

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 Thursday, December 1st, 2005

Volume 102

Inquiry Proceedings



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Mr. Alexander Pringle, Q.C., **for** Justice Calvin Tallis
(Retired)

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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

EVATT FRANCIS ANTHONY MERCHANT, continued:

BY MR. PRINGLE:

Q Mr. Merchant, my name is Alex Pringle, I represent Calvin Tallis. I just have a few questions for you.

You mentioned yesterday some, you provided some general comments about Calvin Tallis and his ability as a lawyer. I would just like to follow that up a little bit with you. I understand you worked with him for one summer; is that correct?

A Correct, for a five month period.

Q And with respect to his diligence and work habits with respect to individual cases, could you comment upon that?

A Unmatched.

Q Pardon me?

A Unmatched in all of my experience and knowledge of people. I myself have 4,000 billable hours every year. I said to Judge Tallis one day, this is sort of an anecdote, he has a good sense of



1 humour, but I said to him you work about 18 hours
2 a day, and he said to me, in all seriousness, yes,
3 I used to be able to work longer hours, but now
4 that I'm older I just can't put in the hours, and
5 he really meant it. A couple of times a month the
6 secretaries would come in and find him asleep at
7 his desk. He was -- he trained us and did himself
8 an incredible thorough job of everything and I had
9 the benefit of being with him at a couple of
10 preliminary inquiries which, when I knew better
11 once I had practiced a few years, it was apparent
12 to me how thorough his preparation had been and
13 his capacity to communicate with witnesses, he
14 would draw out of witnesses things that were done
15 wonderfully. Sometimes he would play the hayseed,
16 sometimes he would be tough, sometimes he -- he
17 had -- his reputation in the day was as one of
18 the -- one of, if not the best criminal lawyer in
19 Saskatchewan, and not only did he have this total
20 grasp of legal principles, work very hard, but he
21 was prepared to go into great detail and
22 uneconomically he would overwork files. If he got
23 into it and it needed more work and he said it
24 will cost X, but the amount of work that was
25 involved was really double X, he would do double



1 X. I was then and am now a great fan both of his
2 skills and his capacity.

3 Q And with respect to Legal Aid cases, did you ever
4 notice him letting up on Legal Aid cases?

5 A He was no different on Legal Aid than he was on
6 any other case. Legal Aid was only -- Legal Aid
7 is different today than it was then and he was
8 really of the old school approach that there were
9 certain things that you did almost as a matter of
10 charity and you dealt with them the same way you
11 dealt with any other case. If he undertook the
12 case, he threw himself totally into it.

13 Q You said yesterday, you made a comment that if you
14 are in front of a jury you really have a large
15 problem if the accused does not testify and you
16 said that you probably heard Calvin Tallis say
17 that. I gather, Mr. Merchant, you are not sure
18 exactly whether he said that, you think he may
19 have said that, but --

20 A Yeah. It's difficult to put into, you know, sort
21 of -- it's kind of the training from mentors. The
22 consensus view when you were always forced to be
23 in front of juries was that it was difficult for
24 juries to accept that people -- to accept the
25 admonition from a judge you ought not to pay any



1 attention to the fact that the accused didn't
2 testify.

3 Q But each and every case is different; would you
4 agree with me?

5 A Absolutely, and certainly the judgment of Cal
6 Tallis is, he would have exercised judgment with
7 great capacity.

8 Q Okay. Now I would like to just bring back a
9 document, 156673, which is a letter to you from
10 David Milgaard dated May 13th, 1981, and in your
11 dealings with Mr. Tallis when you talked to him on
12 the phone and when you met with him at the court
13 house in Regina, was this the document that you
14 were relying upon as a consent for -- by David
15 Milgaard to give Justice Tallis information?

16 A No, I don't think so. I believe I had a consent
17 that I had drawn, an instruction form.

18 Q Do you know where that document is now?

19 A No, I don't have my file, and no, I don't.

20 Q Because I thought I had heard you say the other
21 day that you thought that the file that Mr. Hodson
22 had resurrected was the complete file?

23 A Not precisely. What I said was I don't have
24 reason to believe that anything is missing, but
25 it's like asking me if an ashtray is missing from



1 my living room and if you then ask me about the
2 ashtray, but my belief is that I had a specific
3 authorization.

4 Q Do you know that for sure?

5 A No.

6 Q Okay. And if we could now go to document 332571,
7 and this appears to be your initial contact with
8 Justice Tallis about this matter?

9 A So it appears.

10 Q Okay. And as --

11 A Well, I'm not positive that it's my initial
12 contact, I mean, I'm just recollecting as you are,
13 but this is a rather offhand -- unless there was
14 an enclosure that cast some light on this, that's
15 a strange initial contact, but it may have been.

16 Q Okay. And in your letter you say you would
17 appreciate him answering one or two questions. I
18 get the impression that your major focus in
19 contacting him was to find out why David Milgaard
20 didn't testify at the trial and that would be one,
21 at least one of the questions you would want to
22 ask him?

23 A It might have been, but my -- I can't say that's
24 my recollection. It's my reconstruction that I've
25 just sort of begun what I'm doing and I'm not yet



1 in a position to question very thoroughly, so I'm
2 sort of saying I'm involved here and I would like
3 to talk to you relatively briefly.

4 Q Do you know what the one or two questions were
5 that you were referring to in that letter?

6 A No, no.

7 Q Okay. And if we could then turn to document
8 number 216050, and this appears to be the second
9 letter that you sent to him and it refers to
10 talking to him on June 16th, and that would have
11 been a telephone conversation?

12 A Yes.

13 Q And I gather, at least from what we've seen, there
14 was no memo to file with respect to what was
15 discussed on the telephone conversation?

16 A I would agree with what you gather.

17 Q Okay. And in that telephone discussion, it
18 appears from this letter, and correct me if I'm
19 wrong, but would Justice Tallis not have indicated
20 to you that he wasn't in a position to go into
21 detail about why David Milgaard did not testify or
22 what his account of the event was to him because
23 he did not have his file?

24 A Yes. I'm not sure that he -- I wouldn't draw the
25 inference that there was any discussion of not



1 testifying or testifying. I would read this
2 letter to say that we had a conversation and he
3 said, well, you know, I just don't remember very
4 much about it and I would want to look more
5 carefully.

6 Q Okay. Do you recall him indicating that he would
7 have to look for his working file?

8 A I don't recall those words.

9 Q He could have said that though?

10 A Could have.

11 Q Okay. And you were at his firm for a while. Do
12 you recall that after Justice Tallis was appointed
13 to the Northwest Territories Supreme Court, his
14 firm moved on two to three occasions?

15 A Yes.

16 Q There was some -- they moved around a bit and to
17 different locations; do you recall that?

18 A Yes, and Roy Romanow left for sort of a different
19 life and Irving Goldenberg, later Mr. Justice
20 Goldenberg, went to the Caymans as I recall and
21 Mr. Goldenberg senior died, you know, so there
22 were -- Mayer Schulman left, went elsewhere, so
23 the firm had some people changes and office
24 changes and a whole bunch of --

25 Q Disruptions?



1 A Disruptions, yes.

2 Q And you -- as we find out, you eventually meet
3 with Justice Tallis at the court house in Regina
4 in November of 1982. In the intervening period of
5 time, before that meeting took place, do you
6 recall the fact that he had cancer and had very
7 serious surgery for cancer in April of '82?

8 A No, I didn't know that. I'm pleased that he did
9 well.

10 Q So you don't recall that in the context of this as
11 him being not at work for part of this period of
12 time?

13 A No, I don't.

14 Q And not at work and also suffering from the, from
15 health problems during part of this time?

16 A No.

17 Q Okay. And then if we could take a look at --

18 A And incidentally, if I could interrupt you --

19 Q Yeah.

20 A -- he was -- there was some mention of my
21 political connections, so the political
22 connections resulted in an interest in what judges
23 were doing and how they were doing it. He was of
24 very high reputation for working hard in the north
25 and that's how he came to be on the Court of



1 Appeal and he -- and for his entire period of time
2 was one of the hardest workers on the Court of
3 Appeal which I would have expected flowing from
4 his capacities, and even in that period of time he
5 was thought to be working very hard, and
6 effectively.

7 Q And if we could turn to document number 216059,
8 please. In this document, this is a letter where
9 you are sort of renewing, indicating again you
10 wanted to talk to him about certain things
11 involving Mr. Milgaard, and in this letter you say
12 you are particularly interested in the
13 instructions given by Mr. Milgaard and the reason
14 why he did not testify. That's -- that seemed to
15 be the focus of what you wanted to know from
16 Justice Tallis, is that correct, Mr. Merchant?

17 A It was a big part of my inquiry.

18 Q Okay. And eventually you meet with him on
19 November 29th, 1982, document, if we could get
20 document 213628. And, as I understand it, these
21 are your notes of this -- these are notes of this
22 meeting?

23 A Correct.

24 Q Do you know whether those notes were made during
25 the meeting or after the meeting?



1 A I don't know, but I'm very confident they were
2 made while he was speaking.

3 Q But you are not certain about that?

4 A Not certain, but the context of the wording, and
5 for example 'he was away from the car', 'he
6 confirmed', 'he confirmed', and this is my
7 writing, writing desperately and trying, trying to
8 keep up, 'he confirmed, he confirmed changing his
9 clothes at Shorty Cadrain's but said there was no
10 blood', 'between Saskatoon and' -- you know, I can
11 tell from the speed of -- if I were writing in a
12 more leisurely way, if I were writing on a pad I'd
13 -- it wouldn't be slanting off a page or -- so I'd
14 be surprised. Actually, you know, I may well have
15 said to the judge "where is Meota", and that's
16 where I've written in 'North Battleford', and so
17 I -- I -- as I -- I think I made the notes at the
18 time.

19 Q The words that are in the notes; I gather you
20 can't say that every word is the exact word that
21 he used?

22 A No, but I would have been trying to, I would have
23 been trying to write down what he said. You know,
24 he said "I've really decided not to talk about
25 this" and he said -- "and I", sort of like "I've



1 made that the rule", and I took from that that he
2 had declined to talk with Mr. Young, and then as
3 you reflect on it he answered all my questions.

4 Q Yeah.

5 A Yeah. So he said "I'm not going to tell you", and
6 then he not only told me, but frankly he satisfied
7 me.

8 Q Okay.

9 A I mean I came away understanding.

10 I was standing over there 20
11 minutes ago thinking, you know, if you could have
12 put a million dollars into David's defence you
13 could have assembled a bunch of lawyers who could
14 have explained his -- the curiosities of his
15 problem, maybe he could have testified and been
16 found not guilty, but I fully understood what went
17 through the judge's mind and I wouldn't
18 second-guess that decision.

19 Q Okay.

20 A Particularly, particularly given his capacity to
21 speak eloquently before the House of Lords and at
22 the same time -- well he was never before the
23 House of Lords -- and at the same time, from what
24 I saw, connect with a jury. So if anyone, in my
25 experience, could do a rumple of the Old Bailey



1 and talk about reasonable doubt and think he might
2 succeed, I'd have thought he'd have been the
3 person, but -- so I didn't come away from that
4 saying in my mind "boy, the judge made a mistake
5 not putting him on the stand".

6 Q Okay. And so, ultimately, he seemed to answer the
7 major questions that you had about this matter?

8 A Yes.

9 Q Okay. And if we could just take a look at
10 document number 183639, I think this document
11 bears out what you just said, Mr. Merchant, this
12 is a letter of December the 10th, '82 from
13 yourself to Mr. Milgaard, and just the first
14 paragraph there, the second sentence:

15 "He continues to be prepared to do
16 everything he can to assist you."

17 And was that a fair statement?

18 A Yes. I was -- you know, as you read these letters
19 and letters of report, I was very forthcoming with
20 what was going on in my thinking, and both with
21 David and with Joyce Milgaard. And there was a
22 reason for all of that, because there was this
23 sort of combination of attack, Joyce Milgaard was
24 a sort of untrainable tiger but if one looks back
25 on it clearly Joyce, Mr. Wolch, Mr. Asper, that's



1 the reason David is out, and all the while they
2 were a part of this battle. So I wouldn't
3 normally be writing these sort of complete letters
4 of report for most people because there just
5 wouldn't be a utility to it, but they really were
6 working in a sort of a team here, and David was
7 helpful, his mother was more helpful, Peter was
8 helpful, so there was a transference of knowledge
9 that went far beyond what I would normally do,
10 particularly where, of course, as you might have
11 guessed, I too was spending a whole lot more time
12 than the dollars available would justify.

13 Q Yeah. Now if we could just go back to document
14 213628, I think it's clear from this document when
15 you, particularly when you look at the fact that
16 even though you don't have it in the actual memo,
17 but when you look at the fact where there's
18 discussion about blood on the clothing and being
19 with the people, being with the witnesses against
20 him and stuff like that, that Mr. Tallis told you,
21 as part of this, that David had denied his
22 involvement in this matter?

23 A Yes. Yes, he did. And the other inference to be
24 drawn from these notes, which would have been made
25 quickly and these might be the notes of four or



1 five minutes even though I might have been able to
2 write it in two, but the fact that he was speaking
3 to me more or less in code indicated that he took
4 the time to fully refresh his mind about what was
5 involved, so when he said all of these things he
6 said those things because he knew their
7 significance, and when I wrote them down I knew
8 their significance. Of course, I was on the case
9 and he hadn't been on it for a long time, so it's
10 obvious, it was obvious that he didn't just come
11 in and say "well, you know, I really can't help
12 you, here's the file". Instead, in his usual
13 thorough way, he fully refreshed his mind is what
14 I would think is apparent from reading these
15 notes.

16 Q And if we could just go, there's one other
17 document I would like you to comment upon, and I
18 think I know what you are going to say here but I
19 think, just for the record, we should deal with
20 this. Document 162821. Now this is another memo
21 of the same meeting and it provides the date, and
22 I understand that you didn't -- this is not your
23 handwriting; is that right, Mr. Merchant?

24 A No, it's not my handwriting.

25 Q And do you have any idea whose handwriting it is?



1 And if we can go to the second page, maybe that
2 would be of some assistance, it has basically the
3 same content but -- maybe I shouldn't have been so
4 presumptuous. You are satisfied it isn't your
5 handwriting; is that fair to say?

6 A Satisfied it is not my handwriting, but you have
7 this -- well, it's not my handwriting, but I
8 gather somebody was sort of trying to do a trued
9 copy of my notes because they -- you know, the
10 little code words that I used, 'stab wounds
11 through', for example, and --

12 Q Do you remember ever consulting with anybody,
13 somebody consulting with you and trying to find
14 out what your little abbreviations or your short
15 forms were, to make some sense of that?

16 A No.

17 Q Okay. And the .6 hours at the bottom; do you have
18 any -- is that something that would have come from
19 your notes or is that something somebody has
20 added? Like it's not on the other memo that we've
21 shown you.

22 A Umm, I don't, I -- it may have been on the other
23 memo but it doesn't show up. This was before
24 computerization --

25 Q Right.



1 A -- so --

2 Q Maybe we just --

3 A -- you made notes on files and then, when you sent
4 bills, you went through them and missed half the
5 time. So my method was to put time, so -- but I,
6 again, I don't know.

7 Q Would that meeting on November 29th, this .6
8 hours, sound about right for the length of meeting
9 or --

10 A Yes.

11 Q Okay.

12 A But that would be -- I wasn't with Judge Tallis
13 for 36 minutes, I don't think. That would include
14 the five or six minutes that it took for me to get
15 to the courthouse, and probably the two or three
16 minutes to go in and see him, so I don't recall it
17 as a long chat.

18 Q Okay.

19 A I just live a few blocks from the courthouse.

20 Q Okay.

21 A Or work a few blocks.

22 Q And, as far as you can recall, that was the only
23 meeting you had with Justice Tallis about this
24 matter?

25 A Yes.



1 Q Thank you, Mr. Merchant, those are my questions.

2 BY MS. McLEAN:

3 Q Good morning, sir. My name is Joanne McLean, I
4 represent Joyce.

5 Most of the questions I have for
6 you relate to systemic matters and I would like to
7 get your thoughts on some ideas you may have about
8 what we can do to address the problems within the
9 system. You understood the Department of Justice
10 requirements essentially to be that there had to
11 be something new in order to get a review of a
12 case; am I correct?

13 A Correct.

14 Q If we could have 173964 up, please. This is the
15 telephone conversation or conference call that you
16 were having with Joyce and Peter Carlyle-Gordge in
17 May of 1981. The first section here, this was
18 addressed yesterday, and this is the one where you
19 are talking about the bombshells in there, unless
20 there's some real bombshells you wouldn't have:

21 "Unless we had some real bombshells, you
22 wouldn't have any real chance of
23 fighting the case again. That's what I
24 meant earlier. It's not a matter of
25 deciding whether he should have been



1 convicted of the crime the last time or
2 not, and whether there were significant
3 inconsistencies which should have
4 resulted in his not being convicted the
5 last time, or not. The question is
6 whether things can be so significant
7 that the ...",

8 Attorney General:

9 "... of Canada would authorize a new
10 trial or some investigation into the
11 matter. Those kinds of things -- the
12 time factor of driving the car -- that'd
13 be fine if we could get by the
14 bombshell, the requirement for the
15 bombshell. And certainly she ...",
16 that would be Nichol John:

17 "... didn't say anything that gives you
18 any bombshell."

19 Am I correct that what you are saying there
20 essentially is that if you had a bombshell or
21 some significant piece of new evidence, that you
22 could piggyback other arguments onto it, maybe
23 re-explore some of the things that had come out
24 in the trial?

25 A If you had a bombshell then conjunctively, with



1 other evidence, you could say "here are some more
2 minor errors, but this is what really should
3 result in you turning the rock over and seeing
4 what went wrong". So you are correct, I was
5 looking for some, some lever to pry the interests
6 of the officials in Ottawa.

7 Q 183639, please. And this is an example, I think,
8 of something along those lines. This is a letter
9 you wrote to David Milgaard in December of 1982
10 after you'd spoken to Mr. Tallis, and you set out
11 at the beginning:

12 "More than ever, I believe that unless
13 we can persuade some witness to recant
14 their story, then very little can be
15 done."

