 a day
17 habit in the '80s, I've represented lots of people
18 who -- that's before the Supreme Court ordered a
19 new trial and after he got acquitted and he ended
20 up in jail, so he was around for a long time. I
21 represented lots of people who did lots of heroin
22 over time, those were really the days before what
23 I understand are nicer drugs like cocaine, and so
24 I knew what people were like when they were on
25 drugs. David was worse than anything I have ever



1 experienced, he was -- you couldn't really reason
2 with him and that was kind of the end of his good
3 prospects of getting out.

4 You know, the parole board tends
5 to find out these, all these kinds of things and
6 so I don't really remember what I did about that,
7 I think I reported the problem and Howard was kind
8 of disappointed, Howard Shannon, and so -- but --
9 so him getting out on parole kind of came unstuck
10 for a variety of reasons.

11 Q And again, was that, your meetings with Mr.
12 Milgaard then, were these in relation to either a
13 parole board hearing at the time or an upcoming
14 parole board hearing?

15 A Yeah. I was there because it was coming soon and
16 I didn't see him on either occasion on the basis
17 of Howard or Joyce or somebody giving me \$800 to
18 fly to Ottawa and \$100 to drive to Millhaven and
19 whatever the time costs. When I saw him on each
20 of these occasions it was because I was available
21 in Ottawa anyway, so I wasn't able -- the point of
22 this is that I wasn't seeing him time specific to
23 something that was coming up for him, I was seeing
24 him at a time when it was possible because of,
25 because I -- possible inexpensively because I was



1 in Ottawa for other things.

2 MR. HODSON: I see it's noon,
3 Mr. Commissioner. This might be an appropriate
4 spot to break.

5 I might, and maybe for Mr.
6 Merchant's benefit, if he were to come back at
7 two o'clock. At 1:30 I would like to -- I've
8 raised with the Commission and with counsel some
9 scheduling and timing issues with respect to Mr.
10 Milgaard's application, or Mr. Wolch's
11 application on his behalf, and I think if we
12 maybe had 15 or 20 minutes at 1:30 to have some
13 discussions about that and that Mr. Merchant, if
14 he's back at two o'clock, that's fine.

15 COMMISSIONER MacCALLUM: Okay.

16 *(Adjourned at 12:00 noon)*

17 *(Reconvened at 1:33 p.m.)*

18 MR. HODSON: Good afternoon, Mr.
19 Commissioner. I just wanted to bring back this
20 issue regarding the application to be brought on
21 behalf of David Milgaard to be exempted from
22 testifying to get some, I think some directions
23 on some procedural issues if I might, and what I
24 propose to do is just to give a quick background
25 of what's happened and what the issues are and



1 sort of what my submissions or what I'm looking
2 for. Then I think Mr. Wolch will have some
3 comments and then I would ask that any other
4 party who wishes to be heard on the matter make
5 submissions. My objective here is simply to get
6 in place a process and a time line to ensure that
7 this issue is resolved in a fair and timely
8 manner.

9 And just I guess the starting
10 point, just by way of dates, this issue first
11 arose before the Commission on October 25, 2005
12 with respect to some comments that Mr. Milgaard
13 had made publicly about attending, and at that
14 time Mr. Wolch advised that his instructions were
15 if there's a subpoena, he said I'm instructed to
16 apply to you to look at the medical evidence and
17 consider, (a), whether he has to attend, and (b),
18 whether there's some accommodation that can be
19 made to make it less traumatic, and then there
20 was a time period to allow some things to happen.

21 Then on November 8th -- I think
22 on November 4th if I'm not mistaken, or November
23 7th, Mr. Wolch advised me that he had a report
24 from Mr. Grymaloski and that he had instructions
25 to apply for an exemption from attending on the



1 basis of medical grounds, and the ruling that you
2 made on that date, November 8th, was to, number
3 1, for me to interview David Milgaard by November
4 19th, which has happened, and two, you ordered
5 that Mr. Wolch will file a notice of motion with
6 the Commission returnable on a date satisfactory
7 to Commission Counsel together with affidavits in
8 support of his application for David Milgaard to
9 be excused from testifying on medical or
10 psychological grounds, and you also said that the
11 hearing of evidence will proceed as scheduled,
12 and until the motion is decided the scope of
13 cross-examination by counsel for David Milgaard
14 and counsel for Joyce Milgaard may be restricted
15 upon application by other parties or by other
16 counsel for parties with standing. So that's the
17 background of where we were at. So the order
18 says that it's supposed to be returnable on a
19 date I think suitable to me.

20 To date I've had many
21 discussions with Mr. Wolch and with other counsel
22 regarding process, procedure and timing and the
23 reason I'm bringing it forwarded today is I think
24 it is important that we have some certainty as to
25 how, when and to what extent is everybody



1 participating in this matter and so that we know
2 when it will be resolved. It does impact upon
3 the witnesses that we may call. I have already
4 deferred Mr. Tallis' evidence into the new year
5 pending resolution of this issue.

6 On November 25th I wrote a
7 letter to Mr. Wolch and to other counsel and here
8 are the issues that I indicated needed to be
9 addressed; number 1, the form of the application
10 and the form of evidence to be filed in support,
11 whether it be affidavit, medical report or vive
12 voce evidence, and in the letter, and I can
13 certainly say this is my position, that this is
14 Mr. Wolch's application and it is up to him to
15 determine the substantive nature -- it's up to
16 him to determine the precise relief, whether it
17 be an exemption, accommodation or some
18 combination and the evidence to be put forward,
19 and so in your ruling you said it was supposed to
20 be on a date returnable to a date convenient to
21 me, so I suggested there to Mr. Wolch and others
22 that he should put together his application, tell
23 us what he is seeking by way of specific relief
24 in a written document and tell us the evidence
25 that would be filed in support, whether it be



1 medical, non-medical, affidavit or medical
2 expert. In the case of medical expert, I
3 suggested that if it is an expert report, that he
4 file the report and have his expert available to
5 testify.

6 The second issue I don't think
7 I need to deal with was with respect to funding
8 of medical people and that is being dealt with
9 directly between Mr. Wolch and our executive
10 director.

11 Time limits, I think it is
12 important that we have a time limit in place.
13 What I suggested in my letter was that the
14 materials be filed by December 31, 2005 and that
15 would be the motion and the evidence so that the
16 parties know what it is that we're going to deal
17 with.

18 As far as a hearing date, I
19 propose that the application be heard on January
20 16, 2006. That's the day, the first day of
21 sittings after the Christmas or holiday break,
22 and again the importance there is that I think we
23 need to have this issue resolved before we get
24 too far into the evidence.

25 As far as the format of the



1 hearing, what I suggested was that on the 16th
2 the author of any medical report be here to
3 attend in person to give vive voce evidence and
4 to be cross-examined or examined by parties who
5 may have an interest in the application and that
6 as well the deponents of any affidavits may need
7 to be available to be cross-examined if so
8 ordered by you, and again, I should point out
9 that if Mr. Milgaard swears an affidavit, there
10 might be an issue there about whether
11 cross-examination is the very thing that we're
12 looking at, but putting that aside, as I say, I
13 don't know what evidence Mr. Wolch intends to
14 file.

15 And lastly, the issue of an
16 independent medical examination, whether the
17 Commission would appoint someone to examine Mr.
18 Milgaard or -- and/or give evidence before this
19 Commission about his fitness to testify. I
20 suggested that that be deferred until we see what
21 the materials are.

22 So that's what I sent out to
23 Mr. Wolch and counsel, asked for feedback. I did
24 get a letter from Mr. Wolch on Tuesday and I will
25 ask him to address his position, but just a



1 couple of things.

2 One, he indicated that before
3 he gets an opinion he needs to know, or it
4 depends on the proposed method of examination,
5 whether it's in person before the hearing or at a
6 deposition, etcetera, and again, from my end, I
7 think the starting point is that he would be, Mr.
8 Milgaard would be here to testify viva voce as a
9 witness unless some order of accommodation is
10 made and that if Mr. Wolch is seeking that, then
11 he should spell that out in his motion and put
12 the materials forward, and that it's difficult
13 for me to talk about an accommodation in that
14 regard, or the Commission, until we know what the
15 basis is, so certainly, and I've indicated to him
16 that like we've done with other witnesses, that's
17 something the Commission has done and will look
18 at again in appropriate circumstances.

19 The second thing he raised is
20 to get a clear understanding of the subject
21 matter of what Mr. Milgaard might be questioned
22 on regardless of how he gives his evidence before
23 the Commission, so I prepared a 13 page document
24 which I sent to Mr. Wolch and counsel yesterday
25 outlining the subject areas that I anticipated



1 Mr. Milgaard would be questioned upon if he's
2 found medically fit with a couple of caveats;
3 one, I have not interviewed him other than the
4 one meeting; two, the bottom line is it would be
5 matters that are relevant to the Terms of
6 Reference and for which he has personal
7 knowledge, and those are the guiding factors, and
8 again what I tried to do is identify the factual
9 issues that have arisen to date before the
10 Commission that Mr. Milgaard may have personal
11 knowledge of, and in particular, the subject
12 matters, and I can read from the introduction to
13 the list, and what I've said is this:

14 "Both during the Inquiry and prior
15 thereto counsel for David Milgaard and
16 others on his behalf have made
17 allegations of wrongdoing against
18 police, the prosecutor, defence counsel,
19 Crown officials, witnesses and others.
20 As a result, there are a number of
21 subject matters that have become
22 relevant in assessing the conduct of
23 persons involved in the investigation
24 and trial of David Milgaard, as well as
25 the reopening of the investigation into



1 Gail Miller's death. Many of these
2 allegations are based, either in whole
3 or in part, on facts of which David
4 Milgaard has or had personal knowledge.
5 Accordingly, David Milgaard will be
6 questioned on those subject matters of
7 which he has personal knowledge and
8 which form the factual underpinnings
9 necessary to assess the conduct of
10 persons involved in the investigation,
11 trial and post-conviction time period."
12 So in other words, the focus, my focus of the
13 examination would be personal knowledge and facts
14 that are relevant and necessary to allow the
15 Commission to assess the conduct of people
16 involved in the investigation, trial and
17 post-conviction time frame, and again, you know,
18 and I've expressed this before, it is not my
19 intent in any questions to revictimize Mr.
20 Milgaard or anything of that nature, to do
21 nothing more than get the evidence that's
22 necessary for the Commission to do its job in a
23 way that doesn't traumatize him.
24 So that's where we're at, and I
25 guess just before I ask Mr. Wolch to address us,



1 and any other counsel, I think what I would like
2 is some either agreed upon or ordered time frame
3 to get the motion filed; number 1, motion and
4 evidence; two, a date to hear the matter; and
5 three, an order about having experts attend, and
6 again I'm assuming there will be an expert
7 report, and some finality to that.

8 So maybe with that, I can have
9 Mr. Wolch put forward his comments and then maybe
10 invite other counsel.

11 MR. WOLCH: Mr. Commissioner, as My Friend
12 pointed out yesterday, last night actually I
13 received from him a 13 page list of areas that
14 are of some interest. That is very helpful to me
15 in terms of going forward I must say.

16 I can indicate to you that, and
17 as Commission Counsel will certainly agree, we
18 did meet with David for some period of time. I
19 think it's fair to say that he was cooperative,
20 helpful and tried his best to be of assistance.
21 I'm not certain at this point what effect that
22 meeting had on him and I hope to know that very
23 soon.

24 As far as the nature of the
25 application, I'm not sure at this point whether I



1 know it's an application for excusal or an
2 accommodation. I have to, now that I have the
3 questions, see the areas, get the medical opinion
4 based on where we're going, what might be
5 questioned, what it might trigger or might not
6 trigger.

7 The point that has to be
8 realized is it's not the testifying that's the
9 problem, it's not the speaking, it's the memories
10 that get triggered from it that is the problem,
11 and I don't think anybody really wants to see
12 David back in hospital, and that's what's
13 happened in the last few years any time he talks
14 about the incident, he's hospitalised shortly
15 thereafter. It's not a problem with speaking,
16 it's the effect it has on him, and that's what
17 I'm trying to determine, to put before the
18 Commission our position.

19 Now, in terms of what David can
20 testify to, we will look at that. My Friend
21 raised the matter of Justice Tallis. I don't
22 envision a major problem in that based on what
23 David told Commission Counsel at our meeting, I
24 don't think there's going to be a particular
25 difficulty that will arise. I think Commission



1 Counsel knows, at least from the meeting with
2 David, as to what David's position is. I don't
3 think it causes, or will cause Mr. Pringle any
4 difficulty, and Commission Counsel is authorized
5 to convey it to Mr. Pringle from my point of
6 view, and I don't think it will be anything
7 difficult, I don't think there's anything
8 contentious between the two of them. At the end
9 of the day it will be a matter of pure memory. I
10 don't think there's any suggestion of dishonesty
11 or lack of credibility, it's a matter of memory
12 is the only challenge at all, so that's that one
13 area. Now I see the other areas and I'll have to
14 look at them and consider them.

15 My difficulty with time lines
16 is really a practical one. The first thing is I
17 have no control over how long a doctor will take
18 to offer an opinion. I put forward the name of a
19 person who I think is very well qualified and I
20 sent the CV to My Friend, he's a person who I've
21 never utilized his services before, but I know
22 he's been a, he has testified in many courtrooms
23 and has been accepted by the Alberta bench at
24 least as an extremely qualified individual who is
25 not only medically qualified, he's also a trained



1 lawyer by profession, so that we have -- and
2 worked in the prison system, so I think he has
3 the credentials to really assist us, and I don't
4 know what his opinion will be, and I'm hopeful he
5 can do it, but I don't know his time limits at
6 all.

