

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
Delta Bessborough Hotel at
Saskatoon, Saskatchewan

On Thursday, February 9th, 2006

Volume 121

Inquiry Proceedings



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(Retired)



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- BY MR. HODSON

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Transcript of Proceedings

(Reconvened at 9:05 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

CALVIN FORRESTER TALLIS, continued:

BY MR. HODSON:

Q Good morning, Mr. Tallis. When we broke yesterday we had started to talk about Nichol John and her evidence and went through the preliminary hearing and we talked a bit about her statement and what was in her statements, what wasn't in her statements and her evidence at the preliminary hearing. Before I go to the trial transcript, if we could call up 179439, please, and just for the record, you told us these would have been the notes that you would have prepared based upon her evidence at the preliminary hearing and I think you told us that these would have been used as a guide for you in preparing your cross-examination questions at trial; is that correct?

A Yes. I prefer to call it an index of the testimony with references in it.

Q And if we can go to 179446, please, just at the bottom, can you tell us whether that is your handwriting?



1 A Yes, that certainly is my handwriting.

2 Q And maybe we'll just go through these. I think
3 number one says, "Were you shown where the body
4 found on May 23rd and 24th, that is --"

5 I'm not sure if I got that. Maybe you better
6 read that for me. It might be a prescription is
7 it?

8 A My prescription I guess.

9 Q It says were you shown?

10 A "Were you shown where her body found on May 23rd
11 or 24th, this is before statement and were you
12 told that the girl had been stabbed a number of
13 times." And then, "purse, wallet, contents of
14 purse, Cavalier, tear on trousers, how was she
15 dressed, toque, long toque - green in it, how long
16 were you and Wilson out there by Shorty's."

17 Q So would these be reminders of areas that you
18 might want to canvass?

19 A I'm sure that they were not notes that I put on
20 there at the time I prepared this index and
21 summary of the testimony at the preliminary
22 hearing, but somewhere along the way I jotted them
23 down on the master copy, if I may use that term.

24 Q Okay. If we could now go to the trial transcript,
25 003050, please. Just give me a moment, I'm going



1 to check the date. According to our chronology, I
2 believe the first two witnesses called at the
3 trial, the first was Ron Wilson and the second was
4 Nichol John. Does that accord with your
5 recollection?

6 A I'm sure that you are correct. I don't at this
7 stage recall the order, but just looking at the
8 index --

9 Q Actually, I'm sorry, it looks like Thor Kleiv was
10 the first.

11 A Kleiv, but the first of the, you might say,
12 friends.

13 Q And then if --

14 A Wilson --

15 Q I'm sorry?

16 A Wilson, John and Cadrain, I'm sure that's in the
17 right order.

18 Q And then if we could go to 003055, again this just
19 talks about time, 6:30, and then the next page,
20 this is examination-in-chief, I just want to touch
21 on a couple of areas before we get to your
22 cross-examination, and then this is the reference
23 to the two knives that Mr. Wilson said he saw.
24 Yesterday we talked, we spent a bit of time on the
25 bone-handled hunting knife that both I think Ron



1 Wilson and Nichol John, and I stand to be
2 corrected, but I think they both said they
3 observed that on David Milgaard on the trip from
4 Regina to Saskatoon. We have heard some evidence
5 regarding a bone-handled hunting knife that was
6 found by the police in the alley I think a couple
7 of months after the murder by Constable Oliver and
8 the evidence we've heard is that it was brought
9 to, I think both the preliminary hearing and the
10 trial, but the Crown didn't tender it as evidence,
11 and I think Mr. Caldwell's evidence here before
12 the Commission was that there was nothing to
13 suggest that it was involved in the crime and I
14 think he said that you were aware of it, shown to
15 you and basically it wasn't tendered and returned
16 to the police. Do you have any recollection of a
17 bone-handled hunting knife being found by the
18 police and its involvement in these proceedings?

19 A I'm sure I was aware of it because I had talked to
20 David about whether or not there was a second
21 knife and I've already told you about that.

22 Q And the fact that Mr. Caldwell had this
23 bone-handled hunting knife and didn't tender it,
24 would you or did you see under any circumstance
25 where it would help your case to tender a second



1 knife, the bone-handled hunting knife as being
2 found in the back alley in any way to help David
3 Milgaard's defence?