16 Okay. And that's a reflection of the same thing,
17 you need something fresh, new, a bombshell?

18 A Correct.

19 Q And then at the bottom here -- can we go down
20 further, please, the very last bit. Now this is,
21 the last paragraph here is about your conversation
22 with judge, Justice Tallis, where he says:

23 "Because the stab wounds went through
24 her overcoat but not through the dress,
25 one gathers that she had no dress on



1 when stabbed? I don't know what the
2 significance of that anomaly is but
3 Judge Tallis drew it once again to my
4 attention."

5 And I suggest to you, sir, that that's -- that's
6 something that you probably were not aware of the
7 significance of because you didn't have the trial
8 transcripts in your possession at that time, you
9 had no retainer to investigate the whole case or
10 to review the transcripts looking for holes or
11 things like that; am I right?

12 A Correct.

13 Q And ultimately that point, that Ms. Miller did not
14 have her, at least the upper part of her dress on
15 her body when she was stabbed, was something that
16 was grafted onto the arguments to the Minister of
17 Justice because it actually meant that a trial
18 witness, Nichol John, could not have seen what
19 she'd described; do you understand that that's how
20 that was used eventually?

21 A Yes I do.

22 Q Now one of the roadblocks that you have to getting
23 fresh evidence or new things is the reaction of
24 authorities; is that right? 216040, please. When
25 you were --



1 A I --

2 Q -- when you were first working for the Milgaards
3 in May of 1981 -- could we blow it up a little bit
4 please -- you wrote a letter to Mr. Caldwell
5 thanking him for a meeting that he had had with
6 you, and asking him for:

7 "... the names of the people who
8 received the reward out of the police
9 fund in connection with the arrest and
10 conviction of Mr. Milgaard."

11 Then you go on to express that full disclosure
12 will ultimately serve his interests as well as
13 the Milgaards. You were interested in getting
14 information about who received the reward because
15 it may have had a motivation for somebody not to
16 tell the truth?

17 A Correct.

18 Q And in July of that same year -- number 106849,
19 please -- July of that same year you are making
20 the same request to the Saskatoon Police
21 Commission. And the Saskatoon Police Commission,
22 for your information, are the ones that actually
23 paid the reward out, and it was ultimately paid
24 out to Albert Cadrain. And you are asking there
25 for:



1 "... the names of the people who
2 received the reward out of the police
3 fund in connection with the arrest and
4 conviction of Mr. David Milgaard."

5 So can we assume that or do you recall that Mr.
6 Caldwell's response to you was that you should
7 contact the Saskatoon Police Commission?

8 A I don't recall, but I thought there was a letter
9 that -- where he said "no" -- I don't recall.

10 Q Okay. Well there is a letter that said "no",
11 that's 106852, September the 14th, 1880 -- 1981,
12 and it's a reply to you from the chief of police,
13 and it's not who you had written to, you had
14 written to the Police Commission, but as we'll see
15 in a minute I think what happens is that the
16 Police Commission passes it on back to the Chief
17 of Police, who then passes it back to the
18 Commission, who passes it back to the Chief of
19 Police, who writes to you --

20 A Uh-huh.

21 Q -- advising you that your letter -- it says "with
22 reference to my letter" but I think that means
23 'with reference to your letter of July the 13th':

24 "... this is to advise that I brought
25 your letter to the attention of the



1 Saskatoon Board of Police Commissioners,
2 they discussed it on September 9 ... and
3 have advised me that they are not
4 inclined to release the name(s) of the
5 person(s) who received the reward in
6 connection with the arrest and
7 conviction of Mr. David Milgaard."

8 So you are not even getting a confirmation there
9 of how many people might have shared in the
10 reward?

11 A Well, I would characterize it worse than that,
12 there's a -- by intention the letter disassembles
13 to make sure that I'm confused about whether
14 there's one or two and I -- and the language "not
15 inclined to release" is fun language over
16 something that's sort of important.

17 Q 106850, please. And I don't think you would have
18 seen this document, it's one that intervenes your,
19 between your request in July and the response that
20 you get in September. It's written on August the
21 21st of 1981 from the Chief of Police to the Board
22 of the Police Commissioners, specifically to the
23 Mayor who's the chairman, indicating that you have
24 made a request -- sorry, let me just start with
25 your request down here:



1 "In this particular case, I am advised
2 there was a reward when David Milgaard
3 was tried and convicted and I would
4 recommend to the Board that Mr. Merchant
5 be advised we are not prepared to
6 release that information. I am aware
7 that legal steps could perhaps be taken
8 to obtain the information, but I think
9 that if we voluntarily release the
10 information, we would violate a trust
11 that was placed in us when the person
12 who gave the information came forward."

13 Do you know what legal steps you could have taken
14 to obtain that information, how costly or how
15 time-consuming?

16 A I don't know. As I said a couple of times
17 yesterday, this was pre-*Stinchcombe*, and in
18 addition it was after conviction as opposed to
19 before.

20 Q Uh-huh.

21 A And I'm not sure, even today, that I know what one
22 could do. You make a Court application, but I
23 know that when you sail uncharted waters in the
24 litigation system it's expensive, and of course
25 the determination of the government to control



1 information is of greater value to the government
2 than it is to an individual litigant because this
3 affords the government an opportunity to mistreat
4 all sorts of people as opposed to just the one.
5 So I didn't think it -- I didn't pursue or think
6 about 'how do I get this by making a Court
7 application' and I, candidly, I don't -- I'm not
8 sure it would succeed even today. Maybe it would
9 today.

10 Q Thank you. Going up to the first paragraph here,
11 this paragraph deals specifically with having
12 received your letter, and we just reviewed your
13 letter which is the, asking for the information
14 about who got the reward, however it says here:

15 "We've had conversations and/or
16 correspondence with a local lawyer here
17 in Saskatoon with the Milgaard family
18 and most recently with Mr. Merchant and
19 our reply in all cases has been that we
20 are not prepared to release information
21 unless the Attorney's General Department
22 indicate there will be a re-examination
23 of this case and if that is done, any
24 information we have will be made
25 available to the Attorney's General



1 Department. Notwithstanding that, there
2 has been a constant effort to seek
3 information from us and to give current
4 addresses of persons who were witnesses.
5 We have steadfastly refused to supply
6 such information."

7 That attitude, I would imagine, is not terribly
8 helpful to counsel for somebody who claims they
9 are wrongly convicted and is trying to interview
10 trial witnesses to see whether or not they might
11 be recanting their evidence?

12 A I follow Fowler, so red comma white comma and blue
13 as opposed to red white and blue, but I take it
14 that this communication really meant to say with a
15 local lawyer here in Regina, comma with the
16 Milgaard family, comma, and most recently with Mr.
17 Merchant, so they are really saying we've refused
18 three times to various people. Clearly control of
19 information is important in terms of any
20 examination of wrongful conviction or even wrong
21 impressions by parole boards who are -- in
22 relation to release.

23 The converse for legislators and
24 judges I expect to examine is protection of police
25 information, protection of sources, and secondly,



1 it becomes a never-ending story if everyone who is
2 convicted has access constantly to can we keep
3 turning this over, where does it end, so you're
4 correct in suggesting to me this was most
5 unhelpful in this instance, but where the line
6 should be drawn is the kind of thing I used to
7 think about when I was in the legislature, but I'm
8 not sure I think about it any more.

9 Q Okay. So what we've accomplished between your
10 letter of July the 13th and September the 14th is
11 that two months have passed and the results are
12 nothing in terms of what you were trying to do;
13 correct?

14 A Yeah, and I just didn't understand why there was
15 this sort of systemic clamming up. I was used to
16 the government being like this even though I
17 thought it was wrong, but it crosses your mind
18 that if there's nothing to hide, why wouldn't they
19 give even these most basic bits of information,
20 and I might add, 'just take a hike, we won't tell
21 you who got the reward,' but they didn't, for
22 example, write and say if we voluntarily release
23 the information we would violate the trust that
24 was placed in us or they didn't write and say if
25 we release the information in this case we may



1 find ourselves compelled to release the
2 information in cases where somebody from prison
3 will call a cousin and the person who assisted the
4 police, if you want to put it in a nice
5 characterization, or the way the telephone call
6 would be, please pay a visit to this rat and help
7 him to understand that he didn't do a good thing,
8 so, I mean, it wasn't even as though they were
9 prepared to enter into the dialogue of the whys or
10 they weren't prepared to say there are conditions
11 by which we would release this information. I
12 mean, there are a whole lot of in-betweens between
13 stony silence without explanation and some other
14 means of assisting. This wasn't, and they knew by
15 now, they had had Mr. Young, they had me, they --
16 this wasn't just sort of a jailhouse lawyer
17 inquiry that was -- they had to see this as being
18 more substantial, so to me I think there are greys
19 between black and white, yes and no.

20 Q You are quite right. 331961, please. You are
21 quite right that you weren't the first, Mr. Young
22 had been making requests. This is a reply that he
23 received January 6 of 1981 and it seems that he
24 was seeking, in the first paragraph, response
25 here, it seems Mr. Young had been seeking:



1 "... to be given permission to interview
2 the police officers involved in the
3 investigation of the charges and to have
4 access to the complete police file. I
5 am sorry to say that I cannot agree to
6 such a request."

7 Again, the same kind of thing, you can't get
8 access to the places where you may find the
9 evidence that you need to make an application to
10 the Minister of Justice; correct?

11 A Yes.

12 Q And then the second paragraph of the response --

13 A And again, if I could interrupt --

14 Q Go ahead.

15 A -- it seems to me there might be some systemic
16 reason for saying we don't want you bothering our
17 police officers because they've got their mind,
18 they've got their mind into it and they understood
19 everything and they could answer questions five
20 years ago, but they can't keep writing final
21 examinations on criminal procedure every time some
22 new lawyer shows up every year, but producing the
23 file, even if it got produced with whitening, with
24 things whited out, they said, well, we have an
25 informant here we have to protect might be some



1 explanation, but the refusal to release files,
2 again, you might say we'll release files to
3 lawyers, but we won't release files to people in
4 prison. I mean, there are a whole lot of
5 in-betweens flowing from stonewall, we'll tell you
6 nothing, to send over your relatives and we'll
7 devote ourselves full time to answering questions
8 and reconstructing on every conviction that's ever
9 occurred. At that end of the tunnel I can see
10 some huge problems, but I don't see much in the
11 way of problems of saying, yes, we have a police
12 file, you can come and look at it, we've done some
13 whitening out, something like that.

14 Q Now, in relation to your comment about the police
15 officers not needing to study again a case that
16 they may have forgotten the details of, that
17 doesn't seem to be what the issue is. If we go
18 on, and this again is the same reply to Mr. Young:

19 "You will recall that I asked you
20 yesterday during our conversation
21 whether this case was going to be
22 re-opened or perhaps more specifically
23 what the actual reason for wanting to
24 have access to our file and to interview
25 those officers involved in the



1 investigation is and you could not
2 supply that."

3 And again, that would be sort of impossible to
4 supply if one were looking for information within
5 the file; right?

6 A Correct.

7 Q The letter goes on:

8 "If there is some justification for
9 re-examining this conviction I feel that
10 the reasons for that must be presented
11 to the Attorney General's Department and
12 if necessary we will certainly be
13 prepared to discuss our file with a
14 representative of the Attorney General's
15 Department and, of course, have our
16 members interviewed by a representative
17 of the Attorney General's Department.
18 If the Attorney General sees fit to
19 acquaint you with the information he has
20 at his disposal, then I would have no
21 objection to that. In the meantime, I
22 can only advise you I am not prepared to
23 have our file made available to yourself
24 or members of the Milgard family, nor am
25 I prepared to have the members involved



1 in the investigation available for
2 interviewing."

3 So that seems to be true stonewalling rather than
4 any concern that the potential witnesses might
5 have forgotten information?

6 A Well, sure, he both says no and passes the
7 responsibility somewhere else, but I was just
8 guessing at reasons why -- you asked me 20 minutes
9 ago sort of for some systemic thoughts and I can
10 see some justifications for saying we're not going
11 to allow family members, we're not going to send
12 files to prisons. I can certainly see that that
13 has to be considered by judges and legislators.

14 Q And the reason why information might not be
15 disclosed to lawyers, is there some --

16 A Well, I've got a little bigger problem with that,
17 disclosure to lawyers on certain conditions. I
18 mean, we receive from Attorney General's
19 Departments all the time documents on the basis
20 that we may not disclose, we may not copy. In
21 order to make the system fair and in order to
22 avoid exactly what happened here, a person is
23 wrongfully convicted, we have to take some
24 controlled and acceptable risks of disclosure of
25 information and we do that and to some extent the



1 question is how far over should the line go.

2 Q Okay. 106842 please. This is a second letter to
3 Mr. Young from the chief of police written January
4 23rd, 1981 in response to a clarified request from
5 Mr. Young indicating:

6 "... as indicated to you we would
7 contact the three people --"

8 And the three people are Nichol John, Albert
9 Cadrain and Ronald Wilson,

10 "... would contact the three people
11 noted in your letter and ascertain
12 whether they wish to have their
13 whereabouts made known to you and I
14 might say that this is standard
15 procedure whenever we receive a request
16 to locate persons and I am treating this
17 in that vein.

18 We have now been in contact
19 with Mr. Cadrain and Mr. Wilson and
20 Ms. Nichol John and all three of them
21 are most emphatic that they do not want
22 their whereabouts made known to yourself
23 or to the Milgaard family and we will
24 respect those wishes."

25 Carrying on:



1 "As indicated to you previously, I
2 recognize that cases can be re-opened,
3 however, I also recognize that certain
4 procedures should be followed. If the
5 Milgaard family have reasons sufficient
6 to cause a review of this case, we are
7 certainly prepared to co-operate by
8 making our file available to a
9 representative of the Attorney's General
10 Department. We would, of course, point
11 out that the three witnesses you are
12 trying to locate have indicated they do
13 not wish their whereabouts made known,
14 but it would then be up to the
15 representative of the Attorney General
16 to decide whether those people should be
17 interviewed and by whom."

18 Now, the witnesses referred to there,
19 Mr. Cadrain, Ms. John, Mr. Wilson, were contacted
20 by Mr. Karst, one of the main investigators on
21 the trial file. My question is, is there
22 potential that there's some problems there if the
23 witnesses, for example, had been inclined to say
24 that they had been pressured by police, is there
25 a problem if they are contacted by the main



1 investigator to see whether or not they want to
2 co-operate with the reinvestigation?

3 A There's a problem, and when we dealt with Nichol
4 John, it's hard to conceive that at any time she
5 was most emphatic that she didn't want to have any
6 contact because, to the contrary, she was quite
7 open, and as we all know, the person doing the
8 asking has a huge advantage, do you want to be --
9 that doesn't matter whether you are doing a
10 political poll or contacting somebody to see if
11 they want -- you know, do you want to be bothered
12 by having somebody come and harass you about your
13 evidence or we've had a request and we're worried
14 about the danger that you might be in if somebody
15 comes and sees you, do you want us to disclose
16 your name, or Gary Young is a respected,
17 responsible lawyer from a highly regarded law firm
18 in Saskatoon and I'm sure you've heard of the law
19 firm and may we have Mr. Young contact you, he has
20 a few questions. The way the question is posed
21 will be significant and, as you say, the person
22 who poses the question could have an intimidating
23 effect, and, you know, we sort of see this in
24 movies where the policeman goes to the witness and
25 sort of re-intimidates.



1 Q And just to come full circle there, both
2 Mr. Wilson and Mr. Cadrain eventually took the
3 position that they had been pressured
4 significantly at the time of the prosecution, and
5 you are aware of that; right?

6 A Yes.

7 Q 216097.

8 A Well, they took that position and I think Nichol
9 John was pressured. If there was no reason -- if
10 she wasn't facing any charges, if they told her
11 we're not holding you for any reason, there are no
12 charges against you, what was she doing in
13 custody. You don't have to say to somebody here's
14 the pressure, holding them in custody is as much
15 pressure as a person can face.

16 Q 216097, please, and this is just --

17 COMMISSIONER MacCALLUM: Ms. Knox?

18 MS. KNOX: Mr. Commissioner, again, I
19 haven't risen on this point in a while, but in
20 terms of the fullness of the information, the
21 evidence before the Commission is that while Ron
22 Wilson said in a statement that he gave to a
23 Centurion Ministries worker that he been
24 intimidated by police, he basically retracted
25 that and said in fact the police were very nice



1 to him, that's the evidence that's here, he has
2 some issues with the polygraph operator.

3 With respect to Ms. John,
4 there's evidence before the Inquiry that she
5 asked to stay at the police station because she
6 was scared as opposed to oppression, so in asking
7 the witness to answer these questions and the
8 conclusions he's drawing, I think it's imperative
9 that he be given the full information.

10 Albert Cadrain's evidence I
11 wasn't here for, he is of course deceased, but
12 there was documentary evidence where he retracted
13 what he had said to the investigator and said in
14 fact the police didn't oppress him and that he
15 was kind of tricked by the investigator on behalf
16 of the Milgaards, so I think it's becoming very
17 important that in answering the questions, in
18 fairness to Mr. Merchant, that he have a full
19 picture of what the actual evidence is as opposed
20 to what may have been said at points in time, and
21 I really do have a concern that what we're
22 getting into now is not conveying the full
23 picture of the evidence as it has been presented
24 under oath by Mr. Wilson and by Ms. John and
25 through documentary evidence in respect to



1 Mr. Cadrain.

2 COMMISSIONER MacCALLUM: Thank you.

3 MS. McLEAN: With respect, sir, I'm not
4 discussing with this witness the Inquiry
5 evidence, I'm discussing the process of getting
6 the application for a review of the case before
7 the Minister of Justice and ultimately before a
8 Court for rehearing and the events leading up to
9 that and that's why I didn't ask a question about
10 Nichol John. Both Mr. Cadrain and Mr. Wilson did
11 make the allegation that they had been pressured
12 by the police, that's the point of my question.

13 COMMISSIONER MacCALLUM: Yes. I think the
14 objection was that you didn't make it clear
15 enough what their final position was on that
16 aspect of it, so I take the objection into
17 consideration and I trust that you will put the
18 evidence fairly, that's all she's asking.

