

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
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Volume 115

Inquiry Proceedings



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Transcript of Proceedings

(Reconvened at 9:06 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

PATRICK HUGH FORSYTH BAILLIE, continued:

BY MR. WILSON:

Q Good morning, Dr. Baillie.

A Good morning, sir.

Q My name is Garrett Wilson and I represent Serge Kujawa in these proceedings.

Doctor, David Milgaard has become the phantom of this inquiry that bears his name. Have you ever laid eyes on him in person?

A No, I have not.

Q Not even from a distance?

A No.

Q Strange, isn't it. But you did view a video of Mr. Milgaard testifying in front of the Guy Morin Inquiry?

A Yes, I did.

Q Who provided that to you?

A Mr. Wolch.

Q I see. Did he provide any other videos to you?

A No, he did not.

Q Was that as an example of Mr. Milgaard's



1 performance in this sort of an atmosphere?

2 A My understanding was that Mr. Wolch wanted me to
3 see an example of how Mr. Milgaard responds in
4 circumstances similar to this.

5 Q I see.

6 A The difference of course there is that he's not
7 the focus of the inquiry, but is somebody who is
8 talking about the consequences of a wrongful
9 conviction.

10 Q And I wasn't clear yesterday, did you view that
11 video before or after the report you provided us?

12 A Afterwards.

13 Q So at the time of doing the report, you had not
14 seen even a video of Mr. Milgaard?

15 A I'm sure that at the time that I had written the
16 report, over the years I have seen segments of
17 news conferences or other comments that he's made,
18 but there were no videos or other sources of that
19 type of information that were viewed as part of
20 the preparation of the report.

21 Q When you were at the Commission offices in
22 December searching for material in the file, were
23 you made aware of the fact that there were a
24 number of videos there of Mr. Milgaard in public
25 appearances over the years?



1 A No, I was not.

2 Q But you were aware of one of his public
3 appearances that you describe on the first page of
4 your report when he spoke in this city in October?

5 A Yes.

6 Q Did you see a video of that performance?

7 A No, I did not.

8 Q But you told us yesterday, made some explanation
9 about Mr. Milgaard's performance on that day. Can
10 you repeat what you told us yesterday, please?

11 A Well, I'm not sure which part of what I said
12 yesterday you are referring to.

13 Q Well, you gave some explanation of how he appeared
14 that day.

15 A No, there was a question that I was asked about
16 his decision to come here. As I had described the
17 third symptom or the third criteria for
18 post-traumatic stress disorder is the avoidance
19 strategies, and so the question that I was asked
20 was about how his appearance here on October 24th
21 was consistent with that, and I had said that my
22 understanding was that the comments that he was
23 making had been written out and that he was
24 essentially reading from that statement which may
25 have been part of his way of dealing with the



1 anxiety of that situation.

2 Q I see. And from who did you acquire that
3 understanding?

4 A Mr. Wolch.

5 Q And again, was that conversation before or after
6 the writing of your report?

7 A I believe it was afterwards.

8 Q Did you make any attempt to view the video of that
9 performance in October?

10 A I wasn't aware that there was a video.

11 Q Did you ask?

12 A No.

13 Q I put that question to you, Dr. Baillie, because
14 those of us here who did see that performance on
15 television saw, or thought we saw a very
16 confident, self-possessed and articulate David
17 Milgaard, somewhat inconsistent with the
18 description you are giving us here.

19 A I don't think that it's inconsistent in that as I
20 indicated yesterday, there's a significant
21 difference between Mr. Milgaard speaking about
22 other issues that are unrelated to his wrongful
23 conviction and his imprisonment and the questions
24 that he's likely to be asked if he appears here
25 are directly related to those issues. I am aware



1 that over the years Mr. Milgaard has made a number
2 of public presentations, there was one done in
3 Calgary that I wasn't able to attend that he did
4 in mid November of last year, but again, the
5 context of those presentations is talking about
6 issues that are not directly related to his case.

7 Q I see. Let me ask a little bit about this
8 post-traumatic stress syndrome. Would it be fair
9 to assume that in the normal case it would
10 dissipate over time from the traumatic incident?

11 A For some people it does, yes.

12 Q And with some people it does not?

13 A Correct.

14 Q We wouldn't know which would apply to Mr. Milgaard
15 though, would we, from your examination?

16 A Well, since I haven't examined him, I wouldn't be
17 able to answer that question, so I rely on
18 somebody who has had contact with him over the
19 last 10 years, that being Mr. Grymaloski.

20 Q I see. On page 2 of your report, that's the CV,
21 we have the quotation that you provide from Mr.
22 Wolch, and you were asked some questions yesterday
23 about this hospitalization, but you were able to
24 tell us only that you understand from Mr.
25 Grymaloski that there were maybe six periods of



1 hospitalization over the years?

2 A Yes.

3 Q But you have no specifics beyond that?

4 A That's correct.

5 Q Tell me, Dr. Baillie, when you highlight this
6 statement of Mr. Wolch's in your report, why
7 wouldn't you have put a caveat on there that you
8 were not able to verify this?

9 A I don't think it's my position to be verifying it.

10 Q I beg your pardon?

11 A I don't think it's my position to be verifying it.

12 Q Well, you give it some credibility by the
13 prominence with which you quote it here don't you?

14 A I give it some credibility because it appears in
15 the transcripts of the inquiry.

16 Q But you extracted it and put it in your report?

17 A Because it directly relates to the issues that I
18 was being asked to address.

19 Q I see. Well, we have to keep in mind that Mr.
20 Wolch was your client don't we. You --

21 A I would point out that I'm under oath and
22 therefore the opinions that I'm offering are the
23 opinions that I sincerely hold. Who is my client
24 doesn't change my opinion, it's not for sale.

25 Q But you weren't under oath when you prepared this



1 report?

2 A If you would like me to endorse this statement
3 under oath, then I do, it appears in the
4 transcript. I don't know what the dispute is.

5 Q We'll move on, Doctor, but I'm still on the
6 subject of the hospitalization. You examined the
7 Commission files thoroughly for any evidence of
8 medical attention that Mr. Milgaard received
9 while -- and those files related only while he was
10 in custody; correct?

11 A No, I was able to find some files that went back
12 to when Mr. Milgaard was a youth, but I would also
13 clarify, I can't say that I examined the files
14 thoroughly because, as you are aware, there are
15 over 330,000 (sic) pages of files.

16 Q Yes, but there weren't 230,000 pages of medical
17 reports.

18 A Well, they are not in a medical report file;
19 hence, I have to go through a lot of additional
20 information to find what I'm looking for.

21 Q You were asked yesterday about Mr. Milgaard's
22 appearance before the Supreme Court of Canada in
23 January of 1992. You recall that?

24 A Yes.

25 Q And were you aware of that appearance at the time



1 you did your report?

2 A Yes, I was. I'll just clarify the document that I
3 was referring to was Mr. Asper's letter of
4 February 24th, 1992, I referred to it yesterday,
5 so perhaps I could give a document number for
6 anyone who wants to look it up. The document
7 number that I have is 182051 and it refers to
8 testimony that I believe occurred in February of
9 1992.

10 Q Did you make a specific search for any evidence of
11 Mr. Milgaard's hospitalization after his
12 appearance at the Supreme Court in January of
13 1992?

14 A I don't know what you mean by a specific search.

15 Q Well, it's hardly a conundrum. Did you look
16 specifically for that information?

17 A I was looking for a variety of medical reports in
18 amongst the many, many documents that I was able
19 to search in the two days that I was here.

20 Q You had no particular interest in hospitalization?

21 A I was certainly looking for hospitalizations
22 amongst the medical records if those had been
23 contained in the Commission's files.

24 Q I see. And did you find any consequent upon the
25 appearance of Mr. Milgaard before the Supreme



1 Court?

2 A No.

3 Q At the bottom of page 2 of your report you again
4 refer to the history of hospitalization:

5 "... possibly six times in the past
6 decade or so, during periods of
7 significant distress in his life,
8 particularly, as you have described ..."

9 The "you" in that sentence is Mr. Wolch; correct?

10 A Yes.

11 Q You took some information on this hospitalization
12 theory, we'll call it, from Mr. Wolch as well as
13 from Mr. Grymaloski?

14 A Yes.

15 Q Page 3, please, you found in your review of the
16 Commission files a number of diagnoses of Mr.
17 Milgaard and you set out a number of them here.
18 Presumably if these diagnoses are correct, they
19 would describe a condition that predated his
20 incarceration?

21 A Not necessarily.

22 Q Okay. Well, you don't -- you don't catch a
23 psychopathic personality in prison like a bad cold
24 do you, it's not contagious?

25 A Well, first off, there is no formal diagnosis of



1 psychopathic personality. Second, as I explained
2 yesterday, personality disorders aren't diagnosed
3 until a person is at least 18 years of age, and
4 since Mr. Milgaard was in custody at age 16 it
5 would be impossible for that condition to have
6 existed prior to his incarceration.

7 Q I see. But you are not suggesting that these are
8 disorders that resulted from the trauma of the
9 incarceration?

10 A Well some of the labels are, in my opinion,
11 bizarre because they are not even formal
12 diagnoses, so as I indicated yesterday, the
13 purpose of diagnosis is to facilitate
14 communication between people that agree on the
15 definition of the diagnosis. Since some of these
16 don't have a commonly-agreed upon definition, I'm
17 not sure what the purpose would be in making the
18 diagnosis. A number of them, however, refer to
19 things like situational psychotic illness or acute
20 psychotic reaction that can clearly be stress
21 reactions to circumstances in which Mr. Milgaard
22 found himself at the time that that label was
23 given.

24 Q So there is a potpourri there, of labels, and
25 ranging from the serious to no evidence of any



1 major mental illness?

2 A Correct.

3 Q And no indication of how much examination or
4 assessment is behind any of them and how valuable
5 they might be?

6 A In some cases there was an intensive assessment a
7 number of times that Mr. Milgaard was at regional
8 psychiatric facilities that are operated by the
9 Correctional Services of Canada, and so the
10 diagnoses in those cases would have come out of a
11 more in-depth evaluation, some of the diagnoses
12 come out of what appears to have been a contact of
13 perhaps 20 minutes.

14 Q Were you aware, made aware that at the Supreme
15 Court in January of 1992 an application was made
16 on behalf of Mr. Milgaard similar to the one that
17 we're dealing with here, to excuse or at least
18 delay his appearance in front of the Court?

19 A No, I was not aware of that.

20 Q I see. Had you been aware of that then you might
21 have been more assiduous in your search for
22 evidence of the medical results of that incident?

23 A I think that's fair.

24 COMMISSIONER MacCALLUM: Just repeat that
25 for me, I somehow missed the question. This



1 related to his appearance before the Supreme
2 Court did you say?

3 MR. WILSON: I am sorry, sir?

4 COMMISSIONER MacCALLUM: Did this relate to
5 his appearance before the Supreme Court?

6 MR. WILSON: Yes.

7 COMMISSIONER MacCALLUM: Okay. And he was
8 examined in that connection relative to his --

9 MR. WILSON: What happened, sir, was, as I
10 have been informed by counsel present, an
11 application was made to excuse Mr. Milgaard from
12 testifying, or to at least delay his appearance
13 because of his, the fragility of his medical
14 condition based upon the opinion of a medical
15 practitioner given a day or two previously. When
16 the Court sought to speak with the medical
17 practitioner it was discovered he was out of the
18 country, and had been for some time, and had not
19 been able to render the opinion that had been
20 described. The Court then interviewed Mr.
21 Milgaard personally, Mr. Milgaard described
22 himself as "fine" and "ready to go", and did.

23 COMMISSIONER MacCALLUM: Okay, thanks.

24 BY MR. WILSON:

25 Q Now both Mr. --



1 MR. WOLCH: Just before we go further, I am
2 not saying that didn't happen, I have no memory
3 of it whatsoever. And if there is some
4 documentation or something? I recall that David
5 was the first witness, but an application to the
6 Court, I just have no memory of it.

7 MR. WILSON: Well, there will be evidence
8 on this forthcoming in due course, Mr.
9 Commissioner.

10 MR. WOLCH: Well where can we find it to
11 look at it?

12 MR. WILSON: Umm, it will be testimony that
13 will be coming before the Commission, the -- I am
14 advised that the proceedings at that point were
15 recorded but were not transcribed, it may be that
16 the recordings are still in existence and could
17 be transcribed but I have not sought to do so,
18 but other counsel who were there remember the
19 incident perfectly well and are quite prepared to
20 testify to it.

21 MR. WOLCH: Well --

22 COMMISSIONER MacCALLUM: Well, okay.

23 MR. WOLCH: Well, can we be told who the
24 source is?

25 COMMISSIONER MacCALLUM: But their evidence



1 won't be available now, Mr. Wilson, for the
2 purposes of this examination?

3 MR. WILSON: They won't be available today,
4 but it would -- they will be appearing here in
5 due course, yes.

6 COMMISSIONER MacCALLUM: Well I'm
7 concerned, for Dr. Baillie's benefit, that he not
8 be taxed with evidence which we cannot present
9 before the Commission, you know, for the purposes
10 of this hearing.

11 MR. WILSON: I'm quite prepared to --

12 COMMISSIONER MacCALLUM: If it was a matter
13 of record, it would be easily done, but since
14 Mr. Wolch will not concede that it happened?

15 MR. WILSON: I'm quite prepared to advance
16 the calling of the witness who will support it,
17 but I don't know that, once again, it would be a
18 waste of Commission's time.

19 MR. WOLCH: Might I be told who the witness
20 is?

21 MR. WILSON: Hmm?

22 MR. WOLCH: Might I be told who the witness
23 is who would support this?

24 MR. WILSON: Well, Mr. Murray Brown of the
25 Department of Justice.



1 COMMISSIONER MacCALLUM: Oh, another
2 solicitor. Well, I think the objection is well
3 taken at this point, Mr. Wilson. You will simply
4 have to leave the subject for now.

5 MR. WILSON: Yes.

6 BY MR. WILSON:

7 Q Now just one other area, Dr. Baillie. Both Mr.
8 Elson and Mr. Fox yesterday queried you about Mr.
9 Milgaard's appearance before a lengthy examination
10 for discovery in 1996, and as I understand you
11 admitted to both of them that you had not looked
12 into the transcripts of that event?

13 A That's correct.

14 Q I'm going to suggest we do that this morning.
15 Mr. Fox suggested yesterday that, had you done so,
16 you might have found some interesting information
17 and, as usual, he is right. 198515, please.
18 There you will see in the -- excuse me -- the
19 style of cause Mr. Milgaard sued Serge Kujawa, Mr.
20 Thomas David Roberts Caldwell, Eddie Karst,
21 Raymond Mackie, and Charles Short, and down below
22 you will see that the respective defendants are
23 represented by three different law firms. Mr.
24 Kujawa is my client here, he was represented there
25 by Mr. Si Halyk, who was also appearing for Mr.



1 Caldwell. And Mr. Halyk, in the examinations that
2 went one after the other, was first, and if we may
3 turn to what is numbered as page 2 of the
4 examination, it will be the fourth page of it down
5 the way, you will see Mr. Halyk is now opening the
6 examination -- the following page, please -- and
7 asks Mr. Milgaard about his medications. Mr.
8 Milgaard says he's on Tegretol; are you familiar
9 with that medication?

10 A Tegretol, yes.

11 Q Can you tell us about it?

12 A It's used in low doses as a mood stabilizer and,
13 in other doses, can be used for the treatment of
14 seizures.

15 Q In other doses it is what?

16 A In higher doses it can be used for the treatment
17 of seizures.

18 Q Okay. So when Mr. Wilson says, down at the bottom
19 here:

20 "... it's a mood stabilizer, is that
21 what you understand it to be?",
22 that was essentially correct; is that right?

23 A Yes.

24 Q I see. Next page, please:

25 "Q And who prescribes your medications to



1 you?

2 A At this point I get my medications
3 from the Seymour Clinic in British
4 Columbia.

5 Q Okay. And is that a psychiatrist who
6 prescribes them to you?

7 A No, this is just an M.D. at this point
8 ...",

9 And Mr. Halyk asks:

10 "Q Are you taking any other medications?

11 A I have some sleeping medication that
12 I'm allowed to take if I want to, but
13 I don't try to take that as much as --
14 and people sometimes abuse sleeping
15 medications. I don't think that's a
16 good idea."

17 Mr. Halyk asks:

18 "Q You didn't take any, for example, last
19 night?

20 A No. I had a restless sleep last
21 night.

22 Q Okay. But you didn't take any
23 medication?

24 A No ..."

25 The next page, please:



1 "Q And, generally speaking, how are you
2 feeling today?

3 A I feel a little bit nervous with
4 everybody. I feel a little nervous.
5 I know I shouldn't feel nervous,
6 but --

7 Q No, that's understandable --

8 A -- I do feel nervous

9 Q -- but other than nervous, do you feel
10 healthy and well?

11 A Oh, I'm healthy, definitely healthy.

12 Q And have you been feeling healthy and
13 well the last, say, week?

14 A Yeah, I have been.

15 Q And do you have any problems being
16 examined by me today with respect to the
17 circumstances that you have sued about?

18 A Well, to be frank with everybody here,
19 I feel very uncomfortable because I
20 don't feel it's necessary that I
21 should be here for five days answering
22 questions because I know I'm not
23 guilty. There is no doubt in my
24 mind."

25 Would it be fair to say that that response is



1 rather a useful one in considering a question of
2 Mr. Milgaard's appearance before this Commission
3 ten years later?

4 A I think it reinforces the issue that he is
5 uncomfortable under the circumstances.

6 Q In your experience at the bar have you conducted
7 any examinations for discovery?

8 A Well, to be clear, I'm not at bar. As I said
9 yesterday, I'm not a member of the Law Society of
10 Alberta, I'm not a lawyer.

11 Q Ah, I missed that. Then you have not. So you
12 wouldn't be aware of the fact that practically
13 every civilian witness who winds up in an
14 examination for discovery is pretty nervous about
15 it.

16 A Well I am aware that most witnesses, whether
17 appearing at an examination for discovery or at
18 trial, are uncomfortable because, for most
19 witnesses, it's an unfamiliar process.

20 Q And Mr. Halyk goes on:

21 "Q ... I sense an understanding --

22 A I do feel uncomfortable --

23 Q -- your feeling --

24 A -- with being here to be honest, to be
25 straight with you."



1 Next page, and Mr. Halyk says:

2 "Q Well, and to be honest with you, if you
3 hadn't started the lawsuit you wouldn't
4 have to be here.

5 A Well, it makes good sense to start a
6 lawsuit if you have no money.

7 Q But you realize that's why you're here,
8 is because you sued?

9 A Yes, I do."

10 Now Mr. Milgaard, I would suggest as far as you
11 know, understands the natural probable
12 consequences of his conduct?

13 A Yes.

14 Q Did then, still does. But there are some
15 interesting features over here on page 12 of the
16 examination. Mr. Halyk is asking him what he has
17 done to refresh his memory, and:

18 "A ... I didn't read through all of them.

19 I read through this one, but I had
20 trouble reading through that one because
21 it just kind of, I don't know, made me
22 feel kind of mixed up and stuff a little
23 bit. I get that way from this stuff,
24 just so you know.

25 Q Yes. Well, generally speaking, how



1 would you describe your memory today for
2 all of the events --

3 A I have a good memory.

4 Q -- involved here?

5 A The problem is I try and pull on my
6 memory sometimes. If it's sort of
7 like a quick situation I'll sometimes
8 forget things, but it comes back to
9 me.

10 Q Okay.

11 A I think I've got a good memory."

12 Now question 66:

13 "Q Good. What have you been doing the last
14 three years for employment or otherwise?

15 A Sort of odd jobs here and there. I
16 get paid for my presentations. I
17 consider myself to some extent sort of
18 like a service person, maybe not as
19 much as like a good social worker or a
20 person involved with different issues,
21 like advocacy things, but I usually
22 take a position, an advocacy-type
23 position, that people should be care
24 or concern over others at any point,
25 and I take my position with this whole



1 situation of court and the case and
2 all the rest of it to get up and sort
3 of tell my story and suggest that
4 people inside that picture, and that
5 would be care and concern for others,
6 wherever they are, that it's safe to
7 be so.

8 Q Where do you give these service
9 seminars?

10 A Well, the problem with it is if you're
11 doing it, you know, every time, time
12 and time again and you're sort of
13 making the same speech, it becomes
14 sort of a rote type thing ...",
15 and he spells that for Mr. Halyk:

16 "... and, you know, it becomes an agenda
17 thing and you don't want to always have
18 to be going here or going there, so I
19 did quite a bit of it for a while, but I
20 got out. I still do a little bit
21 occasionally. It's a money --"

22 Mr. Halyk inquires:

23 "Q ... give me an example of the kind of
24 groups that you would speak to about
25 your situation?



1 A A tough one, a tough one. First year
2 social workers in The Pas, any sort of
3 association or group that might ask
4 for me, a criminologist situation is a
5 potential, criminologist situations,
6 schools, universities."

7 "Q And you say you get paid for this?

8 A Sometimes very well."

9 So what we're seeing here, Dr. Baillie, is Mr.
10 Milgaard has been working as a professional
11 lecturer on his story?

12 A And I do not know what he is referring to when he
13 says "my story", he could be talking about his
14 adjustment after his release, he could be talking
15 about how he gets through day-to-day, it is not
16 clear to me from the two words "my story" that he
17 is referring to the events of January 31st, 1969
18 or subsequently.

19 Q But his story is his incarceration; isn't it?

20 A That is your assumption. I do not take --

21 Q Well, it was your assumption yesterday, when you
22 gave us an example of what his obituary might
23 read?

24 A As I indicated, I do not know what he is referring
25 to when he says "my story", I think there are a



1 number of permutations that come out of that
2 reference.

3 Q Nothing there to negate the likelihood or
4 possibility, at least, that what he is talking
5 about is his period of incarceration, his wrongful
6 conviction, and that is the Milgaard story?

7 A As I have indicated, that is a possible
8 interpretation of "my story".

9 Q In which case he is rather practiced at what you
10 say he should have some hesitation at delving
11 into?

12 A Well, again, we're now into a double-level
13 hypothesis because I don't know that that's what
14 was referred to when he says that he tells his
15 story, so I can't say that he has practiced
16 something that I don't know that he has even
17 addressed once.

18 Q If Mr. Milgaard got into a fender bender, or
19 otherwise wound up in some civil litigation that
20 arose subsequent to his departure from the
21 institution, would he have any difficulty dealing
22 with that and testifying?

23 A I think that Mr. Milgaard has a general aversion
24 to testifying.

25 Q Yeah. Aside from that, though, he would -- he



1 would be able to testify about the fender bender
2 or the, or the incident that gave rise to the
3 litigation, without triggering the bad memories of
4 the period of incarceration?

5 A Without triggering bad memories of an
6 incarceration, I think that's fair.

7 Q Yeah. So are you aware, Dr. Baillie, that since
8 Mr. Milgaard was released from prison in 1992 he
9 has made a number of public appearances in which
10 he made serious accusations of misconduct against
11 members of the Saskatchewan Justice system,
12 including the prosecutors and others?

13 A I am aware, from reading the transcripts of this
14 Inquiry, that that is an area of concern to you.
15 I have not read the comments that he made.

16 Q But you are aware that he has done somewhat as I
17 described, that he has spoken publicly, critical
18 of --

19 A Again, I have not seen any transcripts or media
20 reports about those specific criticisms, I'm
21 accepting the information that you put before the
22 Commission as accurate.

23 Q Well let's assume that I am; do you see any
24 difficulty in Mr. Milgaard coming to this Inquiry
25 and telling us about what he said, why he said it,



1 what information he based his serious accusations
2 upon?

3 A Yes, I do see some difficulty with it. One, it's
4 not one of the 12 areas of inquiry that was
5 indicated in Mr. Hodson's memo of the --

6 Q I beg your pardon?

7 A Is it not one of the 12 areas of inquiry that I
8 understood from Mr. Hodson's memo regarding issues
9 about --

10 Q Oh, it's in the preamble, not to worry about that.

11 A Well, it's in the sense --

12 Q That --

13 A Can I --

14 Q Mr. Hodson will worry about the technicalities.

15 A Sorry, if I could please finish my answer?

16 Q Well, if you would restrict your answer to the
17 question, it would be easier.

18 A Would you like to repeat your question?

19 Q Do you see any difficulty in Mr. Milgaard
20 responding to inquiries of that nature?

21 A Yes, I do, in that you had indicated that he was
22 going to be asked a number of why questions and I
23 think that those questions, as I've indicated in
24 my report, have the potential to cause him
25 significant difficulty.



1 Q I see. So, to go back to my fender bender
2 example, if he was asked "why were you driving 80
3 miles an hour in a 50 mile an hour zone", that
4 would be a why question he would have difficulty
5 with?

6 A In that context, yes. But, again, the question
7 that you had asked me was whether that would
8 trigger him with recollections of his
9 incarceration, and I think that there is a
10 significant difference between asking him about a
11 fender bender that occurs in 2006, and comments
12 that he made years ago, or may have made years
13 ago, that are directly related to the issues tied
14 to his incarceration.

15 Q Well all this is hypothetical, isn't it, Dr.
16 Baillie?

17 A As I have indicated, there are limitations to my
18 report.

19 Q In fact, Dr. Baillie, is it not true that you
20 cannot tell this Inquiry with certainty that the
21 reason Mr. Milgaard doesn't want to come here is
22 because he'd rather go back scuba diving in the
23 Greek islands?

24 A I have no absolutely no information to suggest to
25 me that that's his motive in not wanting to



1 testify. As I've indicated, I have relied upon
2 information that Mr. Grymaloski has provided to
3 me, that Mr. Milgaard stated in the appearance
4 before the media on October 24th, --

5 Q So the answer to my --

6 A -- and that he has repeated to Mr. Grymaloski
7 about his concern being the physical and mental
8 effects that come from testifying. There is no
9 information --

10 Q The answer to my question is "yes"?

11 A There is no information available to me that he is
12 attempting to avoid appearing in front of this
13 Inquiry out of some whim for a luxury trip.

14 Q So the answer to my question is "yes"?

15 A I believe that I --

16 Q You cannot tell us with certainty?

17 A I cannot tell you with certainty.

18 Q Thank you.

19 BY MR. WOLCH:

20 Q Just a brief question on a couple of the last
21 questions.

22 In terms of testifying regarding
23 accusations made, I take it there are accusations
24 made based on personal knowledge in which you can
25 be questioned, and accusations made that you have



1 no personal knowledge of?

2 A Yes.

3 Q For example -- and I'm not saying this has
4 occurred -- but if David Milgaard was to assert
5 that Larry Fisher was treated abnormally or
6 received no sentence for committing terrible
7 crimes, questioning him cannot add anything on
8 that point?

9 A Correct.

10 Q Now yesterday, Dr. Baillie, you made reference to
11 a letter from David Asper. Now the number I have
12 is 182342, is that the same number you have, I
13 don't know?

14 A I have a slightly different number. I'm sure
15 there are multiple copies.

16 Q Now --

17 A Yes, mine doesn't -- my copy does not have the
18 letterhead but the layout appears to be similar,
19 or sorry, identical to what I have.