7 COMMISSIONER MacCALLUM: Where does he
8 practice?

9 MR. WOLCH: I don't think he practices.
10 His name the Patrick Baillie. I don't know if
11 you know him, sir, he has been in many Alberta
12 courts. He is called to the bar in Alberta.

13 COMMISSIONER MacCALLUM: And where does he
14 live?

15 MR. WOLCH: Calgary I believe.

16 COMMISSIONER MacCALLUM: Oh.

17 MR. WOLCH: But I think he would be very
18 helpful. My -- I'm certain that -- Mr. Hodson
19 has his complete CV and it's, he lists the number
20 of cases he has testified in, the books he has
21 written, the papers he has written, it's --

22 COMMISSIONER MacCALLUM: What is his
23 profession?

24 MR. WOLCH: Psychologist and lawyer. He
25 has got many degrees. And so he's the person, I



1 haven't had a chance to go into the case with
2 him, but he's the person I'm looking at very
3 seriously.

4 There's an expert in England
5 who I think I would like to get at least a
6 written opinion from him. He came to Canada a
7 few weeks or a month ago and spoke to the
8 conference that was held in Winnipeg, Mr. Hodson
9 I'm sure attended that and would have heard him.
10 He's, I believe, the leading expert in the world
11 on the subject.

12 I don't know if Dr. McDonald,
13 who is testifying here next week, can help us at
14 all, but I haven't had a chance to talk to him
15 but I think Mr. Hardy is going to talk to him.

16 There are other possibilities
17 as well, Dr. Yaren in Winnipeg who dealt with
18 David for many years is a possible one. Although
19 I haven't talked to him for many years, I assume
20 he is still alive, but I haven't talked to him.

21 So there are a number of
22 possibilities in the medical end to determine the
23 effect, and whether an accommodation would work,
24 and what type of accommodation would be best. So
25 there are -- that's all ongoing.



1 My difficulty, sir, is a
2 practical one. As you are aware, I had a second
3 lawyer working with me who was fully conversant
4 with this case from the beginning and was
5 involved with the case for many years before the
6 Inquiry was even held, that lawyer is now
7 unavailable. And I had a second lawyer who was
8 getting up to speed on the case, and last week
9 she went in for an operation of a very serious
10 nature, and is no longer available and may not be
11 available at all to help at any time. So it's
12 very difficult for me to be here full-time, as I
13 am, and really work on this as much as I'd like
14 to, it's -- I have no one assisting me except for
15 one person who is now starting and knows nothing
16 about the case. So that is a practical problem.

17 And the second practical
18 problem is that we have been going at this since
19 August, and we're approaching the Christmas
20 season and I'm hoping to have a holiday of some
21 duration around Christmas, and so I see some
22 practical problems. All I can do is assure you
23 that whether I have a time limit or not, I am
24 going to move ahead as fast as humanly possible
25 to get this going, I don't want to delay it



1 either. But it's a fair bit of work, and I don't
2 want to have a deadline that I can't honour, I
3 like to honour deadlines and I take them very
4 seriously. I'm hoping to do it as quickly as
5 possible, I -- but I just find that there are
6 some time difficulties in getting it done by a
7 deadline.

8 A further problem is that, as
9 the Commission counsel knows, we are entering a
10 very, very important part of David's life right
11 now. There is something of a great nature, a
12 very happy nature happening at the beginning of
13 the year, and all his focus is on that, as he
14 advised Mr. Hodson, and Mr. Hodson has been very
15 accommodating about that, that it is far too
16 important to infringe upon, and Mr. Hodson is
17 aware of it, and so that does curtail, a bit, my
18 ability to communicate on this subject with David
19 at this time. So that is a problem that I know
20 he will accommodate but it's one that does cause
21 me problems in talking to David when he is so
22 focused on this great event in his life.

23 COMMISSIONER MacCALLUM: Which is?

24 MR. WOLCH: Umm, he is going to be a
25 father, --



1 COMMISSIONER MacCALLUM: Great.

2 MR. WOLCH: -- and he is very focused on
3 that. That is my submission, sir, I just need
4 some time.

5 COMMISSIONER MacCALLUM: Do you want to
6 suggest something?

7 MR. WOLCH: I would like by the, if I get
8 the 16th to have the documents filed, if at all
9 possible.

10 COMMISSIONER MacCALLUM: By?

11 MR. WOLCH: January 16th, to have them
12 filed, and then set a date in January, hopefully,
13 to hear an argument or call evidence. That gives
14 me a little bit of breathing room to get it done.
15 I don't think it infringes on any witness in
16 particular.

17 COMMISSIONER MacCALLUM: Oh no, but it
18 could well have a bearing on what
19 cross-examination would be allowed by you.

20 MR. WOLCH: Yeah. I have no difficulty
21 with that, sir. I have not had a single question
22 brought to my attention so far that might not
23 have been asked, and I can assure you that I'm
24 not really sure I, what I couldn't have asked or
25 what would be limited because of what David may



1 or may not have said. I can tell you that, since
2 the Inquiry has started, I've never taken any
3 instructions from David on the issue, and I don't
4 think I have since I first met him, because of
5 the -- it's a difficulty in talking to him.

6 I can tell you, and Mr. Hodson
7 will confirm this, that David, for example, has
8 no memory of the Supreme Court at all, and he was
9 on tremendous amounts of medication when he
10 testified in the Supreme Court. This is a
11 problem that has me perplexed because, umm, what
12 he has been through is something of interest but
13 something that is difficult to speak about, and I
14 know David does not want to speak about it ever,
15 and he won't talk to me about it. He was a bit
16 open with Mr. Hodson, that surprised me, frankly,
17 when he showed Mr. Hodson certain things, but --
18 that was surprising to me, but it's something
19 that's very painful, and so it's a real difficult
20 situation.

21 And I appreciate that Mr.
22 Hodson points out that it's the last thing the
23 Commission wants to do is revictimize David, and
24 I appreciate that. The difficulty is that the
25 kindness that would be shown to him here is not



1 the difficulty, I would expect nothing less from
2 Mr. Hodson, the difficulty that we have to
3 address is that when he leaves the room the
4 triggers in his memory will cause him tremendous
5 grief, we think. And I want medical evidence to
6 support that, but that is the problem I have seen
7 and we have seen over the years, and that's what
8 we want to avoid. I don't think anybody wants
9 that to happen to David. And at a time of his
10 life when he is becoming a father and going on
11 with his life, to bring him back to these
12 horrible places is something that we would like
13 to avoid, and -- or at least accommodate to the
14 best we can to accomplish the purpose of the
15 Commission, which is very important. And I think
16 David exhibited to Mr. Hodson, in our meeting,
17 his desire to help, and he made a number of
18 comments to that effect, that he is very
19 supportive of the Commission and what it's doing,
20 but at the same time he does not want to be
21 hospitalised.

22 And as you can appreciate, it's
23 also a delicate area because we have had a bit of
24 a taste of it, that David has been examined by
25 psychiatrists over the years over and over and



1 over again, and all with the assumption he was a
2 rapist/murderer, so they are horrible experiences
3 for him. So to talk about having him assessed is
4 like a red flag going off with him, of the number
5 of times that he has been assessed with all sorts
6 of diagnoses all based on the assumption that he
7 is this horrible human being, and that is really
8 traumatic as well. Even the -- an assessment is
9 a traumatic thing because, as he told both myself
10 and Mr. Hodson, he went into those examinations
11 with doctors who thought he was a Larry Fisher,
12 that they assumed he was a rapist/killer, and who
13 cannot give somebody a bad assessment when you
14 think they are a rapist/murderer. And that's --
15 so it's a very traumatic thing for him.

16 So I want to emphasize as
17 strongly as possible that David's heart is in the
18 right place and he just simply does not want to
19 go to dark places. And so having said that, sir,
20 I just need an up -- as much time for myself to
21 get the material to you so you understand,
22 better, the information available, and so I'm
23 saying I would hopefully be able to get the
24 motion and supporting material done by the time
25 we reconvene in January, that is subject to



1 doctors' schedules. And I assume that if, as I
2 say, Mr. Baillie says he can't do it, I'll find
3 somebody else who has got a better schedule, and
4 then I don't think it would take that long to set
5 up a date to hear the actual evidence.

6 So that's my proposal, and I
7 can assure you if I'm done sooner I'll get it in,
8 but I don't want to set a time limit that I can't
9 honour.

10 COMMISSIONER MacCALLUM: You understand, I
11 suppose, that what I am concerned about is
12 strictly the fitness issue and not the scope of
13 examination at this moment?

14 MR. WOLCH: Absolutely, sir.

15 COMMISSIONER MacCALLUM: The scope of the
16 examination is a --

17 MR. WOLCH: Oh yes, sir, I understand the
18 fitness is first.

19 COMMISSIONER MacCALLUM: Yeah.

20 MR. WOLCH: But the fitness may have to
21 look further but I certainly see your point.

22 COMMISSIONER MacCALLUM: Well I'll hear any
23 representations that other counsel wish to make,
24 but I only want to hear from those that are
25 interested in having David Milgaard testify,



1 needless to say. If you don't care one way or
2 the other, then please don't bother saying
3 anything, and brevity would be appreciated.

4 MR. FOX: I'll heed your comments, Mr.
5 Commissioner. I think I speak for a number of
6 us. We simply, we obviously are interested in
7 hearing Mr. Milgaard testify, and of course the
8 Commission commenced on the understanding that he
9 would be, and Commission Counsel indicated
10 clearly his intention to call Mr. Milgaard, so --
11 but at this point in time we're in a difficult
12 spot of really not seeing any medical evidence,
13 not seeing the material, and it's difficult to
14 comment.

15 All of us accept the difficult
16 situation he has gone through in his life and
17 none of us wish to re-traumatize him in any way.
18 Obviously, there are relevant issues, though, to
19 be raised with him, and I think it would be
20 difficult for me -- and as I say, I think I speak
21 for a number of others -- to really say very much
22 until we saw some medical evidence in terms of
23 where this could go or how it -- how this
24 particular issue should be handled.

25 So at this point in time I



1 think we simply urge, please bring on the
2 application and the filing of the material as
3 soon as possible, and try and resolve the issue.

4 MR. HODSON: I'm sorry, I didn't mean to
5 preclude anybody else. Just a couple of
6 comments, if I might.

7 You know, Mr. Wolch referred to
8 Mr. Milgaard's comments about Mr. Tallis and his
9 evidence. Well the problem is, unless I get up
10 on the stand and say "here's what he told me" or
11 I call Mr. Wolch to say "here's what he told me",
12 my problem is I need to get it in as evidence and
13 I need to know how it's going to get in as
14 evidence, so that's my present predicament. And
15 the interview was helpful to get an appreciation
16 of what evidence he might be able to give, the
17 practical problem is to get it on the record.

18 Secondly, on the medical side,
19 again I think -- and as far as the timeline with
20 January 16th, I don't think I have a problem with
21 that, I may have to shuffle some witnesses
22 around. But if we're talking materials by
23 January 16th, trying to get a date by the end of
24 the month, I don't foresee that being an issue.
25 But I think it is important that we get the



1 medical information so that we know what the
2 parameters are, whether there are concerns, so
3 again -- and then as far as the rest of the, how
4 the hearing would proceed and the dates and the
5 viva voce evidence, I don't think there was any
6 issue with that. And, again, that's always
7 subject to your direction, but I think at a
8 minimum if we can get a date, a deadline for the
9 filing with the idea that we would have a
10 hearing, you know, in the following couple of
11 weeks, I will then schedule witnesses
12 appropriately.

13 COMMISSIONER MacCALLUM: Well anybody who
14 has been connected with civil litigation, and I
15 suppose criminal for that matter, will know that
16 once you get into filing expert reports and
17 cross-examining and all the rest of it, it can
18 turn into a very long and expensive proposition,
19 so I want to avoid that if at all possible.

20 My idea is to have one medical
21 person or psychological person or psychiatrist,
22 whoever is chosen by Mr. Wolch and proves to be
23 satisfactorily qualified, to give evidence viva
24 voce, and then there won't be any
25 cross-examination on affidavit or anything like



1 that, everybody can get up who has an interest in
2 the matter and cross-examine, and I can decide on
3 that basis, so long as I'm satisfied that the
4 person is prepared to offer something substantive
5 and based upon adequate exposure to David
6 Milgaard to be able to testify. So that, that's
7 what I had in mind, and I would hope to
8 accomplish the whole thing in one hearing on one
9 day.

10 There will be a problem in the
11 interim, Mr. Wolch seems to think that there
12 might not be, but the only reason -- the only way
13 this can be done fairly is to give everybody
14 concerned the opportunity to object to Mr. Wolch
15 having the right to cross-examine as he is
16 accustomed to, and for that matter Ms. McLean or
17 Mr. Lockyer or Ms. Milgaard. And the reason I
18 say that is that Mr. Lockyer has told me in the
19 past that there is no difference between the
20 interests of his client and that of David
21 Milgaard, he has said that in so many words, so
22 as long as he is going to maintain that position
23 there is no way to restrict or differentiate the
24 cross-examination from one side or the other.