4 A I'm sure I didn't think so.

5 Q In fact, what about, if that bone-handled hunting
6 knife had been tendered as an exhibit as being
7 found in the alley, based on the evidence did you
8 have any concerns whether that might be damaging
9 to David's case?

10 A Well, it might be viewed as tending to confirm
11 some of the statements of Wilson and John, but I
12 use the term might, and I'm sure I was thinking
13 about that, but now to tell you specifically what
14 was going on, I really can't do it, but I'm quite
15 sure that what you've mentioned is correct.

16 Q Maybe just take that a bit further. In light of
17 what the evidence of Nichol John and Ron Wilson
18 was about the bone-handled hunting knife, would
19 you be in a position to say, for example, argue
20 that there were two murder weapons and the second
21 one was a bone-handled hunting knife found in the
22 back alley a month later and somehow try to put
23 that forward saying that's a murder weapon too or
24 belonged to the murderer and therefore that
25 exculpates or helps David's case?



1 A I don't think there was anything about the knife
2 or its examination that identified it as a
3 potential -- as a murder weapon, but I don't
4 recall now that, but --

5 Q I think that's the case. As defence counsel,
6 would you want the jury to be aware that a
7 bone-handled hunting knife was found in the back
8 alley near where Gail Miller's body was found?

9 A No, I do not think that such testimony or physical
10 evidence would have helped his case in the
11 circumstances, but particularly in the light of
12 what he had told me.

13 Q Would it have hurt his case in your judgment?

14 A It may well have, and I'm sure that was going on
15 in my mind at the time. I don't remember going
16 over to look at it, but I'm sure if Mr. Caldwell
17 said that he showed it to me at some stage, I'm
18 sure that I did see it and made a decision with
19 respect to -- as a matter of fact, I might well
20 have objected to it being tendered in evidence on
21 the footing that the Crown was not able to connect
22 it in any way to the homicide, and it's like
23 anything else that's found, unless there's some
24 causal link, I don't think I would want the
25 proceedings cluttered up with a knife of that



1 nature or any other knives or instruments that had
2 been found there unless there was something
3 significant from our standpoint.

4 Q Okay. If we can go to page 003060, and again this
5 is Mr. Caldwell's examination, and I just want to
6 touch on what she said in chief about their trip
7 and what she didn't say so that we can put your
8 cross-examination in the 9(2) proceedings in
9 context. She talks about seeing a church as a
10 landmark, did you see any people, at what stage
11 was that in relation to the church:

12 "A It was before I saw the church."
13 And then if we can go to the next page, she talks
14 about stopping a woman for directions, and I
15 think we've been through this in the statement.
16 Were you able to, as far as how they described,
17 both Ron Wilson and Nichol John described this
18 woman as wearing a dark coat, Nichol John
19 describes it as a cape of that nature, was that
20 consistent with what Mr. Milgaard had told you
21 she was dressed in, the woman they stopped?

22 A Well, I think he used the term coat, that's my
23 recollection now, but as far as any other
24 specifics, I don't recall what type of hat he said
25 she was wearing or anything like that.



1 Q And then just down at the bottom of that page --

2 A I noticed that, I remember Nichol John didn't use
3 the term "girl" as I recall it, she used the term
4 "woman", or slightly different words.

5 Q Right.

6 A But -- a lady, but later on she of course referred
7 to her being in the 20s.

8 Q Right. If we can maybe just go to the top of the
9 page, she does:

10 "A It was a woman."

11 And down at the bottom, she said:

12 "A She was approximately in her twenties I
13 figured."

14 A Yes.

15 Q So again I think we had Ron Wilson saying girl,
16 Nichol John saying woman in her 20s and David
17 Milgaard saying an older woman which I think you
18 took to be in the early to mid 30s; is that
19 correct?

20 A Well, I think I -- I think I indicated to you
21 perhaps within the 35 to 40 range.

22 Q Oh, I'm sorry.

23 A But, you know, this is very difficult to recollect
24 in specific terms, but that's my sense today, and
25 it was the other day, that it was in that range,



1 because we spent quite a bit of time, at least I
2 spent quite a bit of time, so did he, talking
3 about how he arrived at the term "older woman",
4 and as I've told you before, the aspects that I
5 raised including a comparison, say, with my own
6 age.