20 Q Okay. Now you were asked questions, and I don't
21 mean any disrespect but I'm not certain which of
22 the two counsel yesterday was asking you this, but
23 you were asked questions about David's ability to
24 have testified for example in the Supreme Court,
25 and how he handled that, and I think you mentioned



1 that you'd seen a letter that might elaborate on
2 that a bit, and this is the letter you are talking
3 about?

4 A Yes, it is.

5 Q And if we can just go through some of it, and this
6 is dated February 24th, '92, it says here:

7 "I don't think that there is any doubt
8 in anyone's mind that David was
9 unusually uptight on Monday, February
10 17, 1992. This was evident even before
11 the proceedings began, and as the day
12 wore on, he became increasingly
13 agitated. I noticed that during the
14 evidence of Det. Karst, David actually
15 left the Courtroom on two or three
16 separate occasions."

17 What do you see in that?

18 A When people are faced with anxiety it stirs what
19 is commonly referred to as a fight-or-flight
20 response. If it's a situation in which I feel
21 that I may be able to gain control of the
22 situation, I can choose to stay and fight in some
23 form, orally or physically; in situations where I
24 don't feel that I have that level of control, or
25 the opportunity to gain the upper hand, then the



1 response becomes to run away.

2 Q And there's some reference in the next paragraph
3 that Anne Derrick, I guess now Judge Derrick, was
4 present or was going to be there with Donald
5 Marshall to offer assistance or to give best
6 wishes.

7 Getting on to the next
8 paragraph, Mr. Asper says:

9 "The next time that I saw David was
10 during the very early morning hours of
11 February 18, 1992 after he had been
12 detained at the Ottawa police station.
13 By that time, I had contacted Mr. Ken
14 Bond, who was the person on call for the
15 Parole Board. I had been advised that
16 the worker at the house had located
17 David and had detected the smell of
18 alcohol on David's breath. This was
19 obviously something that I wanted to
20 clarify as soon as I got to the police
21 station."

22 Next paragraph:

23 "I initially met with a Detective by the
24 name of "Ty", although I cannot remember
25 his last name. I was advised by this



1 officer that the arresting officers had
2 not detected any odour of alcohol
3 whatsoever, and that this fact would be
4 reflected in their report. They were
5 somewhat concerned about David because
6 he seemed disoriented and jumbled.
7 After a brief discussion, I believe that
8 this Detective accepted that this was
9 probably David's ordinary demeanour
10 under these kinds of circumstances."

11 And what does that say to you, sir?

12 A That this law enforcement official, as described
13 by Mr. Asper, was aware that sometimes, under
14 similar circumstances of stress, Mr. Milgaard is
15 reactive and becomes disoriented, confused.

16 Q The next paragraph:

17 "In any event, I was taken to the
18 holding cells where I met with David in
19 a booth. There was a glass partition
20 between us, but there was venting
21 beneath the glass that would allow us to
22 converse quite freely. David wanted to
23 speak in a quiet tone, so we both sort
24 of lowered our faces toward the vented
25 area of the booth. For what it is



1 worth, I did not smell any alcohol
2 whatsoever."

3 If you can just turn the page:

4 "I asked David where he had been, and he
5 related that he had sought permission
6 from house staff to go outside. He
7 claimed that the house person had said
8 something to the effect of, "Okay, but
9 don't go far", and David then went out.
10 My assumption at this point was that
11 Terry Richardson had already left, but I
12 did not explore this with David at all.
13 David told me that he went outside at
14 the front of the house, and then went
15 around back where he found what he
16 called a "plywood sort of pod", and then
17 just sat there by himself until he
18 ultimately went inside at about 3:00
19 a.m.

20 David was totally confused as
21 to what he had done to justify his
22 arrest and detention. He was very
23 adamant that he simply wanted to be
24 alone and away from the whole world. He
25 sought refuge on this "pod" at the back



1 of the house. I might add that it was a
2 relatively warm evening in Ottawa, and
3 David was in fact wearing his winter
4 clothing, including a coat.

5 David's attitude was that this
6 whole thing was a misunderstanding. He
7 wanted to ... meet Anne Derrick ..."

8 The letter goes on, and I think you've read it
9 and I don't want to have to read the whole
10 letter, but what do you gain from that letter as
11 a whole?

12 A Describing the events from the evening of February
13 17 leading into February 18, they depict to me
14 somebody who was confused, apprehensive, anxious,
15 and struggling to make sense of the circumstance
16 in which he found himself.

17 Q I wonder if we could pull up 004257. This is an
18 article dated the 18th of February, '92, it's out
19 of the Canadian Press, I'm not sure what newspaper
20 this comes from exactly, but I only want to draw
21 your particular attention to the portion here:

22 "Milgaard had been given permission to
23 attend the Supreme Court hearings,
24 staying at an Ottawa half-way house. He
25 was returned to Stony Mountain ... while



1 the Court wasn't sitting.

2 Hearings resumed Monday and
3 Milgaard often appeared agitated in the
4 courtroom.

5 He stood to try to ask a
6 question during testimony by Ron Wilson,
7 a key witness who helped convict him but
8 has now changed his story.

9 Chief Justice ... Lamer told
10 him: "No. You let your lawyers handle
11 things in the courtroom."

12 During testimony by Eddie
13 Karst, a former Saskatoon police officer
14 who investigated the Miller murder,
15 Milgaard left the courtroom and returned
16 a number of times."

17 Now what does that suggest to you?

18 A Again, repeating Mr. Asper's comment about how Mr.
19 Milgaard dealt with the testimony of Eddie Karst
20 which was on occasion to leave the courtroom,
21 again, a strategy that he may have been using to
22 deal with anxiety at the time. I think what Mr.
23 Asper's letter and this article point out is
24 reinforcing the comment that I've previously made
25 about different people deal with these situations



1 in different ways. There may be some people who
2 see an inquiry like this as an opportunity for a
3 particular outcome and are very invested in
4 attending and monitoring every little minutia that
5 occurs. Other individuals may choose to want to
6 distance themselves from the process because it
7 brings up some very painful memories and those
8 painful memories have the potential to cause the
9 individual to suffer significant anxiety and
10 distress.

11 Q If we can go to 032534, this is an article in *The*
12 *Globe and Mail* of February the 19th of '92, and
13 I'll just draw your attention to certain portions.

14 "Mr. Milgaard was clearly showing signs
15 of stress on Monday. He appeared
16 agitated and depressed during the court
17 review, kept walking in and out of the
18 courtroom, and at one point tried to
19 talk to the judges.

20 He arrived at the halfway house
21 20 minutes before his 10:30 p.m. curfew
22 ..."

23 Accompanied by a chap from Rockwood Institution.
24 He then reportedly asked for permission to step
25 outside and get fresh air. He told reporters his



1 absence was a misunderstanding and basically sat
2 on the back steps from 10:30 to 3:10.

3 And if you can just give the
4 full page again and if we can go from there down
5 to about there:

6 "Yesterday, Mr. Neufeld, a Justice
7 Department lawyer, continued questioning
8 retired Saskatoon police detective Eddie
9 Karst who denied that the police had any
10 established theory about the murder."

11 Also believed that Mr. Milgaard attacked Ms.
12 Miller and intended robbery and not a rape.

13 "... confirmed that police had first
14 suspected a serial rapist who dragged
15 women at knifepoint into alleyways may
16 have been Ms. Miller's assailant. But
17 this changed once they discovered that
18 Mr. Milgaard and his companions arrived
19 in town without any money and had talked
20 about purse snatching.

21 "None of the rape cases
22 involved murder, did they?" Mr. Neufeld
23 asked Mr. Karst.

24 The lawyer added that several
25 knifepoint attacks in the same



1 neighbourhood as Ms. Miller was slain
2 were touchings, pushing...not horrific
3 crimes.

4 Mr. Karst agreed."

5 Now, given the tenor of the evidence and Mr.
6 Milgaard leaving and whatever else, what does
7 that tell you and how does that fit in with your
8 diagnosis?

9 A The tenor of the evidence is, appears from this
10 excerpt to suggest that Mr. Karst was still at
11 that time of the opinion that Mr. Milgaard was
12 responsible for the crime and, you know, that the
13 final quotation that you were reading about the
14 other offences involved touchings or pushings and
15 not horrific crimes would seem to suggest that by
16 implication this was, and I don't think anybody
17 would doubt that the murder of Gail Miller was an
18 horrific crime, and once again, Mr. Milgaard was
19 being put to task on that, or at least his name
20 was being associated with that, and his response
21 to it was to get up and leave the room and then
22 spend close to -- well, in excess of four and a
23 half hours that evening sitting outside in minus
24 five degree weather.

25 Q And a final clipping I have is 077778, this is the



1 *StarPhoenix* on February 21st of '92 dealing with
2 the Supreme Court appearance, and here it says his
3 lawyer, David Asper, said Milgaard would likely be
4 admitted to the prison's hospital for medical
5 assessment.

6 "Corrections officials overreacted to
7 Milgaard's brief disappearance."

8 "The reaction is a joke. It's just not
9 warranted."

10 The incident has sent
11 Milgaard -- who takes lithium for a
12 condition that often leaves him
13 depressed -- into a "major psychological
14 tailspin."

15 "When I saw him at the Ottawa
16 jail ... he just didn't understand what
17 was happening. They're treating him
18 like a terrorist."

19 Now, the reason I brought all
20 this up is there was some suggestion
21 that the Supreme Court was something he
22 handled fairly well. Obviously this
23 suggests he didn't handle it too well at
24 all?

25 A Yes. I think that it's important that the person



1 who is making the observations, while undeniably
2 Mr. Milgaard's lawyer, one of his lawyers at the
3 time, was also somebody who knew Mr. Milgaard and
4 therefore could offer an opinion about how this
5 had changed the appearance of his client from
6 somebody who had obviously looked forward to his
7 opportunity to deal with the matter before the
8 Supreme Court to somebody who, as a result of some
9 of the evidence that was presented, ended up in
10 what's described as a major psychological
11 tailspin.

12 Q And obviously it doesn't advance his case?

13 A No.

14 Q I mean, for the Court to see or know that the
15 applicant is having problems, etcetera, etcetera,
16 is not something that assists?

17 A It becomes a significant distraction to dealing
18 with the issues at hand.

19 Q The other area that I wanted to briefly touch on
20 was, and once again, I can't recall who the
21 questioner was, but it was regarding his disorder,
22 when it may have started and the effect of the
23 whole appeal, you recall that was talked about,
24 you know, and you mentioned about it may be that
25 an appeal could be something he would cling to for



1 a portion of time.

2 If we can go to 000451 and at
3 page 33, now this is March the 9th of 1970, so
4 it's quite early on. David is 17, indicates some
5 background, he doesn't appear to have a record, it
6 gives some background of David -- focus on that a
7 bit, I'll go through it fairly quickly just to lay
8 a foundation.

9 Born and raised in Winnipeg,
10 family moved to Langenburg, father employed at
11 potash, mother does not work, he's the oldest in
12 the family of four, stays with his family in a
13 close knit, good relationship. It says had it not
14 been for their support he would not have been able
15 to survive the ordeal of his trial and conviction.
16 His family are entirely convinced of his innocence
17 and are standing behind him and encouraging him as
18 much as possible.

19 And if you can get to the next
20 paragraph, it states that he had been going to
21 school prior to offence, had consequently not
22 obtained any steady employment. I'm not sure why
23 that's there, he did have employment. Milgaard
24 states he did not get along with his teachers at
25 school mainly because he fooled around a lot and



1 caused them a great deal of difficulty. He said
2 he never had difficulty with the subject matter,
3 but became bored with school and was simply
4 looking for some excitement. Apparently he was
5 quite popular with fellow classmates."

6 This inmate is a quiet, soft-spoken
7 individual who impresses as being a
8 person who is extremely depressed but
9 hides the depression behind a smile. He
10 is holding back a great deal of emotion
11 and on one hand seems to be anxious to
12 express it and yet is almost afraid to
13 do so. He repeatedly insists on his
14 innocence and is convinced that the
15 appeal courts will verify that this is
16 so. He mentioned that he suffered a
17 great deal from the hostility and hatred
18 that he felt in the courtroom throughout
19 the trial. He said that had it not been
20 for his parent's support and
21 encouragement, he would have taken his
22 own life some time ago. When asked
23 about his plans following his appeal, he
24 was somewhat confused and refused to
25 believe that he would still be in the



1 institution after his appeal had been
2 heard. He is terrified that he may lose
3 his appeal and have to face a lifetime
4 in prison and at this time is convincing
5 himself that suicide is the only answer.
6 Milgaard is still very young and very
7 emotionally immature and will require a
8 great deal of support and encouragement
9 from the staff of this Institution if he
10 is to survive this sentence. During the
11 initial interview he did not in any way
12 give the impression that he was
13 manipulative or that he was trying to
14 erect "innocent" picture."

15 If we can just follow along, please.

16 A If I can just clarify, I think the word was
17 create.

18 Q What did I say?

19 A Erect.

20 Q Okay.

21 A Create. And on the copy that I have, which is
22 from a different page reference than the piece on
23 the screen, it also has the word "an" added before
24 "innocent" picture.

25 Q Oh, I see. Thank you. And the next page, please:



1 "In fact, he appeared very confused and
2 defenceless and almost incapable of
3 understanding what is happening to him.

4 It is interesting to note that
5 Milgaard has not received any threats or
6 hostility from the rest of the inmate
7 population. In fact, he has several
8 older cons who are protecting him from
9 the homosexual population and helping
10 him find his way around. Milgaard
11 himself shows absolutely no fear of the
12 inmate population and almost feels that
13 he has an ally in their strength."

14 Now, in your experience, how would somebody
15 convicted of a rape/murder fair in general
16 population?

17 A Individuals charged with sexual offences fall at
18 the lowest rung in the hierarchy within the
19 institution, so a rapist and murderer is likely to
20 be somebody who is targeted by other inmates for
21 significant violence.

22 Q And it says here that some inmates were protecting
23 him before his appeal, he being a 17 year old,
24 relatively good looking young man?

25 A Which would strike me, for somebody who has been



1 convicted of a rape and murder, as being unusual.

2 Q But after the appeal, that may not be the case?

3 A Yes.

4 Q Then the writer goes on to say that:

5 "Since Milgaard is placing so much hope
6 on the outcome of his appeal, he has not
7 developed any plans for his future. He
8 has suggested that he would be
9 interested in completing his high school
10 but beyond that he has no definite plans
11 whatsoever. Consequently it is
12 difficult to make any realistic
13 recommendation at this time. One very
14 definite recommendation that can be
15 made, however, is that Milgaard placed
16 under close observation following his
17 appeal. If he should lose his appeal,
18 he may very well become suicidal. A
19 second recommendation which may be made
20 at this time is that he be referred to
21 the Psychiatrist for a complete
22 psychiatric assessment. Surprisingly
23 this was never ordered by the Courts."

24 And then for progress it says:

25 "Uncertain and depending entirely on the



1 care and treatment he receives within
2 this Institution."

3 Now, how would that fit in with your comments
4 yesterday about the appeal and the onset of the
5 disorder?

6 A This was one of the documents that I was referring
7 to in my answer about how the distress, the horror
8 associated with the traumatic event may be delayed
9 in part because of this extremely strong belief
10 that the appeal process would serve to exonerate
11 him and so in his early days in custody there is
12 this profound hope, belief even beyond a simple
13 hope that the appeal process is going to achieve
14 that outcome for him and therefore some denial of
15 the circumstances in which he finds himself.

16 Q And my final question, Mr. Wilson was asking you
17 about the words "David telling his story." Has
18 anyone brought to your attention any time other
19 than in an official capacity such as the Supreme
20 Court that David has talked to anybody, media,
21 anyone, about his personal circumstances?

22 A I'm not aware of that, no.

23 MR. WOLCH: Those are my questions, sir.

24 MR. HODSON: That appears to be all for Dr.
25 Baillie.



1 COMMISSIONER MacCALLUM: Dr. Baillie, thank
2 you very much for coming and you are excused.

3 A Thank you, sir.

4 MR. WOLCH: Mr. Commissioner, the next
5 witness is Mr. Grymaloski. I'm prepared to start
6 now or --

7 COMMISSIONER MacCALLUM: Yes.

8 MR. WOLCH: Unless you want the break
9 before we start?

10 COMMISSIONER MacCALLUM: No, we'll start
11 now, thanks. We can go to about 10:30.

12 MR. WOLCH: I'm sorry, sir?

13 COMMISSIONER MacCALLUM: About 10:30.

14 **JOEL ADAM GRYMALOSKI, sworn:**

15 **BY MR. WOLCH:**

16 Q Mr. Grymaloski, I believe you are a family
17 therapist?

18 A That's correct.

19 Q And where do you practice?

20 A In Vancouver.

21 Q And having been there with Mr. Hodson, it's a
22 beautiful office right on the water that looks
23 very nice?

24 A Thank you. Yes, it is.

25 Q And a little different than where you grew up?



1 A This is true.

2 Q And your academic qualifications, can you tell me
3 what they are, starting with your undergraduate?

4 A I have a double major in sociology and --

5 Q Let me interrupt you. Could you try to get the
6 mike closer to you or you closer to the mike?
7 It's helpful to us.

8 A Sure. I have a bachelor degree, a double major in
9 sociology and psychology. I have a Bachelor of
10 Ed, a teaching degree, and I have a masters degree
11 in clinical psychology.

12 Q And where did you obtain those various degrees, on
13 each degree tell us?

14 A They were all obtained in Regina, the University
15 of Regina.

16 Q So you are from Saskatchewan?

17 A Correct.

18 Q And after you obtained those various degrees, can
19 you tell us about your professional working
20 career?

21 A Clinical psychology has a clinical internship, a
22 licensed internship involved. I did that in
23 Regina, child and youth mental health. I got
24 hired on, worked there for three years while I was
25 completing my thesis. Worked for about six months



1 at Swift Current Mental Health. My wife got a job
2 out in Vancouver and I followed her out, worked
3 there in the B.C. Mental Health for just under a
4 year before I started my private practice. That
5 was in 1991.

6 Q And you've been continually in that private
7 practice since?

8 A Correct.

9 Q And can you tell us generally what your practice
10 consists of, what type of work you do?

11 A Well, I see individuals, couples and families, a
12 wide range and assortment of problems in living
13 and human issues. As relates to my report and
14 this Inquiry, I do work for the Workman's (sic)
15 Compensation Board in Vancouver, the criminal
16 injuries section, I get referrals for that from
17 trauma survivors and victims of violence. I get
18 referrals from the Insurance Corporation of
19 British Columbia, ICBC, the auto insurance, much
20 like our SGI here, for again trauma survivors,
21 accident survivors, and I've had a number of
22 private cases of sexual abuse, incest that have
23 gone before the courts and in preparing clients
24 for testifying.

25 Q I see. And I believe you've had contact really



1 with two of the wrongly convicted?

2 A That is correct, David Milgaard and Thomas
3 Sophonow.

4 Q And Thomas Sophonow is the individual who was
5 wrongly convicted in Winnipeg and has been
6 exonerated and was the subject of an inquiry led
7 by former Supreme Court Justice Cory?

8 A That is correct. I was called to testify in that
9 inquiry in 2001, February.

10 Q Now, could I ask you how it is you came into
11 contact with David Milgaard?

12 A One of David's main forms of coping is to go
13 swimming. As you mentioned, my office is right on
14 the False Creek Seawall in downtown Vancouver and
15 I'm also right next door to the Vancouver Aquatic
16 Centre which is a large public swimming pool and
17 so David would have lots of occasion to walk by my
18 office and he saw my name and thought it sounded
19 like a good Saskatchewan name.

20 Q Tell us about that. When approximately was your
21 first meeting with David?

22 A In May of '95.

23 Q And tell us how that came about?

24 A As David would tend to do, he simply dropped in
25 and asked to speak with me and we stepped outside



1 and walked around a bit and he told me who he was,
2 and of course I had heard of who he was and I had
3 known of, you know, his history and his past.

4 Q Is that because of your Saskatchewan background or
5 not?

6 A Sure, that, as well as it's in the national media
7 and that, but certainly also because of my
8 Saskatchewan background, and he asked if I would
9 be interested in seeing him and I said sure, but
10 he said at the time he didn't have any money and I
11 said that would be okay.

12 Q So he had no money, but you were prepared to see
13 him?

14 A Correct.

15 Q And on what basis would you see him or how was
16 that arranged?

17 A At his interest, at his discretion, at his
18 motivation he would call or just unfortunately
19 just simply drop by and if I was free or available
20 we would spend some time, or at the times when we
21 would make appointments, we might go to a cafe and
22 have coffee or -- we rarely would meet in my
23 office. My office isn't the biggest, but I don't
24 think that's part of the issue, he simply would
25 talk about feeling quite claustrophobic and



1 confined and would prefer to be outside.

2 Q From the first meeting was there any indication as
3 to why he wanted help or for what purpose?

4 A To basically try and stabilize his life. I
5 believe he had some concerns, although he wouldn't
6 articulate that very well, of the dangers and the
7 high risk situations he would get himself into and
8 I think that was causing some concern for him and
9 he was, in his way, reaching out for help with
10 that.

11 Q Dangerous and high risk in what way?

12 A Well, any number of different behaviours he would
13 get himself involved with from going out and long
14 extensive swims in the ocean. As you may know,
15 the tides can be quite strong in the Georgia
16 Strait or what not and a couple of times he got
17 himself caught in that and that scared him, as
18 well as then heading out on the road, going
19 hitchhiking with, you know, literally the shirt on
20 his back and sleeping in the woods, getting
21 himself into difficulties surrounding that. Those
22 sorts of behaviours I believe were starting to
23 cause him some concern.

24 Q And you say that you didn't necessarily see him in
25 the office because he found it claustrophobic?



1 A Correct, too confining. David has,
2 understandably, quite an issue with what he would
3 perceive to be people in authority or people who
4 hold positions of some authority or what not and
5 having an office would look like that, and so to
6 circumvent that I was more than willing to meet
7 him in a cafe or just go for a walk. That would
8 help alleviate his anxiety, to be able to walk.

9 Q Obviously back then there was, this Inquiry had no
10 connection with this at all?

11 A Correct. This particular Inquiry?

12 Q Yes. It wasn't --

13 A No. I certainly had no sense of this pending
14 Inquiry.

15 Q Okay. Maybe we can put your report up if I could.
16 Now, I want to thank you because it says here -- I
17 asked you to give a report on the 3rd of November
18 and here's your report the 4th of November, and
19 this was asked for in connection with this
20 Inquiry?

21 COMMISSIONER MacCALLUM: What's the doc ID,
22 please?

23 MR. WOLCH: I'm not sure that it has one.

24 COMMISSIONER MacCALLUM: 332 --

25 BY MR. WOLCH:



1 Q Oh, 332554. Can you tell us, and you can use the
2 report, and I don't even mind if you read it, what
3 your initial objective was?

4 A Well, as I say in my report, and as the literature
5 on PTSD certainly spells out, the development of a
6 trusting, secure relation is paramount and perhaps
7 one of the most difficult objectives at the outset
8 of any therapeutic undertaking with individuals of
9 PTSD.

10 Q In your meetings over the years with him, and I
11 take it you weren't charging for them; is that
12 right?

13 A I -- he asked me to keep a running tally. He was
14 hoping and expecting for compensation sometime and
15 upon that time he said he would reimburse me and I
16 was fine with that.

17 Q And in terms of your meeting with him, how far
18 could you get with him?

19 A In terms of simply my initial objective of
20 developing a trusting relationship, that I was
21 able to do perhaps within the first year of
22 meeting with him, but in terms of any other sort
23 of treatment objectives, I didn't even really make
24 attempts.

25 Q Why wouldn't you?



1 A David was just not ready. David was still very
2 much in what I would like to call his coping,
3 survival mode which would render him relatively
4 ineffectual at being able to reflect and
5 introspect on what was going on for him. In fact,
6 for the first maybe three, four, five years of
7 seeing David, I simply tried to get him to talk in
8 what we call "I" language, making references to
9 himself rather than reference to anything and
10 everything surrounding him.

11 Q Were there times when your conversation might
12 touch on what happened to him or what he went
13 through?

14 A Certainly initially I attempted to do that and
15 that would lead nowhere. Well, it would lead to
16 David becoming quite agitated and calling an end
17 to the session and leaving. If we were in a cafe
18 or if we were talking, he would say, okay, well, I
19 need to be going now and that would be the end of
20 that, so I learned fairly quickly that that was an
21 area that even what I thought was gentle prodding
22 would not produce any viable or useful results and
23 so I dropped that.

24 Q You say in your report that, and you have told us,
25 that David tended to drop into your office, touch



1 base, have a coffee, but on the 25th of October he
2 said:

3 "... "no way he was going" to the
4 inquiry ...",
5 and he introduced you:

6 "... to his very pregnant wife and then
7 left."

8 A Correct.

9 Q You recall that incident, do you?

10 A Yes I do.

11 Q Just scroll down.

12 COMMISSIONER MacCALLUM: This is the 25th
13 of October when?

14 A Last year, 2000 --

15 COMMISSIONER MacCALLUM: 2005?

16 A -- 2005. He, his whole orientation, I hadn't seen
17 David for maybe a year and a half until that
18 point, I knew that he was in Romania in the rural
19 outback. I had heard from his ex, Marnie, that he
20 really enjoyed living there because it, to quote
21 her, "it was like stepping back into the medieval
22 world", and in my mind that took him away from
23 everything, from his life, from his past, and
24 which is why he spent some time there, and where,
25 then, he met his present wife. And so in, in



1 dropping by, he was quite adamant that this is his
2 life now and he didn't want anything to -- he
3 didn't want to get himself involved in this.

4 BY MR. WOLCH:

5 Q But you had to call him to get permission to write
6 the report?

7 A Correct.

8 Q And can you tell us what occurred then?

9 A Well I -- he came into my office, we spent about
10 half an hour, and I asked him if he wanted to read
11 it and he read it. That was the first time he had
12 heard of PTSD. He did not particularly like that
13 notion. David is a relatively proud -- he doesn't
14 like to think there's anything wrong with him,
15 umm, so he, he wasn't, he wasn't all that pleased
16 with -- I'm not sure why this is emotional -- he
17 wasn't that pleased with my diagnosis. But I
18 didn't attempt to rationalize it with him or
19 anything, I just said these were my, my
20 conclusions or my summary, and he said "oh, well,
21 I'll think about that". And so I -- what's
22 particularly interesting about that for me is
23 that, that being the first time I had mentioned
24 any sort of a diagnosis to him, how he prior to
25 that, though, would describe his symptoms,



1 "freezing up, clam up, I don't feel good, it
2 affects me, it hurts my head", he'd describe all
3 the symptoms and symptomology of PTSD without me
4 having ever communicated that to him or, I'm
5 certain, him never really reading that anywhere.

6 Q So, in preparing the report for here, that would
7 appear to be the first time he ever heard of this
8 --

9 A Correct.

10 Q -- syndrome?

11 A Correct.

12 Q Now I skip over a little bit here into your
13 report, you talk about Sophonow and you mentioned
14 that you had testified there along with two other
15 mental health professionals, Dr. Roy O'Shaughnessy
16 and Dr. Adrian Grounds, who have worked with the
17 wrongly convicted, and Mr. Sophonow is also
18 diagnosed with post traumatic stress disorder?