25 So if the Milgaard counsel



1 collectively are prepared to face that, the
2 possibility that they might not be able to
3 cross-examine at all on the motion of somebody
4 concerned, then the urgency of the time limit is
5 diminished.

6 I, of course, won't take the
7 position ab initio, it will be up to somebody who
8 is interested on behalf of another party and who
9 listens to the cross-examination of Mr. Wolch,
10 for example of his witness, and thinks that this
11 is something that can only adequately be answered
12 by David Milgaard's attendance, to then object.
13 So, you know, having listened for example to the
14 evidence adduced by Commission Counsel, if
15 there's an item in there that Mr. Wolch wishes to
16 address in cross-examination and other counsel
17 believe that it's not fair that he should do so
18 unless David Milgaard will be produced, then
19 we'll have to deal with that, and the result
20 could be, of course, Mr. Wolch won't be allowed
21 to ask, and the same would go for Mr. Lockyer or
22 Ms. McLean.

23 So if you, if everybody
24 understands that, we can go ahead within time
25 limits which are possible for Mr. Wolch.



1 MR. HODSON: The one other just comment on
2 the expert, and again I appreciate the fact that
3 Mr. Wolch has given me the CV of the experts, I
4 am operating on the basis that he will select the
5 medical evidence that he wishes to put forward
6 and I don't mind the courtesy of saying "here's
7 who it is", but if I'm wrong on that I guess I
8 don't want to be in the position of either it's
9 his application and his evidence or the
10 Commissions' or something in between. And just
11 so my understanding is correct he will choose,
12 and as I said, arrangements are made through the
13 Commission for funding for that, but -- and if
14 I'm wrong on that Mr. Wolch can maybe advise me,
15 but then it puts me in an awkward position of
16 pre-approving an expert.

17 COMMISSIONER MacCALLUM: Oh, I don't want
18 to put you in that position, I don't want to put
19 any counsel in that position. I think it's up to
20 Mr. Wolch to choose his expert, and of course if
21 he makes a wise choice then nobody else will
22 object, if he doesn't then of course the spectre
23 of an IME arises out of fairness, and it would be
24 primarily up to me to set the groundwork for
25 choosing such a person.



1 MR. HODSON: Perhaps, and again I just
2 raise that, if Mr. Wolch does wish to address
3 that?

4 MR. WOLCH: No, I see My Friend's point,
5 although I think, on something like this, that
6 there is a little less of an adversarial view
7 that he might take in a civil litigation case,
8 and I've purposely sent My Friend the CV to give
9 him a chance to raise some concerns, because I
10 can obviously look somewhere else if there is a
11 real concern. I don't expect him to say that
12 this is an opinion that he gets that he will
13 share, or that he sees this person as having
14 given an opinion that isn't of merit, he can take
15 whatever position he wants. But I would be
16 surprised if, at the end of the day, My Friend
17 came back to me and said "I don't think he has
18 the qualifications to offer an opinion", I'd
19 rather hear that now. I don't even expect him to
20 say "he's a wonderful expert", but if you think
21 he's not qualified or not good enough, tell me
22 now so I don't embark --

23 COMMISSIONER MacCALLUM: Well I think that
24 would make sense. I mean it's no secret, whoever
25 you propose, the name can be circulated, and if



1 anything -- if anybody is dissatisfied with the
2 person they can say so.

3 MR. WOLCH: Yeah, that's all I ask. I'm
4 not asking for acceptance of him or --

5 COMMISSIONER MacCALLUM: Pre-approval or
6 anything.

7 MR. WOLCH: No. That's my only point on
8 that.

9 COMMISSIONER MacCALLUM: And you take my
10 point, I hope, about minimizing the cost of all
11 this? You mentioned getting an opinion from
12 somebody abroad and I really don't see the need
13 for that.

14 MR. WOLCH: Okay. That might be free,
15 depends, sir.

16 COMMISSIONER MacCALLUM: But I mean he is
17 not going to come here.

18 MR. WOLCH: No, but a --

19 COMMISSIONER MacCALLUM: But if he gives an
20 opinion which somebody doesn't like, then of
21 course they will ask that -- for a chance to
22 rebut it, and that of course increases the cost
23 and --

24 MR. WOLCH: No, I'm sorry, I appreciate,
25 and I'm very concerned. And, also, I would be



1 looking to Mr. Grymaloski, who was -- to give an
2 update on what he said before, at least in his
3 report that was filed before. He has the most
4 personal knowledge and he can --

5 COMMISSIONER MacCALLUM: Nothing recent
6 though, I believe?

7 MR. WOLCH: Well he attended at the meeting
8 with Mr. Hodson and I and could tell us --

9 COMMISSIONER MacCALLUM: Oh.

10 MR. WOLCH: -- what may have occurred after
11 and how David reacted, --

12 COMMISSIONER MacCALLUM: Oh, I see.

13 MR. WOLCH: -- how he is progressing since
14 then and given his current circumstances. I
15 thank you, sir.

16 COMMISSIONER MacCALLUM: Thanks. Well I,
17 if there's nothing more, Mr. Hodson, I'll accept
18 what I have heard and suggest that -- or in fact
19 order that the notice of motion and any
20 supporting material, including the expert report
21 or substance of his opinion -- I don't expect a
22 full-blown report, simply the substance of his
23 opinion -- be filed by the 16th of January, 2006,
24 and then we'll set a date for the hearing of the
25 matter.



1 And in the meantime, as I said
2 before in correspondence or at least in the
3 hearing room, the ambit of cross-examination by
4 Mr. Wolch or by counsel for Mrs. Milgaard may be
5 restricted upon application of any party with
6 standing. And it's implicit in that, of course,
7 that, if nobody objects, then there is no limit.

8 MR. HODSON: Thank you, Mr. Commissioner.
9 I will ask Mr. Merchant to go back to the stand,
10 please.

11 EVATT FRANCIS ANTHONY MERCHANT, continued:

12 BY MR. HODSON:

13 Q Good afternoon, Mr. Merchant. Thank you for
14 accommodating our other issue.

15 When we broke at noon you had
16 talked about a visit you had with David Milgaard,
17 or two visits with -- at Millhaven, and you said
18 that it gave you an opportunity to discuss with
19 David some matters in person that you couldn't
20 discuss over the telephone. And again, do you
21 have any recollection of what matters might have
22 been discussed with him, were they related to his
23 defence, or can you shed some light on that if you
24 have any recollection?

25 A I don't have -- I didn't discuss anything of -- I



1 mean I probably discussed something in detail, but
2 I, you've seen my file, and I didn't seek
3 instructions from him to try to pursue theories of
4 a defence or anything of that kind. So he had
5 always advanced that he wasn't guilty and the
6 question was how do we prove it, so I don't have
7 anything to offer you that's useful from that
8 occasion.

9 Q Thank you. If we could then go to 219529, and
10 simply to identify it on the record, here's
11 another letter from you to Mr. Leslie again:

12 "... very important your client in this
13 regard be interviewed ...",
14 and nothing more than just to put on the record,
15 sir, that you continued to write to Mr. Leslie?

16 A Yes.

17 Q And then if we can go to 213628, and if we can
18 call that out. I think, and please confirm, these
19 are your handwritten notes of either a meeting or
20 a discussion you had with Mr. Tallis I'm going to
21 suggest November 29, 1982; are you able to --
22 let's just first talk about what the notes relate
23 to?

24 A They relate to discussing with Mr. Justice Tallis,
25 in a relatively cursory manner, the issues, and he



1 didn't -- he wouldn't go very far, and I made
2 these notes.

3 Q Did you want the handwritten version to look at or
4 the paper copy to look at?

5 A Well no, this is fine, it's just that it goes off
6 the page.

7 Q We can actually get it --

8 COMMISSIONER MacCALLUM: Is that 213628,
9 Mr. Hodson?

10 MR. HODSON: 213628, yes.

11 BY MR. HODSON:

12 Q It shouldn't be -- is that centred as best we can?
13 Yeah. I don't think -- my copy indicates that
14 that's all that we have.

15 A Well I can read it for you anyway I think.

16 Q If you could maybe just, maybe why don't you just
17 read into the record what your notes are? I know
18 you have some abbreviations here that you use and
19 maybe you could just read it for us into the
20 record?

21 A 'He gave written instructions that he would not
22 testify. He had a notebook of instructions to me
23 which I gave back to him. No question he was with
24 his friends who testified against him. He said
25 that he got out with Wilson to push the car which



1 was stuck. Nichol John Regina girl. He was away
2 from the car. He confirmed. He confirmed
3 changing his clothes at Shorty Cadrain's but said
4 there was no blood. Between Saskatoon to Regina
5 he threw out a compact which Nichol John found in
6 the glove compartment and that would have been
7 tough cross. He said of the people who testified
8 that when on drugs, that when on' --

9 Q 'Drugs'?

10 A No, I can see that, 'he testified that when on
11 drugs who recounted his saying that he stabbed her
12 14 times. He said of that I could have said it.
13 Nichol John recant her' -- that's all I can read,
14 'Latta, Horseberg, testimony, Wilson. Nichol
15 John, Wilson's crucial, Cadrain from the Meota
16 area', and then I wrote 'North Battleford', 'but
17 now in Saskatoon, lived on west side, his
18 address' -- it says 'his address' but I think it
19 was a dash, 'lived on west side, address is in the
20 transcript, stab wounds', it says 'stab wounds
21 there her overcoat' but I think I meant 'through',
22 'stab wounds through her overcoat and not through
23 the dress, no dress when stabbed, 35 below zero.'

24 Q And are these your initials here then?

25 A Yes.



1 Q Is that -- and, again, would this be based on a
2 discussion, then, with Mr. Tallis?

3 A Yes.

4 Q And if we can just go back, did these details have
5 some significance for you, Mr. Merchant, as for
6 example getting stuck, the compact, the motel
7 room; were they -- can you tell us what you recall
8 of how they fit into the facts as you understood
9 them at the time?

10 A Well first 'he gave written instructions that he
11 would not testify'; David didn't strike me as a
12 person where that's the way he would have given
13 instructions, and even less strike me as the way
14 he'd have given instructions back then, at that
15 time. So I took this, with a grain of salt, to be
16 Mr. Justice Tallis decided that it was a mistake
17 for him to testify and then he got written
18 instructions from him, so I didn't press him about
19 it, but I -- you know, clients instruct but
20 lawyers lead the client to give the instructions
21 that you want, and then I took it that he was
22 being careful that he had written instructions.
23 Umm --

24 Q Sorry, let me just pause there, and I think what
25 Mr. Tallis, Mr. Justice Tallis said at the Supreme



1 Court was that he did advise him not to testify
2 and that he obtained his written instructions to
3 confirm that?

4 A Yeah.

5 Q Is that what you would have understood?

6 A Yeah, I'm saying the same thing, I just didn't --
7 a misreading of this would be as though David took
8 it out of the judge's hands, or out of Cal Tallis'
9 hands.

10 Q I appreciate your point.

11 A Yes. I never did really understand and didn't go
12 into -- he a notebook of instructions to me which
13 I gave back to him which was interesting, but I
14 don't know whether David at the time was sort of a
15 barrack room lawyer or not. The other things I
16 think were recounted to me and as I listened to
17 them I understood the worry that Cal Tallis had
18 about allowing this, allowing the person to
19 testify about these things which would be
20 difficult to explain and I had the sense, perhaps
21 from him, but I don't know why it wouldn't be in
22 the notes, that the whole drugs life -- it's a
23 jury trial, a jury trial then, not a jury trial in
24 2005, and sort of the sense this is a bad person
25 with a bad crew of people, so I think he was all



1 the while saying I'm really not prepared to
2 discuss it and, you know, I think he was giving me
3 some justification for the decision not to have
4 David testify and it was a justification that I
5 found understandable and believable and credible.

6 Q And again, would these notes, and correct me if
7 I'm wrong here, would your inquiries of him be to
8 tell you why it was he didn't testify and these
9 are some of the reasons, or was this a tell me
10 everything about the case?

11 A No, this wasn't tell me everything about the case
12 because he told me he wouldn't tell me everything
13 about the case, he told me he wouldn't talk to me
14 about the case.

15 Q Okay.

16 A These were what little I could sort of glean from
17 somebody who wouldn't talk to me about the case.

18 Q And were they, though, in connection with his
19 decision to advise his client not to testify?

20 A They were explaining to me why -- I took it he was
21 explaining to me why he advised him not to
22 testify, which was a troublesome factor for me
23 that I knew required explanation with the 617
24 application and I would have almost sensed
25 required explanation even with the, you know, the



1 parole board or whatever.

2 Q If we can just go through those, that no question
3 he was with his friends who testified against him,
4 and that would be Nichol John, Ron Wilson, Albert
5 Cadrain and the motel room reenactment people; is
6 that correct?

7 A Yes.

8 Q And then he said he got out with Wilson to push
9 car which was stuck, and again I think the
10 evidence at the trial at least of Ron Wilson and
11 Nichol John was that, at least with Ron Wilson,
12 when the car got stuck, he said he left and Mr.
13 Milgaard left and that's when the Crown theory was
14 that the murder was committed, and I think Nichol
15 John certainly in her statement to the police said
16 the same thing, at trial I don't think she had a
17 recollection. She may have had a recollection of
18 getting stuck, but not much else. So again, did
19 this fact -- what was your take on this piece of
20 information?