19 MS. McLEAN: Yeah, the final position that
20 they took came after the reference.

21 BY MS. McLEAN:

22 Q The document 216097 of June 28th, 1983, this is
23 coming to the end of your retainer?

24 COMMISSIONER MacCALLUM: What's that
25 number?



1 BY MS. McLEAN:

2 Q 216097. It's coming to the end of your retainer,
3 it's your letter to Mr. Shannon, it ends with:

4 "As you likely have sensed we are
5 basically stymied by an inability to
6 contact former witnesses. As a result
7 the cost of continuing the work is not
8 significant."

9 So it's kind of a vicious circle when you are
10 trying to bring an application before the
11 Minister of Justice isn't it?

12 A Prove that you are innocent and then we'll give
13 you some information which might put a little
14 icing on the cake, but you have to come forward
15 with the cake and prove you are innocent before
16 we'll disclose anything to you and tell you our
17 investigation.

18 Q So prove you are innocent, or go a long way to
19 proving you are innocent, and then we'll give you,
20 maybe, some information that might assist you in
21 proving that you are innocent?

22 A Correct, and you asked me earlier, a long time
23 ago, is there a public, a public issue as well,
24 and there is a public issue because the decision
25 to reopen is a discretionary disposition made by a



1 cabinet minister, a political person. You know,
2 if we go back in time, the Attorney General was in
3 the cabinet and wasn't elected, it's only in less
4 than 100 years that Attorney's General are
5 political and a part of the system, so the more
6 troublesome the crime, this was an heinous crime,
7 the greater the public attention on the crime, the
8 greater the pressure upon the Attorney General,
9 subconscious pressure and really effective
10 pressure not to reopen, not to -- not to go
11 through all that we've seen here.

12 Q And if you are undertaking to assist somebody who
13 wants to have their case re-examined, the time and
14 resources required are absolutely horrific; are
15 they not?

16 A Absolutely.

17 Q You were -- on this case specifically just regards
18 time, you were retained in 1981 at which point
19 David was roughly halfway through his time in
20 prison?

21 A Yes.

22 Q And then the real efforts to try and get a review,
23 having failed at appeals and having failed at
24 parole, the actual time of really trying to get an
25 application together and before the minister to



1 its successful conclusion is about another 11 to
2 12 years, from 1980 until 1992 when he was
3 ultimately released?

4 A And you ask about cost. I mean, you can see the
5 work that I did, but if we had had the kind of
6 information that would have made it feasible to
7 expect success, well then the additional work and
8 the additional cost would have been huge, so even
9 though a great deal of work and time went into
10 this, that would have only been the beginning.

11 Q And you need money for, what, skip tracers,
12 investigations if you don't have a mother that's
13 going to go and interview them, however well or
14 badly that may turn out?

15 A Yeah.

16 Q Lawyers, experts, travel, long distance,
17 transcripts, and then you also have to have, in
18 addition to money, you have to also be dealing,
19 you know, as you deal with experts, as you deal
20 with lawyers, you have to be willing -- dealing
21 with people who are willing to be associated with
22 somebody who is carrying a label of a
23 rapist/murderer and that can also be sometimes
24 difficult; can it not?

25 A Yes, very much, and it has that, the public



1 problem of people don't want to look into that and
2 the political people don't want to look into it.
3 I guess that's why England sent them all to
4 Australia.

5 Q Just on the issue of cost, 219540, this is a
6 letter from you in November of 1983, this is to
7 Joyce Milgaard:

8 "I have your message about hiring a
9 tracing service to find Mr. Wilson. The
10 cost of that might well be \$200.00 and
11 we are not sure of the success that
12 would be involved."

13 \$200 just to make somebody -- to have somebody
14 try to find a witness with no guarantee of
15 success.

16 A Okay. It doesn't sound like much now, but --

17 Q Well, back in --

18 A It was more then.

19 Q -- 1981 that would have been, what, maybe a week's
20 pay to some people.

21 A Uh-huh.

22 Q To try to find one witness of three significant
23 ones in this case.

24 A Yes.

25 Q So we've heard, and we will hear over the coming



1 months, about lots of problems with the 690
2 application treatment once it's in the Department
3 of Justice, but there's a huge problem just
4 getting to the stage where you can start to put an
5 application together; correct?

6 A I agree.

7 Q Do you have any suggestions on what could be done
8 to resolve some of those problems?

9 A If I were blue-skying, it might be appropriate if
10 the process were taken out of the seeming
11 political hands of the Attorney General so that
12 the decision to reopen wouldn't be a perceived
13 political decision as it was here, as it was with
14 Fisher, as it was for Truscott, where they sent
15 the matter to the Supreme Court for a review.

16 Q Could I just jump in there for a minute. You said
17 as it was for Fisher.

18 A I'm sorry, I meant Donald Marshal.

19 Q Thank you.

20 A And if it were removed from that level of public
21 attention, that would relieve potential applicants
22 from trying to draw public attention to their
23 plight, so we have, for example, the Fifth Estate
24 and the sorts of attempts by people to get, to
25 bring some public pressure or inquiry. Second, if



1 it were removed from the attorney -- from the
2 political process and were not under public gaze,
3 then it might be possible for that office, once
4 some beginnings were shown, some reason for
5 concern, to consider modest funding. The
6 government does a good deal of funding of programs
7 where people are going to fight with them. There
8 are all sorts of programs where you apply for
9 money to get to hire lawyers at maybe a third of
10 their rate, you know. It's not, you don't hire a
11 room full of Queen's counsels, but there are these
12 programs now in the civil side where, inquiries to
13 try to change the law and to try to move things
14 forward. If I were blue-skying, those are a
15 couple of things that I think might merit
16 consideration, so that if you could show I've got
17 the beginnings of a case and demonstrated that,
18 then they might give you seed money to keep going
19 and they might give you more money to keep going
20 because the wrongful convictions are very
21 troublesome for a society. They give -- and they
22 are probably troublesome in terms of obtaining
23 convictions, so if you have juries who are mindful
24 of the various wrongful convictions, it may result
25 in them finding people who are guilty not guilty



1 just out of worry, but I don't know that my
2 white-hat considerations are -- as I say, I'm not
3 in the legislature.

4 COMMISSIONER MacCALLUM: Forgive me, Mr.
5 Merchant, I don't understand what blue-skying
6 means and I don't understand what white-hating
7 means. Can you tell me, please?

8 A Yes, My Lord. Blue-skying just means sort of
9 dreaming about different things and just
10 conjecturing without a lot of thought of the
11 disadvantages, and I forget which business
12 administration person says you'll start a meeting
13 wearing white hats and you present every idea you
14 can think of and then you go to a green hat and
15 you do some analysis of them and then you go to a
16 black hat and you say here are all the problems,
17 and the reason that they advance that thinking is
18 if you do them at the same time as soon as you
19 start to advance ideas, if everybody is saying
20 that won't work for this reason, it inhibits the
21 sort of free thought, so white hat means do a
22 little -- do a little dreaming without thinking of
23 the disadvantages.

24 COMMISSIONER MacCALLUM: Good.

25 BY MS. McLEAN:



1 Q And when you say take it out of the political
2 arena so there isn't a need to put pressure by
3 publicity, and so on, on somebody, are you
4 speaking of, maybe for lack of better terminology,
5 some kind of an independent board or body that
6 could deal with these issues?

7 A Well, somebody within the -- I'd have them within
8 -- right now, in reality, this is quite
9 independent so, in reality, the Attorney General
10 doesn't take the book home, take the file home for
11 the weekend and say "yeah, I'm gonna do it". The
12 Attorney General, in reality, is now told "here's
13 what we recommend and here's why we recommend it",
14 but the problem is the Attorney General makes the
15 announcement and the Attorney General is seen to
16 make the decision, and even the people advising
17 the Attorney General have to take into
18 consideration that this is a highly political case
19 or this is a case that's going to make a
20 difference in the way we're perceived on the
21 justice front.

22 Q Uh-huh?

23 A 'We're tough on justice', everybody wants to be
24 tough on justice, even though the rates of crime
25 have been going down penalties keep going up all



1 the while the rates of crime go down in Canada,
2 because public opinion is -- lags catching up to
3 the reality that, indeed, we're doing a good job.
4 So all the political parties follow this same
5 illusion in, or address the illusion in the
6 voters' minds, it's not -- we don't so much need a
7 change in the reality, we need a change -- forgive
8 me, judge, as I white-hat it -- we need a change
9 in the perception. So if the perception were some
10 independent commissioner, a retired, respected
11 justice, they made the decision, they looked at
12 it, they made the announcement, in my mind the
13 attorneys general would like to be relieved of
14 what can sometimes be a problem for them and the
15 re-opening process would be enlarged, and
16 appropriately enlarged.

17 It might result, as it did in
18 Truscott, of a re-opening and a re-affirmation.
19 The government re-opened, the Supreme Court heard
20 it, they actually re-heard witnesses, somebody
21 came in and talked about the lesions on Truscott's
22 penis for example, so there was a real re-hearing.
23 But that really flowed from sort of the politics
24 of the pressure on having a great book and I think
25 there might have even been a movie. Remove that



1 and I think it would be better for the political
2 system, better for the perception of the public,
3 and it might ease, it might make it easier for the
4 system to re-examine the possibility that a
5 mistake had been made.

6 Q Okay. I take your point on the applications that
7 are being considered and your answer in respect of
8 that, but what about getting to the point where
9 you can put an application?

10 A Well the only -- if I were trying to find the
11 line, it seems to me there has to be protection
12 against the police departments just endlessly
13 having to rework old files just because somebody
14 either had the money to hire a lawyer or had
15 family who were interested in reworking the old
16 files, so there has to be some beginnings of a
17 justification in my speculation.

18 Q Uh-huh.

19 A Second, if there is some beginnings, if I were
20 running the world I would then have this
21 independent body with a capacity to fund to be of
22 assistance. Very frequently the people who have
23 been wrongly convicted don't have money for
24 anything to be done, they might have been
25 represented by Legal Aid, their families don't



1 have money, they didn't get an O.J. Simpson
2 defence, so if there is beginnings then I'd like
3 to see some capacity to fund. So conjunctively,
4 it seems to me, that might result in more
5 applications, some of them might result in an
6 application where, as in Truscott, they said
7 "yeah, we got it right", which has benefit in
8 itself because a re-affirmation is good for
9 society; bad for society would be a bit of expense
10 and this sort of perception that maybe the system
11 doesn't work as well as it should. But I think
12 that perception is -- abounds in society, that the
13 system doesn't necessarily work as well as it
14 should.

15 Q Thank you, sir, those are all my questions.

16 BY MR. WOLCH:

17 Q Mr. Merchant, I'm Hersh Wolch, and I'm David
18 Milgaard's lawyer.

19 A Nice to see you again.

20 Q I will not be all that long with you. Just one
21 small point, for the record, on Truscott. You may
22 be aware that the current Minister of Justice, in
23 spite of it all, has declared that there likely
24 was a miscarriage of justice and it's currently
25 before the courts. I just point that out for



1 the -- just to clarify that.

2 And would it be fair to say
3 that, in your approach to this case and a general
4 approach to be taken, that you like to see an air
5 of reality to the claim, if I can use those words,
6 that when somebody says "I have been wrongly
7 convicted" you are looking is there an air of
8 reality to that assertion; would that be fair?

9 A That would be a good, this blue-skying that I did,
10 that would be a good characterization of --

11 Q For example you had Mr. Howland, a well-respected
12 member of the parole board, saying in effect that
13 he thought David was innocent. Now that's
14 something quite rare. Firstly, I'm not even sure
15 what possible difficulty he could get into for
16 saying that; do you know if that's a risk to him
17 to even say that?

18 A I thought it was extraordinary and a testament to
19 his strength that he would say that, and really
20 become a bit of a paladin within the system to try
21 to assist David, and I agree with you that that
22 kind of confident assertion from a respected
23 member of the parole board might well be a part of
24 the air of reality.

25 Q You wouldn't know this, but he actually dropped by



1 here at one point in time to watch the Inquiry?

2 A I didn't know that.

3 Q But that was a person that you wouldn't expect to
4 come out with that, and even if he believed it, to
5 sort of, in a limited sense, go public with that?
6 It's, --

7 A Yeah.

8 Q -- could put him in jeopardy in his job?

9 A The system isn't very good at rewarding
10 iconoclasts within the government.

11 Q And then you had Howard Shannon, who was forming
12 an opinion or offering an opinion that came to you
13 from a person you respected, and wasn't the kind
14 of opinion you would necessarily expect a person
15 to have of a convicted rapist/murderer?

16 A I agree with that, although it seems to me it
17 could well be that a member of the public would
18 just like someone and say "this person can't
19 possibly be a rapist/murderer", I don't know that
20 meeting an individual can be a means of
21 determining whether they are guilty or not guilty.

22 Q And then you had Carlyle-Gordge, a writer,
23 devoting a lot of time it would appear, and you
24 wouldn't expect somebody to devote a lot of time
25 to some cause he didn't believe in?



1 A There were a wide variety, as you say, of people
2 who thought something was wrong, and there wasn't
3 -- this wasn't, this approach to the Attorney
4 General's Department and the police wasn't --
5 ought not to have been taken as just a flyer and
6 people without any substance coming forward.

7 Q And I take it, though, to get to the next step, to
8 complete the air of reality, you really have to
9 have sufficient disclosure or sufficient material
10 to assess what caused the conviction?

11 A Yes.

12 Q And you are greatly hampered by not having that
13 access or you were greatly hampered by not having
14 that access?

15 A Yes.

16 Q And even if you had the access you'd be hampered
17 by lack of funds?

18 A Yes.

19 Q For example, if you had access to all the material
20 and found a document or something that you felt
21 was not disclosed or was not utilized properly,
22 you might be able to combine that with everything
23 else and say "this is very real, it has to be
24 looked at"; do you follow me?

25 A I do. And of course, post-*Stinchcombe*, you might



1 also be able to come forward with a sort of a
2 prosecutorial inaction and that might be, to use
3 my word of 20 some years ago, that might be the
4 'bombshell'.

5 Q Yeah. And I think the Commissioner will have to
6 address it later, and I'm not going to do it now
7 with you, but we'll have to address how
8 *Stinchcombe* or the principle of *Stinchcombe*
9 applies after your appeals are exhausted. That's
10 something we're going to have to look at, I'm
11 sure, so I won't deal with it now, but you have
12 raised a very valuable area of concern.

13 Now I'd like to turn to 213628,
14 and I want to deal with Justice Tallis, to some
15 degree. Would you agree with this comment; that
16 we have to be careful not to confuse Justice
17 Tallis' well-earned reputation with his memory or
18 ability to remember?

19 A Yes.

20 Q Now that comment was one that I heard from him
21 himself so I'm not too worried about saying that.
22 But you have to be careful not to say that,
23 because he is who he is, that he is infallible or
24 his memory is perfect or he couldn't forget
25 something?



1 A Lord Denning got overruled from time to time and
2 may have been wrong.

3 Q Yeah.

4 A Great lawyers make mistakes.

5 Q I'm not sure you picked a good example, Lord
6 Denning was wrong in a number of cases, but -- and
7 found to be so -- but -- and we'll leave that for
8 now.

9 But, in any event, what I am
10 saying is that we have to be careful not to mix up
11 credibility, integrity, honesty, with human
12 memory?

13 A I agree.

14 Q Okay. And the first issue that was canvassed, I
15 believe by Mr. Pringle, was the question of
16 whether David would testify/not testify and the
17 significance of that. In a general sense, it's
18 usually the lawyer who makes that tough decision?

19 A Yes.

20 Q And I use the word "tough" advisedly; it is a very
21 difficult decision?

22 A Yes.

23 Q And, unfortunately, it's not just a matter of
24 deciding whether your client is innocent or not
25 guilty, or telling the truth or whatever, it's the



1 -- other factors affect that decision?

2 A Well sometimes you will have a person who you
3 think is probably going to be found not guilty,
4 they are in fact innocent, and you are afraid that
5 if you put them on the stand they will muck it up
6 because they will appear to be guilty when,
7 indeed, they aren't.

8 Q Right. And so Justice Tallis was faced with a
9 very, very difficult decision?

10 A Yes.

11 Q And would you agree with me, also, that normally
12 that's a decision you leave for the last moment?

13 A Yes.

14 Q You have to see how the trial progresses and you
15 have to make that decision when you have the whole
16 picture?

17 A Yeah. Of course you don't have to leave it to the
18 last moment if the person is guilty, because he's
19 told you that he is guilty and you are not going
20 to be putting him on the stand, --

21 Q Yeah?

22 A -- but if he had told you that he is innocent and
23 you believe he probably is innocent then you are
24 likely to leave that to the last.

25 Q Yeah. And what you normally will do is you'll set



1 up your defence, hopefully through the Crown
2 witnesses, and possibly provide material that will
3 come out again through the -- your accused if he
4 testifies, if you know what I am getting at; that
5 is if you expect your client is going to say
6 something you might put it to certain witnesses or
7 it will govern your cross-examination?

8 A Correct.

9 Q And another consideration, of course, is that if
10 your client does testify you lose your last word?

11 A Yes. That's --

12 Q That is your -- you lose the advantage in front of
13 the jury, you are punished if your client
14 testifies, you might think it should be the other
15 way around, but if your client testifies now
16 you've got to go first and you have no idea what
17 the prosecutor is going to say after you so it's a
18 big disadvantage to have your client testify?

19 A That's one of the disadvantages.

20 Q Yeah. So all of these factors would come into
21 play when Justice Tallis is deciding what is the
22 right way to go?

23 A Correct.

24 Q And David could be saying "look, I want to
25 testify, they are all lying", but that's only one



1 of the factors he would consider in the overall
2 picture?

3 A Yes.

4 Q Now you would also be aware, of course, that
5 Justice Tallis could not force the prosecution to
6 put into evidence what David had told the police
7 when he was first questioned, that the rules of
8 evidence are such it's up to the prosecutor if he
9 puts in an accused's statement?