19 A Correct.

20 Q And that was a diagnosis of yours and Dr.
21 O'Shaughnessy and Dr. Grounds?

22 A Correct. Both those two individuals, their
23 expertise were sought in the Sophonow Inquiry, and
24 our reports were cross-examined there.

25 There is no literature on the



1 wrongfully convicted in regards to effects and
2 impacts on their life, and that's why I put this
3 particular paragraph in my report, to, well quite
4 frankly, to give it some credence.

5 Q Mr. Sophonow, I believe, was incarcerated for
6 roughly four years; is that right?

7 A That's correct, for the murder of a -- the young
8 woman in Winnipeg.

9 Q Barbara Stoppel.

10 A Right.

11 Q But as I understand it, well I say this for the
12 record's sake, he didn't go through a 690, the
13 Court of Appeal eventually quashed the conviction,
14 but he has been treated as a 690 in terms of
15 Justice Cory, etcetera. But it would be fair to
16 say that his suffering, which I don't minimize at
17 all, would be only a fraction of what David went
18 through?

19 A Well, we'd, we would certainly have to play deity
20 to ascertain an individual's stress or duress.
21 What I could say is that Tom Sophonow's situation
22 is, and was, considerably different than David's.
23 Thomas had a family before going -- no, sorry, not
24 before going into prison but upon returning. But
25 before going into prison he had a job, he had a



1 career, he was a tool die maker, and he had held
2 down a job for quite some period of time, and he
3 had that job to come back to so he was quite --
4 his -- the context from which he came out of was
5 much more stabler than David Milgaard's, and so
6 that does present more support for the individual
7 as opposed to David, and certainly you could say
8 helped alleviate the symptomology of wrongful
9 conviction and the stress and duress of that and
10 the trauma of that.

11 Q But as I understand it, and I take it you were
12 probably there, Thomas Sophonow was able to
13 testify at his inquiry?

14 A That is correct.

15 Q And how'd he handle it?

16 A Well there were a couple times, in the short day
17 and a half that I was there, when he stormed out
18 of the room, much like this, when I was giving
19 evidence, and obviously something triggered him.
20 But he, much like perhaps I'm hearing about David
21 and his appeals and that appeal process and really
22 clinging onto that, Tom really clung onto this
23 Inquiry and that became his whole raison d'être,
24 his whole reason for being, and which is why he
25 was able to do that.



1 As well, as his therapist I,
2 right from the get-go I was able to delve into
3 issues with Thomas related to his incarceration
4 and, at the time he was much better emotionally
5 psychologically integrated to be able to deal with
6 that, and so he was, he was, he was able to attend
7 the -- his own inquiry.

8 Q Okay. And, also, that Inquiry was awarding
9 compensation?

10 A Correct, the second half of that Inquiry was all
11 about compensation, so that perhaps served as
12 increased motivation.

13 Q Mr. Commissioner, I don't know if my clock is fast
14 or not, but pretty close.

15 *(Adjourned at 10:30 a.m.)*

16 *(Reconvened at 10:52 a.m.)*

17 BY MR. WOLCH:

18 Q Mr. Grymaloski, just a follow-up on something we
19 were talking about earlier. In talking about
20 David and Thomas Sophonow you talked about
21 starting a new life, as commencing a new life. Is
22 there a point of time where the new life starts,
23 that is does there have to be, for example,
24 exoneration or release, or what prompts a "new
25 life"?



1 A It's not that easily-discernable start and stop
2 point. There are, if you wish, major milestones
3 along the way that one can look at.

4 In the *Sophonow* case it
5 certainly was his exoneration and then his
6 compensation.

7 In David Milgaard's situation,
8 though, I think it's substantially different in
9 that the effects are, and were, so much more
10 pronounced that there is no clear delineation of
11 symptoms, if you wish, no major road map or marker
12 point along his way to provide that for him, other
13 than perhaps what is presently, right at this very
14 moment, going on for him in his life, which is his
15 new wife and their new baby.

16 Q Now it's fair to say that you have diagnosed David
17 as having post-traumatic stress disorder?

18 A Correct.

19 Q Perhaps the report can be brought up on the
20 screen, page 2. Now you have described
21 post-traumatic stress disorder here; could you
22 help us through that, please?

23 A Well I, I attempted to give a more what I would
24 suggest is a user-friendly interpretation or
25 analysis of PTSD, and it's not entirely mine, it's



1 Lawrence Miller's, who has written substantially
2 on PTSD. Umm, and it's best understood as a
3 series of symptoms and accompanying behaviours
4 that doesn't necessarily have to stem from a
5 discreet event, it can, but it can also occur over
6 some period of time.

7 Q You say here:

8 "We must keep in mind that Mr. Milgaard
9 experienced some 22 years of continued
10 traumatizing experiences, starting when
11 he was but a young man, coupled with the
12 complete and total incapacitation of
13 spirit and soul stemming from his
14 innocence."

15 What are you saying there?

16 A Well, what's important to understand about PTSD is
17 the complete shake-up or breakdown of the human
18 individual's personal world views, personal views
19 and world views, the very way in which we all come
20 to understand how things work, how things go. In
21 PTSD victims or survivors their, that very fabric
22 of how they comprehend and understand their
23 reality is shaken, and so that's kind of like what
24 I am trying to get at there. Having occurred at
25 such a young age and then having it continue, the



1 incarceration and life behind bars, having to
2 experience that and live with that, all along
3 knowing that you are innocent, would be very
4 traumatizing.

5 Q Okay. And then you say:

6 "As a result of these traumatic
7 experiences there follows a developed
8 characteristic set of emotional symptoms
9 and behavioural patterns of which David
10 Milgaard has manifested a multitude of
11 such expressions:",

12 and you list the first one as anxiety; can you
13 tell us about that?

14 A Well the -- a very usable metaphor to try and
15 understand David and/or individuals who have
16 experienced PTSD over, or have experienced trauma
17 over a long period of time and are suffering from
18 PTSD, a useful metaphor would be the tsunami and
19 an individual running away from the tsunami. In
20 my mind that's a useful metaphor for David.
21 David's an individual -- it was all impressed on
22 our minds when we observed the tragedy of people
23 running away. Well, for me, David's been running
24 in front of that tsunami for 35 years, trying to
25 get away from it, and that -- that's part and



1 parcel of literal anxiety or specific anxiety
2 related to concrete specific events, or this
3 free-floating anxiety which is just below
4 consciousness and is always there, and then
5 specific events or occurrences can trigger that
6 and bring it out.

7 And so all the different
8 behavioural patterns and symptomology stem from or
9 come from ways in which he has tried to alleviate
10 those symptomology, and specific to that, the
11 anxiety and the intrusion of events and
12 circumstances that have occurred to him.

13 Q You talk about physiological arousal; can you tell
14 us about that?

15 A Well the -- as Dr. Baillie was alluding to and
16 discussed, the fight-or-flight response in us
17 human beings, which is part and parcel of our
18 evolution and our survival, when we run into
19 dangerous situations we become alert and, you
20 know, that yellow alert, if you wish, can go to a
21 red alert where there's impending danger.

22 Well for someone like David,
23 that physiological, emotional, psychological
24 response style has been turned on for, you know,
25 the years of incarceration, and perhaps the 10, 15



1 years subsequent to that, and so the -- all the
2 physiological systems associated with that --
3 neuropsychologists talk about the endocrinatic
4 system, hormonal system if you wish, is -- becomes
5 conditioned, becomes habituated to that constant
6 being on alert, impending threat, and it's not
7 something that, you know, when I go to sleep it
8 goes away, it, umm, it's always there.

9 **Q** Okay. You refer to irritability?

10 **A** Yes. That's part of that physiological arousal.
11 He will -- I see that personally in our sessions
12 where, as I was saying earlier, I will touch on
13 something where he doesn't want to go and he
14 becomes agitated and irritable, and then that's
15 kind of like the end of that and you can see he
16 has turned off, and there is no sense going
17 further, and so we, we don't.

18 Umm, avoidance/denial, that's
19 what I was trying to get across a little earlier.
20 In terms of showing David my report, he
21 understandably and appropriately has a fair degree
22 of pride and does not like to think this has
23 affected him in any way, but yet it -- it's kind
24 of like a very observable contradiction in that he
25 doesn't really want to touch on any of it or talk



1 about any of it unless he is the one who initiates
2 it.

3 Q Okay. You've got intrusions?

4 A Umm, well, these are the, again, not-so-conscious,
5 always-lurking-behind-consciousness, facts and
6 realities of his experience over the past 30 some
7 odd years that, left untreated, are always there.
8 We -- they may fade in consciousness but they are
9 always there, and so circumstances in his reality
10 can trigger that underlying material and bring it
11 out, which then reinforces his feeling of being
12 out of control. And that's -- that's one of the
13 biggest things that he tries to avoid is that
14 feeling of being out of control. None of us like
15 to have that sort of feeling and so we just avoid
16 stimuli or situations that might bring that about.

17 Q Repetitive nightmares?

18 A In talking with David about this report, upon
19 closing he then gave me a little bit, and said
20 "well, you know, I guess I still do wake up
21 sometimes in the middle of the night in a cold
22 sweat believing I'm still in jail", and so that
23 was -- that was --

24 Q I take it that doesn't surprise you at all?

25 A Sorry?



1 Q That wouldn't come as a surprise to you?

2 A No, no, no. And I saw that as quite positive in
3 terms of our relationship and David's healing,
4 that he is beginning the process of starting to
5 own some of the symptomology.

6 Q Impaired concentration and memory?

7 A Well one of the ways in which all of us human
8 beings deal with emotions is to intellectualize.
9 We learn very early that if we analyse the heck
10 out of something, we limit or diminish the
11 feelings associated with it, and in both Tom
12 Sophonow and David Milgaard, and to some degree in
13 my readings of the individuals from England, the
14 Birmingham 6, they all show examples of that, high
15 analytical, we might say intellectual, kinds of
16 capacities. Well that mechanism, we could call
17 it, becomes taxed, becomes overburdened, if there
18 is overabundance of emotion that's being held down
19 or that's being tried to be suppressed. It taxes
20 that, our cognitive system, and hence, then, the
21 fuzzy, the spacey, the stream of consciousness
22 kind of thinking that David has been known for.

23 Q Concern about losing his mind?

24 A Yes. That's very much what I was referring to
25 earlier in terms of losing control. It's much



1 like any of us, or all of us, having a dream and
2 waking up and, you know, giving our head a shake,
3 "oh, wow, that was just a dream", and then the
4 frameworks and the boundaries of our mind are back
5 in place and we're back in touch with reality.

6 Well, this kind of symptomology
7 blurs those boundaries between conscious and
8 unconscious, they -- there isn't that kind of like
9 firm grasp that most of us in normal situations
10 will have, and so then that can be very
11 frightening and all part and parcel of that
12 underlying anxiety that is always there that "I'm
13 just one step away from losing all control".

14 Q Turn to your last page. You talk about
15 withdrawal/isolation?

16 A Well, again, that's a principal coping strategy of
17 David's. Earlier with Dr. Baillie you were
18 pointing out how he would take himself away, and
19 all his behaviours of that form, including his
20 world travels, in my mind, are all part and parcel
21 of that as a coping strategy, just trying to
22 remove himself, or my metaphor of running ahead of
23 the tsunami, "I'll just remove myself completely
24 from the area". So that's best seen as, again, a
25 coping strategy for dealing with his pain and



1 suffering.

2 Q And impulsivity and instability?

3 A Again that underlying anxiety, that perpetual need
4 to be holding emotion down and holding it in
5 check, keeping it suppressed, will make any of us
6 unstable and very impulsive. We feel -- we could
7 feel -- David feels something starting to come up
8 and rather than perhaps, in a more normal
9 situation, sitting there and letting it come up, I
10 like to say inhabiting the emotion, David will do
11 something, he -- he -- hence the impulsivity, just
12 get up and act, do something. And that, if you
13 wish, becomes a distraction, becomes a deflection,
14 and, again, another way of coping and dealing with
15 the emotion.

16 Q Now you come to your conclusions and
17 recommendations. You say:

18 "David ... is a trauma survivor like few
19 others."

20 A By that I mean the length of time that he was
21 exposed to traumatic stimuli.

22 Q Okay. And you state:

23 "He suffers from Post-Traumatic Stress
24 Disorder."

25 A Uh-huh.



1 Q Can you take us through your conclusions? You can
2 obviously borrow from what you have written or
3 elaborate.

4 A Well, as we were just talking about in terms of
5 the symptoms and the behaviours, that has --
6 that's best seen, again, as a syndrome, as a
7 collection. There's nothing discreet or simple
8 about PTSD, and that's certainly highlighted in
9 the literature on PTSD, it takes a -- it requires
10 a real meta, a global kind of approach to dealing
11 with it, because all areas of functioning are
12 affected by it. And so the first objective in
13 trying to provide treatment or be of some
14 effective benefit to such an individual is to,
15 first of all, try and get them to trust you so
16 that they can then open up emotional intimacy.
17 And so that has, that has been my prime objective,
18 and as I say most everything else has been simply
19 crisis management, by that I mean trying to manage
20 the behaviours, trying to manage the symptoms
21 rather than really getting at the roots and the
22 causes of the symptoms and the behaviours --

23 Q Is it -- go on?

24 A -- and attempts to -- in any kind of treatment
25 modality with any human being you can't mandate



1 treatment. I guess we can and people can play
2 along and, you know, pretend if you wish, but that
3 certainly isn't my interest, and because that does
4 no good to anybody, and rather trying to force an
5 individual to get into their stuff simply
6 reinforces their maladaptive ways of coping and
7 dealing with it, it just builds up those defences
8 stronger and stronger, and what -- rather, what
9 you want to be doing to be effective is to limit
10 those and lessen those, and so it's -- it's --
11 what I am trying to get at there is a big-stick
12 approach does more harm than good.

13 Q Just before I finish the report and my questions,
14 I would like to turn for a moment to our meeting
15 in mid to late November in your office with
16 Commission Counsel?

17 A Uh-huh.

18 Q And how did you see your role in that?

19 A Provide support for David, just help him feel like
20 there was someone there with him, for him at an
21 emotional level.

22 Q You spent a fair bit of time with him before we
23 got there I think?

24 A Yes.

25 Q And what was his emotional state?



1 A He was worried, he was anxious, he was agitated,
2 he was kind of irritable, kind of impatient.
3 There was noticeable behavioural examples of that
4 or concomitance of that and my role was, you know,
5 just simply trying to say, you know, it's going to
6 be fine, you know, there's nothing adverse about
7 it, it's not going to be confrontational, it's
8 kind of like an exploratory thing, this is going
9 to work, and so just trying to support him and
10 assure him that things would go okay.

11 Q And what did you observe taking place in the
12 actual meeting?

13 A Well, as hopefully you remember, it was light and
14 jovial and pleasant. We -- and everybody was a
15 part of that, you know, tried to keep it at that
16 level. There were -- there was an instance when
17 the issue of, oh, something that transpired way
18 back when around the throwing out of the car, and
19 you'll have to forgive me for not knowing any of
20 these details, a little packet or something like
21 that, there was some question, a question brought
22 about that I think as a for instance is what the
23 sort of questions would look like, and if you
24 remember, David got up and started gesticulating
25 with his hands a little bit and got a little bit,



1 a tad agitated by that and we see that kind of
2 stream of consciousness thinking, that
3 over-intellectualizing that I talked about, where
4 again it became for a moment a little difficult to
5 follow him, and then he, you know, it -- I think
6 we moved on or changed the subject or what not and
7 he quieted back down and we carried on.

8 Q And when the interview was over, what happened
9 then?

10 A David left, David left in a relative hurry. I
11 didn't get to spend any time with him which again
12 is kind of how things have typically always gone.
13 He gave me a phone call a day or two later just
14 saying he was fine and I have not seen him since.
15 I talked to him on the phone just before coming
16 down here and he was screening his calls and he
17 did not take my call, but then he called right
18 back, I guess he maybe recognized my number and he
19 called right back and that's when he told me about
20 the birth of his boy and that he is so far away,
21 to quote him verbatim, he is so far away from this
22 Inquiry, don't talk about it at all to me, I just
23 want to enjoy my baby and bye, and he hung up and
24 that's the last conversation I've had from him.

25 Q Is there any concern on your part that your being



1 of assistance to us may affect your relationship?

2 A Yes, I do.

3 Q What is your concern?

4 A I do have concerns of that. Well, he
5 understandably, and perhaps appropriately, will
6 not know what exactly my position is and who, for
7 that matter, exactly I am and so he understandably
8 would have some doubts and some concerns and some
9 insecurities around my involvement with this
10 Inquiry, with you, and that may, you know, put a
11 little dent into our relationship and the trust
12 that he does have in me.

13 Q Okay. Just going through the second last
14 paragraph:

15 "Mr. Milgaard has been relatively
16 successful in coping with his history of
17 abuse and trauma through his efforts to
18 normalize his life. This is best
19 reflected by his extensive travels and
20 his new bride and --"

21 Now born child.

22 "The demons of his past are still there
23 waiting for a more stable and secure,
24 and consistently so, time in his life
25 for his real work to begin. I am



1 reinforcing David's present desire to
2 settle down and find a house and a home
3 for his 'baby'."

4 Can you elaborate on that, please?

5 A Well, my second and primary treatment objective is
6 stability, continuity and predictability for David
7 in his life, something of which he has not had
8 anything of, for again ever since he was an
9 adolescent, and so I have certainly encouraged him
10 and reinforced his desires for travelling, I see
11 that as a more adaptive form of coping and dealing
12 with his demons as I say, that underlying, you
13 know, always kept in check emotional baggage of
14 his, but that as he now seeks to provide stability
15 and continuity for his wife and child, it -- and
16 again, this is true with any and all therapeutic
17 relationships and dimensions in my practice, if
18 our life is unstable and unsettled, that serves as
19 a very useful, if I can call it that, distraction
20 from dealing with what perhaps I do need to deal
21 with. Conversely, if we have some stability and
22 continuity in our life, stuff invariably will
23 start to come up and ideally then that's when
24 we're able to start dealing with it.

25 Q Okay. You say for David to appear here:



1 "... would most probably, undo the last
2 10 years of his work and effort to
3 stabilize his life and move past his
4 traumatizing past. As such it would
5 throw him back into the dark chasm that
6 was so long a part of his life and that
7 he is so valiantly but slowly, climbing
8 his way out of."

9 A And again, what I'm referring to there is the
10 continuity, stability and predictability of his
11 life which is all related to power of control
12 himself, feeling himself to be in control of his
13 life and his life circumstances. I am suggesting
14 that he is quite adamant at not wanting to be a
15 part of this Inquiry and so in effect being forced
16 to do so would very much put him out of control of
17 that situation and would -- that is David's
18 history, not being in control of his life, and so
19 it would be a replication of what has come before,
20 what his life has been.

21 MR. WOLCH: Thank you. Mr. Commissioner,
22 those are all the questions I have.

23 COMMISSIONER MacCALLUM: Mr. Grymaloski,
24 maybe I missed it, but prior to October the 25th
25 when you saw Mr. Milgaard, when was the last time



1 you treated him?

2 A That would have been about a year and a half
3 prior, or close to two years.

4 COMMISSIONER MacCALLUM: And was that a
5 series of interviews you had with him then or
6 only one?

7 A No, just one.

8 COMMISSIONER MacCALLUM: And before that?

9 A Oh, probably -- there would have been a couple, I
10 think that was then just before he -- or after he
11 had come back from India, so he would come in and
12 see me once or twice and then go away, I would be
13 out of communication and come back, and that went
14 on and off like that for, well, ever since I've
15 known him.

16 COMMISSIONER MacCALLUM: Well, thanks, I
17 obviously am getting into some new ground. I
18 thought I had missed something. Perhaps counsel
19 will wish to take that up with you.

20 Cross-examination anyone?

21 **BY MR. ELSON:**

22 Q Mr. Grymaloski, my name is Richard Elson and I
23 represent the Saskatoon Police Service at this
24 Commission of Inquiry.

25 I don't mean to be flippant, but



1 I wanted to draw upon one of the answers that you
2 gave in answering questions put forward by Mr.
3 Wolch, and again, as I say, I don't want to be
4 flippant, but you used the words in describing Mr.
5 Milgaard prior to the interview in November of
6 2005 as worried, anxious, irritable and impatient,
7 and with the greatest of respect, those are words
8 my wife uses to describe me before a trial. If we
9 were to look at any witness or any participant in
10 any type of judicial or litigious proceedings,
11 would it not be fair to use those words to
12 describe those persons irrespective of whatever
13 mental condition they might have or might not
14 have?

15 A But, sir, with all due respect, you, before a
16 trial, haven't spent 22 years in jail for a crime
17 you did not commit.

18 Q I appreciate that, but the significance of the
19 words you use, you indicate that Mr. Milgaard was
20 worried, anxious, irritable and impatient. I
21 appreciate that his background may be different
22 than mine, but those particular words I suggest to
23 you don't carry any particular significance and
24 don't necessarily stand out as hallmark s for
25 whether or not somebody has spent 22 years in



1 custody for an offence they didn't commit or
2 whether they hadn't spent any time in custody.

3 A But your worry and anxiety isn't backed up then by
4 an inability to perform, whereas David's is.

5 Q And yet his -- and as I understand it, and I only
6 understand this from information received to me
7 from Commission Counsel, the interaction that was
8 had at that time was quite useful for all
9 concerned?

10 A Sorry, the interaction between --

11 Q The interaction that was had between Commission
12 Counsel and Mr. Milgaard at that time in November
13 of 2005 was reasonably useful?

14 A Yes.

15 Q Now, in your report, and at the first page of your
16 report, second paragraph -- I'm terrible with
17 this -- you indicate the word infrequent and
18 frequent in the same paragraph, you indicated:

19 "I started seeing David Milgaard back on
20 May 23rd, 1995 and have seen him on an
21 infrequent basis every since."

22 And then in the very next paragraph (sic):

23 "The first couple of years, visits were
24 fairly frequent but at coffee shops..."

25 Etcetera. During those first few years -- well,



1 let me be even more specific. When you first
2 began interacting with Mr. Milgaard in May of
3 1995, did you open a file at that time?

4 A Yes, I did.

5 Q And would you record your clinical findings in
6 that file?

7 A No, they are more -- my note taking is more
8 observational, certainly at the initial phase of a
9 therapeutic relationship.

10 Q My understanding of -- I've had occasion to review
11 a few medical records over my time, but my
12 understanding is that clinical records generally
13 record the subjective history a patient gives to
14 the therapist, objective findings made by the
15 therapist in part to confirm whether or not the
16 subjective history is accurate, and then thirdly
17 an assessment and finally a plan. I understand
18 that's known as the SOAP format, subjective,
19 objective, assessment and plan. Do you maintain
20 that same kind of note-taking system in your
21 records?

22 COMMISSIONER MacCALLUM: What was the last
23 word, assessment?

24 MR. ELSON: Subjective, objective,
25 assessment and plan.



1 COMMISSIONER MacCALLUM: Plan?

2 MR. ELSON: Plan.

3 A No, I don't.

4 BY MR. ELSON:

5 Q You don't. You are familiar with the SOAP format?

6 A Yes, I am.

7 Q You are?

8 A Yeah.

9 Q What type of format do you use in maintaining your
10 records?

11 A Well, with someone like David Milgaard, very
12 little. David would wonder what I was writing. I
13 took very little notes. Most of our meetings
14 weren't in my office precisely for the type of
15 client that David is and David was.

16 Q Would you take your file with you when you met him
17 in the coffee shops --

18 A No.

19 Q -- during those first few years?

20 A No, no.

21 Q So you would then record your notes from your
22 memory --

23 A Correct.

24 Q -- after you returned to your office?

25 A Correct.



1 Q And those notes at that time, would I be fair in
2 summarizing your evidence as saying your notes
3 would reflect the subjective history that Mr.
4 Milgaard would be providing to you?

5 A I'm not sure what you mean by subjective history.
6 My notes would simply involve my observations of
7 David at that particular point in time.

8 Q I stand corrected. So when you say you would
9 record your observations, these would be your
10 observations as opposed to what -- your
11 observations of Mr. Milgaard as opposed to him
12 telling you what he was experiencing?

13 A David rarely would tell me what he was
14 experiencing, we would talk about anything and
15 everything but. That's the whole issue, trying to
16 get David to open up.

17 Q All right. Now, do you have your file with you?

18 A No, I don't.

19 Q Were you asked to bring your file with you?

20 A Yes, I was.

21 Q And why did you not bring it?

22 A My file is confidential. David does not want, did
23 not give me a release of information.

24 Q Now, my understanding is that Mr. Wolch arranged
25 for you, or had made the specific request that you



1 attend this Commission of Inquiry in order for him
2 to lead evidence from you with respect to your
3 opinion as to David Milgaard's condition; is that
4 correct?

5 A Correct.

6 Q David Milgaard was aware that you were coming to
7 this Inquiry to testify as requested by his
8 lawyer?

9 A Correct.

10 Q You did not regard the request by his counsel as a
11 waiver of his right to confidentiality?

12 A I did not.

13 Q Did you ask Mr. Milgaard as to whether or not he
14 waived any claim for confidentiality he might have
15 with respect to those records?

16 A Yes.

17 Q As a consequence of his lawyer permitting or
18 asking for you to be here?

19 A I don't think it got quite that complicated.

20 Q I guess what I'm getting at, Mr. Grymaloski, is it
21 sounds, with the greatest of respect, somewhat
22 inconsistent for Mr. Milgaard's counsel to produce
23 you, in effect -- granted, the Commission Counsel
24 assisted in that respect -- but in a sense you are
25 being produced here primarily at the request of



1 Mr. Wolch who is Mr. Milgaard's counsel?

2 A Correct.

3 Q And yet at the same time Mr. Wolch's client is
4 refusing to permit you to disclose or to produce
5 the record which forms the basis of the opinions
6 you are expressing here today?

7 A Fair.

8 Q Does that not strike you as being somewhat
9 inconsistent?

10 A No.

11 Q Why not?

12 A My duty and my obligation is to my client. My
13 file is about his personal, very intimate life and
14 affairs and I'm not sure what bearing or how that
15 could have any bearing on this Inquiry. I have
16 not spent any time with David looking at his
17 wrongful conviction, his incarceration or any of
18 that history, there's none of that in my file.

19 Q But it would be fair to say that your opinion,
20 your report dated November 4th of 2005 would have
21 been based in part on notes contained in your
22 clinical file; is that correct?

23 A Well, not really.

24 Q You didn't have the file open before you when you
25 were dictating this report?



1 A Not really.

2 Q You went totally by memory?

3 A Correct.

4 Q All right. We don't have the report here that we
5 can use in one form or another either to confirm
6 or perhaps even challenge some of the conclusions
7 that are set out in this report. You would agree
8 with that?

9 A Well, I would suggest that there's ample evidence
10 of David's behaviour over the years to
11 substantiate my report.

12 Q And that evidence would be found in your clinical
13 record?

14 A It's also found in the public record.

15 Q I guess what I'm getting at is that it is
16 conceivable, is it not, that there may be entries
17 in your clinical record which, if we were to
18 review, might raise some inconsistencies between
19 the findings in your clinical record and the
20 findings set out in your report of November 4,
21 2005?