21 A Well, that it put him there. My take on it was
22 how improbable that somebody would be pushing a
23 car and just sort of rush off and rape somebody
24 and murder them, but it put him there even though
25 it was just very difficult for me to accept, but



1 juries accept things that I wouldn't accept. I
2 have a higher appreciation for beyond a reasonable
3 doubt than they do. That's why I can't get on a
4 jury.

5 Q And then you say he confirmed that he changed his
6 clothes at Shorty Cadrain's, said there was no
7 blood, and again, that you understood to be an
8 issue at trial, that Mr. Cadrain said he saw blood
9 and changed his pants and here Mr. Tallis is
10 saying that yes, he did change his pants, but no
11 blood?

12 A Yeah, but of course the inculpatory problem is why
13 did he change his pants, so if he's testifying,
14 he's now confirming for the government that he
15 changed his pants and that he's just differing on
16 one little issue, so you could see the, you know,
17 everything that I was told here was troublesome it
18 seemed to me.

19 Q And the next comment, between Saskatoon and Regina
20 he threw out a compact which Nichol John found in
21 the glove compartment and would have been tough
22 cross, and again at trial the evidence was that a
23 compact was found in the car after they left
24 Saskatoon and that Mr. Milgaard threw it out the
25 window without explanation, and again I think -- I



1 think the Crown's theory was that it was Gail
2 Miller's compact, although there was other
3 evidence that her purse was found with make-up in
4 there, but I think that, would it be fair to say,
5 that was the inference? Do you recall what you
6 thought about that piece of information and how
7 that might have impacted on the decision not to
8 testify?

9 A Well, I shared the view that was extended, that
10 was communicated to me, which was that would have
11 been tough cross, but this isn't -- that's not my
12 editorialising on it, that's what I was -- that's
13 what I was told. So here I am sort of desperately
14 writing and that's why you've got there what I
15 went through and that's why I've got to find some
16 justification for seemingly spelling crucial with
17 an X, so, you know, I was writing notes down.

18 Q What about just the fact that according to
19 Mr. Tallis, that Mr. Milgaard had -- was
20 Mr. Tallis telling you that Mr. Milgaard said he
21 threw out a compact?

22 A Yes.

23 Q And what was your reaction to that as far as how
24 to explain David's decision not to testify?

25 A Well, I found the explanation to be a good



1 explanation, an understandable explanation. Judge
2 Tallis wasn't saying hence he was guilty or I
3 didn't believe him. Indeed, I wasn't told -- this
4 is what I was told. My question was why -- you
5 know, if he were not guilty, if he said he were
6 not guilty, I'm not sure I put it in quite these
7 words, but if he said he were not guilty, why
8 didn't he testify, this is an important issue, and
9 this was -- this was the answer, so the question
10 for me was is there an explanation why the person
11 didn't testify that -- other than he didn't
12 testify because he was guilty of the offence, and
13 so I wasn't looking beyond the explanation, I was
14 trying to understand whether the explanation was a
15 valid explanation, and it seemed very valid to me
16 in relation to this is a jury who are going to
17 have difficulty sorting out these little facts and
18 when somebody is there and somebody is sort of bad
19 news in the first place in relation to their life
20 and they will be cross-examined about all the
21 other problems, and so I accepted the explanation,
22 it seemed like a good explanation for me on why he
23 chose not to call him to testify.

24 Q And then just the last point here, it says he said
25 of people who testified when he was on drugs who



1 recounted his -- I'm sorry, is that his saying?

2 A His saying, yes.

3 Q He stabbed her 14 times, and I think this is the
4 motel reenactment, and it says he said of -- I'm
5 sorry, what's this word?

6 A That.

7 Q Of that I could have said it?

8 A Yes.

9 Q And is that what Mr. Tallis then told you, that he
10 had been told by Mr. Milgaard about the motel room
11 incident?

12 A Everything here is what I was told, so -- he said
13 of that I could have said it.

14 Q And again from your -- did you have some knowledge
15 about the motel reenactment evidence at the trial?

16 A Yes.

17 Q And again, did this comment from Mr. Tallis, what
18 was your reaction as far as, (a), the decision to
19 testify or not testify, and (b), trying to explain
20 it to someone, i.e., at the parole board, that
21 this is why he didn't testify?

22 A I didn't delve deeply into whether it was the
23 right decision or the wrong decision.

24 Q I'm sorry, maybe I didn't ask you quite right, not
25 asking you to second guess, but I think you went



1 in to say lookit, explain to me why he didn't
2 testify, I might need to explain this to someone
3 on the 617 or perhaps on parole, and I'm just
4 wondering after you talked to Mr. Tallis -- maybe
5 just in general, what was your reaction after
6 hearing this, were you in a position to perhaps
7 now explain the failure to testify or did, were
8 you concerned about the implications of the
9 explanation?

10 A No, I wasn't concerned -- the implications of the
11 explanation didn't make me think he was probably
12 guilty, the explanation was a satisfactory
13 explanation to me on the decision not to have him
14 testify.

15 Q And again apart from this note, do you recall any
16 further discussions with Mr. Tallis then while you
17 were retained about his representation of Mr.
18 Milgaard?

19 A No, nothing other than what I told you earlier of
20 sort of the general position was I won't talk to
21 you, and I -- and he put it in terms of I won't
22 talk to you and I've always said I won't talk
23 about it.

24 Q Yes.

25 A Which I took to mean others had asked him, and it



1 may be that he was more forthcoming with me than
2 he would have been with others, and I also knew
3 that because we had discussed it about other
4 cases, I also knew that he was very circumspect
5 always about talking about clients' business.

6 Q If we can then go to 183639 --

7 A And that issue of him being circumspect is only
8 relevant as to my state of mind because what he
9 was saying now was so consistent with his
10 commendable general approach on everything else.
11 He was just never a person who would talk about
12 people, he was never a person who would laugh
13 about clients or say anything negative about
14 clients, he sort of took the view if we act, they
15 are ours and we love them kind of, or at least we
16 respect them.

17 Q 183639 is a December 10th letter from you to David
18 Milgaard and I'll just go through parts of this.
19 You indicate that you have now spoken with
20 Mr. Justice Tallis, we met on the 29th, and can we
21 take it from this that your discussion with
22 Mr. Tallis then would have been November 29th,
23 1982?

24 A Uh-huh.

25 Q It seems logical. And:



1 "He continues to be prepared to do
2 everything he can to assist you."

3 And then you say:

4 "More than ever, I believe that unless
5 we can persuade some witness to recant
6 their story, then very little can be
7 done. Obviously the most crucial
8 evidence came from Nicol John, from
9 Wilson, from Codraine, and recanting
10 from one of the other people would at
11 least start us in the proper process."

12 Again, that's something that you told us this
13 morning, Mr. Merchant, that is this more of the
14 same, this is what we need to get it reopened?

15 A Yes.

16 Q Then the next page, a couple of points here, you
17 say:

18 "In summary, as a result of talking with
19 Judge Tallis, I don't have any better
20 ideas than we have been pursuing for
21 some months, namely the fact that we
22 have to get some of the witnesses to
23 testify differently.

24 Mr. Shannon contacted me to
25 indicate that he is prepared to offer



1 you a job in Quebec and he wants me to
2 make submissions to the Parole Board
3 which I will do after I hear from him."

4 So again, would this be where the parole board
5 work would have started?

6 A Well, I think it had started before and there were
7 sort of two tracks, but I began in a more
8 determined, confident way, or at least inquisitive
9 way, to see if there weren't some solutions of
10 showing innocence, and I was of the view that that
11 was not going to get far from what I knew.

12 Q If we could then go to 219511, again this is a
13 letter, January 20th, '83 to Mrs. Milgaard from
14 you just talking about the approach to Albert
15 Cadrain, and I think you had earlier obtained that
16 from a tracing service, and you talk here about:

17 "I wonder however how he might react to
18 Peter Gordge.

19 No matter who makes the
20 approach I think it should be an
21 unannounced approach. The one of the
22 three of us selected or someone else who
23 you think should approach him would
24 simply arrive and discuss the matter.
25 If you call in advance he essentially



1 decides whether he will talk with you
2 and what he will say in your absence so
3 even if he meets with you the tendency
4 is to deliver a prepared text."

5 And I take it that would be advice to Mrs.
6 Milgaard about how one approach might be to talk
7 to Mr. Cadrain?

8 A Yes.

9 Q Now, next there are a couple of letters, 216085,
10 and I just want to identify this because -- I'll
11 come back to this later. This is a February 9th,
12 1983 letter to you from Howard Shannon and I just
13 want to show you this comment because you later
14 write a letter asking him to take this out. He
15 says:

16 "I, like Roger, believe Dave is innocent
17 of the charges brought against him."

18 Etcetera, and then it goes on to talk about the
19 job description, and then if we can call up
20 216090, and this is the same letter from Roger
21 Renaud who also offers to give him employment and
22 again talks here, if we can just call out that
23 paragraph, talks about:

24 "As you know, I never believed Dave was
25 guilty and everyone who has examined his



1 case since, finds it hard to believe
2 too."

3 And then if we can go to 016088, this is your
4 letter back, March 3rd, 1983, and you tell him
5 essentially:

6 "I want you to remove the references
7 regarding your opinion of his guilt.
8 That is not a positive thing to say to
9 the Parole Board."

10 And again, that's what you told us this morning,
11 Mr. Merchant, that that's something they didn't
12 want to hear; is that right?

13 A That was my view, yeah, and my information.

14 Q Then if we can go to 159890, this is a newspaper
15 article that was put in the paper March 26th, 1983
16 by Peter Carlyle-Gordge and asking, it's an ad
17 looking for Linda Fisher, recent whereabouts of
18 Linda Fisher who was married in 1969 to Larry
19 Fisher, to contact a box number, and do you have
20 any recollection of being aware that Mr.
21 Carlyle-Gordge was putting this ad in the paper?

22 A No.

23 Q And again, do you have any recollection of the
24 name Linda Fisher or Larry Fisher coming up in
25 dealings that you had?



1 A No. They -- I think -- well, I know that Linda
2 Fisher was one of the people that we were trying
3 to contact, but it wasn't -- she wasn't of the
4 same level of significance as the people who
5 testified significantly against David.

6 Q And did you know where she fit in or who she was
7 or why they were looking for her?

8 A No. Something to do with living in the area or
9 something, but it wasn't -- it wasn't, as we now
10 know, significant to find her in relation to Larry
11 and his sexual past.

12 Q And if we can call up 213627, and this a letter
13 that you wrote of October 12, 1983 to Universal
14 Process Servers in Calgary, and earlier on the
15 file -- actually, maybe let me just call up
16 332598, this is an October 11th, 1983 letter and
17 it talks about, from you to a Vancouver tracing
18 and it relates to Linda Fisher and Sharon
19 Williams, and you say:

20 "Please discontinue your search efforts
21 regarding both individuals."

22 And I think that that -- I'll show you in a bit a
23 letter, I think that was done in the spring of
24 '83, and then if we can go to 213627, here's the
25 letter the next day to a different process server



1 in Calgary, so it looks like you had earlier
2 tried to find Linda Fisher, now went to a Calgary
3 process server; is that correct?

4 A I just didn't want to pay twice.

5 Q Pardon me?

6 A I did not want to pay twice, so the tracing
7 services tend to communicate between each other --
8 among themselves as I understood it, so if one
9 found the name, it might be communicated and I
10 would end up paying for the same information two
11 times.

12 Q And so here it's:

13 "Please attempt to find one or all of
14 the following:"

15 Ute Frank, Sharon Williams, and the last one:

16 "Linda Fisher. In 1969 she lived at 334
17 Avenue O South, Saskatoon, Saskatchewan.
18 She married Larry Fisher who is
19 presently in prison for a rape charge."

20 Who would have -- do you know who would have
21 instructed you to find Linda Fisher or whether it
22 was on your own volition?

23 A It wasn't on my own, so it would have been Joyce
24 assumably or Joyce/David.

25 Q And again at the time did you know the



1 significance of 334 Avenue O South being the
2 residence that Albert Cadrain lived at at the time
3 of the murder and where Mr. Milgaard visited the
4 morning of the murder?

5 A I don't think I did, but they may have known, or
6 they may have told me and I don't remember that
7 that was why it was significant, and Ute Frank, I
8 mean, her, just because of her unusual name, but
9 to some extent I was a conduit for this
10 information gathering process. I was not as
11 engaged in the idea that this was getting
12 anywhere. I wanted to do it, didn't think it was
13 a useless endeavour, and these are -- this ongoing
14 process by Joyce is all a part of her strengths,
15 you know, which ultimately with the lawyers in
16 Winnipeg resulted in this very commendable result
17 of finding him not guilty, but I wasn't really a
18 part of the whys so much as can we find so and so,
19 here's why, yeah, yeah, sure, I'll try and find so
20 and so.

21 Q And do you recall whether the fact that there was
22 a discussion at the time about Larry Fisher who
23 lived in the Cadrain house at the time of the
24 murder, was in prison for rape, do you remember
25 that being an issue that was either brought to



1 your attention or discussed?

2 A No, I do not recall let's find -- I do not recall
3 let's find the real murderer sort of process
4 underway, and it may have been mentioned in
5 passing, but I don't recall in those terms.

6 Q And again just with this letter, do you have any
7 recollection of looking at this, just what I've
8 circled, that information, and connecting the
9 address to the Cadrain house and the fact that
10 Larry Fisher was in prison for rape?