10 A I'm sorry, I don't -- I'm not familiar with that
11 area of the law.

12 Q Okay. I was going to suggest to you that perhaps
13 we might later look at the possibility that that
14 could be up to the judge's discretion, that is an
15 application could be made to the judge to say it's
16 not fair not to put before the jury what the
17 accused said under questioning by the police when
18 he was first arrested, that it's unfair?

19 A I, to the extent my view matters, I think that
20 if -- that an exculpatory statement ought to be,
21 they ought to say "this was what was said", and
22 they ought to say it to show consistency or near
23 consistency.

24 Q Now, perhaps this is a bit systemic, but it seems
25 there is a basic recognition that an accused who



1 is innocent, who is telling the truth, may very
2 well not be believed?

3 A Unfortunately, that's the case, and I would have
4 thought that was particularly the case at this
5 time, which people may forget, but this happens to
6 be a time when I was 22-23 and people who did
7 drugs and had -- they were, they were very suspect
8 by society, it wasn't -- it wasn't like today
9 where -- so, absolutely.

10 Q Well there is also; isn't there a general
11 disadvantage for accused people because the
12 thought is always in the trier of fact's mind that
13 this person has a reason to lie?

14 A Yes.

15 Q So you start off with a big disadvantage, do you
16 not --

17 A Well --

18 Q -- as an accused person, that "well there is a
19 reason to lie, you are charged with a crime"?

20 A Well, as you know, a couple of hundred years ago
21 you were not -- you couldn't testify for that very
22 reason, that you were just assumed, your testimony
23 was assumed almost to be irrelevant because why
24 wouldn't you lie about it.

25 Q But one of the really difficult areas of any trial



1 is credibility, it's one of the toughest to assess
2 of anybody, be it a witness, be it an accused,
3 it's very, very difficult; is it not?

4 A Tough for judges, and I would assume tougher still
5 for members of juries.

6 Q Unfortunately, a competent lawyer can sometimes
7 make an honest person look like a liar?

8 A Yes, and vice versa.

9 Q And a person testifying can be under a tremendous
10 amount of strain; take an accused who has been in
11 custody for a long period of time?

12 A I always thought that there was a huge tactical
13 disadvantage if the accused testified from
14 custody, because the perception by jurors was
15 unless he -- he's probably guilty and that's why
16 he was refused bail, wasn't released, and there
17 was a huge burden on the accused because you
18 couldn't, you couldn't give him notes, you
19 couldn't spend time in a sort of a leisurely and
20 appropriate way to prepare, to prepare the
21 accused. So the accused coming in, sometimes even
22 in what looked like prison garb, or not prison
23 garb but they knew that it wasn't street clothes,
24 all of these things contributed to the
25 disadvantage mentally for the accused, and a



1 perceptual disadvantage.

2 **Q** Well you can see, for example in David's case,
3 testifying at the Supreme Court after all those
4 years in jail, all he had been through, all the
5 difficulties he's had in jail and all the
6 experiences, to then be asked questions about what
7 he remembered about an innocuous morning many
8 years ago; it would be very difficult?

9 **A** It would be difficult.

10 **Q** Just very briefly on the document, I pulled it up
11 here and I don't know if you, if your memory is
12 any better than the notes itself, but there is a
13 note at the beginning about 'the notebook was
14 given back to David'; now I'm presuming that that
15 would be at the end of the retainer, but were you
16 led to believe anything different?

17 **A** I don't recall, I -- I --

18 **Q** Would you agree that's the most logical
19 interpretation, it's unlikely you would give back
20 instructions while you were still acting is all
21 I'm really saying?

22 **A** Yeah. I don't know.

23 **Q** And there is a discussion about being stuck; is
24 there any discussion as to how many times that
25 vehicle was stuck?



1 A No.

2 Q The notes indicate one time?

3 A I thought it meant one time.

4 Q I only have one other question to ask you, and my
5 interest is not the same as others in this area,
6 it was brought up earlier and we're aware of your
7 involvement in the residential schools?

8 A Yes.

9 Q And you have represented, I believe, a number of
10 clients there?

11 A We represent about, currently, 8200 clients, and
12 because I answer the phone at night and on
13 weekends I've probably spoken, over time, with a
14 thousand plus, and people -- and I've met with
15 many of them. The work tends to be done largely
16 by other lawyers, but I do a lot of direct contact
17 with people sort of at an initial stage.

18 Q And these are mostly victims who suffered, in the
19 residential schools, various types of abuse,
20 etcetera?

21 A Yeah. In addition to talking to a lot of people
22 our firm has done half, about half the trials of
23 residential schools, and I've handled most of
24 them. One case to the Supreme Court I handled the
25 trial, the appeal, the Supreme Court, four



1 appeals, I handled them, various applications for
2 leave, I handled them, so yes.

3 Q And --

4 A All, all, all of those trial cases, and most of
5 the people with whom we've dealt, have either been
6 seriously physically abused or sexually abused.

7 Q Yes. And I believe that for most, not all but for
8 most, there's been settlements entered, and the
9 point I want to focus on is the ability of those
10 victims to come forward and tell their stories.
11 What has been your experience?

12 A I've observed and been told by a wide
13 cross-section that it's extremely difficult for
14 them. I think of it as an emotional wound that's
15 been papered over and bandaged and then they tear
16 the bandage off the emotional wound.

17 The problem in large part is the
18 anticipation of having to tell their story as well
19 as the problem of telling the story, so when they
20 testify it's very hard on them, when they prepare
21 to testify it's very hard on them, and things that
22 are said to them trigger memories that they don't
23 talk about or -- it's a very difficult experience
24 for people. They recount that, and it's obvious
25 it's a very difficult experience as you watch them



1 going through it and as they talk to you when they
2 are testifying.

3 COMMISSIONER MacCALLUM: Excuse me.

4 MR. BOYCHUK: Mr. Commissioner, I think I
5 know where this is going, and my understanding is
6 that we were going to be served with a motion and
7 we were going to deal with the issue of Mr.
8 Milgaard's attendance.

9 My main concern is, although I
10 respect that -- Mr. Merchant's ability as a
11 lawyer, he is not a psychiatrist, he is not a
12 psychologist, so I don't know that this helps us.

13 COMMISSIONER MacCALLUM: I'm not sure it
14 does either, but I'm not sure where we're going
15 either?

16 MR. WOLCH: I'm almost there, sir, that I
17 think from first-hand experience -- it's not a
18 matter of opinion, it's a matter of what he's
19 seen first-hand, and I'm mindful of getting
20 evidence before you, sir, in the most efficient
21 way, and this seems to be a low-cost way of
22 getting it on one issue. Of course there will be
23 other evidence coming, but we have a unique
24 opportunity here to have a witness who has dealt
25 with thousands of victims who, of course, have



1 been through terrible times, and his experience
2 with testifying and the ability to testify helps
3 us in a couple areas. It helps us on the issue
4 My Friend raised, it also helps us with the
5 difficulty an accused has in a systemic case.

6 For example Steven Truscott, he
7 has been mentioned many times, testified in the
8 Supreme Court after six years waiting to be
9 hanged; what would that have done to his
10 credibility findings? David testified in the
11 Supreme Court as well after horrific times in
12 jail, how -- you know, so that it does set a
13 basis for understanding that perhaps these
14 credibility findings are quite unfair to the
15 wrongly convicted, that if you look at the
16 judgement in the Supreme Court it doesn't even
17 refer to David testifying, and so what can a
18 wrongly convicted person do when they are faced
19 with the problems of being through the system and
20 then being expected to be a wonderful witness.
21 There's -- there should be some, perhaps,
22 allowance made, you know, for an innocent person
23 who is trying to testify.

24 COMMISSIONER MacCALLUM: Well I -- yeah. I
25 think your client (sic) answered that point, he



1 said it was very difficult for them to testify.

2 But on the other point, however
3 much this client -- this witness might know about
4 the difficulty of witnesses faced in describing
5 a, having been abused, that's not what Mr.
6 Milgaard is going to be asked to describe.
7 Whatever abuse he has suffered is irrelevant to
8 us, in the prison system.

9 MR. WOLCH: No, but how the, the answer is
10 how --

11 COMMISSIONER MacCALLUM: If he comes he is
12 going to be asked to describe what happened to --

13 MR. WOLCH: Well, no, but it's the abuse
14 that gets triggered, that is the point.

15 COMMISSIONER MacCALLUM: Oh, no, it's --
16 well, don't ask this witness about it, he is
17 telling you about abuse in a different context.

18 MR. WOLCH: Well, much lesser abuse, not
19 that it's not terrible.

20 COMMISSIONER MacCALLUM: No, it's a -- I
21 take the objector's point, the witness has
22 nothing to offer that's useful in that respect.

23 Mr. Wilson?

24 MR. WILSON: Nothing to add to what you've
25 already said, Mr. Commissioner.



1 COMMISSIONER MacCALLUM: All right, thank
2 you.

3 MR. WOLCH: I have no further questions.

4 COMMISSIONER MacCALLUM: Thank you.

5 MR. HODSON: I have no re-examination.

6 COMMISSIONER MacCALLUM: Anybody else?

7 MR. HODSON: Thank you very much, Mr.
8 Merchant.

9 COMMISSIONER MacCALLUM: Okay, thank you
10 for coming, Mr. Merchant, you are excused.

11 A Thank you, judge.

12 MR. HODSON: May we adjourn?

13 COMMISSIONER MacCALLUM: Yes.

14 (*Adjourned at 10:41 a.m.*)

15 (*Reconvened at 11:02 a.m.*)

16 MR. HODSON: The next witness is Mr. Gary
17 Young.

18 **GARY DAVID YOUNG, sworn:**

19 **BY MR. HODSON:**

20 Q Good morning, Mr. Young. Thank you for agreeing
21 to testify before this Commission of Inquiry.

22 I understand, sir, that you
23 reside in Saskatoon?

24 A I do.

25 Q And that you are currently a practicing lawyer



1 with the Robertson Stromberg Pedersen law firm?

2 A Yes, I am.

3 Q And that you've practiced law in Saskatoon since
4 1972?

5 A That is correct.

6 Q And that you acted for David Milgaard and/or Joyce
7 Milgaard from approximately the end of December,
8 1980 through until approximately May of 1981?

9 A That is correct.

10 Q And just briefly at that time, Mr. Young, what was
11 your practice area in the early 1981 area, what
12 was your area of practice?

13 A Primarily civil law with a focus in civil
14 litigation, but I did do some criminal work at
15 that time as I did in the early stages of my
16 career.

17 Q And at that time I think your firm, some of the
18 other people involved were Nick Sherstobitoff who
19 is now an Appeal Court judge; is that correct?

20 A That is correct.

21 Q And I just want to go through this morning sort of
22 in a general way some of the areas that you
23 covered on the matter and I think we heard
24 yesterday and this morning from Mr. Merchant who
25 followed you as counsel for David and Joyce



1 Milgaard. Can we just go back to sort of the
2 first, your first engagement. Who was it that
3 retained you?

4 A It was Joyce Milgaard.

5 Q And I don't want to get too legalistic here, but
6 your client, I take it, would have been David
7 and/or Joyce Milgaard or how did you see that?

8 A I believe that I felt I had a joint responsibility
9 to the two of them at the time, but that I
10 answered primarily to Joyce as it was she who had
11 made the retainer.

12 Q And can you tell us generally, what were your --
13 what were your instructions, what were you asked
14 to do?

15 A My perception of what Mrs. Milgaard was after was
16 to, of course speaking in the broadest possible
17 sense, to see what could be done about getting her
18 son out of jail and we knew that that, in all
19 likelihood, would require a reference from the
20 Minister of Justice, and in order to get that we
21 had to investigate the matter and look for new
22 evidence, and in particular our focus was on
23 seeing whether or not we could identify someone
24 else who may have been in a position to commit the
25 crime.



1 Q And so finding someone else who committed the
2 crime then would mean that David Milgaard had not
3 committed the crime?

4 A Correct.

5 Q And then prior to your engagement as counsel, do
6 you recall what knowledge you would have had of
7 the David Milgaard conviction or the Gail Miller
8 case?

9 A Superficial only. I do remember, while I was in
10 law school, being lectured on, attending a lecture
11 given by Mr. Caldwell where he touched on some of
12 the issues involved and apart from that I knew
13 only what I had available to me through the media.

14 Q And what about Larry Fisher, did that name mean
15 anything to you at the time?

16 A Nothing.

17 Q And did you have any recollection or were you
18 aware of any rape offences or convictions in
19 Saskatoon in 1968 to 1970, that time frame?

20 A No.

21 Q And I just want to go through generally the areas
22 that I think you dealt with and, Mr. Young, just
23 based on my review of your file, and I should
24 point out, Mr. Commissioner, that Mr. Young did
25 produce his file to the Commission, we've provided



1 that to all the parties and basically today and
2 this morning I will go through the relevant parts
3 of that file, but if I can just maybe generally
4 summarize the work that you did, one part was to
5 get transcripts of the preliminary hearing and
6 trial for Mrs. Milgaard; is that correct, one of
7 the tasks that you undertook?

8 A I believe that the answer to that is yes. I do
9 recall getting transcripts. I have no specific
10 recollection as to whether or not it was the
11 preliminary transcript or the trial transcript.

12 Q And I'll take you through some notes, Mr. Young,
13 but I think generally it appears from the file at
14 least that one of the tasks you participated in
15 was assisting in getting preliminary hearing and
16 trial transcripts; is that fair?

17 A Yes.

18 Q And secondly, you had an opportunity to review
19 Mr. Justice Tallis' file as it then existed, or
20 what you were provided by his former law firm; is
21 that right?

22 A Yes.

23 Q And I think you had some contact with Mr.
24 Caldwell, the former prosecutor?

25 A I did.



1 Q Or the prosecutor of the case, pardon me. Fourth,
2 you made efforts through the Saskatoon City Police
3 to obtain access to their file?

4 A Right.

5 Q And we'll talk a bit about that.

6 A I did.

7 Q And fifth, you made efforts to get contact
8 information for witnesses from the police?

9 A Yes.

10 Q Sixth, I think you had some discussions about a
11 fellow by the name of Mahar who had been charged
12 with murder in 1969 and I think Mr. Sherstobitoff,
13 your partner, had acted for him and there were
14 some, and again I'll take you through the notes on
15 this, some discussion that he might have been the
16 person responsible for Gail Miller's death. Do
17 you have a recollection of that?

18 A Yes, I do, although my recollection is that Mr.
19 Sherstobitoff may have been the prosecutor rather
20 than the defence counsel.

21 Q I'm sorry, and that may well be the case, and I
22 think in that case, if I'm not mistaken, there's a
23 media article that indicates he was found not
24 guilty by reason of insanity. Is that your
25 understanding?



1 A Generally, yes.

2 Q And then as well I think you were involved in
3 getting psychiatric reports for, about David
4 Milgaard to deal with some parole or prison issues
5 that he was facing; is that -- again just from the
6 file it looks like you were asked to get some
7 reports and you in fact did get some?

8 A Yes.

9 Q And again from my read of the file, and I would
10 ask you to correct this, it does not look like you
11 were involved directly in the interview of any
12 witnesses; is that fair?

13 A Yes.

14 Q And so again I think about a four month, about a
15 four month time frame you were involved, I think
16 the end of December through until probably around
17 the end of April?

18 A Actively involved in that time frame, yes.

19 Q So I think if we can call up the first document,
20 331970, and I just propose to go through some of
21 your file documents and get you to comment, and I
22 think this may have been the first engagement,
23 December 24th, 1980, you got a call from Mrs.
24 Milgaard. Does that sound about the right time?

25 A Yes.



1 Q And again there's just a couple of notes here, it
2 looks as though, 'Phoned Caldwell (trial
3 transcript in Q.B.) - phoned G. Randall,' who I
4 think was Gwen Randall who was a lawyer at
5 Mr. Tallis' former firm; is that right?

6 A It is.

7 Q And talking about 'check for transcripts'. Can
8 you tell us any more about what's on this document
9 other than what is obvious?

10 A No.

11 Q And am I right to assume that one of the first
12 tasks would be to get, to look at getting the
13 trial transcripts?

14 A I would have considered it to be such.

15 Q If we can then go to 331973, I want to show you a
16 couple of documents. Do you remember a fellow by
17 the name of Chris O'Brien who was a radio
18 announcer who was assisting Mrs. Milgaard? Does
19 that name bring back any memory?

20 A Very limited.

21 Q He -- this note looks like 'Re: Joyce Milgaard
22 file on line now.' It's Mr. O'Brien calling.
23 'Wants to meet with the police - may need me to
24 request same.'

25 Then if we can call up 219408,



1 and this is a document that you may not have seen,
2 it's a letter from Deputy Chief Corey to the Chief
3 of Police John Gibbon around this time frame, and
4 I just want to go through parts of this because I
5 think it relates to the note.

6 "Corey states that at approximately 4:15
7 ... December 30 ... he received a long
8 distance telephone call from a person
9 who identified himself as Chris O'Brien,
10 an employee of CHAB who was calling from
11 Regina. He advised me that he was
12 involved in the investigation recently
13 instituted by Mrs. Joyce Milgaard,
14 relating to the murder conviction of her
15 son.

16 O'Brien claimed to be related
17 through marriage to Mrs. Milgaard who
18 had sought his assistance in obtaining
19 information relating to events that
20 resulted in David's conviction. He
21 stated that he had obtained some
22 transcripts and other information and as
23 a result, believed that Police files
24 contained much more information than had
25 been presented in Court. As a result,



1 he requested permission to interview the
2 Police Officers involved in the
3 investigation and access to the complete
4 Police file relating to this
5 investigation."

6 And scroll down, please:

7 "I advised O'Brien that I would not
8 grant this permission, as it was an
9 unusual request that would have to be
10 taken under advisement by the Office of
11 the Chief of Police and as I was only
12 acting for a very limited time, I
13 suggested that he contact your office
14 early in January, 1981 if he wished to
15 pursue the matter.

16 O'Brien asked what your
17 position would be and I assured him that
18 I could not speak on your behalf,
19 however, was confident that you would
20 render a professional decision."

21 Then the next page:

22 "Mrs. Milgaard has retained Mr. Gary
23 Young, a local lawyer, associated with
24 the firm of Sherstobitoff, Hrabinsky,
25 Stromberg, and Young ... and Mr. O'Brien



1 suggested that he may have Mr. Young
2 contact your office on his behalf.