22 A I would respectfully disagree.

23 Q We don't know though do we?

24 A Fair.

25 Q And in light of the fact that you didn't produce



1 your report, we're not going to know?

2 A Fair.

3 Q When you say in the first couple of years the
4 visits were fairly frequent, I wonder if you could
5 be more specific in identifying what fairly
6 frequent meant?

7 A In the first year, that's '95, I think I saw him
8 five times.

9 Q What about '96?

10 A I probably saw him three times, four times.

11 Q And thereafter?

12 A '97, I think there was one or two visits. There
13 was nothing in '98. '99 I think there was a
14 visit.

15 COMMISSIONER MacCALLUM: A visit?

16 A Sorry? A visit, yes. 2000 there was maybe three
17 visits, 2001 there might have been a visit,
18 nothing in 2003 and 2004 and then --

19 COMMISSIONER MacCALLUM: What about 2002?

20 A I don't think there was a visit then either.

21 COMMISSIONER MacCALLUM: 2002 to 2004
22 inclusive no visits?

23 A Correct.

24 BY MR. ELSON:

25 Q Mr. Grymaloski, you have those specific -- I



1 appreciate you didn't describe the dates, but you
2 are able to identify and you feel relatively
3 comfortable with the number of times that you
4 would have seen him in each of those years you've
5 just described in answering my questions and the
6 Commissioner's questions?

7 A Yes. Prior to coming here I had a look at my file
8 just to see if indeed I could follow through with
9 the request or not.

10 Q Does your record, does your clinical file simply
11 contain your observations and your own notes or
12 does it also contain any materials, clinical notes
13 or clinical records that came from third parties?

14 A No. Just mine.

15 Q Let me be more specific, and I think you've
16 already answered the question, but just out of
17 fairness to you let me be specific. We have heard
18 evidence that there have been hospitalizations. I
19 know from time to time it is appropriate for
20 therapists to receive discharge summaries, for
21 example, of hospital admissions. Did you receive
22 any discharge summary of Mr. Milgaard's hospital
23 admissions during the period of time between May
24 of 1995 and the present?

25 A No, I did not.



1 Q Are you aware of any hospital admissions --

2 A Yes, I am.

3 Q -- between 1995 and the present?

4 A David, on several occasions, had told me that he
5 had checked himself in.

6 Q And did you receive any clinical information other
7 than through Mr. Milgaard with respect to the
8 circumstances of those admissions and, in
9 particular, the admitting diagnosis?

10 A No, I did not. He would not divulge that
11 information to me and I would not pursue that.

12 Q All right. Would it not have been helpful for you
13 to have received clinical information with respect
14 to those hospital admissions particularly if they
15 might have been for mental conditions as opposed
16 to physiological ones?

17 A Yes, it would have been helpful, but again, as I
18 was alluding to earlier, in terms of a global sort
19 of approach to treatment with PTSD, I would
20 suggest that it would have been more harmful in
21 setting up questions within David as to why I
22 would be pursuing that. The nature of the
23 relationship is really quite significant and
24 important in this respect in terms of trust. The
25 only way that I have any access to David at an



1 emotionally intimate level is simply because he
2 sees me as safe.

3 Q I understand. In seeing you as safe, to use your
4 word, to what extent, if any, do you perceive that
5 you must be David Milgaard's advocate?

6 A Well, I'm certainly an advocate for his health and
7 well-being, oh, yes. No, I would certainly agree
8 with that.

9 Q All right. And in your opinion, that advocacy
10 role extends to the point of suggesting that Mr.
11 Milgaard ought not to testify before this
12 Commission of Inquiry, am I to understand your
13 evidence correctly in that respect?

14 A Those were David's wishes and a big part of our
15 relationship is me seeking to validate and empower
16 David, help him find his voice, and those were his
17 wishes and that's his desire. I see that as being
18 directly correlated to his health and well-being
19 to his healing and so yes.

20 Q Now, in that context, are you aware that there
21 were various requests, some might use the word
22 demand, I don't, but there were certainly various
23 requests from Mr. Milgaard in a number of
24 circumstances certainly prior to 1997 that there
25 be a Commission of Inquiry into his wrongful



1 conviction. Were you aware that he had previously
2 made a request for a Commission of Inquiry to
3 investigate his wrongful conviction?

4 A Not coming directly from David.

5 Q All right.

6 A And --

7 Q Have you subsequently been made aware of the fact
8 that Mr. Milgaard had requested the Saskatchewan
9 government to appoint this Commission of Inquiry?

10 A I wasn't aware that it was David Milgaard himself.

11 Q Taking into account the fact that Mr. Milgaard had
12 at least some time in the past made a request for
13 this Commission of Inquiry, would you not see him
14 making that request for this Commission of Inquiry
15 to be created to investigate the circumstances of
16 his wrongful conviction as part and parcel of his
17 attempt to empower himself and to gain control in
18 some respect over his destiny by trying to find
19 out what the heck happened?

20 A Correct.

21 Q In that context, as his therapeutic advocate, does
22 not encouraging him to assist in one form or
23 another with this Commission of Inquiry become
24 part of that therapy?

25 A Yes, it does. I was very supportive of Tom



1 Sophonow testifying at his inquiry, but there's
2 phenomenal and very significant differences
3 between the two. David is simply just not ready
4 at this point in time to broach all the issues and
5 their surrounding emotional valences, their
6 surrounding emotional values at this point in time
7 and that has been, fortunately or unfortunately,
8 compounded by his new wife and the birth of his
9 child. That has taken preeminence for David and
10 his whole motivation.

11 I think as Dr. Baillie attempted
12 to ascertain, David, as with Tom Sophonow, had, in
13 the initial phase of his release, his appeal and
14 compensation as, again as I said earlier, his
15 *raison d'être*, his reason for being, and that
16 propelled him more into the public and being a
17 spokesperson for his cause.

18 Presently, again rightfully or
19 wrongfully or correctly or incorrectly, that has
20 changed and his wife and his child and the
21 stability and continuity and predictability of his
22 life has risen in my mind, thankfully, to
23 preeminence in his mindset and in his control as
24 what he wants to be doing in his life.

25 Q My understanding, when you raised the *Sophonow*



1 case, my understanding of your interaction with
2 Mr. Sophonow is that you had been seeing him over
3 a period of time and it would be fair to say that
4 the circumstances under which you were seeing
5 Mr. Sophonow were, if I might use the phrase,
6 somewhat more in-depth --

7 A Correct.

8 Q -- with Mr. Sophonow than they were for Mr.
9 Milgaard?

10 A Correct.

11 Q In fact, you had occasion, as I understand it from
12 Mr. Cory's Commission of Inquiry, which I
13 reviewed, you specifically had occasion to employ
14 psychological testing with respect to
15 Mr. Sophonow; is that correct?

16 A Correct.

17 Q And you have not done so with respect to Mr.
18 Milgaard?

19 A Correct.

20 Q That psychological testing that you performed with
21 Mr. Sophonow was of some use to you in making your
22 assessment of Mr. Sophonow; is that correct?

23 A Correct.

24 Q The other mental health professionals who
25 testified before Mr. Justice Cory, as I understand



1 it, were Dr. O'Shaughnessy and Dr. Grounds; is
2 that correct?

3 A Correct.

4 Q They are both psychiatrists?

5 A Correct.

6 Q Specifically, Mr. Commissioner, I believe it's Roy
7 O'Shaughnessy, Dr. Roy O'Shaughnessy from
8 Vancouver, and Dr. Adrian Grounds from the United
9 Kingdom?

10 A Correct.

11 COMMISSIONER MacCALLUM: How do you spell
12 his name?

13 A Grounds is just as it is, G-R-O-U-N-D-S.

14 COMMISSIONER MacCALLUM: Okay.

15 MR. ELSON: And O'Shaughnessy is actually
16 referred to in Mr. -- sorry, it's actually
17 referred to in the report, and it's been
18 highlighted there.

19 BY MR. ELSON:

20 Q My understanding is that Dr. O'Shaughnessy, in
21 that case, said much as you've said, and also as
22 Dr. Baillie has said, that there had been really
23 no literature and no studies to identify a
24 wrongful conviction per se as being the triggering
25 traumatic event for post-traumatic stress



1 disorder; you would agree with that?

2 A Well I'm, I'm not saying that it's just the
3 wrongful conviction, I'm saying that that
4 represents a cluster of contributing factors.

5 Q And, primarily, the concern is related to the
6 actual incarceration and the experiences during
7 incarceration, and in Mr. Sophonow's case that was
8 particularly so, because the evidence came out
9 that Mr. Sophonow saw an inmate hang himself while
10 he was incarcerated for a period of time and that
11 played a significant role in Mr. Sophonow's
12 diagnosis; would you agree with that?

13 A Well, again, we're trying to parcel out the degree
14 of stressors and the effect, the impact on the
15 human psyche, and I can't do that. That's what I
16 perhaps glibly, or certainly tongue firmly planted
17 in cheek say, one would need to be a deity to be
18 able to ascertain such an effect. I don't think
19 you can parcel out effects so specifically or
20 concretely.

21 Q Except, as Dr. Baillie said to us yesterday, it
22 may be appropriate for individuals to deal with
23 tangents that may be, in one form or another,
24 associated with a traumatic event?

25 A Right.



1 Q But they are at least sufficiently tangential to
2 the traumatic event that it doesn't stop a person
3 from giving a narration with respect to those
4 tangential things --

5 A Right.

6 Q -- or those tangential circumstances?

7 A Correct, sure.

8 Q And you would agree with that?

9 A Yes, I would.

10 Q Now I understand Dr. Grounds, in his testimony
11 before Mr. Justice Cory, indicated that he had not
12 seen Mr. Sophonow but he, himself, had done work
13 with wrongfully-convicted people, notably the
14 individuals who had been wrongfully convicted with
15 respect to the Birmingham and the Guilford
16 bombings in the United Kingdom?

17 A Correct.

18 Q And, indeed, Dr. Grounds testified that it came as
19 a complete surprise to him that these individuals
20 demonstrated signs of post-traumatic stress
21 disorder; do you recall that testimony given by
22 Dr. Grounds?

23 A Unfortunately, I was not there for that.

24 Q Did you actually see Dr. Grounds' report?

25 A No, I did not.



1 Q My understanding of Dr. Grounds -- and this is
2 taken, Mr. Commissioner, from the web site with
3 respect to the Cory Inquiry -- my understanding of
4 Dr. Grounds' testimony is that he was very
5 surprised at his findings in the Birmingham and
6 the Guilford cases because, up to that point in
7 time, the only evidence and the only literature
8 that described the traumatic event was done in the
9 context of wars, serious accidents, sexual abuse,
10 and victims of concentration camps or victims of
11 torture?

12 A That's right.

13 Q Those were the typical examples of post-traumatic
14 stress disorder?

15 A Correct.

16 Q You would agree --

17 A I attempt -- I make note of that in, I believe,
18 the opening paragraph of my report. No, I agree
19 with that, sorry, the --

20 Q It's actually the top of page 2 I think you are
21 referring to; is it not?

22 A Yes, correct. I agree with that.

23 No, this is a whole new area
24 with the wrongfully convicted, there is no
25 psychological, psychiatric literature on it, on



1 the effects of being wrongfully incarcerated.

2 Q Now, having said that, it's my understanding that
3 the wrongfully convicted, in Mr. Sophonow's case
4 and also with respect to the Birmingham and the
5 Guilford bombers in the United Kingdom, had no
6 difficulty testifying at their subsequent
7 Commissions of Inquiry examining the wrongful
8 convictions in either of those instances?

9 A As did Thomas Sophonow.

10 Q As did Thomas Sophonow.

11 A Yeah. But as I'm suggesting, there is -- I don't
12 know the Birmingham 6, but I do know Thomas
13 Sophonow, and there are substantial emotional,
14 psychological differences between these two
15 gentlemen; age, context, social context, and
16 career.

17 Incidentally, my understanding
18 of Dr. Grounds' work comes from Thomas Sophonow,
19 who subsequently travelled to England and
20 undertook a couple weeks of treatment with Dr.
21 Grounds.

22 Q The -- you are aware of Mr. Milgaard's press
23 conference in October of 2005 here in Saskatoon?

24 A I heard about it, umm, after the fact.

25 Q And so he did not speak with you beforehand?



1 A No, he didn't.

2 Q He did not seek your advice as to whether this,
3 therapeutically for him, was a good thing to do?

4 A I wish he would have.

5 Q I'm interested in your answer on that. If he had
6 done so what would your advice have been?

7 A To stick to his prepared statement and do no Q and
8 A.

9 Q Right. Now for him to actually come into the
10 hearing room where the Commission of Inquiry
11 charged with the responsibility of examining the
12 circumstances of his wrongful conviction, it has
13 previously been described as hubris. That aside,
14 to what extent is that consistent or inconsistent
15 with this avoidance that you referred to in your
16 report and which Dr. Baillie has referred to in
17 his report? You heard that question yesterday.

18 A Uh-huh. Well I think, correctly, David, as I've
19 attempted to allude to, really tries to see and
20 think and believe that none of this has had any
21 effect on him, and so my hypothesis, my
22 assumption, is that he perhaps believed he could
23 do that.

24 Q You are, as I indicated, you are now aware -- or
25 as you had indicated, you are now aware that Mr.



1 Milgaard had asked for this Commission of Inquiry.
2 In your discussions with him about possibly
3 participating in this Commission of Inquiry -- and
4 I say this with the greatest of respect to Mr.
5 Milgaard -- does it come across to you as if he
6 perceives that this is his inquiry, that he can
7 come and go as he pleases and that he can
8 participate as he pleases, that it belongs to him
9 in some way?

10 A Right. No, I -- I think that would -- that's a
11 tad unfair. I don't think he's --

12 Q Tell me why you feel that's unfair?

13 A Because I don't believe he's that egocentric, I
14 don't see him as being that egocentric, this thing
15 revolves around him. He is definitely trying to
16 move, remove himself or leave it in the past,
17 leave it behind him, he is concerned about due
18 process, he is concerned about what did transpire,
19 but he does not -- it's not that flippant of an
20 attitude or an orientation towards it all.

21 Q How can one, in that context then, how can he be
22 concerned about the result, or the proceedings of
23 this Commission of Inquiry, and yet not
24 participate in giving valuable evidence that only
25 he would know?



1 A Because he knows his past, he knows his history,
2 he knows how this affects him, his -- and he
3 knows, he has some sense, then, of how potentially
4 debilitating that would be for his wife and his
5 newborn child, and he is -- his whole emphasis on
6 orientation, understandably and in my mind
7 appropriately in terms of David's healing and
8 movement, growth out of this, needs to be
9 orientated in that direction.

10 Q Irrespective of the consequences that might affect
11 this Commission of Inquiry in that respect?

12 A Well --

13 Q In other words what I am getting at is that in
14 his, in order for him to be concerned about his
15 own health and welfare, if that diminishes the
16 ability of this Commission of Inquiry to do its
17 job, is that of any concern to Mr. Milgaard?

18 A Well, you are asking his therapist that question,
19 and of course you are going to know what my answer
20 is going to be; his health and well-being is more
21 important.

22 Q All right. You are aware --

23 A And that of his family, if I may say.

24 Q I understand. You are aware, if not before
25 yesterday certainly yesterday you would have been



1 aware, because it came up in the questioning of
2 Dr. Baillie, that in May of 1996, a year after you
3 first met Mr. Milgaard, he attended in Saskatoon
4 and was examined for discovery by lawyers who were
5 representing adverse parties? I'm not sure if you
6 have any personal familiarity with the examination
7 for discovery process?

8 A I don't.

9 Q It's a process whereby counsel on the opposing
10 side are permitted to examine, in this instance
11 Mr. Milgaard as plaintiff, are permitted to
12 examine him with respect to the facts in issue.
13 Now, granted, that was prior to the DNA analysis
14 and the finding by the Government of Saskatchewan
15 that Mr. Milgaard was factually innocent. Having
16 said that, Mr. Milgaard was planning to come in
17 for five days, I think he was here for either
18 3 1/2 or 4 days in May of 1996. Let me ask the
19 same question of you as I asked of Dr. Baillie
20 yesterday.

21 To what extent, if any, is his
22 participation, or was his participation at the
23 examination for discovery in 1996, inconsistent
24 with the avoidance that both you and Dr. Baillie
25 speak of in describing post-traumatic stress



1 disorder?

2 A Well I think, as Dr. Baillie and myself in terms
3 of my continual reference to raison d'être, back
4 in '96 that was David's whole reason for existing,
5 so that that was his cause, that was his
6 motivation, his primary, fundamental motivation.

7 COMMISSIONER MacCALLUM: What was, sir?

8 A The inquiry or the -- what you were talking about
9 in '96.

10 COMMISSIONER MacCALLUM: His lawsuit?

11 MR. ELSON: His civil lawsuit.

12 COMMISSIONER MacCALLUM: Make sure he
13 understands.

14 MR. ELSON: I'm sorry.

15 BY MR. ELSON:

16 Q And that's my fault, Mr. Grymaloski, not yours.

17 The examination for discovery
18 was in the context of a civil lawsuit in which Mr.
19 Milgaard was then seeking compensation, because at
20 that time there had been no finding that Mr.
21 Milgaard was factually innocent.

22 A Okay.

23 Q I should have made that clear to you, in fairness
24 to you, and that was the context in which he was
25 giving evidence. He had not received any



1 compensation. So if I could give you that
2 context --

3 A Right.

4 Q -- again let me, if you've forgotten the question
5 let me put the question to you: To what extent,
6 if any, was it inconsistent for him to attend at
7 the examination for discovery, in the context of
8 that civil lawsuit --

9 A Right.

10 Q -- to what extent was that inconsistent with the
11 avoidance mechanism that both you and Dr. Baillie
12 speak of?

13 A I don't see that as being inconsistent at all.
14 David's very livelihood and wherewithal depended
15 upon some kind of compensation, he had no money,
16 and that was very humiliating for him. He was
17 unemployable, that produced a lot of shame for
18 him, and so that was his cause, that was his --
19 that's what he, that was kind of like a
20 life-or-death response.

21 Q But this Commission of Inquiry which he has
22 requested, which obviously was part of his
23 cause, --

24 A Right.

25 Q -- is now no longer part of his cause now that he



1 has been compensated?

2 A It has lessened.

3 Q Are you aware of any consequences to Mr.
4 Milgaard's mental health as a result of him
5 testifying at the examinations for discovery in
6 May of 1996?

7 A There was a number of abhorrent behaviours. He
8 was rather incoherent.

9 Q When?

10 A In July of '96. I think that's when he got
11 himself in trouble for swimming naked or there was
12 some, again, abhorrent, self-destructive kinds of
13 behaviours.

14 Q And you attribute that to an examination for
15 discovery two months before?

16 A Well I would attribute that to all, all of that
17 repressed and kept-down quagmire of emotion being
18 tapped into, triggered by the inquiry --
19 examination.

20 Q Was there any change in 1997 after the DNA results
21 were released?

22 A Yes.

23 Q What was the change? I'm sorry, we don't have
24 your notes --

25 A Yup.



1 Q -- so I'm not able to refer to your notes --

2 A Yup.

3 Q -- in asking you that question?

4 A David was a lot more active, physical, he was
5 really looking to take care of himself, he was
6 running more, he was swimming more, he was trying
7 to eat better, he was trying to pull his life
8 together.

9 Q You appreciate, Mr. Grymaloski, that this
10 Commission of Inquiry, while mindful of Mr.
11 Milgaard's personal circumstances, that we as the
12 participants before it are eager to find out the
13 information that he can remember from the
14 incidents in question, what he recalls, what he
15 does not recall, and his perspective with respect
16 to certain events, not just my client the police
17 service, but a number of parties with standing
18 here are very interested in what he has to say
19 specifically about their interactions in one form
20 or another with them.

21 A Well, quite frankly, I'm not.

22 Q You are not aware of that?

23 A No.

24 Q If you --

25 A I don't quite understand that, and I'm sure we



1 don't have the time to, for you to educate me on
2 that, but --

3 Q But if I, if I were to put that to you as a
4 given -- and, granted, that will come up in the
5 course of argument before the Commissioner -- if I
6 put that to you that as a given that there are
7 people interested in his version of events and
8 what facts he can recall of specific incidents, is
9 there not some balance that can be accommodated
10 between Mr. Milgaard's personal interests, on the
11 one hand, and the interest of the Commission of
12 Inquiry he requested on the other? And I ask you,
13 is that balance not reflected in the accommodation
14 that certain parties with standing presented
15 yesterday, when you were here, asking for his
16 evidence to be received on video tape with
17 Commission Counsel, none of the adverse parties
18 questioning him at all but under oath and by video
19 tape under the circumstances I described
20 yesterday; would you not agree with me that that
21 reflects a reasonably good balance between those
22 two interests?

23 A Yes, I do.

24 Q Thank you, Mr. Grymaloski. I have no further
25 questions.



1 A Okay.

2 MR. HODSON: I see it's noon, maybe I'll
3 just check. Mr. Fox, are you -- I'm sorry, we've
4 got time this afternoon to finish. The witness'
5 flight out is at 6:00 so I would suggest we maybe
6 adjourn until 1:30.

7 COMMISSIONER MacCALLUM: All right. Thank
8 you.

9 MR. HODSON: And just for this afternoon,
10 we will finish with Mr. Grymaloski, we will have
11 Mr. Chartier, and hopefully Dr. Ferris for the
12 last hour.

13 *(Adjourned at 12:01 p.m.)*

14 *(Reconvened at 1:37 p.m.)*

15 MR. HODSON: Mr. Commissioner, I've
16 canvassed counsel. The only party who may have
17 questions for Mr. Grymaloski is Garrett Wilson.
18 I'm not sure if he intends to or not and he is
19 not back yet, so what I propose to do, with the
20 indulgence of Mr. Grymaloski, is perhaps have Mr.
21 Chartier have his evidence which should take no
22 more than five minutes and if you could just
23 maybe -- you are welcome to stay here. We'll
24 call Mr. Chartier and then hopefully Mr. Wilson
25 will have returned. So if Mr. Chartier can come



1 back up?

2 **GERARD CHARTIER, resworn, continued:**

3 **BY MR. HODSON:**

4 **Q** Good afternoon, Mr. Chartier. Thank you for
5 agreeing to attend again at the Commission of
6 Inquiry. You testified on May 30th and 31st, 2005
7 and since having given evidence in this matter we
8 heard evidence, I think last week or the week
9 before from Tom Vanin about discussions he had
10 with you, so I want to touch on that.

11 First if we could bring up
12 324650, please, and again just to refresh our
13 memories, this was your police service that
14 indicated I think in 1969 you were with NCIU and
15 you went into some detail in the evidence about
16 that operation. Do you recall giving that
17 evidence?

18 **A** Yes, according to what was in my memo book.

19 **Q** Yeah. And since your evidence, you are familiar
20 with an individual named Tom Vanin, a retired
21 Saskatoon police officer?

22 **A** Yes.

23 **Q** He testified recently regarding discussions that
24 he had with you, he could not put a date, but I
25 think he said early to perhaps mid 1990s. I



1 certainly wasn't aware of what Mr. Vanin was going
2 to say when you were called back in May, nor was I
3 aware of it from any other documents, and
4 presumably no other counsel were aware of what Mr.
5 Vanin was going to say, otherwise they would have
6 questioned you about it, but that's maybe being
7 presumptuous on my part.

8 Mr. Vanin testified that in the
9 1990s, I'll just go through what he testified and
10 then I have two questions for you, Mr. Vanin
11 testified that in the 1990s he had a discussion
12 with you regarding the David Milgaard case and
13 that you told him that you had secretly listened
14 in and/or taped conversations, a conversation or
15 conversations between David Milgaard and his legal
16 counsel, Calvin Tallis, at the Saskatoon police
17 station, and I think he said either you listened
18 in or arranged for that to happen. And you know
19 who Mr. Cal Tallis is and knew who he was in 1969
20 did you?

21 A Yes.

22 Q Did you arrange for and/or listen in and record
23 conversations between David Milgaard and
24 Mr. Calvin Tallis back in 1969 or 1970?

25 A No, I did not.



1 Q Did you tell Mr. Vanin anything of that nature?

2 A No.

3 Q We heard your evidence about listening in, or
4 arranging to listen in and record Inspector
5 Roberts' interview of Ron Wilson and Nichol John
6 at the Sheraton Cavalier on or about May 23rd,
7 1969. Do you recall telling us about that?

8 A Yes.

9 Q Is it possible that you would have conveyed that
10 information about listening in on Inspector
11 Roberts to Tom Vanin?

12 A I can't recall a definitive discussion with Mr.
13 Vanin in regards to this. It was common
14 knowledge.

15 Q What was common knowledge?

16 A Well, that there had been, we had listened to a
17 conversation.

18 MR. HODSON: Thank you, Mr. Chartier, those
19 are all my questions. I will see if any counsel
20 have questions. I think Mr. Pringle, counsel for
21 Mr. Tallis, does.

22 BY MR. PRINGLE:

23 Q Mr. Chartier, we've heard that on May 23rd, 1969
24 conversations between Inspector Roberts and Ron
25 Wilson and Nichol John were listened to by



1 yourself and your partner. What technique did you
2 use to do that again, please?

3 A Microphone and a tape recorder.

4 Q Okay. And the microphone was placed within the
5 room in which they were having their discussions;
6 is that correct?

7 A Through a wall and into the room.

8 Q Okay. And the tape recorder was where?

9 A In the room that we were in.

10 Q Okay. And the tape recorder would produce a tape
11 of the conversation?

12 A Yes.

13 Q And whatever happened to that tape?

14 A That I couldn't tell you. I had nothing to do
15 with that. You have to understand what our job
16 was and the investigators that were there and I
17 had no further dealings with anything along that
18 line.

19 Q Okay. Did you ever prepare any police reports
20 indicating your involvement in that episode?

21 A I don't believe so. It would have been a very
22 short one, but I don't think we did.

23 Q And who did you turn the tape over to?

24 A That's a -- I don't know if it was turned over to
25 anyone in particular. I suspect someone took the



1 tape recorder and the tape, not us.

2 Q Did you ever see a transcript made from that tape?

3 A No.

4 Q Were you ever asked to look at a transcript to see
5 if it was correct or identify it in any fashion?

6 A No.

7 Q But there was a tape of that conversation between
8 Inspector Roberts and Nichol John and Ron Wilson?

9 A There was a tape recorder. I didn't hear what was
10 on the tape. I suspect, you know, in my own
11 feelings it was a poor transmission and there
12 wasn't too much that could have been taken as -- I
13 shouldn't say evidence, but that you would
14 understand in it. You have to understand that in
15 '69 we were, I became part of NCIU which is the
16 National Criminal Intelligence Unit.

17 Q Right.

18 A I had been to Ottawa, in fact when this murder
19 took place, and I was advised down in Ottawa what
20 had taken place, came back and these things
21 transpired over time. Our job was not to deal
22 with local particular deals, but this murder got
23 very high profile, so we were asked. We didn't
24 have equipment to listen. I think, I'm not
25 positive, it didn't come from the police service,



1 we had to go out and buy a tape recorder and that
2 which wasn't a very effective machine as I can
3 remember I think.