11 A No.

12 Q And thinking about the Gail Miller murder?

13 A No.

14 Q Then go to --

15 A And of course I didn't know -- I didn't know that
16 the reward had been paid to the person who lived
17 at that residence. That would have been a helpful
18 piece of information.

19 Q If we can go to 126046 -- let me just back up.
20 Your letter 012897 is your May 16th, '83 letter to
21 the parole board indicating that he has an offer
22 of employment with people who knew him before he
23 went into prison and allow Mr. Milgaard to make a
24 contribution in society and re-establish himself
25 on the street, so that, if I can then go to



1 126046, here's the response to your letter, and
2 then it says:

3 "Mr. Milgaard will be seen by the Board
4 next month for Day and Full Parole
5 consideration. One cannot predict the
6 Board's decision, however, I can assure
7 such will be made having regard to all
8 information available about Mr.
9 Milgaard."

10 And then I'll show you a bit more about the June
11 parole decision. I don't believe you attended at
12 the session, Mrs. Milgaard did. Do you recall --
13 you had told us this morning that you had, and I
14 think your words were something like had a deal
15 or words to that effect with the parole board,
16 that you thought David would get out, and was it
17 at this, was it for this June, 1983 appearance or
18 was it a later appearance? Are you able to tell
19 us?

20 A I don't know.

21 Q And maybe I'll show you a few other letters and it
22 may assist. If we could go to 219532, and now
23 this is a June 16th, 1983 letter to Mr. Shannon,
24 but if I can go to the next page just to show you,
25 am I right, we can call that out, that the D: May



1 11th means you dictated that on May 11th?

2 A Yes.

3 Q So although the date is May 16th, it would have
4 been done a month earlier; is that fair?

5 A Yes.

6 Q Just go back to the earlier page --

7 A It shows you I needed more secretaries and I had
8 to be less verbose.

9 Q So here this would be on May 11th then telling
10 that:

11 "I indicated that I would check with my
12 sources within the parole board and make
13 predictions about the likely outcome of
14 the hearing and secondly consider the
15 question of whether it would be useful
16 for me to appear with Mr. Milgaard
17 before the parole board. I also
18 indicated that I would be prepared to
19 attend with Mr. Milgaard on the basis of
20 the payment of my disbursements alone
21 which I expect would be about \$800.00."

22 And then if you can scroll down to this
23 paragraph, you write:

24 "First the parole board though they have
25 no specific rules against two



1 representatives appearing really prefer
2 that only one representative be with an
3 applicant. If Mrs. Milgaard intends to
4 be present - and provided she is not too
5 strident in her remarks - she might
6 prove to be a better representative than
7 I would. The parole board will be
8 interested in how he will fit back into
9 the family and as stated hereafter they
10 will very likely be more interested in
11 his visits to Winnipeg than they will in
12 a complete parole. If Mrs. Milgaard
13 does not intend to be present I could go
14 if you instruct me to do so."

15 Q And then just scroll down:

16 "I am told that a temporary absence is
17 likely the only form of parole that will
18 be granted. He is not, I am advised,
19 after a fourteen year term, after
20 institutional problems, and after an
21 escape going to get more than the right
22 to be absent on a temporary basis."

23 And, again, does that assist, Mr. Merchant? Is
24 this before or was this part of the deal you
25 thought you could get from the parole board?



1 A Umm, I can't tell you for certain, I would think
2 so but I'm not positive of that.

3 Q To assist you, the visit you had to Millhaven was
4 in September, I think 18th and 19th of 1983 I
5 think is what -- I'll show you some documents that
6 would suggest that that's when you went. So it
7 would be after the June, the mid-June '83 parole
8 hearing, and I believe that's when you visited Mr.
9 Milgaard for the first time, at least according to
10 the records; does that assist you in placing where
11 matters were at?

12 A Yeah. This would make me think that this was not
13 the parole hearing where I thought things were
14 going to necessarily go particularly well.

15 Q And is that because it was your meetings out at
16 the prison, then, where that -- that you think
17 that was arranged?

18 A No, it wasn't at the prison that I thought things
19 were arranged, I thought things were arranged
20 through contact with the parole board.

21 Q Okay. Then I'll just show you the -- a couple.
22 182263, and this is Mr. David Milgaard's letter to
23 you June 14th, 1983, and just at the top it says:

24 "As you probably know things did not go
25 as well as they should have by way of my



1 parole hearing."

2 And then if I could call up 028337, this is I
3 think June 14th, '83 is the date of the parole
4 hearing, and if we can just --

5 COMMISSIONER MacCALLUM: What's that
6 number, please, Mr. Hodson?

7 MR. HODSON: It's 028337.

8 COMMISSIONER MacCALLUM: Thank you.

9 BY MR. HODSON:

10 Q And again, Mr. Merchant, on July -- just so you
11 know where I'm going -- on July 29th of '83 I
12 think -- and I'll take you to these in a moment --
13 you were in Winnipeg and met with Mrs. Milgaard
14 and had a, I think a discussion with her where she
15 told you about what happened at parole, at the
16 parole board; is that right? And if I can --

17 A Yes, yeah, July -- July -- July 20 -- what date
18 did you say?

19 Q Yeah, maybe, let's call up 219526.

20 A No, but I mean my diary shows that I was in
21 Winnipeg about -- a couple times the end of July,
22 so --

23 Q Here's, this is July 20th, '83, this is your
24 letter to Mrs. Milgaard saying:

25 "I would like to meet with you on July



1 29 early in the morning ...",

2 and:

3 "... come over at 8:30 ... and I propose
4 that you give me your memories of
5 everything that came before the Parole
6 Board.

7 I will have a similar
8 conversation with David ...",

9 and then:

10 "I won't be in Winnipeg until the
11 evening of July 28, ...",

12 and then there are some notes that are dated July
13 29th, '83 that appear to be your notes of a
14 discussion with Joyce Milgaard; so does that
15 sound right?

16 A Yes.

17 Q So then if we can just go back to the parole board
18 decision, which is 028337, just go through parts
19 of this; and do you know if you would have gotten
20 a copy of this decision as part of your work at
21 the time?

22 A I did not.

23 Q And again, just in Comments, it looks as though
24 Mr.:

25 "Milgaard attended the panel hearing



1 with his mother ..."

2 So, again, your letter to Mr. Shannon I think in
3 May was 'you are only allowed one representative,
4 if she doesn't go I'll go'; I take it that the
5 decision was made by someone that she would
6 attend and not you?

7 A Well there was a double problem, I would attend or
8 she would attend, and if I were going to attend,
9 although I were -- although I was prepared to
10 attend without any charge for the time, I think it
11 may have been that I wanted her to pay the
12 disbursements of about \$800, or I forget what it
13 said, but -- so there was also an expense issue,
14 even though I was prepared to do -- to take a
15 couple of days without charge.

16 Q And do you have a recollection of how it came to
17 be that she went, and Mrs. Milgaard went and you
18 didn't go, or --

19 A No.

20 Q And then again, here, it looks as though
21 Mr. Milgaard, it says:

22 "He continues to feel that he is
23 innocent of the crime for which he has
24 been convicted and his mother is
25 actively pursuing evidence and a hearing



1 to prove Milgaard's innocence."

2 Then it goes on to say here:

3 "Milgaard requires an extensive
4 psychiatric assessment by an outside
5 psychiatrist. There is certainly a
6 question as to his psychiatric condition
7 at this time in light of the past
8 diagnosis of an acute schizophrenic
9 episode. The interview with Dr.
10 Carpenter on April 18, 1983 did not go
11 well because of Milgaard's hostile
12 attitude.

13 Milgaard seemed to be dominated
14 and greatly influenced by his mother.
15 "His plans" were clearly the work
16 product of his mother. At times during
17 the interview, his facial expression
18 showed disagreement with some of the
19 thoughts espoused by his mother. She
20 created unduly highly expectations for
21 his parole hearing notwithstanding the
22 recommendations of the Court. He might
23 have been better served had his mother
24 not appeared as his assistant."

25 And, again, did you have any discussions with



1 anybody at the parole board about this hearing,
2 Mr. Merchant, or whether this -- and if you like
3 I can leave the question until after we go
4 through the notes with Mrs. Milgaard?

5 A All right. I don't think I did but all right.

6 Q If we can go to 332589?

7 A Actually, just before you leave this, of course if
8 I'd seen this I wouldn't have been as optimistic
9 as I was, so it wasn't just the "I'm innocent"
10 issues, there were other issues here that I would
11 have wanted to address.

12 Q If we can just scroll down to the bottom, the
13 Parole Denied, scroll down. It says here:

14 "(2 year deferral for full parole
15 review)"?

16 A Uh-huh.

17 Q And I think this comes up later in some of your
18 correspondence, that you -- were you not aware of
19 that being the result of the June '83 decision?

20 A I think I was, but -- I'm not sure whether I was,
21 but I -- full parole would be different from
22 getting him on the road. I always knew that, even
23 when I was optimistic, I knew that they weren't
24 going to give him a bouquet of flowers and say
25 "give us a call in a year or two".



1 Q And then if we can go to 332589, and maybe we'll
2 just call out the top part and have you identify
3 these, this -- these notes are in your
4 handwriting; are they?

5 A Yes.

6 Q And are you able to tell us what these relate to?

7 A I suspect that these are notes from meeting with
8 Mrs. Milgaard in Winnipeg on July 29th, 2003 --
9 '83 I mean.

10 Q I called up your July 20th, '83 letter, which you
11 don't need to call up but it's 219526, and in that
12 letter you say:

13 "I propose ...",

14 you are going to:

15 "... come ... at 8:30 a.m. and I propose
16 that you give me your memories of
17 everything that came before the parole
18 board."

19 And would these be notes of what Mrs. Milgaard
20 told you came before the parole board?

21 A Yes.

22 Q And then if we can go to the next page, there is a
23 comment here at the bottom and it says, 'I believe
24 one community member', and I take it that's a
25 community member of the board; is that right?



1 A Yes. There were two. There was one, one parole
2 board member, and there were two community
3 members, and one of -- this refers to 'one of the
4 community members said I have seen photographs of
5 the dead girl'.

6 Q And then it says 'Caldwell sends photographs and a
7 letter for' --

8 A 'Caldwell sends those photographs, sends those
9 photographs and a letter from a psychiatrist'. I
10 would have been writing down exactly what, exactly
11 what was said because I, I never, I would never
12 write 'Caldwell sends those photographs', I
13 never -- I never write or think in the present
14 when it is in fact in the past.

15 Q Okay.

16 A You know, teenagers, I missed that too. So I --
17 this would be exactly what I was sort of writing
18 down, so, 'Caldwell sends those photographs and a
19 letter from a psychiatrist in Yorkton done' --
20 yeah, I wouldn't make that grammatical error
21 either -- 'done when David was about 15. David
22 didn't eat for four or five days last fall. He
23 had been going to breakfast, was sent back', I
24 can't read that, 'it was' --

25 Q 'An alleged'?



1 A Right, 'an alleged P' --

2 Q Looks like 'pajama top'?

3 A 'Pajama top'? Okay.

4 Q If we can actually just scroll down to this part
5 here I think it says, 'they said they wanted an in
6 depth psychiatric interview'?

7 A Yes.

8 Q And then as well if we can go to the next page?

9 A Now I don't know whether -- so I was getting some
10 of the information from that, from that report, I
11 don't know whether Joyce had that report or
12 whether the parole service kept it from her or
13 David, I don't know what the process was. But of
14 course it would have been -- these things wouldn't
15 have been of much news to me if I, if I had had
16 a -- had had the report in writing.

17 Q If we can go to actually the next page, 593, just
18 call out that part, and I think maybe just from
19 the top if you -- and, again, would these be
20 verbatim notes, then, of what Mrs. Milgaard told
21 you?

22 A I can only tell if I start reading it.

23 Q Yeah?

24 A 'Perhaps just testing him with the 4-year things.
25 She said David in Toronto while he was out',



1 something 'with my brother'?

2 Q 'Stayed'?

3 A Right, 'stayed with my brother for some time,
4 didn't tell the board these things. Until that
5 time they said it would be impossible to function
6 on the street. Didn't say that at the meeting.
7 Maybe get back his' grader, his --

8 Q 'Grolier'?

9 A -- 'Grolier job. He had been sent to the Yorkton
10 Psychiatric Centre at 14 - 15 because he had
11 stolen a car. We were living' something --

12 Q 'Then'?

13 A -- 'then in Langenburg. Report says this person
14 is capable of killing'. Umm, I can't read that,
15 whether it says 'through' or something, 'are the
16 maximums that the system may prescribe before you
17 may seek parole and may you seek or this just
18 paroled.'

19 Q Are you able to tell us this, what this reference
20 is to 'report says', is that 'personally' or
21 'person capable of killing', are you able to tell
22 us --

23 A 'Person, person is capable of killing'.

24 Q Do you know what that --

25 A Report --



1 Q -- referred to?

2 A I was being told that there was a report before
3 the parole board that said 'this person, report
4 says this person is capable of killing'.

5 Q And then the next page, just at the end, it says
6 'he would have been happy with a half-day pass.'

7 A Right.

8 Q Do you recall then, at the conclusion of this
9 meeting, or what the purpose was of this meeting
10 with Mrs. Milgaard?

11 A Well to sort of tell me what had gone on so that
12 -- and for me to get involved, I -- in -- well, to
13 continue regarding parole issues, but --

14 Q And I think -- and I'll take you to this in a
15 moment -- September of the -- a couple of months
16 later, I think, was when you went -- was it
17 Millhaven that you went to?