3 I have since learned that

4 Mr. O'Brien went to contact Parker ..."
5 Etcetera. And again, it looks like on, at or
6 about the time of your engagement, that
7 Mr. O'Brien had made a request of the police to
8 get access to the police file, were you aware of
9 that or do you have any recollection of that, and
10 that he may have in fact called you to assist him
11 in getting that?

12 A I have no recollection of it at all, of that
13 aspect.

14 Q And again, what is your recollection if any of
15 Chris O'Brien and his involvement?

16 A From what I can reconstruct from the file, I met
17 with Mr. O'Brien on one occasion, but I have no
18 recollection of him, and I can't recall any
19 discussions with him.

20 Q And I appreciate you making that distinction, Mr.
21 Young. You've had an opportunity to look at your
22 file and if you can tell us where -- and I'll try
23 to be careful in my questions as to what you
24 recall versus what you think happened or
25 reconstruct based on the file.



1 If we can then go to 331976 and
2 I just want to go through some of your telephone
3 notes, and this is a December -- if you can --
4 December 30th, 1980, so again it's around this
5 same time frame. There's actually four different
6 notes. This one is to Ian Buckwold (Milgaard) and
7 my understanding, Mr. Buckwold was a lawyer at the
8 firm, the Goldenberg firm which was the
9 predecessor to Mr. Tallis' firm; is that right?

10 A Yes.

11 Q And he says:

12 "- they sent trial transcripts to David
13 Milgaard - they have transcripts from
14 the prelim - but won't release without
15 Milgaard's authorization."

16 And I take it that would be an accurate note of
17 your discussion with him?

18 A It is.

19 Q And you had some dealings with Mr. Buckwold and
20 efforts to get what was on Mr. Tallis' file?

21 A Yes.

22 Q And again 331975, just again -- this is I think
23 Susan Martineau who I believe is David Milgaard's
24 sister; is that right? Do you recall some
25 dealings with her?



1 A I don't recall.

2 Q And again this looks to be a phone call again just
3 about transcripts and I don't know if we need to
4 get too concerned about the details. It looks
5 like you were -- Dennis would be Dennis Berezowsky
6 and some calls to the Court of Appeal to try and
7 locate what was there?

8 A Yes.

9 Q And then 331974, again these are all December
10 30th, and just for the record outline a couple of
11 spots here. Phoned Dennis at the court house,
12 court reporter called Fred Newis at the Court of
13 Appeal, and again, these would be efforts to get a
14 complete set of the transcript?

15 A Yes.

16 Q Then go to 331967 -- or sorry, 968, this is again
17 December 30th, 1980, and this appears to be a note
18 of a call with Mr. Justice Tallis; is that
19 correct?

20 A Yes.

21 Q And at this time would you have known Mr. Tallis?

22 A I knew him professionally, yes.

23 Q And just go through the notes here and it says,
24 'Suggests I see Court of Appeal judgment which
25 reviews the facts,' and then the *Latta* case in



1 Alberta, Minister of Justice granted a reference.
2 I think professor of law. *Truscott* case, *Coffin*
3 case, and then at the bottom, 'In many of these
4 cases there was new evidence.' And then Miss
5 Nichol John, or pardon me, 'Nicol John evidence.'
6 Do you have a recollection of the discussion with
7 Mr. Tallis beyond what's in this note?

8 A Yes, I do. It's stayed with me for some reason,
9 it stayed in my mind, and it was to the effect
10 that Mr. Tallis, Justice Tallis said to me, he
11 gave me words of caution, and it was something to
12 the effect that be cautious when dealing with some
13 of the individuals involved in this situation, and
14 I took that to mean that they, that one could not
15 predict how they might act.

16 Q And who did you think he meant by individuals, are
17 you talking witnesses or who?

18 A He didn't say, I didn't ask, and nor did I form
19 conclusions as to who he had in mind.

20 Q And so again it was be cautious with individuals
21 and, I'm sorry, because you don't --

22 A As best I can remember, it was a very, a very
23 succinct warning to the effect be careful.

24 Q And again, I think you said you didn't draw any --
25 I mean, who did you think he was talking about or



1 did you ever form that conclusion?

2 A No.

3 Q Did that strike you as being unusual in your
4 discussion with him?

5 A I think it did in the sense that it has stayed in
6 my mind all of these years.

7 Q What was your purpose in calling Mr. Tallis; do
8 you remember?

9 A An early start-point in the investigation.
10 Probably nothing other than that.

11 Q And was he co-operative with you?

12 A He was professional and answered any questions
13 that I had for him.

14 Q Again, did you get into in detail what was David's
15 defence, what did David tell you, things of that
16 nature?

17 A No.

18 Q And there's a note here about Nichol John. Do you
19 have any recollection of discussing Nichol John's
20 evidence with him?

21 A I have no recollection, but I did make a note
22 to -- I have no recollection, but there's
23 something in my file that suggests that -- whether
24 or not it's my note or it comes from some other
25 source -- suggests that it was the way in which



1 the evidence of Nichol John had come out at trial
2 that was of significance to, that Mr. Justice
3 Tallis felt was significant to the ultimate
4 conviction.

5 Q And I'll take you to that note a bit later. I
6 think that may have been in a transcript of a
7 telephone discussion that you had with, I think it
8 was David Milgaard, Joyce Milgaard and Peter
9 Carlyle-Gordge, and is that something that you
10 recall seeing in a file that you've looked at
11 recently?

12 A Yes.

13 Q As opposed to a memory of him telling you that; is
14 that right?

15 A Correct.

16 Q Then go to 331967, and again this is all December
17 30, 1980 and it's just a reference to Milgaard and
18 Truscott, and then again reviewing 617, the code,
19 Supreme Court Act, *R vs Coffin*, and I think you
20 told us earlier that that's what you felt was part
21 of your instructions, to look at an application?

22 A Yes.

23 Q And I'll just quickly call them up on the screen,
24 we don't need to go through them, but they are
25 from your file, 332012, and this is the reference



1 from the Supreme Court Act, and I'm assuming
2 that's your underlining. If we can just go to the
3 next page, again dealing with references to the
4 Court. The next page, and the next page, there's
5 the *Truscott* case, and I think the next page,
6 please, and 617 of the code, so again it would
7 appear from your file, sir, that you had done some
8 research or review of these issues; is that a fair
9 assumption?

10 A It is.

11 Q If we can then go to 331972 and if we can just
12 call that up. This is December 31, '80 and you
13 recall the note I showed you about Chris O'Brien
14 and Deputy Chief Corey's letter indicating a call
15 from Chris O'Brien on December 30th. It looks as
16 though December 31 you phoned the Deputy Chief of
17 Police, he says:

18 "- he will not authorize release of info
19 - police chief will be back Mon Jan 5
20 - I am to contact him."

21 So again, fair to say that you would have
22 followed up with the deputy chief on December 31
23 and been told to deal with the chief on the 5th;
24 is that right?

25 A Yes.



1 Q Did you know Chief Gibbon at the time or Deputy
2 Chief Corey, were you familiar with these people?

3 A I don't think so.

4 Q Had you dealt with senior police officers before
5 in your capacity as a lawyer?

6 A Not to my recollection.

7 Q Then go to 331966, again I just want to identify
8 this, this is January 2nd, 1980:

9 "3/4 hr. office. Chris O'Brien &
10 Susan."

11 Who I presume is Susan Martineau, and information
12 about Albert Cadrain, where he lives, trial
13 transcript. Do you have any recollection of
14 meeting with Chris O'Brien and Susan in your
15 office?

16 A No.

17 Q Can we take it from this note that you likely
18 would have met with Chris O'Brien and Susan?

19 A I believe that I did.

20 Q Then if we can go to 331965, this is January 5,
21 '81, and this looks to be a call with Chief
22 Gibbon. I presume where it's got 10 minutes, that
23 would be the time of the call; is that right?

24 A Yes.

25 Q It says:



1 "He will not release info. - nor
2 authorize his officers to discuss the
3 case unless we give him some reason for
4 wanting to do so.

5 - suggests we go thru' A.G."

6 I'm assuming that's the Attorney General?

7 A Yes.

8 Q And do you recall anything else from that
9 discussion with Chief Gibbon other than what's
10 noted here?

11 A No.

12 Q And again it appears here, and we'll see some
13 letters later on, that that seemed to be the
14 response from the police, is to contact the
15 Attorney General's office?

16 A It was.

17 Q And did you have any concerns with that direction
18 or with that response?

19 A I think it fair to say that it was not the
20 response that I was hoping for. I don't believe
21 that I was, that I was taken aback by the
22 response, or felt as though there was something
23 unreasonable in it at that point because I still
24 had another direction in which I might turn, and
25 that was turn to the AG, speak with Bobs Caldwell,



1 that kind of thing.

2 Q And we'll come back to that a bit later. If we
3 could then go to 331 -- well, 331964, January 6,
4 '81, it just looks like Dennis Berezowsky tells
5 you they have copies of trial transcript. 'I can
6 read it there.' Presumably that's at the court
7 house; is that right?

8 A Yes.

9 Q Then 331963, this is January 6, '81, a call with
10 Joyce Milgaard I presume setting up a meeting in
11 January. And then down at the bottom it says:

12 "She gave me full authority to speak to
13 media."

14 Do you recall, Mr. Young, what role the media
15 were playing at this time or what this might have
16 been referring to?

17 A No, I don't.

18 Q If we can go to 331962, it's the same date, it
19 looks like there was a call from someone at CBC
20 Winnipeg where you've got a note 'called'. Do you
21 have any recollection what that might have related
22 to?

23 A None.

24 Q 331961, and this is the January 6, 1981 letter
25 from John Gibbon back to you and they talk about



1 the, your inquiries and the inquiries from Chris
2 O'Brien and to interview police officers and to
3 have access to the complete file.

4 "I am sorry to say that I cannot agree
5 to such a request."

6 And if we can just scroll down, it says:

7 "You will recall that I asked you
8 yesterday during our conversation
9 whether this case was going to be
10 re-opened or perhaps more specifically
11 what the actual reason for wanting to
12 have access to our file and to interview
13 those officers involved in the
14 investigation is and you could not
15 supply that."

16 Again, let me just pause there. I think there's
17 a subsequent letter, Mr. Young, where you advised
18 the police that you are looking at reopening the
19 case. Do you recall whether that might have been
20 something you gave to Mr. Gibbon on the first
21 call?

22 A I don't remember whether I gave it to him on the
23 first call, but I have a recollection of having a
24 concern that he had misunderstood where we were
25 at. I wanted to make it absolutely clear to him



1 that we -- that I, I think I have to say, I have
2 to say me personally at that particular point, had
3 no reason to suggest that his department had done
4 anything wrong and wanted to make it clear to him
5 that we were simply looking at the matter, I
6 didn't want him to be defensive about it and to
7 refuse me access to his officers or to his file
8 material by reason of an overly defensive position
9 if he thought that I was accusing his department
10 of wrongdoing, and I wasn't doing that at that
11 point.

12 Q And do you know what Chris O'Brien might have said
13 to the police in his attempts to get the files, do
14 you have any recollection of that from --

15 A No. No, none.

16 Q And then it says:

17 "If there is some justification for
18 re-examining this conviction I feel that
19 the reasons for that must be presented
20 to the Attorney General's Department and
21 if necessary we will certainly be
22 prepared to discuss our file with a
23 representative of the Attorney General's
24 Department and, of course, have our
25 members interviewed by a representative



1 of the Attorney General's Department.
2 If the Attorney General sees fit to
3 acquaint you with the information he has
4 at his disposal, then I would have no
5 objection to that. In the meantime, I
6 can only advise you that I am not
7 prepared to have our file made available
8 to yourself or members of the Milgard
9 family, nor am I prepared to have the
10 members involved in the investigation
11 available for interviewing."

12 And again, we touched on this just a bit earlier
13 with the telephone note. What was your reaction
14 to this letter, Mr. Young?

15 A Again, it wasn't the answer that I was looking
16 for, but I was not alarmed because I still had
17 other avenues through which I might approach the
18 issue.

19 Q And can you tell us again what you could have or
20 would have done?

21 A Well, certainly talking to Bobs Caldwell would
22 have been, I hope was the next step within reason
23 in this regard.

24 Q And is that something again that you did or would
25 have done?



1 A I talked to Bobs Caldwell, yes.

2 Q Okay. And as far as accessing the police file?

3 A I don't believe that I asked Mr. Caldwell to get
4 access to the police file for me.

5 Q I'm just -- sorry, I think you said that you were
6 not overly alarmed about this response because you
7 had other avenues and this letter deals with a
8 request to look at the police file. I'm just
9 trying to find out, did you think you could get --
10 did you think you could eventually get the police
11 file if you persisted?

12 A I assumed that if I was to get the police file, I
13 would have to persist and I would have to do it
14 through the Attorney General's Department.

15 Q I see. And did you in fact follow up on those
16 steps?

17 A To a limited degree only in that I did speak with
18 Bobs Caldwell, but I have no recollection as to
19 whether or not I raised access to the police file
20 with Mr. Caldwell. I think that it seems likely
21 that I would have gotten to that point at some
22 stage. I don't think I did get to that point
23 before I -- before Mrs. Milgaard changed lawyers.

24 Q And had -- so did the change of -- let's go on
25 this basis, if there had not been a change of



1 lawyers and you continued to act, what further
2 steps would you have taken as far as getting
3 access to the police file?

4 A For the moment, I can't think of anything that I
5 would have done other than go through Bobs
6 Caldwell.

7 Q And asked for him to get access to the police
8 file?

9 A Yes. That is the only thing I can think of, for
10 the moment, that I might have pursued.

11 Q And again, you had made a comment earlier about --
12 and, again, there's another letter when you follow
13 up with Chief Gibbon -- about that you were not
14 alleging, at that time, any wrongdoing by the
15 police. Do you recall having a sense at the time
16 that the police were defensive in their dealings
17 with you or had an impression that someone was
18 maybe suggesting wrongdoing on their part?

19 A No, no I didn't, but I definitely -- I didn't get
20 the sense -- I did not see Chief Gibbon's response
21 to me as being a true reflection of what I had
22 tried to communicate to him during the course of
23 my initial call to him, and my letter was to
24 clarify that.

25 Q And maybe we can just call up 331953. And this is



1 your letter of January 12th, and follow-up, and I
2 think what you say -- you acknowledge his letter.

3 You say:

4 "In order to insure that there is no
5 misunderstanding as to the approach of
6 myself and the Milgaard family with
7 respect to our wish to speak with one or
8 more of the police officers involved in
9 the Milgaard investigation, I wish to
10 indicate that the reason for same is
11 that it is hoped that information can be
12 obtained that might ultimately lead to
13 the exoneration of Mr. Milgaard."

14 And, again, you go on to give -- ask for
15 assistance on contacting three witnesses. And
16 again this paragraph, the second paragraph that I
17 read then, does that capture what you had tried
18 to communicate to Chief Gibbon?

19 A Yes, it is, and my recollection is that it was in
20 direct response to his suggestion in his letter to
21 me that we may have something, and I wanted to
22 make it clear to him in this letter that we
23 didn't, we're looking.

24 Q I see. And what was the purpose in getting the
25 police file, what were you looking -- what were



1 you going to look for in there?

2 A Inconsistencies. We were going to do the
3 detective work, to the extent that we could for
4 ourselves, to see whether or not the prosecution
5 had done its job properly.

6 Q Now if we can go to 331960, and I'll come back to
7 this letter in a moment. And is this a telephone
8 note, are you able to tell us, or is this just an
9 attendance?

10 A I think this is a record of my attendance at the
11 courthouse.

12 Q And the trial transcript; do you know where that
13 was located at the courthouse?

14 A No.

15 Q And again, just for the record, 331947. This is a
16 letter from Mrs. Milgaard to you and it talks
17 about, it says:

18 "I hope it has been possible for you to
19 spend some time going over the
20 transcripts so that it will be possible
21 for me to see you on January 16th."

22 So I take it one of your tasks was to go through
23 the transcript and look for things that might
24 help David Milgaard?

25 A I read the transcript.



1 Q And do you have any recollection, Mr. Young, after
2 having read the transcript, what your thoughts
3 were as far as whether there were any errors that
4 jumped out, or any areas where you thought could
5 be pursued on Mr. Milgaard's behalf, or what you
6 generally thought about the case against Mr.
7 Milgaard and his prospects for moving to set aside
8 the conviction?

9 A I didn't find anything in the transcript that led
10 me to conclude that, on the basis of that alone,
11 we could succeed in having the matter set aside.
12 I found the matter sufficiently complex to cause
13 me to believe that one had to dig very deeply into
14 the matter before drawing any conclusions.

15 Q And did you at the time, as counsel, at some point
16 form any impressions about Mr. Milgaard's
17 responsibility for the crime, or his guilt, or his
18 innocence?

19 A I don't think that I did. I may have expressed a
20 certain measure of hope, I suppose, for
21 Mrs. Milgaard, but at no stage in my own
22 involvement in the matter did I reach the
23 conclusion that more likely than not David was
24 innocent. I reserved, I continued to reserve my
25 judgement with respect to it. It wasn't



1 necessary, perhaps, for me to form judgement at
2 that particular point, but I don't believe that I
3 felt capable of judging the matter on the
4 information that I had available to me.

5 Q If we can go to 331958, please. And this is a
6 January 9, '81 attendance at the courthouse, it
7 looks like you ordered the transcript, the
8 diagram, and a copy of the statement given by
9 Nichol John to the police; is that right?

10 A Yes.

11 Q And that statement, by the way, was an exhibit at
12 the trial, and so I -- do you think that came from
13 the Court file, or do you recall?

14 A I have no recollection, but it does appear to me
15 to be so.

16 Q And then if we can go to 331956. This is a
17 telephone note of January 12, '81 that -- would
18 this be that Chief Gibbon called, you called him
19 back, and gave him these names?

20 A I think so.

21 Q And it says:

22 "I am to confirm in writing - he will
23 inquire + advise".