4 Q Are you -- do you remember listening to the tape
5 to see whether it was of good quality or are you
6 just speculating on that?

7 A I did not listen to the tape, I know that.

8 Q So you don't know whether it accurately recorded
9 what was said or whether there was a problem with
10 respect to its recording?

11 A No, I can't tell you that.

12 Q But you do know there was a tape in existence that
13 attempted to record those conversations?

14 A There was a tape in the machine.

15 Q Okay. Now, am I correct in understanding that
16 your role in this matter was not to become a
17 witness, rather, you were to give background to
18 the investigators?

19 A Yes.

20 Q That was the role of the NCIU officers; is that
21 correct?

22 A That's right.

23 Q To basically provide background information or
24 sometimes various forms of surveillance type of
25 information, but not to personally get involved in



1 the investigation?

2 A That's right.

3 Q So it would be rare that you would ever become a
4 witness?

5 A Never. We were not supposed to become witnesses.

6 Q Okay. And would it surprise you to learn that in
7 the police reports that were filed in this matter,
8 that there wasn't reference to you tape recording,
9 you know, using a listening device to record the
10 conversations that occurred in that room?

11 A I never looked at the report and I don't know what
12 other officers left reports. There might have or
13 might not have.

14 Q Okay. And the attempt, though, was to compile a
15 record of the conversation that occurred in that
16 room; is that correct?

17 A That's right.

18 Q And when that was happening, did you hear some of
19 that conversation that occurred in the room
20 between Inspector Roberts and the parties?

21 A I did, but there were no notes taken at the time
22 of what I heard and that because I was supposed to
23 be, we were technical assistants, we put the
24 machine in, had it running and then whoever was
25 investigating would look after the rest. I



1 remember hearing things, but to this day I can't
2 tell you what.

3 Q Did he, did Inspector Roberts know that you were
4 conducting this electronic surveillance?

5 A I believe he did. Yeah, I'm sure he did.

6 Q And did he give any instructions after the
7 interview was conducted as to what should happen
8 to the tape?

9 A Not to me he didn't.

10 Q And you can't recall who you gave the tape to?

11 A No.

12 Q Do you --

13 A I didn't give anything. The machine was there.
14 Someone took it. I'm sure I didn't -- I know I
15 didn't take the machine, but --

16 Q But wouldn't there be an issue with respect to the
17 continuity of the tape, wouldn't you have to sign
18 the tape, being the operator, and then somebody
19 else would have to sign for it as, you know, as
20 the continuity of that tape develops?

21 A I know what you are saying and there was nothing
22 like that done.

23 Q So there was never the intent to use that tape in
24 a courtroom, otherwise you would have been keeping
25 the continuity records of the tape; is that fair



1 to say?

2 A I would say that's true.

3 Q And do you know whether there was ever any intent
4 to disclose the contents of that tape to defence
5 counsel?

6 A I don't.

7 Q It's unlikely that there was. Do you know?

8 A I don't know.

9 Q Now, with respect to this comment that Mr. Vanin
10 made the other day, he's indicated that you
11 advised him that you had taped -- secretly
12 listened to or taped conversations between
13 Mr. Tallis and Mr. Milgaard. Do you remember
14 Commission Counsel just told you he said that?
15 I'm sure you heard about that; right?

16 A I read it in the paper which --

17 Q Okay. Do you have any -- can you give me any
18 reason why Mr. Vanin would say something like that
19 about you?

20 A I would not even speculate. I had too much
21 respect for Mr. Tallis to even think about that.
22 It's just a case of wouldn't do it.

23 Q But I'm asking about Mr. Vanin, do you have any
24 reason why Mr. Vanin --

25 A I can't tell you that. You would have to ask him



1 that. I don't know why he would do it. I haven't
2 talked to him about it, I didn't tell him this, so
3 I don't know why.

4 Q The police station is where I believe Mr. Vanin
5 said that this occurred. Do you know where the
6 lawyers would meet with accused at the police
7 station back in those days?

8 A Oh, yes, I was involved, there was station duty,
9 we would take lawyers in there and it was a little
10 room with barred windows and a secure door, and I
11 remember, you know, I would like to be a fly on
12 the wall, that this was conversation that police
13 officers had when their lawyers came in and talked
14 to people, but --

15 Q The same room was used, it was predictable what
16 room would be used?

17 A Oh, yes. No, I shouldn't say that, because a lot
18 of interviews were carried on in the morality
19 office or detective office.

20 Q But when somebody would come in, like, if Mr.
21 Tallis wanted to see Mr. Milgaard, the police
22 would tell him what room he would go to; is that
23 fair to say?

24 A Oh, yes, a situation like that where the lawyer is
25 seeing someone, it was held in this one room in



1 that building.

2 **Q** Okay. And with respect to the room, of course
3 it's in the police station, it's under the control
4 of the police?

5 **A** Yes.

6 **Q** And had you ever put listening devices in that
7 room?

8 **A** No.

9 **Q** But your task at that point in time, even in the
10 early stages of this case -- well, at that time
11 when Mr. Tallis would have been involved, which
12 would be shortly after this incident in the hotel,
13 the Cavalier Hotel room on May 23rd, your task
14 would still continue to be to try and get some
15 form of surveillance information on the case;
16 would it not?

17 **A** No.

18 **Q** No?

19 **A** No. It was a national, NCIU was the national
20 criminal and it dealt with national crimes,
21 gambling at that time, gangs, things like that,
22 and it was getting information on those particular
23 people.

24 **Q** But you got involved in the Milgaard case because
25 it was high profile?



1 A I think because our particular boss at that time,
2 Inspector Woods, felt this was a requirement, and
3 asked that we do that.

4 Q And was there -- were you given a reason as to why
5 you were asked to put a listening device in the
6 hotel room and tape record what happened?

7 A I think I had a reason when Cadrain came to me and
8 said that he suspected and it started the deal
9 with Ray Mackie, which apparently had already been
10 going unbeknownst to me, or lots of other people I
11 think, so I knew of what was going on generally.
12 I had never looked at the file itself at no time.

13 Q But why were you asked to put a listening device
14 in the hotel room and record what occurred inside
15 that hotel room when Inspector Roberts was
16 interviewing the two potential witnesses?

17 A Well, we were asked by our particular boss at that
18 time, Superintendent Woods.

19 Q Why?

20 A Because of the information that might be gleaned
21 from that.

22 Q And after that happened, were you being asked to
23 try and get other information about the case?

24 A No.

25 Q Through other mechanisms?



1 A No.

2 MR. PRINGLE: Thank you, sir. Those are my
3 questions.

4 MR. HODSON: I think that is all. Thank
5 you very much again, Mr. Chartier.

6 COMMISSIONER MacCALLUM: Thanks for coming,
7 Mr. Chartier. You are excused.

8 MR. HODSON: Maybe Mr. Grymaloski can go
9 back. I'm advised by Mr. Wilson that he has no
10 questions, so I think it's Mr. Wolch for any
11 re-examination.

12 COMMISSIONER MacCALLUM: Okay.

13 **JOEL ADAM GRYMALOSKI, continued:**

14 **BY MR. WOLCH:**

15 Q I just have a couple of questions. Mr. Elson
16 referred you to Thomas Sophonow and, in
17 particular, to Mr. Sophonow being traumatized by
18 seeing another inmate hanging himself or something
19 to that effect, and you said that would traumatize
20 somebody?

21 A Yes.

22 Q Correct?

23 A Uh-huh.

24 Q And I take it in that scenario there would be
25 another individual who would be perhaps even more



1 traumatized, as the person who hung himself?

2 A Correct.

3 MR. WOLCH: Now, Mr. Commissioner, I spoke
4 to Commission Counsel earlier and I do want to
5 refer the witness to two pages of documents and I
6 am asking for a publication ban on these two
7 pages. They are quite sensitive and should not
8 be in the public domain.

9 MR. HODSON: I advised Mr. Wolch that our
10 practice has been he can seek a publication ban
11 for that, I don't know if any parties wish to
12 make submissions on that, and secondly, the
13 interest of the media who have a right to be
14 informed and if they wish to possibly take a
15 position on it. I think our practice has been
16 that if a publication ban is granted and media
17 wish to challenge it, they have the right to do
18 so by informing me, and if you are inclined --
19 and I have no objection to the publication ban.
20 I'm not exactly sure -- I haven't seen the
21 document yet, but I have no problem with the ban.

22 COMMISSIONER MacCALLUM: What in general is
23 the area affected?

24 MR. WOLCH: It involves trauma while in
25 custody.



1 COMMISSIONER MacCALLUM: Of Mr. Milgaard?

2 MR. WOLCH: Yes.

3 COMMISSIONER MacCALLUM: Anybody take a
4 position contrary to that? No? Very well, there
5 will be a publication ban.

6 MR. WOLCH: Thank you. This shouldn't take
7 too long. The document is ----- . This would be
8 a -----, ----, so we're quite
9 early in the process, from a ----- to the
10 ----- in ----- re: ----, and it states
11 here:

12 "-----
13 -----
14 -----,
15 -----
16 -----
17 -----.
18 -----
19 -----
20 -----
21 -----,
22 -----
23 -----
24 -----
25 -----"



1 And if I can then go to the next page, and this
2 is to a -----, this is ----- of ----,
3 it's a ----- I think,
4 and it's to the ----- regarding -----.

5 "-----

6 -----

7 -----

8 -----

9 -----.

10 -----

11 -----

12 -----.

13 -----

14 -----

15 -----

16 -----"

17 Those are the two documents I would like to refer
18 to, thank you.

19 COMMISSIONER MacCALLUM: So that was ---,
20 and what was the second one?

21 MR. WOLCH: I think it was the next page.

22 COMMISSIONER MacCALLUM: Okay, thank you.

23 BY MR. WOLCH:

24 Q Now, this would have been not too long after the
25 appeal was turned down. What do you recognize in



1 that in terms of your diagnosis?

2 A Well, a highly-traumatized individual looking to
3 escape, looking to alleviate the trauma, albeit in
4 a very maladaptive way -----.

5 Q Now, finally --

6 COMMISSIONER MacCALLUM: Is that the end of
7 the publication ban?

8 MR. WOLCH: Yes.

9 COMMISSIONER MacCALLUM: Okay. Back on the
10 publication record then.

11 BY MR. WOLCH:

12 Q Yes. Finally, Mr. Elson asked you about the
13 suggestion for an accommodation of videotaping and
14 people present and I think it can be agreed that's
15 a reasonable position, but what do we do if it
16 doesn't appear to be reasonable to David? How do
17 we handle that?

18 COMMISSIONER MacCALLUM: What was the
19 question?

20 MR. WOLCH: How do we do it if it's not
21 reasonable to David, that there's -- if he's in a
22 panic over that suggestion even though we may
23 think it's better than writing, is there any
24 insight you can give us?

25 A Well, further compounding that issue is David's



1 plans to leave the country in about three months
2 or so, so when I say compound, the time frame is,
3 it's a problem. I want to be perfectly frank, I
4 obviously have a lot of interest in seeing this
5 Commission, this Inquiry being successful, but at
6 the same time I am not -- well, it's a very fine
7 line I walk between losing the trust in my client,
8 David, so I can't engage in any kind of
9 metaphorical arm-twisting to fulfil that wish or
10 that objective of the Commission, but in our
11 meeting that we had with yourself and Mr. Hodson,
12 we talked about laying the seeds with David for
13 the possibility of notching, get up, if you wish,
14 going, moving to videotaping and recording, but in
15 that meeting that we did have, David was fairly,
16 you know, to relatively adamant at not wanting to
17 do that.

18 COMMISSIONER MacCALLUM: I'm not clear
19 about what meeting you are speaking of.

20 MR. WOLCH: November 17th.

21 A November the 17th.

22 COMMISSIONER MacCALLUM: The one in
23 Vancouver?

24 A At my office.

25 COMMISSIONER MacCALLUM: With Commission



1 Counsel?

2 MR. WOLCH: Correct.

3 COMMISSIONER MacCALLUM: Okay. And the
4 video/audio was discussed then?

5 A Yes.

6 COMMISSIONER MacCALLUM: Okay.

7 A So to answer, I guess to answer your question, in
8 my mind the variable that would expedite that
9 would be time for David to become more comfortable
10 with that idea, but as I'm saying, though, time is
11 a bit of a factor.

12 BY MR. WOLCH:

13 Q The idea of answering questions in writing was
14 discussed and David appeared to be favourably
15 inclined to that?

16 A Correct.

17 Q Can you give us any insight as to why he would
18 prefer the more laborious and tougher way of doing
19 it?

20 A Well, David has had, for quite some considerable
21 period of time, aspirations to be a writer, so he
22 feels a lot more comfortable, and he has written
23 and he has produced poetry and is working on
24 material and so he feels a lot more comfortable in
25 that forum and in that jurisdiction, if you wish,



1 whereas videotaping, it's kind of an unknown
2 variable, feels more like a performance or, you
3 know, him being presented, and if there are
4 unfavourable reactions or responses for him, from
5 him, that would cause him some concern, some
6 trepidation, and so then hence the opposition to
7 it.

8 Q I take it also in writing he would be alone I
9 assume?

10 A Correct.

11 Q Without the presence of people --

12 A Correct.

13 Q -- perhaps surrounding him or whatever?

14 A Correct. It is -- it would be more of a single,
15 solitary kind of activity.

16 Q The idea just comes to me the possibility of him
17 talking into a tape recorder, would that be a
18 possibility?

19 A That would, yeah, that could be a good compromise
20 perhaps, that it wouldn't seem too intrusive.

21 COMMISSIONER MacCALLUM: I don't -- you
22 better elaborate on that.

23 MR. WOLCH: Well, the possibility of giving
24 him a list of questions and he just dictates the
25 answers as best he can into a Dictaphone and gets



1 it transcribed just to save time. I don't know
2 how many questions there would be, but --

3 COMMISSIONER MacCALLUM: He would answer
4 orally to written questions into a tape?

5 MR. WOLCH: Into a Dictaphone by himself,
6 yes.

7 COMMISSIONER MacCALLUM: Hmm?

8 MR. WOLCH: It's really answering in
9 writing than having a stenographer do it for you.
10 I'm not saying -- that idea just came a second
11 ago, I hadn't thought of it until now as a
12 possibility, that it would save time. I don't
13 think it will necessarily work, but it's an idea.

14 Those are all my questions.

15 A Can I just make a comment on the videotaping. As
16 I tried to present in the morning, a sense of
17 control and predictability is really quite
18 important and significant for David in his growth
19 and development emotionally and psychologically
20 and he is certainly under the impression or the
21 understanding that he will be answering questions
22 which is why it puts me in quite a bind to present
23 the videotaping as the way to go, and I'm not
24 adverse to doing that, but as I said a moment ago,
25 I don't want to argue the point, I'm not going to



1 argue that point, the metaphorical arm-twisting so
2 to speak, so any kind of a compromise would be
3 greatly appreciated.

4 Q Thank you, sir.

5 MR. HODSON: That is all for Mr.
6 Grymaloski.

7 COMMISSIONER MacCALLUM: Mr. Grymaloski,
8 thank you for coming, you are excused.

9 A Thank you. Thank you for having me.

10 MR. HODSON: Thank you.

11 Just one final matter, Mr.
12 Commissioner. I had been asked, there were a
13 couple of letters from counsel to me associated
14 with the application, and a letter from me to
15 Mr. Wolch that I had been asked to put on the
16 record. The first, and this deals with the issue
17 of hospital records, and I will get them ID'd and
18 then quickly go through them. All counsel are
19 aware of these, I sent them out to everybody a
20 number of weeks ago.

21 The first is a December 5
22 letter from Mr. Fox to me, it's also copied to
23 Mr. Wolch, and it sets out about the application
24 for an exemption or an accommodation and then
25 refers to the quote of Mr. Wolch in the Inquiry,



1 it's the same quote that refers to in Dr.
2 Baillie's report, about David being hospitalised
3 after speaking.

4 And then Mr. Fox asks if we
5 could get copies of the hospital records
6 pertaining to David's hospitalization over the
7 last few years, including any hospitalization
8 that took place after he spoke about this matter
9 at the conference in Winnipeg, the news
10 conference in Saskatoon, and after discussing the
11 matter with me on November 19th.

12 Just go to the next page. Now
13 this is my Email of December 13th to Mr. Wolch
14 sending a copy of that letter, the letter was
15 sent to him directly as well, and I have simply
16 relayed the request and indicate please advise if
17 you are planning to include David Milgaard's
18 relevant hospital records as part of the
19 materials filed in support of your application.
20 If not, please advise if you will provide them to
21 the Commission and parties as requested by
22 Mr. Fox.

23 And the next is a letter dated
24 December 13th, 2005 from Ms. Knox on behalf of
25 Mr. Caldwell, she has reviewed Mr. Fox's letter



1 and wants to expand the request for records
2 through the current year for all records since
3 1993, and suggest you might consider making this
4 request to Mr. Wolch on a more extended basis.

5 And the next document is my
6 letter of December 16th to Mr. Wolch that deals
7 with a number of matters relating to Dr.
8 Baillie's evidence. If we can go to the second
9 page, if you could just go right down to the --
10 this part, it says in addition I am enclosing a
11 copy of a letter dated December 13, 2005 from
12 Ms. Knox. She is following up on Mr. Fox's
13 letter of December 5, 2005 wherein he requested
14 David Milgaard's hospital records, and it goes on
15 to talk about Mr. Fox's request and Ms. Knox's
16 request that we go a bit further.

17 And then I say I understand
18 that Dr. Baillie will be collecting and reviewing
19 Mr. Milgaard's medical and hospital records from
20 the date of Mr. Milgaard's release from prison to
21 the present, which is information that Dr.
22 Baillie provided to me directly. It would seem
23 that David Milgaard's hospital and medical
24 records are relevant documents that should be
25 part of the record for your application. Please



1 confirm that these records will be provided to
2 the Commission as part of your application. If
3 you or Dr. Baillie would like our assistance in
4 gathering hospital and medical records please
5 advise.

6 And there is no further, there
7 is no response to that letter, nor did we get
8 asked to go and obtain, either by subpoena or
9 otherwise, any other records.

10 So I just want that on the
11 record for -- to indicate what transpired between
12 the date of the application and the calling of
13 these witnesses.

14 So I think, with that, unless
15 Mr. Wolch has other evidence I think we would
16 proceed to argument and, presumably, Mr. Wolch
17 will proceed first?

18 COMMISSIONER MacCALLUM: Yeah, Bates
19 numbers or doc. IDs will be assigned to these?

20 MR. HODSON: Doc. IDs will be assigned to
21 those. I may black out the Email addresses of
22 all counsel on the one Email but, other than
23 that, they will all be available publicly.

24 COMMISSIONER MacCALLUM: Thanks.

25 **MR. WOLCH:** Mr. Commissioner, I don't



1 expect to be all that long.

2 I think the evidence of Dr.
3 Baillie and Mr. Grymaloski is quite clear and
4 makes it very clear that David is suffering from
5 post-traumatic stress disorder. I don't know how
6 anybody can take quarrel with that. It doesn't
7 require even medical knowledge, really, to
8 understand the trauma here, that it's beyond
9 almost comprehension that somebody could have
10 gone through what David went through, to be
11 wrongly convicted, sentenced, traumatized, nobody
12 ever listening to you, go on and on and on, the
13 trauma is overwhelming. It's heartbreaking to
14 even try to appreciate what this man has been
15 through, it's horrible, and why anybody would be
16 surprised that there are effects and lingering
17 problems is quite hard to comprehend. Clearly,
18 there are serious, serious problems, and it's
19 years of trying to get out of it, to develop and
20 grow and rebuild, that are paramount.

21 And the suggestion is made
22 several times that, well, David wanted the
23 Inquiry and now he doesn't want to be here.
24 That's not an inconsistent position. The
25 Inquiry, the Terms of Reference are really to



1 look into the investigation, determine what
2 occurred, why wasn't Linda Fisher listened to,
3 why was Larry Fisher omitted, what happened. And
4 for David to want the answers to questions is one
5 thing, but to suggest that David can seriously
6 aid in answering those questions is another, as
7 to how much he can help, particularly now, after
8 all he has been through.

9 COMMISSIONER MacCALLUM: That's not our --
10 in issue any more. You've abandoned the
11 application for -- to be excused, this is --

12 MR. WOLCH: I appreciate that, but it goes
13 to --

14 COMMISSIONER MacCALLUM: In fact, he has
15 undertaken to appear and give evidence as
16 directed, on the terms directed by the
17 Commission.

18 MR. WOLCH: Well --

19 COMMISSIONER MacCALLUM: It's only the
20 terms that I am interested in.

21 MR. WOLCH: Well what I'm saying is that
22 the amount of evidence and the nature of the
23 evidence should have an effect on the
24 accommodation, as to how he is to be
25 accommodated, what is necessary.



1 And what I am saying, sir, is
2 this; that if you look at the prime areas of
3 concern here, if you look at the -- why witnesses
4 lied or why Fisher did what he did and wasn't
5 found, David has nothing to contribute on that,
6 on those issues. He doesn't know why they lied,
7 doesn't know a thing about Fisher. And I believe
8 in the Terms of Reference you are given the
9 authority, as if you needed it, to refer to
10 transcripts or refer to previous evidence. It's
11 right in the Terms of Reference, I believe, that
12 you can rely on it. Well the fact of the matter
13 is that David has testified before, and under
14 different circumstances where many of the items
15 were canvassed by people very adverse in
16 interest, so they were probing, very probing.

17 Now there was some mention this
18 morning about an application supposedly made by
19 David not to testify at the Supreme Court. Well,
20 leaving aside the fact that I have no knowledge
21 of that at this moment at least, it has to be
22 remembered that David was as innocent then as he
23 is now. He was an innocent person. And it's
24 very difficult to imagine that an innocent person
25 is fearful to testify for what it would do to



1 him, so that I wish that application had been
2 made, because imagine that you have a person who
3 is factually innocent who is too traumatized to
4 stand up and say "I'm innocent". So it's --
5 works the other way, it's -- he has always been
6 as innocent as he is now. The fact that somebody
7 declared him innocent doesn't make him any more
8 innocent, he was always innocent, at every step
9 of the way he was innocent. When he testified in
10 the Supreme Court he was innocent, when he was
11 examined for discovery he was innocent, he was
12 always innocent.

13 COMMISSIONER MacCALLUM: I'm not sure I
14 follow the argument. I can understand a guilty
15 person not wishing to testify, it's perhaps not
16 as easy to understand why an innocent person
17 would be unwilling to stand up and --

18 MR. WOLCH: The same way a rape victim
19 doesn't want to testify.

20 COMMISSIONER MacCALLUM: Pardon?

21 MR. WOLCH: The same way a rape victim
22 doesn't want to testify, she's innocent, she
23 doesn't want to testify. If you are a victim,
24 and he was a victim, that's the reason, you are a
25 victim.



1 COMMISSIONER MacCALLUM: Yes. On that
2 point of course, Mr. Wolch, it is in the public
3 interest to have even unwilling rape victims
4 testify and it's commonly done in the courts.

5 MR. WOLCH: But --

6 COMMISSIONER MacCALLUM: It's certainly
7 uncomfortable for them, often these people are
8 deeply traumatized, but in the public interest
9 they are made to testify anyway.

10 MR. WOLCH: Yes, but -- but, with respect,
11 when the rape victim testifies there may or may
12 not be a guilty person who may go free if there
13 is no testimony. There is a balancing there.
14 Here, David not having to testify, for example,
15 will not set a guilty person free. It doesn't
16 have that kind of consequence that flows from
17 your ordinary case, they are very different in
18 that way.

19 And it has to be understood
20 that David today, moving on with his life, will
21 not have a better memory than he had before.
22 It's not that he is going to be able to come up
23 with something that hasn't been canvassed close
24 to the incident. It must be remembered, for
25 example, that it wasn't for about six weeks that



1 he was ever questioned about the day in question
2 at all.

3 COMMISSIONER MacCALLUM: Well, I just have
4 -- I'm sorry, Mr. Wolch, --

5 MR. WOLCH: Sorry?

6 COMMISSIONER MacCALLUM: -- I have to bring
7 you back to the point I was trying to make. This
8 argument you are advancing now seems to go to his
9 being excused from testifying.

10 MR. WOLCH: Well --

11 COMMISSIONER MacCALLUM: You have to
12 accept, sir, that we believe, we the Commission
13 believe he has relevant evidence to give, and
14 that is why we want him here, that's why we want
15 it to be in the public interest. So never mind
16 your view of whether he has anything to offer or
17 not, it's only a question of how he is going to
18 give his testimony.

19 MR. WOLCH: Well I think the amount he has
20 to offer, and the value of it, may go to the
21 manner of presentation.

22 COMMISSIONER MacCALLUM: And how is that?

23 MR. WOLCH: Well if what he has to offer is
24 of a limited, a very limited amount, it can be
25 done in an expeditious way.



1 For example -- and I'll list
2 the, some of the interests. In our perspective
3 the -- and I say this and I'm prepared to back it
4 up -- the only party significantly affected by
5 David is Justice Tallis.

6 COMMISSIONER MacCALLUM: Oh no, I disagree,
7 sir.

8 MR. WOLCH: Well if I can --

9 COMMISSIONER MacCALLUM: But I mean go
10 ahead, yeah.

11 MR. WOLCH: Well, and what I'm saying is
12 I'm sure that can be arranged. Because of what
13 David had to say to Mr. Hodson, I don't see a
14 problem in that, it can be done very quickly and
15 briefly.

16 But in terms of various
17 parties, if you look at the parties who are
18 interested, as I said before I don't see what
19 David can say. For example, be specific, if you
20 take Mr. Caldwell, David can't talk about
21 disclosure obligations or his dealings or where
22 we focus regarding Mr. Caldwell, he can't say
23 anything about that.

24 COMMISSIONER MacCALLUM: No.

25 MR. WOLCH: Mr. Fisher, I'm still at a loss



1 as to why he even thinks he can ask questions.

2 Mr. Kujawa --

3 COMMISSIONER MacCALLUM: David -- before
4 you leave Mr. Caldwell, David Milgaard could
5 certainly explain to us, I suppose, why he made
6 the accusations he was party to in a press
7 conference with his mother and you?

8 MR. WOLCH: Well, firstly, that's not part
9 of the Terms of Reference --

10 COMMISSIONER MacCALLUM: Well, why not?

11 MR. WOLCH: -- essentially.

12 COMMISSIONER MacCALLUM: Oh, no, it relates
13 to the quality of the information which came
14 before the authorities and which should have
15 caused them, so some say, to re-open his case
16 sooner, the third arm of our Inquiry.

17 MR. WOLCH: That was after the Supreme
18 Court.

19 COMMISSIONER MacCALLUM: Well, I don't care
20 when it was. After what?

21 MR. WOLCH: The Supreme Court I think.

22 COMMISSIONER MacCALLUM: Yes.

23 MR. WOLCH: Well, Linda Fisher was 12 years
24 earlier.

25 COMMISSIONER MacCALLUM: How -- the press



1 conference in question was after the Supreme
2 Court of Canada hearings?