18 A Yes, yeah.

19 Q So would these notes be as part of your -- telling
20 you what happened so that you could prepare for
21 re-applying for parole or the next set of parole
22 hearings?

23 A Yes.

24 Q Okay. If we could call up 183405. This is a
25 letter of August 15th, '83 to Mr. Milgaard, and



1 there is a letter that David Milgaard had drafted
2 to Ron Wilson and I think sent out for some people
3 to look at, and I think Max Steinburg was his
4 parole officer or involved in parole; do you
5 remember that name?

6 A Don't remember.

7 Q And I think we'll see it on some documents in a
8 moment. Anyway, you tell David here:

9 "You have to stop writing aggressive
10 unpleasant letters to people in
11 authority. People don't speak to each
12 other in the way that you speak and they
13 certainly don't write letters like the
14 letters that you write. Beyond
15 question, they don't write letters like
16 that to people in authority.",
17 and then go on to talk about his
18 institutionalisation and how that may have
19 impacted that. Can you tell us what, what did
20 this relate to? I mean there was one letter from
21 Ron Wilson, but was this a concern of yours in
22 what you were trying to do?

23 A Yeah.

24 Q And in what way?

25 A Well, got to be a little gentler, you've got to



1 make people love you, not whip them, sort of
2 thing.

3 Q Again, if we can go to 332595, and this is I think
4 August 15th, '83, and maybe just call out the top
5 part. And they look -- these are your notes, are
6 they?

7 A Yes.

8 Q And is that Howland, is this --

9 A Yes.

10 Q And can you tell us what this -- what these notes
11 relate to?

12 A Umm, --

13 Q And maybe we could just go through them, but --

14 A I know. I just wanted to look in my diary. Umm,
15 you know, you are saying Kingston and I've got
16 going to Kingston later at the right time. Umm,
17 --

18 Q Maybe we could just go through them. Would they
19 have been the notes of a meeting with Mr. Howland
20 do you think?

21 A I suspect not. I suspect they are notes of a -- I
22 -- my belief, based on not having a note in my
23 diary, is that this would -- were -- was a
24 telephone conversation with him.

25 Q With?



1 A Ken Howland.

2 Q With Ken Howland? And then maybe just go through
3 the first paragraph; is this handwriting on the
4 left-hand side, is that yours?

5 A Yes.

6 Q Okay. If we could maybe just go through the body
7 of the first paragraph?

8 A Can't make out the first word.

9 Q 'Problem'?

10 A 'Problem for him was that he was a disturbed
11 teenager. Stating that he is not guilty troubles
12 some board members. Then', or something,
13 'compounded his problem, then compounded his
14 problem with drug abuse in jail. Behaviour
15 created further problems. Will get', something,
16 'into just that' --

17 Q 'Will get back'?

18 A Yeah, right, 'will get back into just that sort of
19 thing on the street. Escape set him back a long
20 way. Must' --

21 Q Scroll down.

22 A Yeah, 'must believe' --

23 Q Or 'behave', does it say 'must behave well'?

24 A Yeah, 'must behave well in the institution and
25 avoid drugs in the institution. Was his -- what



1 was his behaviour on bail is what behaviour in the
2 77 days' -- that would refer to the time when he
3 was out I think, when he broke away -- ' in the 77
4 days. Didn't lose her' or something?

5 Q 'Abuse her'?

6 A 'Didn't abuse her?' And there, you may remember
7 there was some issue about he lived, he lived with
8 a girl and --

9 Q Peggy Neil; does that name --

10 A No, and there was some question about I think she
11 was a nurse or something about what he had done to
12 her.

13 Q And was this while he was out of prison, had
14 escaped from prison, is that what you are
15 referring to?

16 A Yeah, he -- he wandered off while on parole, I
17 guess you could call it, and I wouldn't call that
18 'escape from prison' but --

19 Q Okay.

20 A But --

21 Q Yeah.

22 A But he was unlawfully at large. 'Didn't abuse
23 her? Alcohol and drugs?' Something 'charged with
24 any offences'.

25 Q Maybe we could go to the next page?



1 A Yeah.

2 Q Just one, it says a comment here, 'give a written
3 presentation so other board members see if
4 arguments shouldn't be so lengthy', and would this
5 be advice from Mr. Howland how to proceed before
6 the board?

7 A Yes.

8 Q And would this be, again you talked this morning
9 about, I think your words were trying to get a
10 deal to get him out; would this be part of that
11 process, this discussion with Mr. Howland?

12 A Yes.

13 Q This might be an appropriate spot to break, Mr.
14 Commissioner.

15 (Adjourned at 3:06 p.m.)

16 (Reconvened at 3:24 p.m.)

17 BY MR. HODSON:

18 Q And if we could go to 156689 of doc. ID 156673.
19 And Mr. Merchant, this is a September 27th, 1983
20 letter to Mr. Shannon, and I think this is about a
21 week after you met with Mr. Milgaard at Millhaven,
22 and you talk about 'I thought the trip to Kingston
23 was well worthwhile', and then you talk about your
24 impressions of David. Then you say, 'I view my
25 role in preparing him to appear before the Parole



1 Board to be that of a 'presentation advisor'. I
2 won't be going before the Parole Board to argue a
3 case in the same way that a lawyer would do so,
4 but rather to go before the Parole Board and prior
5 to the hearing to work with David to make sure
6 that he gets across a message that he is reformed,
7 not dangerous, not volatile and no too pushy or
8 aggressive in his attitude.' And, 'his case
9 officers think highly of him', and etcetera.

10 And I'll just -- actually just
11 let me scroll down a bit to, it says here 'on the
12 20th I met with Max Steinburg, the parole officer
13 in charge. David, his mother, the psychologist
14 and David's case officer had all thought that Mr.
15 Steinburg intended to allow a hearing for escorted
16 day passes or unescorted temporary absences from
17 prison within eight to ten months after the
18 hearing in January. On the record, however, Mr.
19 Steinburg set the next hearing date for
20 approximately January of 1985.'

21 So this is September of '83, and
22 it looks like you are looking to get something
23 happening in 1984; is that right?

24 A Yes -- no, not necessarily. January of '83, I'm
25 look to go get something in '83, not --



1 Q Sorry, this is September 27th of '83.

2 A Oh, okay. Yeah, yeah.

3 Q And so, again, January of '84?

4 A Yeah.

5 Q And, again, you had talked about trying to make
6 arrangements, and just so that I understand that
7 as far as how the parole board works, is it -- are
8 you saying that you had contacted people and,
9 through proper channels, were trying to get the
10 best presentation available and the best result
11 through the normal ways the board operated?

12 A Yeah, in the normal. But the normal ways the
13 board operated at that time, and I suspect still
14 is, is you could phone and make representation,
15 you could meet with people, you could not exactly
16 negotiate but make submissions. There was nothing
17 extraordinary being done by me that any other
18 capable lawyer or individual might not also have
19 done. There was -- I didn't get -- I wasn't
20 getting any favourite, any favoured treatment by
21 any means. Everybody within the system with whom
22 I spoke was aware of David's situation, they were
23 -- I say again, this was a very long period of
24 time to be incarcerated for a murder in those
25 days, before Parliament wrongly succumbed to the



1 pressure of the voters to have maximum sentences
2 for no good reason, so they were aware that this
3 had been a long time and there was some will to,
4 you know, to get him out and make him better, kind
5 of, but --

6 Q And, again, was -- when you talked, and I think
7 your words were that a deal or an arrangement --
8 was that based on, would it be fair to
9 characterize it that based on your discussions
10 with various people involved you believed that
11 there would be a favourable outcome when the board
12 did decide?

13 A Yes.

14 Q Based on what feedback you were getting?

15 A Yes.

16 Q But that there was still a need for the board to
17 go through the process and reach the decision?

18 A Absolutely. And not only did they have to reach
19 the decision sort of appropriately based on
20 whatever came before them, but it isn't over until
21 the decision is made, and that could include
22 something going wrong.

23 COMMISSIONER MacCALLUM: And that's a typo
24 there, is it, January of '85 should say '84?

25 A No, I don't think so, My Lord.



1 BY MR. HODSON:

2 Q No.

3 A I think it's that it was scheduled for January of
4 1985 and I was trying to get it --

5 COMMISSIONER MacCALLUM: Oh, a year and a
6 half down the road?

7 A Yeah, I'm trying to make it, I believe I can make
8 it happen more quickly.

9 COMMISSIONER MacCALLUM: Okay.

10 BY MR. HODSON:

11 Q And if we can in fact call up 012874, this is a
12 letter of October 11th, 1983 to the parole board,
13 and I think this suggests here:

14 "It is my understanding that Mr.
15 Milgaard will be allowed to apply for
16 day parole in January.",
17 which would be January '84, so that's what you
18 were working for -- towards?

19 A A year, a year earlier than the --

20 Q Yes. And then if we can go to 156680, and the
21 doc. ID is 156673, and this is a letter October
22 24th, '83 from the parole board to you indicating
23 that, 'Subsequent to your visit David has
24 undergone a relapse. He has been charged with
25 assaulting an officer and is presently housed at



1 the Regional Treatment Centre in Kingston
2 Penitentiary. He is in reasonably good physical
3 health, however his mental state is not
4 satisfactory.' 'To reiterate, Mr. Steinburg
5 should be contacted to see when he wishes the
6 assessment to be undertaken'.

7 And then if we can go to --

8 A They were more sympathetic of -- about those
9 things than members of the public would be. You
10 know, the parole board understood that, as Charlie
11 Messer used to say, if people weren't screwed up
12 mentally when they got to prison, the prison
13 pretty quickly screwed them up. So you read that
14 and you sort of say, well, that's curtains for
15 David for gosh knows how long, just like every
16 time Jean Valjean got mad at somebody he got
17 another two years. That wasn't -- I got that, but
18 it wasn't sort of, well, forget about it, he's
19 going to be forever again, these were things that
20 occurred.

21 Q And then if we can go to 219537. And this is a
22 letter of October 25, '83 to Howard Shannon, and
23 you also say you are sending a copy of the letter
24 to Mrs. Milgaard, and you say:

25 "She probably already knows about the



1 difficulties which arose on
2 approximately October 11."

3 And then scroll down. You talk about:

4 "By the 11th of October David was noted
5 by the staff to be uncommunicative and
6 essentially somewhat 'spaced out'."

7 And:

8 "Drugs are quite common in the
9 institution and it was thought that he
10 might simply have been on some kind of
11 drugs or having problems as a result of
12 involvement with drugs."

13 Scroll down:

14 "By Thursday it was apparent that he was
15 not having a drug problem but that there
16 was a mental breakdown of some sort and
17 on October 14 he was transferred to a
18 psychiatric centre. He is now under
19 medication."

20 Again, is this the same incident you described
21 earlier, Mr. Merchant, about your visit out there
22 and David Milgaard's condition, or is it a
23 different one?

24 A I think it's different.

25 Q Okay. And would this be after your visit, then?



1 A This is October of '83?

2 Q This is October 11th of '83, and I think September
3 19th is when you went out to Kingston.

4 A Umm, I think it -- I think -- I think this is
5 after.

6 Q Maybe just let me, the next page of the letter,
7 there is a couple parts here that I will just read
8 for you and then have you respond. And it says:

9 "So that you and Mrs. Milgaard clearly
10 understand the situation I have to
11 outline the difficulty faced by David in
12 its clearest terms. The parole board
13 will now be very suspicious that he had
14 a similar sort of mental breakdown at
15 the time of the offence for which he was
16 convicted. Moreover they will be very
17 concerned that if he had been on the
18 street at the time of this mental
19 breakdown, without help, he would
20 conceivably have deteriorated to a state
21 where he might have been dangerous to
22 himself or others. Problems involving
23 drugs in the past are likely to now be
24 reinterpreted as potentially having
25 involved a similar sort of mental



breakdown.

This incident will set back David's release by a very considerable period of time. That remains to be seen and I quite frankly intend to wait a month or so before even contacting Mr. Steinburg once again."

Now does that --

A I don't find in my diary when he, when I was there, so I'm troubled by being in Kingston.

Q Maybe I'll just show you one more letter, 219539. Now this is November 14th, 1983, so this is a couple weeks later, and again --

A Just a minute, I'm sorry, I was looking in the wrong book.

Q Oh, sure.

A Yeah, I was in Kingston September, September 17, and then in Ottawa on the 19th. So yeah, I was writing after the -- right after my being in Kingston.

Q And so, again, do you recall, and my question earlier was the incident described in your letter about it being related to a mental breakdown and not drugs; was that a different incident than the one you described earlier when you were present --



1 A No.

2 Q -- to meet with David Milgaard?

3 A No, I think that I, if this were shortly
4 thereafter I think it would be the same, --

5 Q Okay?

6 A -- the same incident.

7 Q And then here's the letter November 14th to Mrs.
8 Milgaard and you say --

9 A Not exactly the same incident, a continuation.

10 Q A continuation?

11 A Yeah.

12 Q You say:

13 "I spoke with Mr. Shannon on November 1.
14 In relation to the current problems
15 facing David it is futile to even
16 consider a further parole application
17 for at least six months and very likely
18 something in the neighbourhood of a
19 year."

20 And then scroll down:

21 "There really is nothing that can be
22 done for at least six months."

23 And:

24 "Further progress will now be delayed
25 for quite some period of time."