24 And then, I think, if we can go back to 331953.

25 And so, again, I think we touched on this second



1 full paragraph; you also asked them to get:

2 "... the assistance of the ... Police in
3 locating ... individuals:

4 Ronald ... Wilson;

5 Nichol John;

6 Albert ... Cadrain.

7 It is possible that the family will want
8 to try to speak to other individuals
9 involved in the investigative and trial
10 process, however for the time being I
11 simply wish to ask for the assistance of
12 the police with respect to locating the
13 three people mentioned above."

14 And then the next page, and then I think you set
15 out how these three were involved in the case?

16 A Correct.

17 Q And would the request at this time, Mr. Young, be
18 "lookit, help us find where these three people are
19 so we can go talk to them"; is that what you were
20 after?

21 A Yes.

22 Q And had you considered getting a private
23 investigator or a tracing service or someone else
24 to do the locate, or what prompted you to ask the
25 police to do that?



1 A Probably the, I believe it would be the cheapest
2 and most direct method of dealing with it from our
3 perspective. We did consider, I believe that I
4 asked Joyce whether or not she wanted me to hire
5 someone to look for them, and I have no
6 recollection of getting instructions to do so.

7 Q Was there any desire on your part, Mr. Young, to
8 have the police involved or be aware that you
9 would be talking to these witnesses?

10 A No.

11 Q Or was it simply an assistance in locating?

12 A I was looking for as much help as I could get from
13 them.

14 Q But again, and maybe let me rephrase it, did you
15 -- were you looking to have your interviews of
16 these witnesses to be done sort of via the police,
17 in other words so that in that situation, compared
18 to finding them on your own so the police don't
19 know and then having them go to the police; was
20 that an issue in your mind?

21 A No, no, we just wanted to have their help in
22 locating them.

23 Q Okay. If we can then go to 331948, again just a
24 note of January 12th, and again it looks as though
25 this is a day spent at the courthouse reviewing



1 the transcript; is that fair, is that correct?

2 A It's possible that this is a note, a to-do note to
3 myself suggesting that that is what I want to do.

4 Q Okay. I'm sorry, I thought this might be times
5 that you were -- and it says "read including to
6 page 662", and I don't know if anything flows from
7 that?

8 A I think I'm just reading the transcripts there.

9 Q Then if we can go to 213139. And this is the
10 letter from Joyce Milgaard to Jim and Jackie, I'm
11 not sure who they are, but it's January 15th,
12 1981. So this would be, I think, right around the
13 time you are reviewing transcripts, and there is a
14 comment here, it talks about Mr. and Mrs.
15 Carlyle-Gordge and saying:

16 "They have agreed to work on our case
17 providing it can be done without anyone
18 knowing about their connection with it
19 at the start. They feel they would be
20 greatly hampered in their work if the
21 police knew what they were up to. I
22 have naturally told Mr. Young about it,
23 in fact, he has forwarded the
24 transcripts to me and I am having them
25 recopied ...",



1 etcetera. And, just on that point, what was your
2 understanding of the role that Mr. Peter
3 Carlyle-Gordge was playing in that matter?

4 A Well, in many respects I thought that he was doing
5 the same as what I was doing with respect to
6 factual investigation, come up with information
7 that might lead to the Minister of Justice
8 directing the matter be re-opened.

9 Q And did you understand him to be working on behalf
10 of Joyce Milgaard --

11 A Yes.

12 Q -- and David Milgaard?

13 A Yes, I did, in one sense, yes, but on the other
14 hand I never ever got the sense that he was doing
15 it because he was doing it for Joyce. I mean he
16 may well have been doing it for himself, you know,
17 he felt it was the right thing to do and therefore
18 he was doing it.

19 Q Yeah, no, and when I said "on behalf of" maybe the
20 question was as part of the investigating team, so
21 to speak; is that how you viewed him?

22 A Yes.

23 Q Were you aware that he was a writer as well?

24 A Yes I was.

25 Q And did you have any understanding of him writing



1 about this subject matter or --

2 A I believe that I did assume that he was doing it
3 because it might provide him with something to
4 write about.

5 Q And then there is a comment here -- no, if we can
6 go back, sorry -- and this is a reference to you.
7 Mrs. Milgaard writes:

8 "He said that he had briefly gone
9 through parts of them ...",
10 and I think those are the transcripts or the
11 interviews:

12 "... and I asked him on what he had
13 read, if he had been on the jury, what
14 would have been his thoughts on David's
15 guilt. He said he would have had
16 serious doubts, so that has given me
17 hope."

18 And, again, is that consistent with what you told
19 us earlier about what your thoughts were,
20 Mr. Young? Are you able to comment on that; did
21 you reach the conclusion as stated here?

22 A I don't think that I did, but it's entirely
23 possible that I did try to give Joyce some hope
24 with respect to the matter. It's -- it would be
25 unusual for me to overstate it to someone such as



1 Joyce in these circumstances but, nevertheless, it
2 would not be unusual for me to try to give her
3 some hope if I felt that there was any possibility
4 of there being some.

5 Q Then if we with go to 331989. And this is just a
6 document signed by David Milgaard authorizing you
7 to have access to his files, and I presume this
8 was what you needed to access Mr. Tallis' file; is
9 that right?

10 A I felt so.

11 Q And then 331944. This is January 21, '81, it
12 looks as though there is a call with Maureen
13 Milgaard, and talks here about:

14 "Mr. ... Carlyle-Gordge - reporter -
15 McLean's - wants to have a conference
16 call - encourage David that efforts are
17 being made to help".

18 And then the next page -- actually no, I'm sorry,
19 we can go to 331942. This is your note of
20 January 22, '80:

21 "1/2 hour - conference call - David
22 Milgaard, Joyce Milgaard - Peter
23 Carlyle-Gordge".

24 Now did you -- do you recall that conversation at
25 least generally?



1 A I have a recollection of such a conversation, yes.

2 Q And was it a conference call or --

3 A Yes, yes it was, in the sense that there were a
4 number of parties to the call.

5 Q And were you with anybody when the call was taken
6 or do you know where everybody was when the call
7 was set up?

8 A No, I was alone.

9 Q Yeah.

10 COMMISSIONER MacCALLUM: I suppose that
11 means '81, does it?

12 BY MR. HODSON:

13 Q Yes, it was '81 -- no, that was 19 -- that should
14 be '81, would that be correct, that would be a --

15 A I think so.

16 Q Yeah. If we can call up 155260. And this
17 appears, I believe this to be an edited transcript
18 of the conference call, if we can just call out at
19 the top. It's got:

20 "David, Joyce, Peter, L for Lawyer,
21 Young -- Jan 22/81".

22 And again, I've shown you this transcript
23 Mr. Young, were you aware that the call was being
24 taped at the time?

25 A I don't think so.



1 Q And, again, you have had a chance to at least go
2 through this transcript recently; is that fair?

3 A Yes.

4 Q And do you have any reason to dispute -- and,
5 again, I think in fairness there's some editing as
6 we see at the top -- but again, from what's in
7 this transcript, does anything jump out as being
8 something that is attributed to you or you may not
9 have said?

10 A I have no reason to think that this transcript is
11 inaccurate.

12 Q And just a couple of points that come out, and
13 there's just a discussion here that -- about, I
14 think Joyce is talking to David about what might
15 be on his prison file about him being a
16 schizophrenic, and can't leave that on the file.
17 And then if we can just scroll down a bit, and
18 Mrs. Milgaard appears then to ask you if you can:

19 "... do this for David ..."

20 and get some:

21 "... access to that file so he can read
22 it himself ...",

23 etcetera, and we'll see later in your file where
24 you write a number of letters to some health care
25 providers to get reports; is that right?



1 A Yes it is.

2 Q And would it be fair to assume that that came as a
3 result of this call and that you were asked to get
4 that information because of concerns that either
5 Joyce or David Milgaard had about that information
6 being on his file?

7 A I think it is fair.

8 Q And then if we can go to the next page, I just
9 want to go through parts of this, because it
10 involves -- I think from the transcript it looks
11 like Peter Carlyle-Gordge asked a number of
12 questions of David Milgaard, is that right, about
13 the events of January 31, 1969; is that correct?

14 A It is.

15 Q And at this time you would have read the
16 transcript or parts of the transcript; is that
17 fair?

18 A Yes.

19 Q And had some, at least, general understanding of
20 the evidence against Mr. Milgaard?

21 A I did.

22 Q If we can go to 155263. Do you have a
23 recollection of there being evidence at the trial
24 about an incident in a motel room where two
25 witnesses at the trial said that David Milgaard,



1 for lack of a better word, reenacted the crime and
2 made some incriminating remarks; do you recall
3 that being part of the evidence in the case?

4 A I do.

5 Q And, here, this is -- and Mrs. Milgaard says:

6 "David, in that motel, do you recall
7 doing that or not? Becuz it said that
8 you were under the influence of drugs at
9 that time."

10 David says:

11 "I remember being high in the hotel
12 room, but I don't remember those people
13 showing up in the hotel room."

14 Mrs. Milgaard says:

15 "You see, they didn't have either of
16 those girls on the stand."

17 And David says:

18 "Yeah, one girl's name which you
19 probably don't have is Judy Frank.",
20 it probably should be Ute Frank. and

21 Mrs. Milgaard says:

22 "We've got that. We're going to follow
23 it up."

24 And do you recall that being part of the case,
25 Mr. Young, about this motel room reenactment or



1 this evidence?

2 A Nothing other than what I read in the transcript.

3 Q And then, if we can go to the next page, and then
4 Mr. Carlyle-Gordge is asking about the woman that
5 was asked for directions. And I take it, sir, you
6 would have been aware of the evidence or the Crown
7 theory that the Wilson vehicle stopped to ask a
8 woman for directions and shortly after got stuck,
9 and I think the Crown theory was that the woman
10 asked for directions was the woman -- was Gail
11 Miller or likely Gail Miller; do you recall that
12 being, at least generally, part of the Crown's
13 case?

14 A I believe I do.

15 Q And then Mr. Carlyle-Gordge asks:

16 "Other than what you have said to your
17 mother, can you recall anything else
18 about the woman you talked to? asking
19 directions?"

20 And David says:

21 "Oh, just that it was an older woman,
22 OK. I think it was --",
23 question:

24 "How old?",

25 David:



1 "-- it was like this. We turned around
2 alright but the tires were spinning on
3 the car. It was very old tires on the
4 car, and I'm not sure if we went up
5 there to ask her directions. The idea
6 was to turn around, and I'll be honest
7 with you. The idea was to look her over
8 and see if we could possibly grab her
9 purse, you know. Cuz we were short of
10 funds at the time. But as we turned
11 around, I'm not sure whether we asked
12 her for directions or whether we just
13 continued turning back again around the
14 centre of the boulevard and then going
15 to the garage."

16 And then:

17 "We had some soup in the garage ... a
18 little package of soup?"

19 And, again, do you recall, Mr. Young, at the time
20 you were looking at the transcript and looking at
21 the evidence, trying to find some
22 inconsistencies, did this -- do you recall this
23 being discussed any further or what, if anything,
24 you did with this information from Mr. Milgaard?

25 A I have no recollection of doing anything with it.



1 Q And then 155268. And there is a discussion here
2 where I think David Milgaard asks you some
3 questions, and it says:

4 "(turns to Mr. Young, the lawyer)",
5 but I'm assuming that that was an editorial, he
6 was not -- I mean he was in prison at the time,
7 you weren't there; is that fair?

8 A Yes?

9 Q Correct? And this is what's attributed to David:

10 "As a lawyer, Mr. Young, you realize the
11 protections a person has, especially in
12 a non capital murder case. From this
13 perspective, either as Defence or as
14 Prosecution, for a person in my
15 situation, excepting the fact that I'm
16 not guilty, what would have to be done
17 or in what areas -- like say for
18 instance like a police chief evidencing
19 -- it wouldn't be dealt with by a police
20 chief, it wouldn't be dealt with by a
21 prosecutor -- possibly you could look at
22 it from that perspective and figure out
23 areas that would be of our concern that
24 may be areas of our investigation."

25 And then you say:



1 "I think that I follow you David."

2 Peter says:

3 "What we need is new evidence. Is that
4 not the 1st thing?"

5 David says:

6 "Yeah. I'm not even sure exactly what
7 would be called for in the Supreme Court
8 of Canada now, after an appeal. It has
9 to be new evidence; it has to be --- law
10 evidence."

11 And then Mrs. Milgaard says:

12 "Mr. Y told me it would have to be new
13 evidence. Say we went to Nichol and she
14 changed or admitted to being under a
15 great deal of pressure, we could show
16 something over that period of time.

17 There may be something that way."

18 And again generally, Mr. Young, would that have
19 been what your advice would have been to Joyce
20 and David Milgaard about what might be needed for
21 a reference?

22 A Yes.

23 Q Then if we can go to 155270. And, again, this
24 follows a discussion about Nichol John's evidence,
25 and then again Mr. Carlyle-Gordge says:



1 "I checked the trial transcript and she
2 retracted the written statement, and I
3 don't think there's anything too serious
4 against you in what she did admit. The
5 problem was that the Crown managed to
6 get the statement in anyway."

7 And then David Milgaard says:

8 "I can barely hear you. The statement
9 was probably one of the most damaging
10 things against me becuz ---- the jury.
11 Her reaction to the statement as it was
12 read to the jury, in itself, was more
13 detrimental than the statement. He said
14 'Is this true? Is this true?' and she
15 started crying, and whatnot, and she
16 said 'It's true, it's true.'

17 And then Peter says:

18 "I think I can confirm what David is
19 saying, becuz I spoke ...",

20 and I'm sorry, I think this is you, Mr. Young:

21 "I think I can confirm what David is
22 saying, becuz I spoke to Cal Tallis and
23 he indicated to me that that was his
24 feeling about what Nichol had to say:
25 it was more the manner in which it came



1 out."

2 And then, if I can just pause there, is that the
3 note that you had commented on earlier, Mr.
4 Young, as something that you felt Mr. Tallis had
5 said to you?

6 A Yes.

7 Q And, again, is that by memory or by the fact that
8 it's in this transcript that you are saying you
9 think that that happened?

10 A The fact that it's in the transcript.

11 Q And then David Milgaard says:

12 "About Cal Tallis: the fact the I
13 wanted to take the stand and he
14 suggested I not take the stand; he asked
15 me to sign a document saying I didn't
16 want to take the stand, and many other
17 things, like especially when I asked
18 about the garage, you know if it was
19 possible to have someone check it, and
20 if it was possible for this or that, ..
21 I'm not saying -- I guess I am saying I
22 think he was inadequate in what he was
23 doing. Is there anything beyond that,
24 you know -- anything unethical? I'm
25 reaching anywhere, anyhow, to somehow



1 prove that I'm not guilty."

2 And then you say:

3 "Why didn't he want you to take the
4 stand, David?"

5 David says:

6 "He felt that it was all --- The
7 different stories that had come out of
8 Wilson, the diff. stories that'd come
9 out of Nichol John and all the rest of
10 it -- He felt that was in itself
11 sufficient enough that if I got up and
12 actually told him what what I told him
13 was the truth, that it'd probably go
14 against me. That was his decision
15 there."

16 You say:

17 "You can't necessarily be critical of
18 that, David."

19 And he says:

20 "I can't?"

21 And you say:

22 "Any good defence counsel takes the
23 position that there's very little to be
24 gained by having the defendant on the
25 stand. There is a theory that maintains



1 that in principle."

2 And then David says:

3 "OK, that --",

4 I'm not sure:

5 "-- be rationalized by the majority of
6 the people being defended are possibly
7 guilty?"

8 I think you -- and then if we can just scroll
9 down. That part that I read, Mr. Young, again,
10 do you have any recollection of that generally
11 being discussed with Mr. Milgaard?

12 A Well, yes I do. I question whether or not I would
13 have said "any good defence counsel", it strikes
14 me I might have said "many --"

15 Q "Many?" Okay.

16 A "-- good defence counsel".

17 Q And again, what's reflected there, is that
18 something you either remember saying, or you think
19 you would have said, or likely said?

20 A I believe that I have a recollection of this. I
21 could never have restated the wording, but I do
22 believe that I have a recollection of this portion
23 of the conversation.

24 Q And do you have a recollection of David Milgaard
25 expressing concerns about not testifying himself



1 and about Mr. Tallis' representation of him?

2 A As indicated in the transcript, yes.

3 Q And if you can scroll down, 155271. Mrs. Milgaard
4 says, I think to you:

5 "Have you had any luck with the Police
6 Dept. yet, Gary? regarding Nichol or
7 the others?"

8 You say:

9 "I haven't heard any yet, Joyce. I
10 certainly can push in that direction,
11 and am. I don't have any negative
12 response from them, so they still may
13 help us ... I'll quickly phone the
14 police chief in Sask. as soon as I get
15 off the conference call & see if he's
16 reached a decision as to what he will
17 do."

18 And again, at this time, you would have already
19 received the one letter from him indicating that
20 they wouldn't give you access unless you went
21 through the Attorney General; is that correct?

22 A Yes.

23 Q And, again, is that -- you agree with what's
24 attributed to here, that -- and let me rephrase
25 that. Did you view that as a negative response



1 from the police? I'm not asking that very well,
2 let me try again.

3 A That's all right. In any event, you go ahead if
4 you care to, but I just want to take a second to
5 read this.

6 Q Sure.

7 A I believe that what I am referencing here is that
8 I didn't have a negative response to our request
9 to have them provide their assistance in locating
10 --

11 Q Right.

12 A -- the three witnesses.

13 Q Yeah, and that was my next question. They had --
14 you had asked them to find the three and you
15 hadn't heard back on that; is that right?

16 A I'd have to double-check the timing on the letter,
17 but I suspect that that is so.

18 Q Based on your notes I think I can tell you, Mr.
19 Young, that you hadn't yet -- I don't think you
20 had yet heard back from the police regarding the
21 locating.

22 I think this is probably an
23 appropriate spot to break, Mr. Commissioner.

24 COMMISSIONER MacCALLUM: Okay.

25 (Adjourned at 11:59 a.m.)



(Reconvened at 1:30 p.m.)

BY MR. HODSON:

Q Good afternoon, Mr. Young. If we could just go back to the transcript of the phone call, 155260, and go to 272, I think we finished off reading your comment, and I think you told us that you were still waiting to hear about witness whereabouts, and there's a comment right at the top here that's attributed to you and I think the question is, David had asked you:

"What was the initial reception by any of the police there in Saskatoon upon your enquiries?"