3 MR. WOLCH: Yes.

4 COMMISSIONER MacCALLUM: Well, I stand to
5 be informed on that, certainly.

6 MR. WOLCH: I'm prepared to be corrected,
7 but I think it was quite a bit after.

8 COMMISSIONER MacCALLUM: Well clearly
9 whatever it is, whatever the case, you know, it
10 has to be relevant, obviously.

11 MR. WOLCH: Well, it's relevant, but for
12 what purpose. It doesn't help in your Terms of
13 Reference.

14 COMMISSIONER MacCALLUM: Was he still in --
15 it was after he was released from custody?

16 MR. WOLCH: Yes.

17 COMMISSIONER MacCALLUM: Okay.

18 MR. WOLCH: So it's way later in the day.

19 COMMISSIONER MacCALLUM: I take your point,
20 yeah.

21 MR. WOLCH: So it was way later, it can't
22 affect the behaviour.

23 COMMISSIONER MacCALLUM: Well -- but, you
24 know, there are other matters. Obviously we have
25 heard in the evidence the hotel or the motel



1 reenactment and so on.

2 MR. WOLCH: The motel reenactment was
3 questioned in the Supreme Court at length, it was
4 questioned in his exam for discovery, it's -- he
5 has been questioned up -- every which way to
6 Sunday on those issues.

7 COMMISSIONER MacCALLUM: Okay.

8 MR. WOLCH: I don't see what he can add to
9 that, as to what he said before.

10 COMMISSIONER MacCALLUM: Well what could he
11 be questioned on then?

12 MR. WOLCH: I believe the only thing he has
13 personal knowledge of that could assist us to any
14 degree is conversations with Mr. Tallis.

15 He has never talked to Mr.
16 Caldwell, he has never talked to Mr. Kujawa, as
17 far as Mr. Karst is concerned he hasn't made any
18 accusations about Mr. Karst from personal
19 dealings, he hasn't accused him of being rough
20 with him or terrorizing him.

21 COMMISSIONER MacCALLUM: Uh-huh.

22 MR. WOLCH: Umm, I think, Mr. Commissioner,
23 if you analyse it you will see that there -- that
24 these are not issues that really advance anything
25 towards your mandate.



1 COMMISSIONER MacCALLUM: So what you are
2 really arguing now is your suggestion in the
3 Notice of Motion that his questioning be resolved
4 by accommodation of examination of what's in the
5 transcripts and then an agreement between counsel
6 as to what remains outstanding?

7 MR. WOLCH: What issue is there left that
8 has some relevance or importance?

9 Because if I may, sir, do you
10 have the Notice of Motion, if I could help with
11 that?

12 COMMISSIONER MacCALLUM: No, I left it in
13 my office.

14 MR. WOLCH: Perhaps, if it could be brought
15 up, I could help you with that.

16 COMMISSIONER MacCALLUM: But before I
17 forget to ask you, Mr. Wolch, is it your position
18 now that you cannot agree to the compromise
19 solution suggested by other counsel which has
20 been marked?

21 MR. WOLCH: No, I can't at this point, I
22 can't get my client's permission. I prefer it --

23 COMMISSIONER MacCALLUM: Thanks.

24 MR. WOLCH: -- but I can't get it. I -- he
25 has agreed to answer in writing, it's a major



1 step for him, and I, at this point in time with a
2 baby born, to even -- I can't bring him back to
3 this area. That's the problem. It's -- I mean I
4 have been dealing with a damaged client for many,
5 many years, and know how damaged he is from
6 previous dealings, it's always been a problem.

7 COMMISSIONER MacCALLUM: I have the Notice
8 of Motion.

9 MR. WOLCH: Yes. If you could just turn
10 the page -- and, sorry, the next page. Mr.
11 Commissioner, I'll take you through this if I
12 could, but I don't want to take more time than
13 necessary so if you are familiar with the
14 document, which you probably are, I don't have to
15 bring it up.

16 But in terms of what David has
17 said, March the 3rd of '69 from 9:30 in the
18 morning to 4:00 p.m. he was interviewed by
19 Detective Karst, there are 16 pages of questions
20 and answers, rough notes, and a schematic.

21 I believe we've gone through
22 that, sir, did you want me to bring it up at this
23 point or --

24 COMMISSIONER MacCALLUM: No, I remember it,
25 yeah.



1 MR. WOLCH: So that's, that's many hours of
2 questioning reduced to writing very early on when
3 the memory is perhaps freshest.

4 Then we go to April the 18th,
5 for over an hour interviewed in Winnipeg by
6 Detective Barrett, nine pages of handwritten
7 questions and answers as written by Detective
8 Barrett. There was also a typed version. If we
9 can just scroll down.

10 There is notes in a notebook
11 describing the events of January 31st and the
12 relationship with Wilson, John and Cadrain, 314
13 numbered points, nine handwritten pages, and I'm
14 not certain if you have seen that, sir?

15 COMMISSIONER MacCALLUM: I don't think the
16 notebook is extant, is it?

17 MR. WOLCH: Sorry, sir?

18 COMMISSIONER MacCALLUM: I don't think the
19 notebook is extant, is it? There is a
20 transcription of it somewhere in the evidence.

21 MR. WOLCH: I don't believe it's been -- I
22 think, if we pull it up, you'll see it's a --
23 maybe Mr. Hodson can help us.

24 MR. HODSON: On the issue of the notebook,
25 there is a typed version of the notebook, there



1 is a dispute on the evidence, at least previous
2 evidence. I think Mr. Tallis' evidence at the
3 Supreme Court was -- pardon me -- Mr. Milgaard's
4 evidence was "this is the scribbler I gave to
5 him", Mr. Tallis said, "no, it's not, I didn't
6 get a scribbler", and there's some issue that
7 will be addressed by Mr. Tallis, and I would
8 intend to raise it with Mr. Milgaard as well,
9 about when that was prepared. And, secondly,
10 there's an issue about the contents of what's in
11 the scribbler versus what Mr. Tallis said he was
12 told by Mr. Milgaard, so that's an issue that
13 will be canvassed in detail with Mr. Tallis.

14 MR. WOLCH: Yes, but if you can just have a
15 look at it, you will see what it is. Pull that
16 document up. You will see it's a -- it goes into
17 exceptional detail, sir.

18 COMMISSIONER MacCALLUM: I might be wrong,
19 you will have to correct me, I thought that this,
20 what we see in front -- on the screen in front of
21 us now is not Mr. Milgaard's work, it was someone
22 else's writing?

23 MR. WOLCH: No, it's dictated by him to
24 somebody with better handwriting, he's -- the
25 person is identified.



1 COMMISSIONER MacCALLUM: Yes, okay.

2 MR. WOLCH: But --

3 COMMISSIONER MacCALLUM: So it's not the
4 notebook?

5 MR. WOLCH: No, it's Mr. Tallis told Mr.
6 Merchant that he had given the notebook back, if
7 I recall correctly.

8 COMMISSIONER MacCALLUM: Okay.

9 MR. WOLCH: And that's -- but the most
10 important thing, I do believe, is the content.
11 And, you know, you can just see that you have got
12 conversation with Ron to go on the trip, it goes
13 into exceptional detail as to what occurred from
14 Regina to Saskatoon, all the places. If we could
15 just scroll down a bit, I can't go through it
16 all, but there's over 300 points.

17 COMMISSIONER MacCALLUM: And when was this
18 supposed to have been written?

19 MR. WOLCH: If you can flip back to the top
20 it says "written in 1969 after the arrest".

21 COMMISSIONER MacCALLUM: After the arrest?

22 MR. WOLCH: Yes. So this -- and the timing
23 can be better-placed if we look at some of the
24 matters in here as you go through it, but it's
25 clearly early on, and he talks about inviting



1 Nicky on the trip, umm -- just scroll down
2 please. And to give you an example of the
3 thoroughness, down here we're still in Regina, in
4 terms of every little detail that you could
5 possibly imagine.

6 And keep going to the next
7 page. It talks about the acid being splashed,
8 used Ron's bathroom, changed into a pair of green
9 striped pants.

10 My point, sir, is that then he
11 remembered green striped pants, the chance of
12 remembering it now are probably zilch, nil at
13 this point in time all these years later.

14 He talks about Mrs. Wilson, in
15 my suitcase I had the grey pants with acid on
16 them and burgundy pair. If we could just scroll
17 down, umm, it talks about buying grass in
18 Edmonton, their going there, drove into town, Ron
19 said there was nothing worthwhile, I'm not sure
20 what that's about.

21 But just keep going down, or to
22 the next page, rather. There is the flashlight
23 we know about. And we're down into the '80s and
24 we still, I don't think, are even into Saskatoon,
25 so there's vivid detail remembered then but



1 hardly expected to be remembered now. Just
2 scroll down, please. It talks about the
3 boulevard, turning, Pleasant Hill, asked for
4 directions, gave us some type of direction. Next
5 recollection is a garage by a bridge we went
6 over, I also remember going around the block with
7 the, I think it says, Bay store on it downtown
8 someplace, we asked an elderly man, quite
9 possibly -- I'm not sure what the word is,
10 directions, and we talk a little while and he
11 gave us some type of direction.

12 If we go to the next page,
13 headed down the street, umm, I was looking for a
14 garage, gas station, which I had remembered from
15 previous, goes on with getting the map that we
16 know about. And then going further down, this is
17 the Danchuks are described here as to what
18 occurred there, it's fairly consistent with the
19 Danchuks' evidence, he recalls telling Danchuks
20 that he worked for *Maclean's*, talks about the tow
21 truck problems.

22 If we can turn the page, about
23 Mr. Danchuk, still more on Mr. Danchuk. Arriving
24 at Cadrains', parked on the opposite side of the
25 street. If we can go down, here's the



1 description of meeting with Cadrain, talking with
2 him, changed from my green striped pants to my
3 other grey ones is right there. He remembers Ron
4 changing pants, Ron gave me the keys to the
5 suitcase -- gave me the keys to put the suitcase
6 back in the trunk while Cadrain was getting
7 ready, I decided to move the car over to the
8 other side of the street, we have had evidence
9 about that.

10 Just turn the page. Made a
11 U-turn, talks about moving the car there and Ron
12 getting upset, tow truck driver came, Cadrain
13 decided to come and was with us, there's more
14 description there, talks about waiting for Nicky
15 and Cadrain, Shorty playing a ukulele, talking to
16 the mechanic, which I think we know about that,
17 Shorty paid the bill, we left.

18 Just turn the page. Shorty,
19 went to Shorty's friend's place, we've heard from
20 that witness and there's more detail here but we
21 did hear that gentleman testify here, and he says
22 he was mad at Nicky, I took over driving because
23 she was playing up to Shorty, I knew she got
24 scared when I drove fast so I poured it on. We
25 arrived in Calgary, talks about Ron, etcetera,



1 and more about driving, and etcetera, etcetera.

2 Go to the next page. More car
3 troubles, got to Edmonton, talks of what occurred
4 there with Sharon Williams. Go down the page.
5 Went back to Calgary and were checked out by the
6 RCMP in Banff, were given a meal ticket.

7 Just turn the page. Something
8 about stealing some beans and drinks from a
9 curling house, dropped Nicky and Shorty off at
10 the Cornwall house, stayed at Ron's house for two
11 days and later stayed at Pat Murray's place, and
12 he got his licence, that's the licence to sell
13 from Maclean's, went to Winnipeg under the
14 supervision of Roger Renaud, and that's the first
15 place I heard of the Gail Miller murder.

16 I mean, Mr. Commissioner, these
17 are details that were given around the time of
18 the incident. They don't seem to be slanted to,
19 for any particular purpose, and knowing that he
20 was innocent and is innocent certainly has some
21 effect on that, but that is a detailed detail
22 that, I mean, we're now talking 35 years later.
23 How can he possibly add anything to that in terms
24 of what he said back then. Counsel is free to
25 make whatever use they want of that, I mean, in



1 terms of what he says, but what more can he add
2 except for the 318 points of, on a day that
3 really didn't amount to much from his
4 perspective.

5 So you have the notebook and if
6 we can go back to the Notice of Motion, and I
7 pause here to say that after this notebook was
8 written we know what happened to David in terms
9 of his incarceration and what he went through and
10 this was written before that obviously.

11 Now, in document 301675 there's
12 a six page affidavit from David which contains
13 more of his position on many things and I don't
14 know if, Mr. Commissioner, you want to pull it
15 up, but it is available.

16 COMMISSIONER MacCALLUM: What's the doc,
17 please?

18 MR. WOLCH: 301675, and it's November 25th
19 of 1986, it's a six page affidavit referring to
20 many things, including the reenactment, it's all
21 in the affidavit.

22 COMMISSIONER MacCALLUM: Okay.

23 MR. WOLCH: Maybe just turn the page on the
24 motion.

25 Now, we have before us also the



1 Supreme Court evidence and I think it's telling
2 that when Mr. Hodson and I were in Vancouver
3 David could really not even remember the Supreme
4 Court and I've shown you the clippings and the
5 letter from Mr. Asper which show the emotional
6 trauma he was under in terms of being quite
7 traumatized, in and out of the room, and I think
8 it has to be looked at from his perspective as to
9 what he's been through, the pressure, the years
10 of saying I'm innocent, I'm innocent and not
11 being believed, the trauma in jail, all that
12 horror, he just can't handle it, and nevertheless
13 he did answer questions, he answered a lot of
14 questions, and I remind everyone that he was
15 innocent. It wasn't like he was a guilty person
16 taking the stand, he was an innocent person,
17 totally innocent, so in document number 232580
18 there is, from pages 2 to 39, questions from
19 myself, and then from Mr. Neufeld we have from
20 pages 44 to 227, and I think Mr. Neufeld would be
21 the first to agree that he was very adversarial.
22 I don't say that as a criticism, I say that as a
23 fact, extremely adversarial in cross-exam in that
24 manner.

25 Then there's document 231940



1 and Mr. Fainstein cross-examines and -- well, he
2 was from the Department of Justice, I think a
3 fair reading of it was that he had certainly a
4 side he was upholding, he cross-examined from 231
5 to 312. That's a lot of pages. And then I
6 re-examined for 10 pages as well. So that's a
7 lot of examination on all these issues by parties
8 that were going beyond what would be going here.
9 They were looking at him, you are guilty, you are
10 guilty, and we're going to expose you and
11 whatever else, so it was very probing
12 cross-examination at a time when obviously
13 everything was more fresh, not very fresh, but
14 more fresh in David's mind.

15 Then we go to May 6th and 7th
16 and this is the civil suit that we've heard about
17 and there are approximately 1,423 questions on
18 behalf of the prosecutors and all these are
19 before us that anybody can look at and use as
20 they wish and they have as an exhibit in here,
21 they have the 14 pages of David's notes asking to
22 have his case reviewed -- and scroll down -- just
23 turn the page please, sorry. Then you have on
24 other dates 903 questions asked by counsel for
25 the police officers on that particular day, and



1 then down here on May the 8th are 282 questions
2 on behalf of Mr. Karst.

3 Now, the point I make, sir, is
4 that that's an awful lot of questions and answers
5 for a non-event in his life. I mean, it's not
6 like he's being asked to talk about when he acted
7 in self-defence and shot somebody or when he was
8 jumped on and attacked or something that you
9 focus on, he's being asked about something that
10 really was a non-event in his life, a day where
11 nothing happened of note, so how -- those are the
12 kind of memories you don't retain.

13 That is, if any of us were to
14 think back to 1969 and be asked questions what
15 did you do on the morning of so and so, what
16 happened to you here, what happened to you there,
17 how many memories come back to us, like, how many
18 would come back to us. An important case maybe,
19 if you were asked to describe an important case
20 you adjudicated perhaps then or were counsel for,
21 how many details can you remember, something you
22 knew backwards and forwards back then. People
23 just don't remember. So to expect David to come
24 here and talk about green trousers or purple
25 trousers, it's not going to help us any.



1 The fact is we have his notes
2 made then. Rightly or wrongly those are the
3 notes he made then. He can't correct them or
4 change them or add anything that has any
5 credibility to alter something at this point in
6 time that I know of, so the point I make is that
7 it's all there. He is prepared to confirm that
8 at all times he did his best to tell the truth.
9 He will confirm that. I always try to tell the
10 truth, but I could be wrong. I can make
11 mistakes. I mean, his position with Mr. Tallis
12 is my memory is mine, his memory is his, he could
13 be right, I don't know. It's just -- he doesn't
14 say that he doesn't believe Mr. Tallis, he
15 doesn't accuse him of anything, he just says he
16 could be right, I could be right, I don't know,
17 we're both attempting to be honest and that's all
18 his position is, so on one hand I say he's
19 answered everything at some point in time, and
20 for the parties, they can look at it and say,
21 look, where didn't he answer this thing or what
22 can I get out of it, and while there may be some
23 things I'm sure you can find in there because of
24 the civil suit, for example, the same parties
25 were in a very different position than they are



1 now, it was quite adversarial, there was money at
2 risk and everything else, and they sure asked a
3 lot of questions, so everything has been asked.

4 If there's something new coming
5 out, I could understand that, but let's make it
6 brief, identify it, let it pass a threshold
7 perhaps with yourself or Mr. Hodson that it has
8 some more than just passing benefit or has it
9 been asked and answered before. I mean, I would
10 welcome a chance to look at the question and say
11 lookit, he answered it on page so and so, the
12 same question so we narrow it down, because the
13 bottom line is that what you heard this morning
14 is truthful evidence of a very upset individual
15 and it doesn't stretch common sense to appreciate
16 that, one does not have to analyse deeply and
17 greatly to understand the trauma of what David
18 went through and the effect it would have, and he
19 can't be punished for being traumatized; that is,
20 you are not good enough because you are
21 traumatized, and it is pure trauma. There's no
22 hint of disrespect or anything like that. In
23 fact, for what he has been through he's
24 remarkably not containing much, carrying much
25 malice because most individuals would be bitter



1 beyond belief for what occurred to him.

2 COMMISSIONER MacCALLUM: Mr. Wolch, let me
3 ask you this, supposing for the sake of argument
4 I accept what you have said about the utility of
5 his past testimony in various venues and that the
6 remaining questions should be worked out with a
7 view to being as brief as possible and causing
8 him the least amount of grief, do you think that
9 within the four corners of the notice of motion
10 as you've framed it I would be entitled to make
11 an order requiring him to be examined under
12 audio/video in a manner which both of your
13 experts have agreed would be a reasonable
14 compromise?

15 MR. WOLCH: I think you would, sir, but I
16 think -- I guess the point I'm making is we have
17 to work together, that's really what I'm saying.
18 It's not a matter of adversarial, we're not here,
19 supposedly, I hope, in an adversarial capacity,
20 we have to work together, and to, I think Dr.
21 Baillie put it, to balance, and my suggestion is
22 simply this, that we identify what people really
23 want to know and hopefully what they think hasn't
24 been answered before, they can't find in all
25 those documents, identify it, let's see what it



1 is.

2 My preference would be to have
3 written questions, hand them over, get the
4 answers back quickly, that I think I can do, and
5 if they are not satisfactory, take the next step,
6 ask more questions or then ask, look, let's try
7 and get whatever is left on camera, but I think
8 one step at a time. If we can do it quickly with
9 the questions, I'll undertake to go to him as
10 fast as I can, given the birth of the child, and
11 say here are the questions, please try and get
12 them done, like, quickly and get them back so
13 we're one step closer to where we want to be, but
14 I think that when counsel sit down and actually
15 analyse the questions, we'll see that many of
16 them really aren't of that much merit.

17 For example, and I understand
18 if he was an ordinary witness Mr. Hodson would
19 ask certain questions that he composed before,
20 but some of those questions such as do you have a
21 criminal record, well, we know he doesn't have
22 one, I mean, why do we have to ask that, or
23 things of that nature can be narrowed, and many
24 things we have reports on. Did you tell, I mean,
25 did you tell the police the truth as best you



1 know it? Yes, I did at the time. I don't know,
2 I don't know what will contribute that much to
3 what you are mandated to look at and I guess my
4 point is that thousands and thousands of
5 questions have been asked already of which we can
6 point to the answer and say yeah, if they want,
7 that's true, that's my position, that's my
8 evidence under oath, and I think the most
9 valuable of all, quite frankly, is that notebook,
10 and it doesn't much matter if David is right as
11 to the one that Justice Tallis saw or not, the
12 point is it is a recollection of a series of
13 events.

14 COMMISSIONER MacCALLUM: Because it's
15 contemporaneous?

16 MR. WOLCH: Yes, it's the best record of
17 what happened, it's every little detail. Sir,
18 when you have time to look at it you'll see the
19 most minute detail, it's amazing how many small
20 little things are in there, and many of them
21 we've heard here from one source or another, it
22 just all comes together. Today he couldn't even
23 come close to doing that, and, you know, I think
24 you have my point, but my point is I think we
25 have to work together. I hopefully believe that



1 nobody wants to see him damaged any more. I
2 think the fact that he wants to get on with his
3 life is totally understandable. He lost almost
4 30 years of his life and he wants to get on with
5 his life and do things and he doesn't want to be,
6 as two doctors explained, back in the prison, he
7 doesn't want to be reminded, he doesn't want to
8 be sitting there and remember sitting down with a
9 psychiatrist who told him he was, actually did it
10 but suppressed it, he doesn't want to go back to
11 that space.

12 COMMISSIONER MacCALLUM: All of which is
13 something I would love to have heard about a year
14 ago, Mr. Wolch.

15 MR. WOLCH: Sir, I appreciate what you say.
16 I must say that it was on the news report before
17 we started. From the very beginning I told Mr.
18 Hodson we had problems and we'll try to work on
19 it, we'll try to work on it, I explained to him
20 that I've had problems with David from day one in
21 terms of instructions, of talking about the case,
22 we can't talk about it, but I'm not going to
23 desert him if he can't talk to me.

24 COMMISSIONER MacCALLUM: You are not going
25 to what?



1 MR. WOLCH: I'm not going to desert him
2 because he can't talk to me, I can't punish him
3 because he can't relate and can't give me help.
4 That's been the case since 1986, that he can't
5 get into it. I challenge anybody to find any
6 time he has spoken, other than in the settings
7 we've put out, or ever spoken about jail, he just
8 can't do it, and that's the circumstance, so this
9 Commission of Inquiry was set up in part to help
10 him, it was part of the package of compensation
11 and helping understand what caused, what happened
12 to him and his desire that it doesn't happen to
13 somebody else, but just on that point, when Mr.
14 Hodson mentioned to him, "David, maybe you have
15 some insight as to how to prevent this," he said
16 no, he said, "I'm not competent." I'm not
17 quoting, but "I'm not competent and I don't want
18 the burden of making recommendations that might
19 not work, I don't want that on my conscience."
20 He said, "I can't do it, I'm not capable," and
21 it's very commendable he takes that position, "I
22 just don't know."

23 I mean, he could easily say how
24 frustrating it was, but that's a different
25 matter, but he can't help on that because he's



1 not qualified to understand the system. He can't
2 talk about Department of Justice practice or
3 policy or whatever, it's just not within his
4 area, and there are so many things he doesn't
5 know anything about.

6 It was interesting when, in one
7 of the questions this morning there was a
8 reference to, well, he can talk about his
9 friends. Well, those are the friends who put him
10 in jail for life. I mean, they are not -- the
11 word friends is a bit of a stretch in terms of
12 what they are, and in terms of Larry Fisher,
13 there isn't a person in this courtroom who
14 doesn't know more about Larry Fisher than David
15 Milgaard, he doesn't know about him, and that's
16 just -- he couldn't sit through the Supreme
17 Court, but rather than looking at that as
18 something negative about David, it's really the
19 effects of what happened to him. It's the result
20 of what happened to him that words cannot do
21 justice to.

22 The banned report I showed you
23 and things like that, you can't relate to that,
24 it's just impossible as a human being to look at
25 that and understand how anybody could have gone



1 through that, and I think we should balance, try
2 to get whatever really will help us in a way that
3 doesn't harm him any more and I think we should
4 work together and do that and that's really all I
5 can ask of you, sir, but -- and I do apologize
6 that this matter had not gotten before you
7 sooner, but it's a very difficult issue, it's
8 very difficult to speak about. I don't know what
9 would happen if this got back to David, if
10 anything became public on his personal matters.
11 It's walking a fine line here as Mr. Grymaloski
12 said, you are walking a tremendously fine line.
13 It's only because society damaged him.

14 Unless you have any questions,
15 sir, that's my position.

16 COMMISSIONER MacCALLUM: Thank you.

17 MR. WOLCH: Thank you.

18 MR. HODSON: Mr. Commissioner, before you
19 call on other counsel, I wonder if I might just
20 touch on a couple of matters.

21 First of all, I as Commission
22 Counsel am not taking a position on the
23 application before you. As your counsel, I have
24 facilitated getting the witnesses, etcetera, and
25 so I am not making any submissions regarding the



1 accommodation, but I do wish to address the one
2 issue that -- I guess two issues that deal
3 squarely with me and my role as Commission
4 Counsel, and that is, one, the Terms of
5 Reference, and two, the questions that would be
6 asked of Mr. Milgaard, and I do not think it's
7 fair to counsel for the other parties to have to
8 justify what questions I might put, it's my job
9 to determine relevance initially, parties can go
10 to you on that, and it's my job to determine who
11 will be witnesses and what questions to ask.

12 October 13th -- or pardon me,
13 October 13th or 16th, 2004, three months before
14 the Inquiry started, I advised Mr. Wolch in
15 writing that I intended to call David Milgaard as
16 a witness and I have not changed that position.
17 I certainly appreciate the concerns that he has
18 expressed about trying to do that in a way that
19 minimizes any harm to him, so I just want to
20 talk about --

21 COMMISSIONER MacCALLUM: What was that
22 date, I'm sorry?

23 MR. HODSON: Actually, I've got the letter,
24 I think it's October 16th -- October 13th, 2004,
25 which is three months before we started, so



1 again, that has been my position from day one,
2 and I certainly have had discussions with Mr.
3 Wolch about how we go about doing that over the
4 years -- over the year -- actually, years is
5 probably correct, about trying to find a way to
6 deal with that, so --

7 COMMISSIONER MacCALLUM: Well, that of
8 course is, what you say is of course correct and
9 I hope there's no misunderstanding amongst
10 counsel that within the bounds of relevance and,
11 which are determined by our Terms of Reference,
12 the discretion as to what to ask any witness,
13 including David Milgaard, is entirely that of
14 Commission Counsel. When we ask for input or
15 allowed as a possibility input on questions if an
16 accommodation were to be made, questions by other
17 counsel, it was only with respect to matters
18 which might have arisen during Commission
19 Counsel's examination of Mr. Milgaard.

20 MR. HODSON: Yeah.

21 COMMISSIONER MacCALLUM: This is not --
22 this is not a co-operative effort in terms of
23 framing the questions to be put.

24 MR. HODSON: Yeah, and certainly I, and my
25 concern and the reason I rose is to sort of put



1 forward my position, which I've put forward
2 before and I'll put forward again. The Terms of
3 Reference require us to look at principally two
4 things, the conduct of the investigation and
5 trial and the reopening. We have stated the
6 reopening spans from 1970 to 1997, a 27 year
7 period. You and Mr. Wolch had a discussion about
8 the press conference of 1992.