1 And again, is that, would this be the end of your
2 involvement then in efforts on behalf of Mr.
3 Milgaard for parole?

4 A It suspended it and so I was kind of out of ideas
5 and I knew what had to happen, but there had to be
6 change in David before we would get anywhere with
7 that.

8 Q A couple more letters, 216121, this is December 1,
9 '83 to Mr. Shannon, he spoke with Mr. Milgaard
10 last week.

11 "He will be seeking a more modest order
12 - as he says in the letter - namely a
13 speeded-up temporary absence program and
14 things of that nature. Perhaps it will
15 work."

16 And then:

17 "I don't know whether he had received my
18 letter indicating that I was no longer
19 retained to act on the matter when he
20 wrote to me."

21 So I take it at this point you would have advised
22 him you weren't acting any more and it appears
23 that you kind of continued on in some respects;
24 is that right?

25 A Well, Howard had given up as you've noted, or you



1 haven't noted, but it has been in there. I was
2 doing more and more of this without payment and
3 offering to do more and more things without
4 payment, so I had been -- I had been drawn into
5 the tar baby of there's an injustice here and I
6 have a duty or a desire to do something about it,
7 but with Howard gone and even, not even
8 disbursements being paid, yeah, enough.

9 Q Go 216123, this is February 27th, '84, a letter to
10 Mr. Shannon, and you say:

11 "Perhaps both you and I were too hasty
12 in concluding that David's problems
13 towards the end of the year would make
14 it impossible for the parole board to
15 allow any further progress.

16 It may also be that the
17 representations that I made while in
18 Ontario had such a positive effect that
19 they carried on with the plan to ease up
20 on David. I don't know whether you want
21 to reconsider financing David's
22 situation."

23 Was there a point, Mr. Merchant, where Mr.
24 Shannon had said I'm not paying any more to do
25 this?



1 A Yes, five or six months before, but I remember
2 talking with him and it was, I could have
3 dissuaded him. I didn't. If I had said here's
4 the explanation, hang in there, but I didn't, I
5 thought that he was entitled to have sort of my
6 real view, and my real view was that
7 unsatisfactory things were happening in David's
8 life and he ought not, you know, he didn't want to
9 keep spending money. It was sort of, gosh, hasn't
10 he kind of let us down, do you think he's let us
11 down, I'm paraphrasing or making this up, but do
12 you think he let us down? Yeah, Howard, he really
13 kind of has. Why am I spending more money and,
14 you know, I set a limit, he said I set a limit and
15 I'm way over the limit, I remember him saying
16 that.

17 Q If you can go to 156692, and this is of doc ID
18 156673, this is now into September of '84 and your
19 letter to David Milgaard, and you say:

20 "I expect that if there were useful
21 things to do on your behalf, I could get
22 Mr. Shannon to pay the cost. I wouldn't
23 be prepared to act for you on the basis
24 of being paid sometime in the future.
25 It might also be possible for your



1 mother to pay if there were anything
2 useful to be done.

3 I don't think that trying to
4 track down witnesses is useful. We
5 would need a greater breakthrough than
6 getting George Lapchuk or Greg Melnick
7 to change their evidence. As I told
8 you, a very significant turn-around in
9 testimony would be necessary.

10 I might, on the other hand, be
11 prepared to represent you with regard to
12 bail proceedings, though you may not
13 need my help. You seem to be making
14 some progress without legal assistance."

15 And then I don't know whose writing this is here:

16 "Bail? He meant parole."

17 I suspect someone after.

18 UNIDENTIFIED SPEAKER: David.

19 MR. HODSON: Is that David's?

20 UNIDENTIFIED SPEAKER: Yeah.

21 BY MR. HODSON:

22 Q Do you know if it was bail? Should it have been
23 parole instead of bail or were you referring to
24 bail?

25 A I wasn't referring -- I don't know what I was



1 referring to, but I couldn't have been referring
2 to bail.

3 Q So at this point would it be fair to say that you
4 were still in contact, but not technically
5 retained to do anything?

6 A Correct.

7 Q Then 219493 --

8 A You know, I still believed, so I was still sort of
9 prepared to help in appropriate circumstances.

10 Q And this is a letter to David August 26, '85 about
11 a phone call from Eric Malling:

12 "... the issue of whether I knew
13 anything about the Milgaard killing,
14 etc. I did not immediately tell him
15 that I was your lawyer, but in due
16 course came to the conclusion that you
17 had been in touch with the Fifth Estate
18 and had discussed with them some sort of
19 coverage. I decided that it would be
20 valuable to talk openly with
21 Mr. Malling. The fact that I represent
22 you is not a confidential matter in any
23 event and though I didn't tell him
24 anything that is protected by solicitor
25 and client privilege, I did give him my



1 views of the matter and discussed some
2 of the other things that I knew about
3 the case which I thought would continue
4 to prick the interest of the Fifth
5 Estate in doing a story."

6 And I take it at the time did you know Eric
7 Malling?

8 A Yes, I had known him right back to my time on the
9 Sheaf, the student newspaper, and we were very
10 good friends and he spent a lot of time with me.
11 Well, he lived in Toronto, but he spent time with
12 me.

13 Q And at this time did you think it would be
14 beneficial for David Milgaard's plight to get some
15 media exposure on a program such as the Fifth
16 Estate?

17 A Yeah, very much so. It was the sort of Steven
18 Truscott theory that if you could shine some
19 sunlight, it would be a good disinfectant, and
20 the -- so I was encouraging and I knew enough to
21 try, as I said, to prick Eric's interest. Eric
22 was always looking for western stories just to
23 maintain the pretence that the CBC cares about us,
24 so he would call me from time to time and ask me,
25 you know, did I have any good western stories, so



1 I talked with him quite a bit.

2 Q You made that comment after the CBC cameras left
3 I'm afraid, Mr. Merchant, but --

4 A Get them back here.

5 Q So just back on -- did you become aware -- let me
6 call up 18 -- 182373. Did you know whether
7 anything became of Eric Malling doing a Fifth
8 Estate story on the David Milgaard case, or what
9 happened to that?

10 A I didn't know, although I would have -- I suppose
11 I probably knew because if Eric had done a story
12 he would have probably interviewed me even if it
13 remained in the can, didn't go to air, so he
14 would -- I was on the Fifth Estate six, eight
15 times over a period of time. I mean, he would --
16 the most bizarre time was when he included me in a
17 story about a pipeline of water from, to Regina on
18 the theory I guess that I drank water, so I was, I
19 would be an expert, so if he came, he always
20 looked for people that would sort of go to air and
21 that he liked, so --

22 Q Do you know, did you in any of your discussions
23 with Mr. Malling discourage him or the Fifth
24 Estate from running a program on David Milgaard?

25 A No. I encouraged him to do that just as I said in



1 the letter and I tried to dress the issue in an
2 interesting and provocative way that he might be
3 interested in carrying the story.

4 Q And again, this is a letter from David Milgaard to
5 Mr. Hersh Wolch at the time, February 27th, '87, I
6 won't go through all of it, but in this letter it
7 suggests that you somehow may have been involved
8 in causing the Fifth Estate or Eric not to run the
9 story, and did that in fact happen?

10 A No. To the contrary.

11 Q Now, again when Mr. Wolch became involved and Mr.
12 Asper in acting for Mr. Milgaard, did you become
13 aware of that at some point?

14 A Yes.

15 Q And did you have any discussions with either Mr.
16 Wolch or Mr. Asper about the work that you had
17 done?

18 A I may have, I think I did, but I think they asked
19 me some questions from time to time. I knew them
20 and I, you know, respected them, and I sent
21 everything, tried to be of assistance.

22 Q Now, there's a letter that suggests your file was
23 sent in 1992. Do you recall -- 216144. This is a
24 letter, this is right around the time of the
25 Supreme Court hearings and you say:



1 "I enclose our file, conditional upon
2 your returning the file to us within one
3 month, making no copies of the file, not
4 allowing members of the Milgaard family
5 to look at the file, but if you find
6 anything of use in the file, I expect
7 that upon your contacting me you will
8 receive authorization to release
9 portions of the file as may be
10 required."

11 Do you recall whether prior to February 13, 1992
12 you had been asked by either Mr. Asper or Mr.
13 Wolch for your file?

14 A I don't know. I would guess I did because I don't
15 know why I would have been setting these
16 conditions or what the issue was that I, that
17 worried me.

18 Q And again, are you -- I haven't found anything in
19 the documents that suggest prior to February 13,
20 '92 you either were asked for or sent your file.
21 Do you have any recollection of that being the
22 case?

23 A No.

24 Q A couple of miscellaneous documents here, 213641,
25 and this is a disbursement account to Sandra



1 Bartlett, January 27, 1986, and photocopying 60
2 documents, and we've seen Sandra Bartlett's name
3 on some other documents as being involved with the
4 CBC and in fact perhaps part of the Fifth Estate.
5 Do you recognize the name Sandra Bartlett at all?

6 A No.

7 Q Are you able to tell us what this photocopying
8 might have related to?

9 A No. That doesn't look to me to be a CBC address,
10 but --

11 Q And then if we can go to 156693, and the doc ID is
12 156673, and this is August of '87, and it says:

13 "This case has gone further than past
14 cases in allowing new evidence even
15 though that new evidence is not
16 conclusive."

17 And I'm not sure whether you can elaborate on
18 what this relates to, I couldn't find any
19 document around this time that this might relate
20 to. Do you have any recollection, are you able
21 to tell us what it might have related to?

22 A No. Sorry.

23 Q No? If we can then go to 331238, and the doc ID
24 is 331214, and this is an interview, Mr. Merchant,
25 of the RCMP with Joyce Milgaard in 1993 at the



1 time just prior to the -- or when the RCMP started
2 to investigate various matters, and there's a
3 reference in this transcript and as well in a book
4 that was written by Mrs. Milgaard about your
5 involvement in the file, and what she said here is
6 that:

7 "To get back to Nichol John and Lesley
8 and Merchant, um, because later we heard
9 about Colin Thatcher and the fact that
10 Merchant was his lawyer we suddenly
11 thought, have I been used. Was this
12 \$5,000.00 -- \$5,000.00 ever really -
13 take place or was it a set-up, to find
14 out where I was in the case with what I
15 was doing. Because at that point
16 Maggie --"

17 I don't know who that was,

18 "-- that was doing research for the book
19 umm, started to tell me about, you know
20 um, Colin Thatcher and they did some
21 research in it and found out that he had
22 known Gail Miller and that uhm ...

23 Q Tha.. Thatcher had known Gail Miller?

24 A Oh, went with her and uh, and she did
25 some research and found out that he



1 had gone away uhm, had been sent away
2 to college right after this had
3 happened, into the States."

4 And then down at the bottom:

5 "Q He was trying to see what he, maybe the
6 possibility exists, he was trying to see
7 what you had.

8 A What we had because he, he knew of the
9 involvement and that, and it stopped
10 us cold in our tracks because then we
11 stopped -- and that's when we ended up
12 going to Hersh. Uh, probably in --
13 Merchant worked for me for probably a
14 couple of years -- and then after ..."

15 And then I think there's also a reference in the
16 book, I'll just maybe call that up, at 269424,
17 the doc ID is 269317, and this is from "A
18 Mother's Story" by Joyce Milgaard, and it talks
19 about your involvement, and at the bottom, if we
20 can just call that out, it says:

21 "I didn't know at first that Merchant
22 was the lawyer for Colin Thatcher, the
23 former Saskatchewan cabinet minister who
24 was convicted in 1984 of murdering his
25 wife, JoAnne. However, my uneasy



1 feeling about Merchant wouldn't die.
2 Obviously, powerful people were working
3 against David. Why else would the
4 Saskatoon police keep telling witnesses
5 to stay away from us? Why would they
6 care so much, so long after the murder?

7 We heard that Colin Thatcher
8 and Gail Miller had gone out for a
9 while, then had broken up. Did Tony
10 Merchant know this? Merchant was a
11 friend of Thatcher's as well as his
12 lawyer. What if he thought that his
13 friend had killed Gail Miller? I began
14 to suspect that Colin Thatcher was the
15 killer. We heard that the day after
16 Miller's murder, Thatcher's family sent
17 him away to college in the States. We
18 also knew that Thatcher had a terrible
19 temper, and whoever killed Gail Miller
20 was extremely violent. I had always
21 suspected that someone powerful might be
22 involved, and in Saskatchewan few people
23 are higher up than the Thatcher family."

24 Etcetera. And again I think I've read you a
25 couple of the excerpts, but the suggestion there,



1 Mr. Merchant, is that your being involved on
2 behalf of David Milgaard was in some way
3 connected to either your association, friendship
4 or relationship with Colin Thatcher, and did your
5 relationship with Colin Thatcher have anything to
6 do with your acting for David Milgaard?

7 A I didn't know that, until you showed me this, that
8 he allegedly knew Gail Miller. The name didn't
9 ever come up in the work which I did for
10 Mr. Thatcher, which was all his family law
11 matters, I wasn't his lawyer on the criminal
12 charges, but I think, you know, paranoids aren't
13 always wrong, but in this case it's not correct,
14 and Colin's period, his civil proceedings were
15 going on in '83 and, you know, it wasn't -- I
16 wouldn't have even remembered that, but as I've
17 been paging through my diary, you know, his -- so
18 no, I don't think -- well, there was no
19 relationship, I had never, it had never been
20 suggested to me there was any relationship. I
21 didn't make any nexus in my mind. Mr. Thatcher,
22 incidentally, doesn't have a terrible temper, I
23 know that that's the impression that was left, and
24 he's a person, I've never heard him say damn or
25 God or anything, I mean, he doesn't swear, he's



1 just -- but no.