And you said:

"Well at the lower levels it seemed to be fairly positive. But the police chief himself ultimately put his foot down and said that unless we came up with some valid reason for expecting to find evidence that hasn't already been dealt with, he didn't want his police officers spending time on helping us out."

And I'm wondering if that would reflect what you would have been told by the police at the time,



1 Mr. Young?

2 A I hope so. The only conversation that I have,
3 that I recall having with the police would be
4 conversations with the police chief himself and
5 the other conversation would be with the deputy
6 chief, and it may be that the, that it was at the
7 lower levels I may be referring to the deputy
8 chief and it may be that I felt that I had some
9 support from him for getting the documents by
10 reason of my conversation with him.

11 Q Okay.

12 A But I do not recall. I am reconstructing.

13 Q If we can then go to 331941, just carrying on with
14 the contacting the witnesses, this is January 22,
15 '81, it looks like Chief Gibbon, you talked to
16 him:

17 "He says - Cadrain has been contacted -
18 & he does not want to talk to anyone
19 about Milgaard - he says Milgaard
20 threatened Cadrain - they are still
21 looking for Wilson & John & will not
22 release info. relating to their address
23 unless they are willing."

24 Again, did you have any concerns about that
25 approach being taken by the police?



1 A I wasn't happy with the approach, but as I have
2 suggested earlier, I still had other avenues and
3 did not feel as though this was necessarily going
4 to be fatal to our further investigations.

5 Q If we can then go to 331940, which appears to be a
6 call of the same day with Mrs. Milgaard, and it's
7 reported you write:

8 "- she didn't think it advisable that
9 police contact Nicol John or Wilson."

10 And do you have a recollection of that happening,
11 Mr. Young?

12 A None.

13 Q And can we take it from that that Mrs. Milgaard
14 didn't want the police getting in touch with
15 Wilson or John?

16 A I believe that we can.

17 Q And I think just to assist, and I'll take you to a
18 couple of documents, and we've already seen some.
19 Around this time, I think in fact on January 21,
20 if I'm not mistaken, Mrs. Milgaard actually had
21 interviewed Ron Wilson by phone and contact had
22 already been made with Nichol John; do you recall
23 that, and again the dates you maybe weren't aware
24 of, but do you remember that happening, that Mrs.
25 Milgaard had in fact talked to them?



1 A Yes. At the very least I believe I was aware of
2 her conversations with Mr. Wilson. I am uncertain
3 at this point as to whether I was aware of her
4 conversations with Nichol John.

5 Q And just for the record, we don't need to call
6 them up, but on your file there is, as document
7 331993, a transcript of a telephone call between
8 Joyce Milgaard and Ron Wilson on January 26, 1981
9 and we've heard tapes earlier of discussions that
10 Mrs. Milgaard had prior to that date with George
11 Lapchuk and Mr. Lapchuk agreeing to give
12 assistance to finding Ron Wilson. There's also a
13 second one, 331978, which is an April 15th, '81
14 call between Ron Wilson and Joyce Milgaard, so at
15 this point I think you are telling us that -- in
16 fact, let me call up the next document, 331939, it
17 looks as though this is a note from the next day,
18 and am I correct in this that you had maybe tried
19 to reach Chief Gibbon to tell him you didn't need
20 to find John and Wilson, but wasn't able to reach
21 him in time? I'm speculating on that.

22 A I can't recall.

23 Q If we can go to 331932, and this is a January 23
24 letter from Chief John Gibbon, and again just in
25 the second paragraph, they confirm they've been in



1 contact with Cadrain, Wilson and John and all
2 three of them are most emphatic that they do not
3 want their whereabouts made known to you or to the
4 Milgaard family and he says we will respect those
5 wishes, and then the next paragraph, he says:

6 "As indicated to you previously, I
7 recognize that cases can be re-opened,
8 however, I also recognize that certain
9 procedures should be followed. If the
10 Milgaard family have reasons sufficient
11 to cause a review of this case, we are
12 certainly prepared to co-operate by
13 making our file available to a
14 representative of the Attorney's General
15 Department. We would, of course, point
16 out that the three witnesses you are
17 trying to locate have indicated they do
18 not wish their whereabouts made known,
19 but it would then be up to the
20 representative of the Attorney General
21 to decide whether those people should be
22 interviewed and by whom."

23 And I take it, sir, this is what you talked about
24 earlier this morning about the avenue you were
25 considering in going to a representative of the



1 Attorney General to get access to the police
2 file?

3 A Yes.

4 Q 331937, just a couple of notes here we can go
5 through quickly. This is January 24th, it looks
6 as though there's a call from Mrs. Milgaard with a
7 note, 'May be destroying exhibits in S'toon. She
8 has heard from a source she can't disclose. Like
9 whatever legal steps necessary to preserve them.
10 Will be meeting with ...' you later on, and then
11 I'll maybe just go through these notes and ask you
12 a question, and then a call to the police
13 department, and if we can go to the next page, to
14 actually 936 -- sorry. Yeah, to 936, and, 'Call
15 continued with Chief Corey. Archives at
16 university, they may have a right to some of these
17 exhibits - if they can be found they maybe would
18 claim them,' and then to 331935, just a note that
19 looks like that's a continuation of a call with
20 Corey, 'Unaware of this happening. Doesn't
21 know --' I'm not sure of -- can you read that? Of
22 the -- I think it has something to do with
23 exhibits. And then if you can call up 331938 --

24 A No, I can't read that to answer your specific
25 questions. These four documents are not my notes.



1 Q Oh, they are not your notes?

2 A No, they are not my notes, and the author hasn't
3 signed them, but I believe them to be the notes of
4 Lucille Lamb who was then at that time a junior
5 lawyer in our law firm.

6 Q Okay. Maybe we can just go to a couple of notes
7 here, 'Call to AG department,' I think these all
8 relate to exhibits, and then to 331933, and then
9 this is a note from Mr. Caldwell:

10 "- as far as exhibits are concerned he
11 thinks still intact

12 - doesn't think they can have a new
13 trial or anything - would be interested
14 to know what Mrs. Milgaard proposes to
15 do.

16 Call to Registrar's Office. Denis to
17 call me back."

18 And then 331931, this is a note January 29,
19 Dennis Berezowsky:

20 "Exhibits are still at Ct. House insofar
21 as they are aware."

22 And:

23 "- again asked for a copy of Nichol
24 John's statement & diagram."

25 So it looks like there was some concern that



1 exhibits were destroyed and someone followed up
2 and were advised that no, they were not destroyed
3 and they were intact. Is that a fair reading of
4 those notes?

5 A I believe it to be.

6 Q 331930, and again just for the record, this is a
7 note on January 29, '81 and it looks as though
8 Mrs. Milgaard is advising you that she:

9 "Interviewed in Regina - & obtained
10 tapes. Lapchuk, Melnyk, conflictions in
11 testimony. John went hysterical & left.
12 Debbie Hall says boys in hotel were
13 lying."

14 And would that be information that Mrs. Milgaard
15 would have passed on to you then?

16 A Yes.

17 Q And then 331929, this is just your letter to Mr.
18 Berezowsky saying:

19 "Please do not destroy these exhibits."
20 Is that correct?

21 A Yes.

22 Q Then 331928, this January 30, '81:

23 "Spent with Mrs. M. Peter
24 Carlyle-Gordge at Ct. H. & in my
25 office."



1 Do you recall what at the court house, or what
2 you were looking at and where you were looking at
3 it?

4 A I have no recollection.

5 Q If we can go to 331926, this is a note, February
6 2nd, '81, there's a couple of notes at the top, I
7 think February 1:

8 "Mrs. M phoned - wanted me to look into
9 the following

10 - phoned Ian Buckwold re getting access
11 to their files. He will check with
12 Tallis & advise.

13 - reward money?"

14 And then if you can call out this bottom part, it
15 says:

16 "Caldwell ..."

17 Phone number,

18 "... he says he gave copies of material
19 statements to Tallis - however he is
20 prepared to go over his file with me -
21 but will not release copies to Mrs. M."

22 And pause there. Does that accord with your
23 recollection of your discussion with Mr.
24 Caldwell?

25 A Yes.



1 Q Now, do you have a recollection of looking at Mr.
2 Caldwell's prosecution file?

3 A No, I don't.

4 Q Mr. Caldwell has testified before the Inquiry that
5 he believes that he provided his file to you at
6 the court house in his office for you to look at
7 and he says he has a recollection of that. Are
8 you able to assist us in saying whether you, it's
9 something you may have done and forgot or you
10 didn't do it or you might have done it?

11 A I don't believe that I looked at his file. I
12 don't believe that I reviewed his file. It is
13 theoretically possible that he showed me the file
14 and for one reason or another I didn't review it
15 at that time, but I can't -- I can't reconstruct
16 any reason for me not getting into it if it was
17 made available to me at that given point and I do
18 not believe that I saw, that I reviewed the file
19 based both on my recollection and on my
20 reconstruction of my file material because it
21 would have been sufficiently important I believe
22 that I would have had notes of it had I reviewed
23 the file.

24 Q And if you had not looked at his file, would there
25 be any reason that you did not do so?



1 A No, none that I can identify. Timing might have
2 been a reason, but there was plenty of time for me
3 to follow up on it after the 2nd of February.

4 Q And I'm just wondering, I think you've told us,
5 would this note be accurate, that he made the
6 offer to you to go look at his file?

7 A Yes.

8 Q And again, do you know if there was a reason --
9 let's put aside timing for a moment -- a reason
10 that you would not have gone and looked at his
11 file?

12 A I can't identify any.

13 Q And I think we will see shortly that in about
14 April you were disengaged as counsel and had you
15 not been disengaged, is this something that you
16 would have done?

17 A I believe I would have.

18 Q And then as between February and April of '81, can
19 you think of any reason why you wouldn't have
20 reviewed the file?

21 A No.

22 Q Did you consider what was on Mr. Caldwell's file
23 to be of importance in the work that you were
24 doing?

25 A I would have considered it to be such.



1 Q If we can then go to 331925, just on the -- just
2 before I leave that, I think Mr. Caldwell's
3 evidence was that his office was at the court
4 house and I'm wondering, Mr. Young, do you have a
5 recollection of looking at perhaps the Court file
6 in Mr. Caldwell's office as opposed to his file?

7 A I don't remember being in Mr. Caldwell's office.
8 I do have a recollection of being at the court
9 house and looking for exhibits and transcripts.

10 Q Do you recall seeing Mr. Caldwell while you were
11 at the court house?

12 A No.

13 Q If we can go to -- 331925 is up, this is February
14 2nd, '81, again just a letter to Mr. Buckwold
15 asking to go through Mr. Tallis' file; is that
16 right, and it looks as though you sent the
17 authorization from David Milgaard?

18 A Correct.

19 Q And then 331924, February 2nd, '81, it looks as
20 though Mrs. Milgaard has located Shorty Cadrain,
21 will try to interview him, and then she asks you
22 to get statements given by those who administered
23 lie detector tests, other suspects, etcetera, so I
24 take it that would be a note of a discussion that
25 would record what Mrs. Milgaard told you or asked



1 you to do?

2 A It is.

3 Q 331923, please, and this is a letter back, maybe
4 we'll just take a look, this is the Goldenberg,
5 Taylor, Randall, Buckwold & Halstead, and I
6 believe this would have been the successor firm to
7 Mr. Tallis' firm; is that right?

8 A Yes.

9 Q And then just down at the bottom, Mr. Buckwold
10 says:

11 "While we have no objection to your
12 access to the file on behalf of Mr.
13 Milgaard, I will have to review the file
14 so that internal memorandum may be
15 removed. I hope to be in a position to
16 review the file in the near future."

17 Now, as far as internal memorandum, Mr. Young, at
18 this time, 1981, what was the practice amongst
19 lawyers as far as disclosing files to successor
20 lawyers or to other lawyers?

21 A It wasn't unusual to take lawyers' work product
22 off the file.

23 Q And again, would internal memorandum be considered
24 lawyers' work product in your view?

25 A Yes.



1 Q And so did this surprise you then or cause you any
2 concern, that Mr. Buckwold would be removing
3 internal memorandum from the file he was going to
4 provide you?

5 A It didn't surprise me. I would have preferred to
6 have access to the work product. As it was, I
7 wasn't getting insights into the way in which the
8 matter had been analysed by anyone, I was getting
9 some of the objective, so-called objective
10 information, the transcripts and access to
11 statements and that sort of thing, but not to
12 people's thought processes.

13 Q And I won't go through -- just for the record,
14 Mr. Commissioner, there's a few other notes that
15 are on the file and I'll put Mr. Young's entire
16 file in where there are efforts where Mr. Young, I
17 think you are contacting Mr. Buckwold on a couple
18 of occasions to perhaps prompt him a bit to get
19 the file review done; is that fair?

20 A Fair.

21 Q Then if we can go to 331919, this is March the
22 6th, and it looks as though George Taylor now has
23 the file and will be going through it, perhaps
24 this weekend, and I think the notes show that
25 George Taylor, who was a senior partner at that



1 firm, had picked up the matter and was going to
2 review the file; is that right?

3 A It is.

4 Q And in fact he ended up sending a bill for four
5 hours' worth of work in reviewing the file to you?

6 A He did.

7 Q Go to 331915, and this is a note, March 10th, '81,
8 I'm just trying to find -- just for the record, I
9 don't think your notes indicate when you got the
10 file. Actually, you pick up the file March 11th.
11 I'll take you to a note in a moment from the
12 Goldenberg, Taylor firm, so this is March 10th and
13 it's a discussion I presume with Mrs. Milgaard; is
14 that right?

15 A It is.

16 Q And then just scroll down, it talks about Father
17 Murphy and then just at the bottom, it's got here,
18 'Wilson 2 part statement May 23 ...' I think
19 that's cut off, might be 24, and then you have 'on
20 file'. Is that your writing or do you know what
21 that refers to?

22 A It is my writing I believe and I don't know what
23 it refers to.

24 Q And then just for the record, if we can go to the
25 next page, there's a discussion of some other



1 points, 5 to 10 that I think Mrs. Milgaard asked
2 you some questions about, is that right, was Gail
3 on Avenue O and N, did police interview,
4 Mrs. Cadrain, etcetera. Would that be a fair
5 reading of the notes, that these were questions or
6 things that Mrs. Milgaard was asking you to check
7 on?

8 A Yes.

9 Q And then if I can call up just for the record
10 048569, and this is a document, it's edited
11 transcript of conversations between Gary Young,
12 Mrs. Milgaard and Danchuk. That's an error. I
13 think on this tape that the RCMP typed up there
14 was a Danchuk interview as well, and I don't
15 propose to go through this, and I'm not sure, Mr.
16 Young, did you get a chance to look at this, this
17 transcript?

18 A Yes, I did, and I wondered about the reference to
19 Danchuk.

20 Q That's an error, but I think this is the March
21 10th -- the notes that I just showed you with Mrs.
22 Milgaard on March 10th, if you go through the list
23 of the subject matters in your notes, they
24 correspond almost exactly with the subject matters
25 raised in the phone call and it appears that this



1 is a transcript of the phone call between you and
2 Mrs. Milgaard of March 10th, '81. Is that --

3 A I have no reason to think otherwise.

4 Q And again, were you aware that your call was being
5 taped?

6 A I don't believe so.

7 Q And I don't propose to go through anything in the
8 transcript. If we could go ahead to 331913 just
9 quickly, and again this came up in that previous
10 call, Mrs. Milgaard I think had a suspect by the
11 name of Lalonde in North Battleford and it looks
12 as though she had asked you to make some
13 inquiries. Is that correct?

14 A It is.

15 Q And again, would this be -- I think you told us
16 earlier one of the mandates or one of the items
17 you were looking into was to see if you could find
18 who committed the crime; is that right?

19 A That's correct.

20 Q And then 331911, this is March 11th, it looks as
21 though this is a letter from the law firm,
22 Mr. Buckwold saying you are free to take the file
23 on the strict condition that you return the file
24 intact upon completion of your review. And then
25 if we can go to 331910, this is March 11th, '81,



1 it looks as though:

2 "- picked up file at Goldenberg Taylor

3 - reviewed same."

4 And then statements of, I think that's Ron
5 Wilson, Cadrain, March 2 and 5, and Nichol John,
6 and so I take it, sir, on that day you would have
7 actually picked up the file and reviewed it?

8 A Yes.

9 Q Now, do you have a recollection of what, how big
10 that file was or what was on that file and what
11 wasn't on the file?

12 A No, I have no recollection except -- I have no
13 recollection of what was on it with any kind of
14 precision except to say that there was no work
15 product and I was, it was a very Spartan file.

16 Q And again I want to show you, and I've shown you
17 these prior to you testifying, this Commission has
18 three memorandums prepared by Mr. Tallis and I
19 just want to go through and ask you if you recall
20 seeing these. The first is 153491, this is a
21 memorandum dated June 10th, 1969, I don't propose
22 to go through it, it's a memorandum prepared by
23 Mr. Tallis to the file I think shortly after his
24 retainer, and would this be a work product
25 document in your view, Mr. Young, in what you



1 described?

2 A Yes.

3 Q And do you have a recollection of seeing a
4 document of this nature or this document on the
5 file?

6 A No, I have no recollection, which leads me to the
7 view that it wasn't on the file.

8 Q Okay. And sorry, from that are you telling us
9 that you don't believe it was on the file that you
10 looked at in 1981?

11 A I don't believe it was.

12 Q And again, this would be Mr. Tallis', and just go
13 through parts about it, talking about the Crown's
14 case and his thought process. If you would have
15 seen this document on the file, is this something
16 you think you would have made a note of or a copy
17 of?

18 A I think so.

19 Q And again, from the fact that there's no note on
20 your file, or a copy of this on your file, does
21 that conclude you to think that you didn't see it
22 or it wasn't on the file when you looked at it?

23 A That, along with the fact that with the other
24 things that I've described, my general
25 recollection of the state of the file plus



1 something such as this would, I believe, have
2 stayed in my mind.