9 To the extent that Mr. Milgaard
10 has, one, made comments publicly about the
11 conduct of the investigation and trial, in other
12 words, that aspect, that is relevant to the Terms
13 of Reference. Secondly, to the extent that
14 information is provided to the authorities from
15 1970 to 1997 that bears on the issue of
16 reopening, it is relevant because you must seek
17 to determine whether the investigation should
18 have been reopened earlier than it was and it was
19 1997 that it was reopened.

20 COMMISSIONER MacCALLUM: The point being
21 that the date of Mr. Milgaard's release from
22 prison is not the governing date?

23 MR. HODSON: That is correct. Secondly, on
24 the issue of questions of witnesses, and
25 certainly we've seen many witnesses that have



1 both testified on many occasions and do not have
2 much in the way of recall, and what I can say to
3 that, if that's the situation with Mr. Milgaard,
4 I mean, I accept that, but that is something
5 again with other witnesses -- we have called some
6 witnesses to say I don't remember, but it's on
7 the record.

8 Secondly, to the extent that
9 questions have been answered previously, and Mr.
10 Wolch referred to many; however, the answers are
11 not always consistent, not in any way saying that
12 Mr. Milgaard answered wrongly or anything, but at
13 different times there is different answers and
14 there certainly is, I think, a need to go back
15 and say okay, how can that be reconciled, and if
16 he has no memory so be it, but again, it's not --
17 I mean, the notebook is an example where I can
18 tell you that what we will hear from Mr. Tallis
19 is that there is a difference about the notebook.
20 Peter Carlyle-Gordge testified that he had the
21 notebook in the early '80s I believe, so again --
22 however, that does not mean that I need to spend
23 days upon days with Mr. Milgaard. It would be a
24 careful set of questions in some form, whatever
25 ends up being, whatever accommodation or forum is



1 ordered, I would ensure that we get to the very
2 specific question, and then the outline that I
3 provided to Mr. Wolch and to others, it is only
4 questions which he has personal knowledge of and
5 that are relevant, and I share his view that to
6 minimize and ask only those questions that are
7 absolutely necessary, that would be my view, but
8 again, I think that's my responsibility, so I
9 wanted to state that so that the parties are not
10 put in the position of having to address that
11 issue which I didn't expect to be part of the
12 accommodation application.

13 So with that, I think it's
14 probably break time, Mr. Commissioner. There are
15 at least four counsel who wish to address you on
16 this.

17 COMMISSIONER MacCALLUM: Thank you very
18 much for saying that. We'll take 15 minutes.

19 *(Adjourned at 3:03 p.m.)*

20 *(Reconvened at 3:24 p.m.)*

21 COMMISSIONER MacCALLUM: There are several
22 of you counsel I think who wish to
23 cross-examine and --

24 MR. ELSON: Not cross-examine.

25 COMMISSIONER MacCALLUM: Sorry, argue, and



1 I just wanted to say that one of our upcoming
2 witnesses is available only for one day and he
3 has some relatively important things to say, so
4 please bear that in mind in your presentations,
5 whether in argument or in cross-examination.

6 **MR. ELSON:** Mr. Commissioner, I will be
7 very brief. I have had an opportunity to speak
8 with other counsel who were included in the
9 memorandum yesterday and I think to some extent
10 we've kind of divvied up the submissions that
11 would be made and, for the most part, although
12 there are some exceptions, we will try to make
13 our submissions insofar as our particular clients
14 are engaged.

15 **COMMISSIONER MacCALLUM:** Okay.

16 **MR. ELSON:** First of all, just if I can
17 make a general comment, we had said in our
18 memorandum that we did not believe that the
19 evidence filed in support of Mr. Milgaard's
20 application came close to justifying any form of
21 accommodation. Quite frankly, we stand by that,
22 and in terms of any general submissions that we
23 make in that respect, our first concern, and we
24 say this with the greatest of respect, or I
25 certainly say this with the greatest of respect



1 to Mr. Grymaloski, Mr. Grymaloski obviously has a
2 very good, trusting, therapeutic relationship
3 with Mr. Milgaard, that is a good thing, and it
4 is our hope and prayer that that will assist Mr.
5 Milgaard in whatever he is able to do in the
6 future insofar as his family is concerned and
7 insofar as whatever adjustments are needed to be
8 made in his life.

9 Having said that, when Mr.
10 Grymaloski comes before us as an expert giving
11 opinion, it is necessary for us to view his
12 opinion, or to receive his opinion hopefully as
13 an independent expert. Mr. Grymaloski was quite
14 candid in answering my questions that he does
15 perceive himself certainly in the context of this
16 proceeding as being an advocate for David
17 Milgaard in the assessment that he has made.

18 As a result, it is our
19 respectful submission that in considering the
20 weight of Mr. Grymaloski's evidence, certain
21 considerations should be had to its lack of
22 independence and to the fact that Mr. Grymaloski
23 quite candidly regards himself as being an
24 advocate for Mr. Milgaard and, as he indicated,
25 an advocate for Mr. Milgaard's wishes.



1 Dr. Baillie I will candidly
2 acknowledge came across as significantly more
3 independent and in part perhaps that was because
4 he had not had a therapeutic relationship with
5 David Milgaard and indeed did not have the
6 opportunity to meet with Mr. Milgaard in order to
7 provide an assessment.

8 Having said that, there was a
9 question with respect to the extent of his
10 independence to the extent that he has hitched up
11 his train, or his caboose to the train of Mr.
12 Grymaloski in the sense that he has adopted
13 certain of Mr. Grymaloski's opinions in the
14 assessment that he has made of David Milgaard, so
15 it is our respectful submission that the weight
16 to be given to the evidence of Mr. Grymaloski and
17 of Dr. Baillie is to be limited in that respect.

18 It is also to be limited in a
19 second respect and that is with respect to the
20 fact that, to the fact that Mr. Baillie, or Dr.
21 Baillie rather, did not have an opportunity to
22 actually see Mr. Milgaard in order to perform the
23 assessment, and indeed he doesn't describe it as
24 an assessment, he describes it rather as a
25 commentary because it did not involve what he



1 would typically do and conduct in his practice
2 and that would include a clinical interview as
3 well as psychological testing.

4 And thirdly, Mr. Commissioner,
5 on January 17th of this year you had indicated to
6 counsel, and indeed had indicated to Mr. Wolch,
7 that there should be supporting documents with
8 respect to the opinions that were to be received
9 in support of the notice of motion and it was my
10 understanding, and I don't know whether we need
11 to bring the transcript up, but it specifically,
12 I believe, on pages 26 -- I think I wrote them
13 down -- page 21670 through to 21672 of January
14 the 17th, 2006, and notably I believe at 672 is
15 where it's most important, where you indicated
16 that you shared a concern with Mr. Hodson and
17 indicated, and I quote:

18 "I hope counsel will take this
19 seriously. And the consequences of not
20 bringing supporting material which is
21 reasonably needed to cross-examine, of
22 course, is that the evidence given will
23 lose its weight."

24 Here we have a situation where we did not have
25 Mr. Grymaloski's clinical chart with respect to



1 his interaction with David Milgaard. That would
2 have been very useful for me in conducting the
3 cross-examination of Mr. Grymaloski in that I
4 would be able to draw comparisons and
5 cross-references between the opinions expressed
6 in Mr. Grymaloski's report and those which were
7 contained in his chart. They were not provided.
8 Notwithstanding the fact Mr. Milgaard's counsel,
9 Mr. Wolch, made the arrangement through
10 Commission Counsel to have Mr. Grymaloski come
11 here and I would have thought, certainly given
12 Justice Picard's decision some years ago in the
13 *Hay* case in the Alberta Court of Queen's Bench
14 with which you may be familiar, Mr. Commissioner,
15 that to the extent someone puts their health,
16 whether it be their mental health or their
17 physiological health in issue in a litigious
18 proceeding, which we submit Mr. Milgaard did in
19 this case, that they have, by virtue of having
20 done that, waived any right to rely on
21 therapist/patient confidentiality.

22 So we submit that there should
23 be less weight given to the opinions filed in
24 support of this application on those three
25 grounds.



1 I listened very carefully to
2 the discussion between yourself and Mr. Wolch,
3 and I listened particularly carefully to the
4 comments made by Mr. Wolch, and I have to say
5 first of all I was somewhat aghast at the comment
6 that this Commission of Inquiry is to be regarded
7 as being for Mr. Milgaard's benefit. It may have
8 that incidental effect.

9 This Commission of Inquiry
10 belongs to the people of Saskatchewan. The
11 people of Saskatchewan have felt, given the
12 finding that David Milgaard is factually
13 innocent, that the circumstances giving rise to
14 his conviction need to be investigated in order
15 to determine whether or not there was serious
16 wrongdoing by one or more parties or to determine
17 whether or not, notwithstanding the fact that Mr.
18 Milgaard was innocent, he was convicted not as a
19 result of unreasonable care, or not as a result
20 of malice, but perhaps by some mistakes in
21 judgement that have been made from time to time,
22 or perhaps mistakes in judgement that were part
23 of the practice of the day but have now been
24 corrected, or perhaps mistakes in science which
25 have now been corrected.



1 In our respectful view, those
2 are the things that are wide open, but also part
3 of it -- and this is where I refer to my own
4 client and the extent to which our client is
5 engaged -- what we have learned, I think, from
6 the police testimony that has been presented is
7 that so much of what a police officer does, and
8 so much of what motivates a police officer to
9 proceed in a certain manner in the conduct of an
10 investigation, depends on the impression that a
11 police officer has of either a person or a
12 certain set of facts.

13 We cannot be unmindful -- and I
14 say this with the greatest of respect, and I
15 don't say this to heap blame or to heap fault on
16 Mr. Milgaard -- but the question that arises is
17 whether or not there were certain conclusions
18 drawn by police officers involved in this
19 investigation which were unreasonable; or were
20 there facts, having regard to Mr. Milgaard's
21 behaviour, having regard to his conduct, or
22 having regard to how others described his
23 behaviour and conduct, that suggested he was a
24 person worthy of suspicion or suggested, if I can
25 be so bold, that he was a person worthy of being



1 charged with the offence. Those are very
2 important issues.

3 And when I say that I again
4 accept, as I must and as I should, that Mr.
5 Milgaard is factually innocent. But the fact of
6 him being factually innocent does not mean that
7 his conduct is to be disregarded or that his
8 behaviour is to be disregarded. His behaviour
9 may have, notwithstanding his innocence,
10 suggested something contrary to his innocence,
11 and it may have led reasonably to the conclusion
12 of certain persons charged with the investigation
13 of this offence that maybe he was a person well
14 worth looking into.

15 The other concern I have with
16 respect to the submission Mr. Wolch makes is that
17 Mr. Wolch says he is innocent, we all accept
18 that, we must accept that, and as I indicated
19 earlier we should accept that, but that does not
20 mean that his credibility should never be
21 assessed in the context of his innocence.

22 I have never met David
23 Milgaard, I have never seen him testify under
24 oath. When we look around this room we will
25 realize that, in that respect, I am not alone.



1 There are people in this room who have seen him
2 testify under oath, but most have not. We have
3 not had an opportunity to assess his credibility.
4 And I don't mean assess his credibility in the
5 context of whether or not he is guilty of this
6 offence, that's not what I mean, but to assess
7 his credibility in determining whether or not
8 there really were things which justified the
9 investigative attention which was drawn to him.

10 In this respect, we have not
11 seen before this Commission of Inquiry Mr.
12 Milgaard's response to the evidence which was
13 received through Sharon Williams, and more
14 particularly through her statement about his
15 conduct prior to January of 1969. This
16 Commission of Inquiry has not had an opportunity
17 to view Mr. Milgaard in describing what he
18 recalls occurred in the motel room in Regina.
19 And, indeed, we must remember that Mr. Wolch
20 vigorously cross-examined Mr. Melnyk with respect
21 to the events that took place in that motel room.
22 The only manner and the only way in which that
23 evidence could reasonably have been challenged by
24 Mr. Wolch with respect to the motel room
25 reenactment is if Mr. Milgaard had provided him



1 with information that would support Mr. Wolch in
2 asserting the challenge.

3 Because it is necessary for
4 this Commission of Inquiry, and for those of us
5 participating as counsel representing parties
6 with standing, to assess Mr. Milgaard's
7 credibility, the importance of that cannot be
8 understated, and we cannot do that simply by
9 receiving the transcripts of the evidence already
10 presented. Moreover, we cannot do that by
11 receiving written answers to written questions
12 posed to Mr. Milgaard. We do not have that
13 opportunity to make that assessment.

14 It is for that reason that the
15 respondents have made the accommodation proposal
16 that we have. We trust Commission Counsel
17 implicitly to do his job and we have decided,
18 subject to any applications which may be made by
19 individual counsel for the respondents, to forego
20 the absolute right for cross-examination.

21 And I don't mean to -- I'm
22 jumping ahead a little bit. One of the things I
23 believe that My Friend Mr. Pringle will be
24 raising with you is the opportunity to bring an
25 application to you, sir, for the right to



1 cross-examine, depending on what is heard in the
2 video tape evidence, and speaking on behalf of
3 myself and my own client, we do not oppose that.

4 But, having said that, in the
5 accommodation proposal we had presented to you it
6 has been anticipated that cross-examination would
7 only -- is not really contemplated but it would
8 only be allowed by special application to you for
9 that right. And certainly, speaking on my own
10 client's behalf, I really do not anticipate that
11 there would be any cross-examination that I would
12 ask leave to do in the course of receiving Mr.
13 Milgaard's evidence.

14 So, with that one caveat, we
15 implicitly accept that Commission Counsel is
16 going to be able to do a good and thorough job in
17 presenting the evidence and in seeking Mr.
18 Milgaard's testimony.

19 Does it have some risk to Mr.
20 Milgaard? Yes, it probably does.

21 COMMISSIONER MacCALLUM: Could I -- just
22 before you get into that, does the proposal still
23 enjoy the support of all other counsel, except
24 Mr. Wolch of course, notwithstanding the fact
25 that Mr. Wolch has forged ahead with his



1 application and not accepted the proposal
2 beforehand as he might have?

3 MR. ELSON: Yes, it does. And I have had,
4 and Mr. Pringle can speak for himself, my
5 understanding is that in Mr. Pringle's submission
6 to you he would like to deal with the issue of
7 cross-examination.

8 COMMISSIONER MacCALLUM: Of cross? Subject
9 to that? Okay.

10 MR. ELSON: And having said that, in all
11 other respects -- and certainly I join with
12 Mr. Pringle in making that request -- I do not
13 see frankly, having regard to the evidence and
14 what I believe the evidence will be, I don't
15 see -- I think it very, very, very unlikely that
16 either myself or my colleague, Mr. Loran, will be
17 up before you asking for leave to
18 cross-examination -- or to cross-examine Mr.
19 Milgaard. So I -- having said that,
20 Mr. Pringle's circumstance is somewhat different,
21 and that of his client is somewhat different than
22 the circumstances of my client, and I shouldn't
23 go any further than that and allow Mr. Pringle to
24 speak for himself.

25 The -- there is an element of



1 risk. There is always a risk in putting anyone
2 on the stand. Any witness could break down. Any
3 of the witnesses that have testified to this
4 point could break down, arguably as a consequence
5 of their being called to give evidence, whether
6 in direct examination or whether in
7 cross-examination.

8 We accept that there may be a
9 heightened risk of a problem for David Milgaard
10 if he were to testify. The question is whether
11 or not what we are to gain, and the value to this
12 Commission of Inquiry, is worth the risk. In our
13 respectful view it is. The question is is it
14 within any risk, and we accept no, it is not.
15 So, therefore, we have come forward with this
16 accommodation for the purposes of minimizing that
17 risk, and we are confident in the ability of
18 Commission Counsel to ask sufficiently probing
19 questions and yet to be sensitive to the
20 interests and the circumstances of Mr. Milgaard
21 in order to minimize that risk, and yet at the
22 same time accommodate the purposes for which this
23 Commission of Inquiry was established.

24 Subject to any further
25 questions, Mr. Commissioner, that concludes my



1 submission.

2 COMMISSIONER MacCALLUM: Thank you, Mr.
3 Elson.

4 MS. KNOX: Mr. Commissioner, I will
5 restrict myself to commenting, really, or making
6 a submission, really, with respect to a single
7 area, and the single area is the evidence that's
8 been proffered on the application with respect to
9 the need for accomodation.

10 I share and adopt the concerns
11 raised by my colleague just before me, Mr. Elson,
12 regarding the nature of the medical evidence that
13 we got from Dr. Baillie, but more particularly
14 from Dr. Grymaloski or from Mr. Grymaloski. And
15 I've spent some time debating whether I would
16 raise the issue, but a concern that became
17 particularly pressing for me as I listened to Mr.
18 Grymaloski this morning is that there appears to
19 be a casting of the situation that Mr. Milgaard
20 finds himself in as a proposed witness to this
21 proceeding that's taking him outside what is, I
22 would submit to you in the experience of most of
23 us who have worked with witnesses who have been
24 victims of crime, is really not outside the norm.

25 It is quite normal for persons



1 who have to come into a Court proceeding to talk
2 about traumatic events to become more and more
3 troubled by the prospect of that testimony as the
4 date becomes closer.

5 Where I don't see any evidence
6 in the record to support a broader issue here, to
7 the extent identified by Mr. Grymaloski, is when
8 we look at the history of this proceeding. And
9 Mr. Commissioner, I just want to draw up for you
10 or call to mind some dates that have governed in
11 these proceedings. There is a document on the
12 Commission web site, it's doc. ID number 324945,
13 that is a chronology prepared by the staff at the
14 Commission dated January 17th, 2005 of the events
15 that pre-date the whole process that finds us
16 here today, starting with October 21st, 1968.

17 Mr. Commissioner, if we proceed
18 forward through the pages of that chronology to
19 page 10, which I would believe will be 955 --
20 well, 954, that will do, the page 10 number --
21 what you will see as you go through the document
22 is that the Government of Saskatchewan first made
23 a commitment to hold a public inquiry into these
24 events in 1997. And perhaps if we go to the next
25 page we'll find that. Sorry, I didn't bring up



1 my marked copy because I didn't have a printed
2 copy, but in any event it was in 1997, August
3 19th, 1997, as we look at the chronology, that
4 Justice Minister Nilson announced that there
5 would be a public inquiry.

6 The public inquiry was
7 something that was being asked for by David
8 Milgaard and others on his behalf since the early
9 '90s, and certainly post his release from custody
10 in 1992. It became a confirmed reality for him
11 as an individual when Minister Nilson made that
12 announcement on August 19th, 1997, and over the
13 ensuing months to May 19th, 1999 when a
14 compensation arrangement was announced for him,
15 there was confirmation two years later that the
16 government intended to carry through with the
17 inquiry. That commitment by the Government of
18 Saskatchewan has been continuing and made known
19 to him.

20 Now I raise these dates,
21 because if we take it and we parallel it with the
22 notes that I made this morning from Mr.
23 Grymaloski's recollection of the dates that he
24 had contact with Mr. Milgaard, I note,
25 significantly I would suggest to you, a number of



1 things. In 1997, when the commitment was made by
2 the Minister in August to hold this public
3 inquiry, by his recollection of his records the
4 -- Mr. Grymaloski thought he might have seen Mr.
5 Milgaard one or two times; in 1988 -- or sorry --
6 '98 he has no recollection or he indicated he
7 doesn't believe he saw him at all; in 1999 it's
8 his belief that he saw him once; in 2000 it's his
9 belief that he may have seen him about three
10 times; in 2001 he might have seen him once, or he
11 might have had a visit he said; he doesn't
12 believe he saw him in 2002, 2003, 2004, or 2005
13 until October 2005 when a concern was raised
14 because of the press conference he did here.

15 Mr. Grymaloski is his
16 therapist, his counsellor. In all this time, and
17 knowing that this eventuality was coming for
18 him -- certainly it was communicated to Mr. Wolch
19 on October 13th, 2004 that he intended to call
20 him as a witness -- we saw no difficulties being
21 manifested by David Milgaard with respect to
22 professing anxiety about the appearance here. It
23 became an issue in very recent times.

24 And again, Mr. Commissioner, I
25 would say to you, as any of us at the table who



1 have gone to Court with victims have been there,
2 in those days and weeks and months as Court dates
3 get closer have been told many many times by
4 people who have traumatic events to relate that
5 they can't possibly do it, they won't be able to
6 do it, only to find that with the right support
7 and encouragement, both from counsel and from any
8 therapist involved with them, that they quite
9 ably are able to do it and, in fact, many of them
10 find it to be an empowering experience to be able
11 to do it. And I caution you to take a look, in
12 assessing this request for accomodation, how this
13 history of David Milgaard's knowledge of this
14 process that he wanted, he asked for and wanted
15 to be part of, has continued very much to be a
16 part of his life but doesn't appear to be
17 reflected in the therapeutic record as we have it
18 from Mr. Grymaloski, and I suggest to you that
19 you give consideration to the proposal that we,
20 as counsel, make around accommodation, because I
21 would suggest to you that the documentary record
22 and the limited medical opinion that we were able
23 to get would suggest that, with the proper
24 supports and structure -- and I think to some
25 extent this was perhaps manifested in the meeting



1 Commission Counsel had with him some short time
2 ago in Vancouver -- but that with the right
3 support and accommodation the very thing that we
4 need to be achieved here can indeed be achieved
5 with hopefully no harm to Mr. Milgaard, but
6 certainly minimal harm to him.

7 As to the suggestion of anyone
8 in the room wanting to cause him harm, this was
9 something that was raised again today by
10 Mr. Wolch, I have assured him on a personal level
11 that my instructions from my client are that I am
12 to do nothing that will potentially cause any
13 harm to Mr. Milgaard. I have to balance that
14 against the issues that he has raised in respect
15 of my client, including the allegations he made
16 against him in a very public press conference in
17 September 1992, and for that reason I feel it is
18 essential that he be able to be questioned, but
19 through the good offices of Commission Counsel
20 rather than through me personally.

21 **MR. PRINGLE:** Mr. Commissioner, with
22 respect to the application for accomodation, I
23 agree with the two previous counsel who discussed
24 this that really, looking at the law, I don't
25 think there is grounds for accomodation. But if



1 one looks at the unique situation here, perhaps
2 it's a situation where we look for a creative
3 solution to this situation for compassionate
4 reasons, and that is what counsel for the parties
5 have tried to do here.

6 I, first of all, wish to point
7 out that what we have proposed is something that
8 is not something that's common, it's very
9 unusual, because normally individuals that are in
10 situations of post-traumatic stress such as rape
11 victims or children that have been molested and
12 sexually assaulted for years who are severely
13 traumatized, they still have to go to Court and
14 testify, or at the very least what is required is
15 that a video be prepared from somebody that's saw
16 them fairly recently thereafter, and then they
17 have to come to Court and adopt the video and be
18 subject to cross-examination in Court.

19 And what counsel for the
20 various parties have suggested here is, I submit,
21 a very -- you know, I hate to use the word
22 "accommodating" -- but it's been very
23 accommodating with respect to a potential
24 solution here. And, having heard the evidence,
25 one cannot help but think that maybe this would



1 be less stressful for David Milgaard than a
2 prolonged, written question and answer type of
3 approach.

4 We all know that Mr. Hodson is
5 not an intimidating individual, he is somebody
6 who would question him in a sensitive manner, and
7 --

8 COMMISSIONER MacCALLUM: I don't know if we
9 can stand any more compliments.

10 MR. PRINGLE: That's the only one he'll get
11 today.

12 COMMISSIONER MacCALLUM: Commission Counsel
13 anyway.

14 MR. PRINGLE: Yeah. But -- and, also it's,
15 what we're suggesting is that it could be done at
16 a location near where David Milgaard and his wife
17 are currently residing, and so that he doesn't
18 disrupt his lifestyle, doesn't -- nobody is
19 suggesting that he has to come down here. It's a
20 situation where the whole process could be done
21 fairly quickly, and be over with rapidly, rather
22 than a prolonged situation where, you know,
23 questions and answers are answered over a lengthy
24 period of time.

25 Umm, the -- there's really, if



1 you -- I don't recall ever, in a Court case,
2 seeing a situation where a witness was allowed to
3 give evidence through a written question and
4 answer. I can't recall. And sometimes we have
5 agreed statement of facts, as you know. That
6 process probably, to go through that with all the
7 counsel here and all the revisions and everything
8 that would have to occur, would probably be --
9 and all the issues that would have to be covered,
10 would probably be as difficult for David as Mr.
11 Hodson going in and doing an oral question and
12 answer with video camera. One would think that,
13 you know, initially if you are in front of the
14 video camera for a couple of minutes you would be
15 aware it's there, but after a while you'd
16 completely forget it's there and it would just be
17 Mr. Hodson and him and whatever other individuals
18 you feel should be there, sir.

19 Umm, but as far as a written
20 question and answer, I have never seen it done,
21 it's -- it strikes me as a difficult way. And,
22 of course, the disadvantages of a written
23 question and answer in case a question of
24 credibility comes forth is that you, Mr.
25 Commissioner, will not be able to see the



1 demeanour of Mr. Milgaard, whether he hesitates
2 to answer a question, whether there is a long
3 time, or whether there's flippancy or whether he
4 is seriously answering the question. I mean the
5 video may very well be helpful to David in
6 showing that he is credible, but it's at least a
7 record of what is occurring, and a written
8 question and answer would be a -- situation would
9 be very difficult to put in controls and how that
10 would be -- how that would take place. So it's
11 our proposal that, initially, this process be
12 done by -- as proposed.

13 But, having heard Mr. Wolch
14 today asking that previous transcripts be
15 accepted as his evidence, previous statements,
16 the notebook be accepted, I feel constrained to
17 ask for the right at some future point to -- I
18 doubt whether this will occur because Mr. Wolch
19 has reassured me that there shouldn't be an issue
20 between our clients -- but I feel constrained to
21 ask for the right, if necessary, to apply to this
22 Court, if accommodation is granted, for the right
23 of cross-examination if significant differences
24 arise between my client's testimony and Mr.
25 Milgaard.



1 COMMISSIONER MacCALLUM: Is that however
2 the or whatever the form of questioning is,
3 whether it by video or by written Q and A?

4 MR. PRINGLE: Yes.

5 COMMISSIONER MacCALLUM: Yeah.

6 MR. PRINGLE: Either way I would seek that
7 opportunity, sir. And I wish to emphasize that I
8 doubt whether that will occur. And the last
9 thing I want to do, and I felt this way right
10 from the start of this Inquiry, is cross-examine
11 David Milgaard, but if something significant does
12 come up where I have to, where I feel for the
13 principles of natural justice that I have to seek
14 the right to cross-examine, then I certainly feel
15 that that should be part -- that should be left
16 open as part of any accommodation that is granted
17 here.

18 COMMISSIONER MacCALLUM: Yeah. That wasn't
19 in the proposal.

20 MR. PRINGLE: Well --

21 COMMISSIONER MacCALLUM: It was some form
22 of further questions, was it not?

23 MR. PRINGLE: It was further questions -- I
24 can't remember exactly how that was worded, but I
25 don't think it was clear, that's for sure.



1 COMMISSIONER MacCALLUM: It wasn't
2 cross-examination?

3 MR. PRINGLE: I don't think it really was
4 clear that counsel may seek that right from the
5 way the proposal was written, but I --

6 COMMISSIONER MacCALLUM: Were it to be
7 extended to you, of course, in fairness all
8 counsel should have the same privilege?