7 Q If we can go to page 003065, and here's where she
8 described after leaving the woman went about half
9 a block to another intersection, and next page,
10 and she describes getting stuck, going around the
11 boulevard on some ice, and then scroll down, we've
12 been through this before, it's a bit confusing, I
13 think she describes getting stuck for a short
14 while before they actually got stuck again behind
15 the funeral home, and I think when the examination
16 is occurring I think there might be some confusion
17 about that and we've been through that.

18 If we can then go ahead to
19 003075, and I don't think she was able to say how
20 long they were away from the car, but here's where
21 Mr. Caldwell asks:

22 "Q So then when Dave got back in the car on
23 what we have been calling the second
24 time at the curb as you say, what
25 happened then?



1 A Then we drove away."

2 And then go to the next page:

3 "Q What is the next place you got to that
4 you can assign a name to or a
5 description?

6 A Well, I remember getting stuck in
7 another alley which I now know to be
8 behind a funeral home."

9 It goes on to describe that, and in an alley, and
10 on an incline.

11 And if we can go to the next
12 page, and here Mr. Caldwell asks her about what
13 happens:

14 "Q ... what happened when you got stuck at
15 that juncture?

16 A Well, Dave got out of the car to see
17 if we could get unstuck. He came back
18 into the car and then he told Ron that
19 we couldn't. So then I remember both
20 of them getting out and looking.
21 Other than that I think they tried to
22 push the car; I'm not too sure
23 though."

24 And then the next page, and then talks, just
25 scroll down, talks about Dave getting out only



1 for a few minutes, just to the back of the car
2 and then back in, and then at the bottom she says
3 they both got out, so this is the second time.

4 "Q ... okay; are we to understand that on
5 this occasion on the incline where you
6 were stuck that that would be the first
7 time Ron was out, that is when they both
8 went out together?

9 A Yes."

10 And then some questions, go to the next page, and
11 then again, as I said, it's a bit confusing, but
12 I think they are getting mixed up, the questioner
13 and the answerer between which occasion, but in
14 any event, when they arrived back -- let me just
15 back up. I think Nichol John talked about when
16 they first got stuck on the incline behind the
17 alley they got out to check for a couple of
18 minutes to try and push them out and then got
19 back in the car, and then here again:

20 "A Well, Ron went one way and Dave went the
21 other way.

22 Q ... so this incident we have been
23 talking about up to now was simply a go
24 to the back of the car and look sort of
25 thing, was it?



1 A Yes."

2 And now middle of the page, the description, any
3 attention to which way either of them went:

4 "A Ron went to the left and David went to
5 the right as the car was facing."

6 Then the next page, I think this is where we get
7 into the key area, the question:

8 "Q Now, what is the next thing that
9 happened?

10 A Well, I remember Dave getting back
11 into the car. That's about all."

12 And I've skipped through the transcript,
13 Mr. Tallis, but this is where in her statement
14 she had described, before David got back,
15 witnessing him grabbing the girl and stabbing
16 her, so now this is the same time frame, she
17 says:

18 "A Well, I remember Dave getting back into
19 the car, that's about all.

20 Q And who got back first of the two?

21 A Well, Ron must have because when Dave
22 got back into the car I moved over to
23 Ron so --

24 Q You say Ron must have been back before
25 Dave?



1 A Right.

2 Q How much before Dave?

3 A I don't know.

4 Q How long do you estimate Dave was out on
5 this occasion?

6 A I don't know ...

7 Q I take it all you can say is longer at
8 any rate?

9 A Yes."

10 And then the next page:

11 "Q Now, up till the point when Dave got
12 back in on this occasion had you up till
13 this point seen anything of any other
14 person than the two of them and yourself
15 since you got unstuck at the
16 intersection?

17 A Not that I can recall."

18 And again, that would be in her statement where
19 she said that she did see David Milgaard and the
20 girl. And then the Court:

21 "Q And when you were stuck there on this
22 incline I take it from what you said
23 there wasn't any car in front of you ...

24 A No."

25 And just scroll down.



1 "Q Alright; now, when the two of them were
2 back in did you notice anything about
3 say the condition or appearance of
4 either of them?

5 A Well, Dave looked cold, that's about
6 all.

7 Q And what happened when they were both
8 back in?

9 A Then we started driving again."
10 And then the next page, she's asked about how
11 they got unstuck and she says:

12 "A I can't recall that."