3 Q Okay. And just for the record, this is a
4 document, this one I think we obtained from Mr.
5 Wolch. 224933 is a memorandum of August 20th,
6 1969 and it's Mr. Tallis' memorandum about
7 attending the scene, St. Mary's church, and you
8 had a chance to read through these this morning;
9 is that correct, Mr. Young?

10 A Quickly, but yes.

11 Q And again, I don't propose to go through them.
12 This memorandum, again, can you tell us whether
13 you think this was on the file that Mr. Tallis'
14 former law firm provided to you in 1981?

15 A No, I don't think it was, and I would give the
16 same answers for this memorandum as with the
17 previous.

18 Q And, again, this memorandum was provided to the
19 Commission by -- on behalf of Mrs. Milgaard, and
20 048305 is the third memo I showed you. This is a
21 September 8, 1969 memo, and we have seen this
22 document before, it relates to a discussion or a
23 meeting that Mr. Tallis had with Mr. Caldwell.
24 We've only got the first page, scroll down to the
25 bottom, and it kind of ends off there. And,



1 again, you have looked at this memo and do you
2 think this is a memorandum that was on the file
3 when you looked at it in 1981?

4 A No, I don't think so.

5 Q And, again, just you described the file contents
6 as Spartan; do you recall what types of documents
7 were on there, what was on there?

8 A Transcripts, witness statements, that sort of
9 thing.

10 Q If we can go to 331895, and again this is five
11 minutes with Mrs. Milgaard, I'm not sure if that's
12 a phone call or a meeting; are you able to tell
13 us?

14 A Not with certainty, except on the face of the memo
15 it would suggest a personal visit.

16 Q And there is a reference here, and it says:

17 "First pages of statement of Dennis
18 Cadrain",

19 and do you have any recollection as to what that
20 referred to?

21 A None.

22 Q And Dennis Cadrain gave a statement to the police
23 I think on March the 2nd, 1969, he is the brother
24 of Albert Cadrain or was the brother of Albert
25 Cadrain, and that police statement, at least based



1 on the record we have seen a copy of that
2 statement was on the police file, it was on Mr.
3 Caldwell's file, but that statement, being the
4 March 2nd, '69 statement, was not provided to Mr.
5 Tallis, and nor do I believe was it tendered as
6 evidence on -- at the trial and therefore would
7 not have been an exhibit. And I'm wondering, Mr.
8 Young, if you are able to, based on that
9 information that I have provided to you, give us
10 some indication of whether this is referring to
11 the same statement of Dennis Cadrain and, if so,
12 where either you or Mrs. Milgaard might have
13 gotten it from?

14 A I am unable to make any comment of any nature
15 whatsoever with respect to it, I don't remember
16 anything about it.

17 Q Okay. Thank you. Next, if we can go to 331896,
18 which is the second page of these notes, and there
19 is a remark that says, '89 copies, J. Milgaard, 89
20 times 7, 6.23 charge for photocopying done by
21 Joyce herself', and am I correct that she would
22 have been in your office and would have made
23 copies of something that day?

24 A I believe so.

25 Q Are you able to tell us what it was she would have



1 copied?

2 A No, I can't.

3 Q Would it be, presumably, something that you had
4 either on your file or had obtained from someone
5 else?

6 A I believe so, either from the courthouse or from
7 the Goldenberg firm.

8 Q 331992. This is a document -- if we can just get
9 it enlarged -- I think this is located on your
10 file, and it's an April 15th, 1981 letter from
11 Mrs. Milgaard to Nichol Demyen, and I'm just
12 wondering; do you have any recollection, Mr.
13 Young, of what was going on with Nichol Demyen and
14 efforts that Mrs. Milgaard was making to interview
15 her?

16 A No, I have no recollection. I can reconstruct
17 certain events from the file, but no recollection.

18 Q Would it be fair to assume that she would have
19 been keeping you advised of, generally, of what
20 she was doing with Nichol Demyen?

21 A I understood her to be doing that.

22 Q Yeah. And did you have any involvement in any of
23 those steps to either -- other than trying to find
24 her, as far as interviewing her, or was that
25 something being done by Mrs. Milgaard,



1 Mr. Carlyle-Gordge, or others?

2 A Yes, it was being done by them, I don't believe I
3 had any involvement.

4 Q And 331977. And this is a letter from
5 Mrs. Milgaard to you April 20th, '81 and talks
6 again about getting your conclusions on the review
7 of the case law, and then if we can scroll down,
8 there is a reference here to:

9 "You will note the dates, ...",
10 and it has a clipping attached:

11 "... and the fact that Mr. Mahar was
12 seeing a priest at St. Mary's Rectory in
13 August, the paring knife ...",
14 etcetera.

15 "We noticed that a member of your firm
16 represented him. Perhaps you could
17 check this out with him."

18 And I think the newspaper clipping is 331191, if
19 we could maybe just have that brought up for a
20 moment. Is that the full page, I say is that the
21 -- oh, okay, it looks like it's cut off. Maybe
22 if we could just call up this part. Now I think
23 you said this was, you thought it was prosecuted
24 by --

25 A I thought it was prosecuted by Mr. Sherstobitoff



1 but --

2 Q I think actually, here, it says defence counsel?

3 A It does suggest, indeed, I'm undoubtedly mistaken.

4 Q Okay. So again, if we could just go back to
5 331977, and do you have any recollection --

6 there's some notes here about some follow-up that
7 you would have had about -- and I'll actually
8 refer you to a letter in a moment, to your letter,
9 but do you have a recollection of making
10 inquiries, appropriate inquiries about Mr. Mahar
11 and whether he might be a suspect?

12 A I did speak with Nick about it, Nick Sherstobitoff
13 about it, and my recollection is that it appeared
14 in a dead end.

15 Q And if we could just go to the bottom, it looks as
16 though Mrs. Milgaard has sent you a copy of the
17 latest call to Ron Wilson, and there is a
18 transcript on your file that I have already
19 identified, and I take it that's when she sent you
20 that information?

21 A I think so.

22 Q Then if we can go to 331877. This would be your
23 reporting letter, I presume, to Mrs. Milgaard
24 after you had reviewed the law on the Section 617?

25 A I think so.



1 Q And, again, I don't want to dwell on this but at
2 the bottom you express your view that:

3 "In order to satisfy the Minister of
4 Justice that a reference should be
5 directed, it would be necessary to
6 submit evidence of a very strong nature
7 pointing in the direction of the
8 innocence of your son. The evidence
9 would have to be submitted in Affidavit
10 form."

11 And I take it that that's something you would
12 have concluded based on your review of the law at
13 the time?

14 A Yes.

15 Q Go to the next page. I don't propose to go
16 through it, but there is the report, the
17 discussion on the *Maher* case with
18 Mr. Sherstobitoff, and you indicate that while
19 some of the material is privileged, certain
20 information is public, and I think you ended up
21 concluding that this was a dead end; is that
22 right?

23 A That was my recollection.

24 Q And then if we can go to 331857, and this is the
25 letter of June 25, 1981 from Mrs. Milgaard to you,



1 and explaining that Howard Shannon became
2 involved, and Tony Merchant was becoming involved,
3 and would it be fair to say that at this point
4 your involvement in the file ended?

5 A Yes.

6 Q Thank you, Mr. Young, those are all my questions.

7 I expect that counsel may have
8 -- may or may not have questions. No? No?

9 MR. WOLCH: Unless somebody else has. You
10 can ask, but --

11 MR. HODSON: Alex, do you have --

12 MR. PRINGLE: I have one question.

13 MR. HODSON: One, one, and maybe. Go
14 ahead.

15 BY MS. KNOX:

16 Q Mr. Young, I'm Catherine Knox, I introduced myself
17 to you this morning and I believe you know that
18 I -- that my office acts as counsel for Mr.
19 Caldwell.

20 Am I correct in understanding
21 your evidence that when you contacted Mr.
22 Caldwell, he was quite cooperative with you in the
23 sense that he extended, your file indicates he
24 extended you an offer to look at his file if you
25 wished?



1 A I have no recollection of him being anything other
2 than what I will refer to as professional about
3 the matter.

4 Q Okay. And in --

5 A That would include cooperation, at least to the
6 point that I felt was required in order to allow
7 me to see him as a professional, responding in a
8 professional way.

9 Q And I take it, given that that's your enduring
10 impression to this day, as you reconstruct your
11 involvement in the file there's nothing that would
12 cause you to think that he ever did anything that
13 would be other than professional in relation to
14 you and anything you may have sought on that file?

15 A I don't want to comment on anything other than my
16 direct contact with him --

17 Q Uh-huh.

18 A -- because I don't feel as though I've been part
19 of the debate, to tell you the truth, --

20 Q Okay.

21 A -- but I've got no reason to -- I found him
22 professional in my dealings with him.

23 Q Okay. And Mr. Hodson has indicated to you that it
24 is his evidence that he remembers you coming to
25 his office, you say you don't remember going to



1 his office and looking at the file, but can you
2 say that in fact you didn't go there and, at some
3 point in time, peruse his file to any degree?

4 A I'm reasonably certain that I didn't peruse his
5 file.

6 Q Okay. Thank you.

7 BY MR. PRINGLE:

8 Q Mr. Young, my name is Alex Pringle, I represent
9 Calvin Tallis.

10 And I'd just like you to, just
11 to be thorough here, look at a document 331838.
12 And just quickly look at that, and then take a
13 look at the next document, 331839. And then
14 finally the -- have you had a chance to see that?

15 A Yes, I have, --

16 Q Yeah.

17 A -- and I just want to check for a date --

18 Q Yeah?

19 A -- so I can place it into reference. I may have
20 to go back to the earlier document, I don't -- oh
21 yes, I see the date, 1996.

22 Q And then finally 331840.

23 A I see them.

24 Q This is another account, and this last page
25 indicates photocopy charges, the account



1 indicates:

2 "Photocopy charges, material from the
3 Milgaard file";

4 do you have anything -- idea what that's about?

5 A I have an idea without being certain about it, and
6 that is that it is likely to be the photocopy
7 charges for the same file material as I have
8 provided to this Inquiry --

9 Q Okay.

10 A -- or portions thereof if not. I'm sorry, I do
11 have a recollection now, if I may, and I think I
12 was asked -- I think Bob Kennedy asked to look at
13 my file, and did so, and asked me for specific
14 portions of the file, and this reflects the
15 photocopying charges.

16 Q Okay.

17 COMMISSIONER MacCALLUM: Who is he, sir?

18 A Bob Kennedy was with the, at that time the law
19 firm of Gauley & Company, and it is my sense,
20 going by memory, that he was doing so at the
21 request of Mr. Wolch. I could be mistaken on that
22 but that's --

23 MR. HODSON: Actually, if you call up
24 331841, I'm sorry, it might assist. I think it
25 was in connection with the civil proceedings, it



1 was just getting a copy -- if you could take a
2 look at the screen -- of certain documents, and I
3 think that's in the folder. That corresponds
4 with the date, I believe.

5 MR. PRINGLE: Okay.

6 COMMISSIONER MacCALLUM: 3 which, 31,
7 that's 331841?

8 MS. KNOX: Yeah. I think, Mr.
9 Commissioner, I can clarify with certainty.

10 Mr. Kennedy, who now works at
11 my office, was in 19 -- the mid-'90s at the
12 Gauley & Company office, which is where Mr. Fox
13 and Mr. Boychuk are from, and back in those days
14 when he was with that office Mr. Kennedy was
15 working with respect to the representations of
16 some of the city police officers, Mr. Short,
17 Mr. Karst, and Mr. Mackie, I think, in terms of
18 civil claims, or some of them, so his involvement
19 was to get some documents that were listed in --
20 for purposes of examination for discovery in the
21 civil claim in his role at that time, but it was
22 on behalf of Saskatoon City Police officers he
23 was acting.

24 COMMISSIONER MacCALLUM: Okay.

25 BY MR. PRINGLE:



1 Q And I have one other question for you, Mr. Young,
2 on -- if we could go to 155264. You have a -- Mr.
3 Hodson went over this with you earlier, but
4 starting about a third of the page down, David
5 Milgaard is providing an account as to what
6 happened at a material time in this matter. First
7 of all I'd like you to confirm that that sounds
8 like what he said to you, or what is taken down
9 here is -- are you fairly certain that's what he
10 said, you have no reason to dispute that?

11 A I -- no, I have no reason to dispute it, but I got
12 myself on this particular note a bit earlier when
13 I said much the same thing, and then on reflection
14 felt that "any" perhaps should have read "many" in
15 relation to the defence counsel.

16 Q Right.

17 A So that, within reason, I believe this to be an
18 accurate reflection of what took place.

19 Q Right. And in there you note that he admits that,
20 with respect to this what he describes as the
21 'older woman', that they were going to take --
22 that there was a -- let's get the exact words
23 here:

24 "The idea was to look her over and see
25 if we could possibly grab her purse,



1 ...";

2 do you see that? That's --

3 A Yes I do.

4 Q And certainly just that admission alone, if he
5 were to take the witness stand before a jury,
6 would certainly be something that would be very
7 detrimental to his case, would it not, in the
8 context of this case?

9 A I wouldn't take issue with you. I don't believe
10 that I would want to venture a personal opinion
11 without having much more information available to
12 me with respect to the context.

13 Q Okay. Those are all my questions, thank you.

14 BY MR. WOLCH:

15 Q Mr. Young, I'm Hersh Wolch, I'm David Milgaard's
16 lawyer. I apologize not meeting you earlier, I
17 was kind of preoccupied, to be honest. Just a
18 very -- couple questions.

19 Regarding Mr. Pringle's recent
20 questions to you, I don't intend to go through it,
21 but the comments about the older woman on that
22 transcript; there's a great deal of preamble to
23 it, is there not, as to location and things like
24 that?

25 A I think there was.



1 Q Yeah, so you have to put it in the context of the
2 overall picture?

3 A I would.

4 Q Yeah. And there were some comments in there that
5 -- where David is perhaps mildly critical of Mr.
6 Tallis, and I take it those kind of comments from
7 a wrongly-convicted person who's been -- might not
8 be surprising to you, in fact they might be mild
9 for what you would expect?

10 A I wasn't surprised by the comments from David
11 under the circumstances.

12 Q Yeah. I mean people who are even guilty complain
13 about their lawyers?

14 A Well, presumably so.

15 Q Right.

16 A Now what I can say with respect to that is,
17 because I do have a general recollection of that
18 portion of the conversation, and with respect to
19 Mr. Tallis we all -- I think his reputation was so
20 sound and so broadly accepted as being beyond
21 reproach amongst the lawyers in Saskatchewan at
22 that particular stage that I, along with everybody
23 else I suspect, would give him the benefit of the
24 doubt and we would automatically -- and we would
25 not want to move quickly to any conclusions



1 suggesting that he had made any kind of
2 significant error. That doesn't mean he didn't
3 make an error, I have absolutely no idea under the
4 circumstances, I don't have a clue. But the one
5 thing I do know is that I respected him and that,
6 because David Milgaard expressed to me that
7 perhaps something had gone wrong, I would take
8 that information, take it for what it's worth, but
9 it would mean nothing more to me than David
10 Milgaard --

11 Q Okay. With the benefit of hindsight, an innocent
12 person questioning things is not too surprising,
13 after he has been wrongly convicted?

14 A Any person, any person questioning something, --

15 Q Sure.

16 A -- whether innocent or otherwise.

17 Q I --

18 A There's room for disagreement on some of those
19 things.

20 Q Just one last point. I for -- meant to ask it of
21 Mr. Merchant, so I'll probably ask it of you.
22 Were you here when I questioned Mr. Merchant about
23 the problems of deciding if a client will testify
24 or not?

25 A I believe I was.



1 Q Yeah. I take it you share the view that that's a
2 very difficult decision for lawyers?

3 A It would be for me.

4 Q Sure. And the one point I didn't make, and I want
5 to see if you agree with me, is that we've talked
6 a lot about "well you didn't testify, you didn't
7 testify" and the inferences that can be drawn from
8 that possibly; that is, a Court of Appeal might
9 look at that as an issue as well, the accused
10 didn't testify?

11 A With respect, you are the expert in a sense when
12 it comes to criminal law, --

13 Q Well, I thank you for that --

14 A -- and --

15 Q -- but --

16 A -- and I don't think that it helps -- I'm happy to
17 give you a personal opinion in the right set of
18 circumstances. I don't disagree with you, I have
19 no reason to disagree with you, but it's not the
20 field within which I have practiced
21 extensively, --

22 Q Okay.

23 A -- and the truth of it is I don't necessarily feel
24 comfortable offering an opinion unless I know what
25 I am talking about.



1 Q Well, it's smart, because I was leading into a
2 trap. The trap is this; if you do testify and you
3 are convicted the position is you weren't
4 believed. You follow what I am saying? It's a
5 damned if you do/damned if you don't, is what I am
6 getting at, because if you don't testify, "well
7 you didn't take the stand and answer the
8 allegations", if you do testify, "well look, you
9 talked and the jury didn't believe you". You see
10 what I am getting at; you can't win.

11 A Well of course I see what you are getting at, and
12 again with the greatest of respect -- and I know
13 that it's my job to answer your questions --

14 Q Okay.

15 A -- if you were presenting, if you and I were
16 arguing, presenting argument with respect to this,
17 I would be delighted to debate it with you, but to
18 state under oath that I agree or disagree with
19 you --

20 Q Okay.

21 A -- when it is a field that is -- has the potential
22 to be complex and is not one where I practice
23 regularly, I'm not comfortable giving you an
24 opinion.

25 Q I respect that. But you do see the point of the



1 dilemma that we'll deal with perhaps later, that
2 either way the accused can't win, is what I am
3 saying?

4 A I see your point.

5 Q Thank you. Those are all my questions, Mr.
6 Commissioner.

7 MR. HODSON: I believe that is all. Thank
8 you very much, Mr. Young.

9 COMMISSIONER MacCALLUM: You are excused
10 then, Mr. Young.

11 MR. HODSON: I'd like to advise that I have
12 an hour and a half of read-ins, but I think
13 there'd be mutiny, so I think we're done for the
14 day Mr. Commissioner.

15 COMMISSIONER MacCALLUM: All right.

16 (Adjourned at 2:26 p.m.)
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