2 Q If we could just go back up just to the top, and
3 this is again from the book, there's also a
4 comment about Mr. Shannon's involvement, and it
5 says here:

6 "It wasn't until a few years later that
7 we learned that the businessman, whom we
8 considered so generous ..."

9 And again the previous page talks about the
10 businessman at Maclean Hunter:

11 "... who had worked with David at
12 Maclean Hunter offered to pay our legal
13 bills. The only condition was that we
14 had to drop our lawyer, Gary Young, and
15 hire --"

16 You'll be happy to know,

17 "-- high-profile Regina lawyer Tony
18 Merchant."

19 And then to the next page, it says, if we can
20 call that out:

21 "It wasn't until a few years later that
22 we learned that the businessman, whom we
23 considered so generous, had actually
24 applied to collect reward money for
25 urging David to turn himself in to



1 police back in 1969. Was he now
2 suddenly feeling guilty? Or was he
3 trying to trick us?"

4 Now, on the reward money, that's -- the record
5 reflects that that's not correct, Mr. Merchant,
6 Mr. Shannon did not apply for the reward money,
7 but again, was there anything in your dealings
8 with Mr. Shannon that -- where you thought he was
9 trying to trick Joyce or David Milgaard with what
10 he was doing with you?

11 A His actions were selfless, he didn't want anybody
12 to know that he was involved, he was doing
13 something out of kindness and personal charity.
14 That's the way -- that's the way he described it
15 and I didn't know Howard very well before and I
16 didn't get to know him very well as this was going
17 on, but I've always reflected that this was an act
18 of significant generosity, you know. He had
19 money, but he wasn't rolling in money, and he
20 believed in David and it's really unfair to think
21 ill of him after he was very generously trying to
22 be of assistance and spending money to be of
23 assistance.

24 MR. HODSON: Thank you very much, Mr.
25 Merchant, those are all my questions. I suspect



1 that some may have questions. Volunteers? Who
2 is interested maybe first and then maybe we can
3 figure out order. Mr. Wolch, Ms. Knox,
4 Ms. McLean. Lana, you are still thinking?

5 MS. KROGAN: No.

6 MR. HODSON: No?

7 MR. WILSON: I don't think so.

8 MR. HODSON: Alex?

9 MR. PRINGLE: I have some questions.

10 MR. HODSON: So I think we have Mr.
11 Pringle, Ms. McLean, Mr. Wolch and Ms. Knox. I'm
12 not sure, Mr. Commissioner, whether we have any
13 concerns about order or whether we just ask
14 whoever wishes to go first to proceed.

15 COMMISSIONER MacCALLUM: I haven't been
16 asked to decide it, so you can just invite
17 anybody to come up.

18 MR. HODSON: They are all getting up so
19 quickly. Mr. Wolch I think is saying he thinks
20 he's entitled to be last on the basis that he's
21 David's lawyer. Ms. Knox appears to be
22 volunteering.

23 **BY MS. KNOX:**

24 **Q** I just have a very brief few questions. Mr.
25 Merchant, you and I don't know each other, but I



1 did extend an introduction to you today, and for
2 the record, I advised you, you'll agree, that I
3 act as counsel for T.D.R. Caldwell.

4 A Yes.

5 Q And I have very few questions with you. I gather
6 from your evidence that your contact with him was
7 limited to the letter you sent him about the
8 reward information. He directed you where to go
9 to find that information, you did not ask to have
10 access to his file, but at no point in time did
11 you get any impression from him that he would be
12 anything more than open and willing to offer any
13 service he could to you in the task you had
14 undertaken?

15 A I'm not positive I would go that far.

16 Q Okay.

17 A But I thought that I spoke with him, my memory
18 would be that I spoke with him and my recollection
19 is that he was open, friendly, anything that I --
20 we didn't come to a point where I asked for
21 something and he didn't do it.

22 Q Right.

23 A And if -- other than the information you've seen,
24 and if I had asked for something and he wouldn't
25 give it to me, I'd have written a letter and



1 harangued on him a little and sort of gotten it on
2 the record.

3 Q Okay. I'm not sure how much knowledge you have of
4 this file, but are you aware that in fact he was
5 contacted by Gary Young and he gave access to his
6 file, apparently, and we'll hear from Mr. Young
7 tomorrow, to Mr. Young, but certainly was open to
8 him to come look at his file?

9 A Yeah, I've been told that, but I didn't know it
10 until I was told that, but I'm -- I would assume
11 that I knew it from Mr. Young's file.

12 Q And while I wasn't clear with respect to your
13 answer regarding what knowledge you had back in
14 1983 of Peter Carlyle-Gordge's dealings with him,
15 are you aware now that the record reflects that he
16 gave extended opportunity to Mr. Carlyle-Gordge to
17 review his whole file, allowed him to dictate
18 notes and met with him in fact, did a recorded
19 interview with him about the information contained
20 in the file, but certainly to all indications gave
21 him unfettered access to his full file?

22 A I've been told that Peter spent time with him
23 under some subterfuge was the sense I got, but I
24 didn't know that at the time and I've only been
25 told that by counsel.



1 Q Okay. And by some subterfuge, I take it you've
2 heard that Mr. Carlyle-Gordge approached him on
3 the premise that he was writing a book and did not
4 disclose to him in any manner whatsoever that he
5 was working to assist Mrs. Milgaard and the
6 Milgaard family in their quest with respect to
7 David?

8 A That's what I was told, but Peter was doing both
9 things, so he was writing a book and he was a
10 writer and he was also, he also believed and was
11 being helpful to the family, so I'm not sure I
12 would be particularly faulting him for the way he
13 made contact.

14 Q All right, I take your caution in that regard, and
15 he will speak to that in due course. With regard
16 to specific information that was reviewed with you
17 by Mr. Hodson today, I wonder if we could bring up
18 the document -- full document number as I have it
19 is 216102 which are your notes of your meeting
20 with Mrs. Milgaard following the parole hearing in
21 July of 1983 I think, July 29th, 1983, and I want
22 to go specifically to page 216106, and if I could
23 bring out somewhere around here because this is
24 really hard to read. Sorry.

25 A Do you want me to read?



1 Q Sorry, I'm not sure if -- that's not quite the
2 part. If you'll just bear with me, my copy is not
3 that good either. First off, in respect to that,
4 there was some information that there had been a
5 problem with Mr. Renaud and the presence of drugs
6 on his person when he went into the prison and
7 some suspicions that that cast upon David in the
8 eyes of the parole board or the prison
9 authorities, I take it that's essentially what you
10 are recording there?

11 A Well, I would have to read what you want me to
12 read.

13 Q Certainly.

14 A 'They asked if he'd said things about getting a
15 big score. The officer may have overreacted, but
16 we thought there was no percentage in going after
17 him. Then they made fun of the coincidence of
18 Roger bringing drugs into the prison. Drug
19 incident prior had been about 1 1/2 months before.
20 Roger visited him 4 or 5 times. Roger had been
21 his supervisor when David was picked up in B.C.
22 Roger wasn't --' I'm sorry, 'Roger is early 40's.
23 Howard is early 50's. They actually said Roger
24 wasn't the sort of job!'

25 Q I think that's as far as you need to go for



1 purposes of my question. And I simply want to
2 verify that the 'Roger' that you understood you
3 were making notes about there was 'Roger Renaud',
4 who had offered him a job on his release and he
5 who had obtained correspondence from confirming
6 that offer for the parole board?

7 A Yeah, and I think it's ridiculous to suggest that
8 Roger Renaud would take drugs into -- from
9 everything I know of Roger Renaud he was another
10 respected business person, and fairly wealthy, and
11 just kind of a goofy suggestion.

12 Q Yeah, and I'm not meaning to suggest that, I just
13 want to know what the information was that you got
14 from Mrs. Milgaard as to apparent concerns --

15 A Yeah.

16 Q -- that arose in the parole board hearing, and
17 this appears to have been one of them in respect
18 of Mr. Renaud?

19 A Appears to be, yes.

20 Q Okay. Now further down the page, yeah, we could
21 start right here and bring out this part right
22 here.

23 A 'One community member said I have seen photographs
24 of the dead girl. Caldwell sends those
25 photographs and a letter from a psychiatrist in



1 Yorkton done when David was about 15. David
2 didn't eat for four or five days.'

3 Q And that's -- and we can stop there. With respect
4 to the suggestion that Mr. Caldwell sends
5 photographs and a letter, did you attempt to
6 verify whether in fact this information or some of
7 this information with respect to his time in
8 Yorkton was on the file independent of Mr.
9 Caldwell? And I'm gonna direct your attention to
10 a document that may help you, 183287.

11 A I didn't attempt to determine whether it was there
12 independent.

13 Q Okay. If I could just refer you to this letter to
14 see if it will assist you in refreshing your
15 memory.

16 A Yes.

17 Q And if we could go to the next page, 183288. This
18 appears to be a letter that was written in 1977 to
19 a psychiatrist at Stony Mountain from the Director
20 at the Psychiatric Centre in Yorkton, which I
21 would suggest to you confirms that they did, that
22 the institution obtained, themselves, copies of
23 Mr. Milgaard's file from Yorkton Psychiatric
24 Centre?

25 A Umm, I, I don't know. I could form that



1 conclusion just as you do, but --

2 Q Okay.

3 A That's a conclusion I would form, but I don't have
4 any independent knowledge to bring to bear.

5 Q Okay. Do you have any recollection, from your
6 file as it used to exist, whether you kept a copy
7 of the material that was forwarded to you from the
8 Yorkton Psychiatric Centre on October 25th, 1983
9 by the medical director, Dr. Samuel?

10 A I don't have any recollection, but I'd be very
11 surprised if I didn't keep copies of that kind of
12 thing, even if I didn't ever intend to look at it
13 again, you'd put it on the pegs and forget it.

14 Q Okay. Contained in the materials I have been able
15 to find in CaseVault there are a few pages from
16 the Yorkton psychiatric report but not the entire
17 report. Do you have any knowledge of how much of
18 that report would have been in your file when you
19 copied it or provided it to anyone on behalf of
20 Mr. Milgaard?

21 A No, but I have a vague memory that sometimes I
22 wasn't given full information for one reason or
23 another, and I -- it wasn't that they had some
24 right to hold back information and it wasn't
25 crucial to what we -- I was trying to do.



1 Q Okay. So if you were to look at what appears to
2 be attached to that letter to you of October 25th,
3 1983 you wouldn't be able to tell us whether
4 that's everything that you received, part of what
5 you received, or offers any assistance in that
6 regard I take it?

7 A No, I'm sorry, I wouldn't.

8 Q Okay, thanks. And then sir, just listening to
9 your evidence with respect to your dealings with
10 the parole board and reasons why David experienced
11 difficulties with his release, particularly after
12 the early '80s, would it be fair to say that a lot
13 of it had to do with his mental health status,
14 difficulties within the institution, including
15 drug use and so forth?

16 A That was certainly part of the problem.

17 Q Okay. I don't have any more questions for Mr.
18 Merchant, thank you.

19 MR. HODSON: I think it is Mr. Wolch,
20 Ms. McLean, and Mr. Pringle. I'm not sure
21 whether they wish to speak to order.

22 MR. PRINGLE: Mr. Commissioner, I'm -- I'd
23 like to look at some documents that are on
24 CaseVault -- that aren't on CaseVault that I have
25 been trying to access, Mr. Hodson said he'd let



1 me look at them later today, so I'd just like to
2 look at those before I do my cross-exam.

3 MR. HODSON: How, if I might ask, how long
4 do Ms. McLean and Mr. Wolch and Mr. Pringle
5 expect to be? Are we gonna get Mr. Merchant done
6 today? We've got 15 minutes for the three of
7 you. Putting aside the document issue, because I
8 can go give them the documents right now while
9 one of you examine, if we can get Mr. Merchant
10 done today? I'm not sure what the documents are.

11 MR. WOLCH: I don't think it's realistic
12 that the three of us will finish in 15 minutes
13 even by your standards of time.

14 MR. HODSON: Mr. Merchant is my counsel
15 with respect to how long I took in his
16 examination.

17 I -- I mean I guess I would
18 like to, if Mr. Merchant can't get done today I
19 suspect we can try and finish him very quickly
20 tomorrow morning, but if -- on the other hand, if
21 we can get 20 minutes done today --

22 COMMISSIONER MacCALLUM: Why not use the 20
23 minutes to look at the documents and all come
24 back in the morning. Is that okay with you, Mr.
25 Merchant?



1 A Would it make a difference if I said no?

2 COMMISSIONER MacCALLUM: It wouldn't.

3 MR. HODSON: Okay.

4 COMMISSIONER MacCALLUM: 9:00 tomorrow
5 morning.

6 MR. HODSON: Thank you.

7 *(Adjourned at 4:12 p.m.)*

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OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATES:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,
Official Queen's Bench Court Reporters for the Province of
Saskatchewan, hereby certify that the foregoing pages
contain a true and correct transcription of our shorthand
notes taken herein to the best of our knowledge, skill,
and ability.

_____, CSR

Karen Hinz, CSR

Official Queen's Bench Court Reporter

_____, RPR, CSR

Donald G. Meyer, RPR, CSR

Official Queen's Bench Court Reporter



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