9 MR. PRINGLE: Yes, I think so. Yeah, I
10 agree, I think they would -- I don't think
11 anybody wants to go that far but, if necessary,
12 at least have that right to do that at some
13 future point. Those are my --

14 COMMISSIONER MacCALLUM: Or at least to --
15 I think what it said, wasn't it, that the
16 questions, designated questions, could be
17 submitted to Commission Counsel to put again to
18 Mr. Milgaard?

19 MR. PRINGLE: Yeah, to put -- you know.
20 But I would like the right not only to -- yeah,
21 thank you -- I would like the right to not only
22 ask Commission Counsel to ask the questions, but
23 I also would like to leave the right open to
24 myself --

25 COMMISSIONER MacCALLUM: Yes.



1 MR. PRINGLE: -- to conduct questioning if
2 I feel necessary. And I don't think it will
3 happen, because of comments that Mr. Wolch has
4 made in this Inquiry and to myself I am fairly
5 sure it wouldn't happen, but I just, I feel
6 constrained to ask for that right in case --

7 COMMISSIONER MacCALLUM: Yes, I understand.

8 MR. PRINGLE: -- I find myself in that
9 circumstance, sir.

10 Those are my submissions unless
11 you have any questions?

12 COMMISSIONER MacCALLUM: Thanks. No, I
13 don't, no.

14 MR. PRINGLE: Thank you.

15 MR. FOX: Mr. Commissioner, I will be --
16 I'll try and be very brief here.

17 For the record -- and this is,
18 I obviously only speak on behalf of Mr. Karst, my
19 client -- again, there is no issue about Mr.
20 Milgaard's factual innocence.

21 The second part of it, there is
22 no issue that he has suffered. I mean we all can
23 look at that. And Mr. Wolch is exactly correct
24 that you couldn't need an expert to recognize
25 that being convicted of an offence that you



1 didn't commit and being incarcerated for that
2 length of time would cause great suffering, and
3 there is no issue of -- about that, we don't need
4 an expert to tell us that.

5 But, of course, that doesn't
6 help us deal with the situation.

7 The third thing I observed
8 though, and this is a little bit about why we are
9 here, is that when we look at the history of this
10 matter we see -- we have seen repeated instances,
11 prior to this hearing and at this hearing, where
12 people have spoken on behalf of David Milgaard
13 and have said "this happened" or "that happened",
14 or whatever, and frankly I have some great
15 sympathy for Mr. Milgaard now when he says "well
16 gee, you know what, I can't really comment on
17 that" because, frankly, in some instances he
18 can't, and probably can't because others have
19 spoken for him, and really he may not have had
20 any part in it. But that, unfortunately, leaves
21 us in the difficult situation where those matters
22 have to be dealt with.

23 As you correctly pointed out,
24 Mr. Commissioner, relevancy or the relevancy of
25 his evidence, his ability to give evidence, has



1 already been determined. And I don't mean to go
2 through that. But certainly Mr. Hodson, in his
3 proposed list of questions, has identified a
4 number of relevant areas.

5 And a good example of it, one
6 that jumps out of course, is the compact. One
7 might think about questioning him about the
8 compact being thrown out of the car is somehow
9 questioning him about guilt or innocence. From
10 Mr. Karst's perspective, it has nothing to do
11 with guilt or innocence, it only has a question
12 of did that event take place. And of course if
13 it did take place, then if other Crown witnesses
14 also alluded to it, that flies in the face of the
15 suggestion that it was planted there by police.
16 Nothing to do with guilt or innocence, but very
17 much to do with an issue that is extremely
18 relevant to Mr. Karst, but also extremely
19 relevant to this Commission as well.

20 The issue before you, though,
21 isn't relevancy. That has been determined. The
22 issue is -- and I think it was addressed by Dr.
23 Baillie in his report -- is there any real and
24 substantive harm that might occur to Mr. Milgaard
25 if he is going to testify. And you see that



1 repeatedly in his report, and of course that
2 report was drafted at a time when the
3 consideration was would he come here and testify
4 versus some other accommodated arrangement, since
5 then the accommodation proposal has been put
6 before you.

7 In terms of the application
8 itself, I daresay if we were in a Court of law in
9 a civil setting or a criminal setting, frankly
10 the evidence that's presented before you to even
11 support an accommodation is pretty thin. Dr.
12 Baillie has never spoken with Mr. Milgaard, Dr.
13 Baillie has never reviewed any of the records of
14 Mr. Milgaard as -- at least since 1992, and as he
15 has indicated quite fairly, what he has provided
16 is a commentary as opposed to an assessment or a
17 report.

18 There's a rather bold statement
19 made that every time Mr. Milgaard has had to
20 speak about this he has had to be hospitalised.
21 The request has been made for those records.
22 None, not a single one has been produced, and as
23 acknowledged by Dr. Baillie, that would be
24 extremely helpful in making any sort of
25 assessment.



1 Mr. Grymaloski saw Mr. Milgaard
2 once in 2001, didn't see him again between 2002
3 and 2004, then saw him in the fall of 2005 after
4 this issue arose, and I'm not sure where, how
5 much of assistance any assessment he makes in
6 those circumstances would be, and again pointing
7 out that when he spoke to David in October of
8 2005 David had never heard the word
9 post-traumatic stress disorder ever mentioned to
10 him. It would be difficult to imagine he has
11 ever been treated for it or assessed to have it
12 if he has never even heard of it.

13 But I think at the end of the
14 day, I respectfully submit, your decision has
15 been made relatively easy on this, and I say that
16 with respect, but that's because of the testimony
17 of the two witnesses that were called by Mr.
18 Milgaard's counsel. Dr. Baillie's evidence, and
19 it's at pages 23111 to 12 of the transcript, are
20 very clear that the accommodated option that has
21 been now put forward of Mr. Hodson carrying out a
22 videotape examination of the witness would really
23 be a very reasonable one. If you turn to the
24 next page, if I could, he concludes here by
25 saying:



1 "Apart from that issue --"

2 And the issue there was whether or not the
3 testimony would of course be in Vancouver or not,
4 and I think all of us agree we don't have any
5 difficulty with that:

6 "Apart from that issue, I see the
7 proposal as being consistent with one of
8 the options that I presented and
9 therefore I'm comfortable with it.

10 Q And in your mind, would this represent a
11 reasonable middle ground?

12 A Yes."

13 That's really almost a short answer to this
14 application. I listened to Mr. Grymaloski's
15 evidence and I don't think anyone could suggest
16 that he's -- he obviously raises concern about
17 the well-being, but really can't point to
18 anything that would stand in the way of carrying
19 on with the procedure that's suggested there.

20 I think this accommodation
21 represents the working together that was sought
22 by Mr. Wolch, counsel for Mr. Milgaard, and I
23 think that's what's been put before you.

24 The last question Mr. Wolch
25 asked was how do I convince Mr. Milgaard to go



1 ahead with that and I really thought that because
2 of the undertaking he's given, that convincing
3 has already been completed, he's already agreed
4 to proceed with whatever direction you give, so
5 to that extent I think, and again to use Mr.
6 Wolch's words, that reasonably good balance
7 between the two has been achieved and that is the
8 accommodation that's been proposed.

9 The last point I make, just in
10 relation to the last item that was discussed by
11 Mr. Pringle, I think probably it's reasonable for
12 your order to contain something along the lines
13 as is presently in the accommodation or at least
14 leave for the parties to apply for further
15 directions or orders depending on what might come
16 out of the interview, because we really, really
17 don't know what will take place at the interview.

18 COMMISSIONER MacCALLUM: I think Mr.
19 Pringle wanted not only the right to re-apply,
20 but a right to cross-examine.

21 MR. FOX: Yeah, and I think what he was
22 saying with that is that that will really depend
23 on what might come out of that. He can't imagine
24 at this point that something might come up, but
25 maybe it will, and I suppose we're all a little



1 in that point, and I would think that would have
2 to be a pretty extreme circumstance where that
3 will occur, but obviously none of us will know
4 that until the interview process is completed, so
5 that's the only caveat I add to it, and I think
6 that probably goes without saying, that depending
7 on what transpires there, there's some remote
8 possibility that we might have to come back
9 before you for further directions.

10 CHAIRMAN: So you support Mr. Pringle's
11 position?

12 MR. FOX: I do, and I think that, and by
13 all of us, I would suspect that would include
14 counsel for Mr. Milgaard himself who may want to,
15 may want to address it should something occur.

16 COMMISSIONER MacCALLUM: Thanks, Mr. Fox.

17 MR. FOX: Thank you.

18 COMMISSIONER MacCALLUM: Any further cross?
19 Reply?

20 MR. WOLCH: Yes, briefly, sir.

21 Dealing first with Mr. Elson's
22 submission, I don't think he quoted Mr.
23 Grymaloski correctly, I think Mr. Grymaloski, as
24 I heard him, said that -- say, rather, that he
25 was an advocate for David's health and



1 well-being, he specifically didn't adopt the
2 words that he was David's advocate. I'm pretty
3 sure I have that right.

4 COMMISSIONER MacCALLUM: Well --

5 MR. WOLCH: The transcript I think will
6 bear me out.

7 COMMISSIONER MacCALLUM: He came pretty
8 close to that. I'll make sure I look it up.

9 MR. WOLCH: Yeah. I'm pretty sure he said
10 that.

11 Secondly, I found it
12 interesting in Mr. Elson's submission that he
13 talked about impressions and impressions and
14 things that may have caused police to form
15 impressions such as Sharon Williams who I don't
16 believe adopted it in the stand, but whatever it
17 is, the point is, and I think he's maybe
18 defeating his own cause, the truth of it isn't
19 really what counts, the question, it was said
20 earlier to be relied on is what counts. I mean,
21 if Sharon gets up on the stand and says I don't
22 know anything about that and David says it didn't
23 happen, the point is I'm sure counsel's position
24 will be but we did rely on it then, so I'm not
25 really sure, you know, where he's going with that



1 in that sense.

2 Furthermore, it's interesting
3 because impression and all of those things is
4 classic tunnel vision, that's your classic
5 example of what tunnel vision is, you've got an
6 impression, but you haven't got evidence, and
7 that's really what that is.

8 Turning then to, I think the
9 second was Ms. Knox, I'm hoping that she quoted
10 me in error, I think I heard her to say that I
11 had alleged that counsel wanted to harm David; is
12 that -- I don't believe I said that, I think I
13 said the opposite.

14 MS. KNOX: If I said that, I misspoke and I
15 apologize. The comments that you made toward
16 closing was that you trusted that nobody in the
17 room wanted to harm him and that's what I was
18 referencing.

19 MR. WOLCH: Okay.

20 MS. KNOX: If I did --

21 MR. WOLCH: I thought you said that I said
22 that --

23 MS. KNOX: If I misspoke myself, then I
24 apologize.

25 MR. WOLCH: That's fine. I just wanted to



1 make sure I hadn't said it.

2 Regarding Mr. Pringle's
3 position, two things, and this also applies
4 pretty well to most counsel, is the problem I
5 annunciated earlier. It is one thing to say that
6 this is the best concession, the best way to do
7 it, and it's something that we may agree with.
8 The problem, and Mr. Hodson knows this is the
9 problem from firsthand, the problem is what is
10 David's perspective as to what's best for him.
11 That is the problem that I hope to overcome, but
12 it's not easy. David is still so badly damaged
13 that he can only have his own opinion, I can't
14 communicate in that sense, and like I say, if
15 communication was the only issue, then I wouldn't
16 have been his counsel for many years because you
17 can't penalize him for not being able to speak
18 and all I can do is do the best I can for him.

19 The other point Mr. Pringle
20 raised about unusual accommodation and writing is
21 unusual, etcetera. Well, there are provisions in
22 the *Criminal Code* even for reading in evidence,
23 that is, cases can go where the witness is out of
24 the country, people can go to trial on read-in
25 evidence, that does happen, and if -- I didn't



1 bring it in front of me, but I'm pretty sure he
2 will agree with me that there are provisions with
3 somebody who is deceased, if they out of the
4 country, if they are too ill, to exempt them and
5 to read in --

6 COMMISSIONER MacCALLUM: There are
7 provisions in civil cases for taking commissioned
8 evidence of course, but it's not -- I think Mr.
9 Pringle's point related to questions of
10 credibility. It's not a very satisfactory
11 procedure when credibility issues are involved.

12 MR. WOLCH: Well, except that -- I get his
13 point, but there are people who will go to trial
14 on read-in evidence in a criminal case and that's
15 in the Code and it's done.

16 COMMISSIONER MacCALLUM: Uh-huh.

17 MR. WOLCH: And finally, regarding
18 Mr. Fox's remarks, he spoke about people speaking
19 on behalf of David and that sort of thing. I
20 think one has to distinguish between remarks
21 where it's David saying this is what happened to
22 me and people saying look, here are the facts,
23 there's something wrong here. It's two different
24 things. When you say here are the facts, then
25 there's people to answer that, it's not personal



1 knowledge, it's just here are a set of facts, and
2 as far as David is concerned, I don't recall, and
3 I'm sure if we get into it somebody can maybe
4 point out where he has specifically accused
5 anybody of anything, other than the fact he was
6 wrongly convicted and something has to be wrong,
7 and the other point is about, there have been
8 many comments about the evidence, etcetera,
9 etcetera, that was presented. I just would
10 remind you, sir, that I was encouraged to keep
11 costs down and Adrian Grounds was the person I
12 talked about bringing here from England and quite
13 correctly you said that might not be the best
14 idea and there are certain limits that when you
15 say to Dr. Baillie read all these transcripts and
16 everything else, we're talking about an enormous
17 number of hours to be spent on something which I
18 say, with respect, is so obvious.

19 COMMISSIONER MacCALLUM: What's your point,
20 the lack of records?

21 MR. WOLCH: Well, no, the point is that
22 there aren't more doctors or other doctors.

23 COMMISSIONER MacCALLUM: Nobody suggested
24 there should be more doctors, it's simply the
25 ones that came should have been better equipped



1 to give an opinion.

2 MR. WOLCH: Well, with respect, I submit
3 that it's hard to imagine, in Dr. Baillie's case,
4 a more qualified person to give an opinion.

5 COMMISSIONER MacCALLUM: No question about
6 his qualifications.

7 MR. WOLCH: And he's prepared to give it,
8 whatever the failings are, he will still give his
9 opinion. If he wasn't comfortable, he wouldn't
10 give it. Mr. Grymaloski is in the position that
11 he is the person that saw David, I mean, he's the
12 person that dealt with him, and it was with no
13 motive for any hearing, for nothing to advance
14 any cause, he saw him just for help, and that's
15 the only reason he was seeing him. It wasn't for
16 any Court procedure or any other type of hearing,
17 but a legitimate cry for help, and one that I
18 expect is totally understandable given the
19 background.

20 Those are my remarks.

21 COMMISSIONER MacCALLUM: Thanks very much.

22 MR. HODSON: I know I'm not going to be
23 popular, but we do have 15 minutes. Dr. Ferris
24 is here and I presume we should start with him
25 today?



1 COMMISSIONER MacCALLUM: Yes, we certainly
2 should, yes.

3 MR. HODSON: Dr. Ferris?

4 COMMISSIONER MacCALLUM: Counsel, with
5 respect to the motion, I'll take some time to
6 consider your submissions and the evidence you've
7 presented and I won't promise when it will be
8 delivered, I'll try to pick a time that won't
9 interfere with witness time which has otherwise
10 been allocated, I'll try and prepare a memorandum
11 of decision which I will circulate at that time.

12 MR. HODSON: Thank you.

13 COMMISSIONER MacCALLUM: Dr. Ferris?

14 **JAMES ALEXANDER JOHNSTON FERRIS, sworn:**

15 **BY MR. HODSON:**

16 **Q** Good afternoon, Dr. Ferris. Thank you very much
17 for agreeing to testify before this Commission.

18 If we could call up 333189,
19 please, and this is a copy of the curriculum vitae
20 that you provided to me I think a couple of weeks
21 ago; is that correct, a current CV?

22 **A** Yes, that's correct.

23 **Q** And just by way of background, you reside in New
24 Zealand and have resided there for the last number
25 of years; is that correct?



1 A Yes. Since July of 2002.

2 Q And that you just finished testifying at a trial
3 in Toronto I think and are on your way back to New
4 Zealand Thursday morning; is that correct?

5 A That's correct, yes.

6 Q And the entire CV is certainly part of the record
7 and, as I discussed with you before, Dr. Ferris,
8 in this Inquiry one of the purposes or the main
9 purpose in calling you is to have you tell us what
10 you did in connection with this matter. I will be
11 asking you from time to time where you've
12 expressed opinions to express them again. I don't
13 think there's any issue here with respect to your
14 qualifications, so I will just briefly go through
15 that, and other counsel may have some questions
16 for you, but I understand that forensic
17 pathologist, would that be the best description of
18 what you are and what you do?

19 A That's correct.

20 Q And can you just tell us what that entails, what
21 does a forensic pathologist do?

22 A Well, in essence, forensic pathology is a branch
23 of laboratory medicine where we, as forensic
24 pathologists, investigate usually sudden,
25 unexplained or unnatural deaths and do this on



1 behalf of coroners or medical examiners or the
2 police, depending on the jurisdiction, and we
3 conduct postmortem examinations to determine the
4 cause of death, the manner and mechanism of death
5 and relate those to the circumstances of death.

6 Q And I understand from your curriculum vitae that
7 you've testified literally on hundreds of
8 occasions with respect to homicides or sudden
9 deaths about how the death may have occurred,
10 things of that nature; is that correct?

11 A Correct.

12 Q And I understand that as far as your involvement
13 in this matter, that you were initially contacted
14 in 1987, 1988 by Mrs. Milgaard and then counsel
15 for David Milgaard and asked to do some work on
16 their behalf; is that correct?

17 A That's correct.

18 Q And that you did some initial work relating to
19 examining the exhibits from the original trial and
20 trying to obtain a sample so that you could do a
21 DNA comparison between Gail Miller's clothing or
22 stains on her clothing and David Milgaard; is that
23 correct?

24 A Yes, a blood sample that was supplied by David.

25 Q And we'll touch on some documents a bit later, but



1 maybe you could just summarize for us what it was
2 you did with respect to the DNA and what the
3 results were?

4 A Perhaps if I can give some background to my
5 involvement in DNA work?

6 Q Sure.

7 A In 1984 I had been working in Vancouver for just
8 over a year and I was approached by one of our
9 registrars who had a project that suggested that
10 we might be able to use existing technology to
11 identify male from female tissue and that that
12 might have some application in forensic science.
13 At that stage there was no published work anywhere
14 on the use of genetic typing for forensic science.
15 The science, although well established in clinical
16 practice, had not been transferred to forensic,
17 the forensic world. We did the project and
18 submitted it for publication and it was in fact
19 eventually published.

20 By the time our paper was
21 published, Alex Jeffries from Lester University
22 had been involved in two well-documented legal
23 cases, one was a serial killing in which the
24 genetic typing was used to identify the assailant,
25 and in another case genetic typing had been used



1 to solve an immigration paternity issue.

2 At that time in Canada some work
3 on genetic typing was being done in Calgary and
4 the RCMP were beginning to look at the possible
5 role of genetic typing in forensic science in
6 Canada. There were difficulties as I understand
7 it in determining what the best standard
8 technology might be and they were liaising with
9 the FBI in Quantico and the home office in
10 Britain, both of whom were going in different
11 directions in terms of the technology, and in
12 Vancouver we decided at that stage that we simply
13 couldn't, that type of research was simply beyond
14 our abilities in terms of facility, etcetera, but
15 what we decided to do was to look at how reliable
16 DNA technology might be; in particular, what might
17 cause degradation of DNA so that in fact it could
18 not be used for forensic purposes.

19 So we got a research grant from
20 the Law Society in British Columbia and some money
21 from the Attorney General's Department in British
22 Columbia and we set up a research lab which was
23 staffed by a research technologist and a Ph.D.
24 student.

25 Q If I can just pause there. The term research lab,



1 is that different than a forensic lab then?

2 A This was purely a research lab. It was not our
3 intention initially to do any actual forensic case
4 work.

5 Q Okay. Let me just pause there. Like, a forensic
6 case work would be if I came in and said examine
7 this and tell me whether the stain on this garment
8 matches DNA or blood type or things of that
9 nature?

10 A Exactly.

11 Q So a research lab would be to do, I mean,
12 presumably just research?

13 A We were doing simply experimental work to
14 determine, if you like, what might cause DNA to
15 break down and make it no longer testable. There
16 was quite a bit of local publicity in Vancouver
17 and British Columbia about our work and we were
18 then asked to do a number of paternity cases and
19 we also received a couple of cases from the
20 Vancouver police to see if we could identify
21 anything. It was not that we were expecting that
22 we would give evidence on this, but it was
23 material which we could then use as an appropriate
24 background for our research which we were working
25 on.



1 Q And -- I'm sorry, carry on.

2 A And I think it was as a result of the publicity
3 that went with that lab that Mrs. Milgaard got to
4 hear about us.

5 Q Okay.

6 A And she contacted me.

7 Q So just so that we understand this then, as far as
8 the research work you were looking at degradation
9 of DNA, so would that be looking at what happens
10 to human tissue or human material over time when
11 it's on a garment or clothing or on some other
12 substance; is that right?

13 A That's correct, and we were also looking at issues
14 of bacterial contamination.

15 Q So that would be that if you have a -- and let me
16 back up. My understanding, in order to do a DNA
17 analysis of some substance, that there has to be
18 some human cell in the substance; is that right,
19 in order to extract the DNA?

20 A Yes. We have to go back to the mid '80's
21 technology which of course it was somewhat
22 different, but in those days in order to be able
23 to extract DNA, you had to have intact nuclei from
24 human cells or from animal cells, and we were
25 obviously looking at human cells, and we required



1 a stain that would be probably at least the size
2 of a 25 cent piece.

3 Q Okay. And so the -- what you would then do, for
4 example, let's take a semen stain on a piece of
5 clothing, putting aside the issue of time and
6 degradation, but your task would be to take that
7 sample and extract from that and try and identify
8 human cells; is that correct?

9 A We were trying to identify -- no, not cells, just
10 the DNA. We did not test the samples for, you
11 know, to actually identify the type of tissue.
12 For example, if we were given a seminal stain, we
13 did not identify the seminal stain, that was the
14 role of the RCMP.

15 Q Okay.

16 A We were simply taking a stain and working from the
17 assumption that that stain was what it was claimed
18 to be.

19 Q Yeah. And what was the process then to take the
20 stain and get out of that stain the nuclei that
21 you needed to look at?

22 A That was the standard laboratory technique of
23 extracting DNA chemically and then going through
24 the standard method of cutting the DNA chemically,
25 separating the fragments, again by



1 electrophoresis. We then applied radioactive tags
2 to the separated fragments and developed an image
3 using x-ray plates. By modern technology this was
4 extremely primitive, but it was giving us results
5 and, more important, it was giving us results
6 which were important in terms of our research,
7 because we were able in fact to show that in some
8 circumstances using the existing technology in the
9 mid '80s, that DNA could be broken down to the
10 point where it could not be identified.

11 Q I see. So if we can then just back up, and then
12 once you go through the process with your
13 quarter-size stain to extract, a successful
14 extraction would give you what, a slide that would
15 have a DNA profile of --

16 A It was actually an x-ray plate --

17 Q An x-ray plate?

18 A -- that would have had a profile with a number of
19 white bands on that plate which we could then
20 compare with controls and compare one sample with
21 another.

22 Q And so that once you had that successful
23 extraction that gave you the x-ray plate, you
24 would then compare it with, for example, a suspect
25 or someone else where you would have presumably



1 blood, I take it blood would easily give you a
2 profile of another subject; is that right?

3 A Well, that -- in theory that would be where the
4 technology was going, but what we were looking at
5 was the problems where, when you did this
6 extraction and you divided the sample by
7 electrophoresis and tried to get separate
8 identifiable bands, instead of getting
9 identifiable bands we were getting smears and that
10 was the problem and that was what we were trying
11 to show, that you couldn't in fact positively
12 identify or compare samples if the DNA had
13 degraded.

14 Q And it's my understanding that that was the -- the
15 premise of your research was just that, that over
16 time samples would be degraded such that DNA could
17 not be recovered when earlier it might have been?

18 A That's correct, and in fact that remained the case
19 until what we now know as PCR which is the system
20 of amplification developed and then of course tiny
21 residual amounts could then be amplified and
22 identified, but we were never involved in that.

23 Q And the PCR came in in the early '90s; is that
24 right?

25 A Yes. Well, again, the technology was available I



1 think in the late '80s, but this whole process of
2 DNA technology in the early days was really,
3 strictly speaking, transfer technology where the
4 science was being used usually in medical research
5 practice and cancer research and then the
6 laboratory methods were being taken over by the
7 forensic scientists and applied to forensic
8 science. Nowadays, of course, the technology has
9 become so sophisticated that the forensic science
10 itself is advancing the technology.

11 Q Right.

12 COMMISSIONER MacCALLUM: Doctor, could you
13 tell me what the acronym stands for, PCR?

14 A It's polymerase chain reaction, and it's a simple
15 process -- well, it's a complex process, but in
16 essence the DNA molecule is capable of making, of
17 copying itself and makes a whole series of mirror
18 images of itself and that can be repeated multiple
19 times so that you can end up with enormous
20 quantities of identifiable DNA from perhaps a
21 single molecule.

22 COMMISSIONER MacCALLUM: Okay.

23 BY MR. HODSON:

24 Q And so again I think you said late '80s, early
25 '90s that PCR was a technique that was available



1 and being used and presumably advanced?

2 A That's correct, and by that time our research lab
3 was closed.

4 Q Okay. Just to go back a couple of questions and
5 then we'll break for the day. Once you had the
6 sample that had the band, I think you said your
7 results were that it would be smeared, if you had
8 one that wasn't smeared that had the bands, then
9 the purpose would be to compare that x-ray plate
10 that had the DNA bands of the substance on the
11 garment, for example, with the DNA profile of
12 someone else; correct?

13 A That's correct, and that's why we were very happy
14 to receive fresh samples from potential paternity
15 cases or police cases where we could actually get
16 good results and not constantly be dealing with
17 failures.

18 Q Would it be fair to say that your objective, your
19 research lab, the objective in getting the
20 paternity cases and the couple of cases from the
21 Vancouver police was to assist you in your work;
22 in other words, provide you with live cases where
23 you could research and look at the degradation
24 issue as opposed to doing work for a third party?

25 A That's correct, and again, the structure of the



1 laboratory involved myself, my role was to look at
2 the relevance of the work that we were doing as it
3 might apply to forensic science. I was not a sort
4 of bench scientist doing the techniques myself.

5 MR. HODSON: This is probably a good spot
6 to break for the day.

7 *(Adjourned at 4:30 p.m.)*



OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,
Official Queen's Bench Court Reporters for the Province of
Saskatchewan, hereby certify that the foregoing pages
contain a true and correct transcription of our shorthand
notes taken herein to the best of my knowledge, skill, and
ability.

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Karen Hinz, CSR

Official Queen's Bench Court Reporter

_____, RPR, CSR

Donald G. Meyer, RPR, CSR

Official Queen's Bench Court Reporter



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