13 And then the next page, Mr. Caldwell is asked
14 about how their car got stuck and the judge says:

15 "Surely you must have known whether
16 somebody was pushing you. You remember
17 sitting in the car in the front seat -
18 you must have known whether someone was
19 pushing you to get out of there, don't
20 you?

21 A I don't remember."

22 And at this point, Mr. Tallis, just trying to get
23 a sense of whether you recall whether Chief
24 Justice Bence at this point -- I think you've
25 told us earlier the atmosphere during Nichol



1 John's evidence, and we'll get into this in a bit
2 greater detail, but do you recall whether at this
3 point the judge was becoming concerned about
4 Nichol's evidence?

5 A Well, I don't recall this specific area, but
6 reading it over and trying to reflect back, I
7 would say certainly at this stage, even in the, in
8 this stage of the examination-in-chief, his words
9 indicate to me that he was skeptical.

10 Q And as far as --

11 A By the words he -- my sense was that he was
12 skeptical of the words "I don't remember".

13 Q Right.

14 A And I think that comes through, and while I don't
15 specifically recollect this area of examining, I
16 certainly recollect that in her
17 examination-in-chief I sensed that he was
18 skeptical of the "I don't remember" or inability
19 to recall.

20 Q Right. Now, the day earlier, or the day of this
21 evidence Ron Wilson was the prior witness, the
22 Court would have heard Ron Wilson testify that,
23 similarly when they left the car, but that when he
24 got back Nichol was hysterical?

25 A That's correct.



1 Q And so I take it Chief Justice Bence would have
2 been aware of that evidence and as well Ron
3 Wilson's other evidence that tended to incriminate
4 Mr. Milgaard, that had already been out at the
5 trial; correct?

6 A Yes.

7 Q As far as her statement, Nichol John's statement,
8 would the judge have been aware of the contents of
9 that are you able to tell us at this stage?

10 A I don't think he would have been.

11 Q Now, when we get --

12 A Because -- and I say that because that statement,
13 I don't think he had read the preliminary hearing,
14 but I don't think that -- that statement would not
15 be on the Court file.

16 Q And I suppose at this point though, in light of
17 what Mr. Wilson said, the question may have been
18 if she was hysterical must have been -- I suppose
19 an inference could be drawn that if she was
20 hysterical, she must have seen something; is that
21 a fair inference that the jury might draw?

22 A Yes, I think the inference you suggest is a
23 reasonable one.

24 Q And so is it possible at this point that the judge
25 is concerned that Nichol John maybe is holding



1 back? I mean, I think you told us yesterday that
2 that may have come out a bit later. May it have
3 started at this point on how they got pushed out?

4 A I think so, having read it, this is a reasonable
5 suggestion on your part. I have no difficulty
6 understanding what you are saying.

7 Q And I appreciate, I think what you are saying is
8 you can't specifically recall, you can't go back
9 and say yes, I remember this question and I
10 remember at that point that things started to go
11 this way, but looking back at it, I think you've
12 told us you have a general recollection and
13 impression of the judge's demeanour towards her
14 and, based on that, this may have been the start
15 of it; is that a fair summary of your evidence?

16 A Yes, and I have a general impression too of the
17 witness' demeanour and that I'm sure is something
18 that caught the attention of the presiding judge.

19 Q And can you tell us again at this early stage, I
20 presume that you would have been fairly
21 attentive -- well, throughout the trial, but
22 certainly at this stage you knew at the
23 preliminary hearing that she didn't repeat her
24 evidence --

25 A That's right.



1 Q -- about this part, presumably at trial you didn't
2 know whether she was going to repeat it or not; is
3 that fair?

4 A Yes. You know, you learn to expect the unexpected
5 at times and --

6 Q And when she went through this part of her
7 evidence-in-chief with Mr. Caldwell, and I've just
8 gone through parts of it where she says I don't
9 remember, what observations did you make about
10 Nichol John's demeanour in giving that evidence?

11 A Well, first of all, this was consistent
12 essentially with what, how she handled herself at
13 the preliminary hearing, but I could see that
14 having regard to the answers and her demeanour
15 people might well feel that she was holding back
16 for some reason, and when I say that, of course, I
17 refer not only to the impression she may have been
18 making on the jury, but also on the presiding
19 judge. Now, I certainly can't look into the
20 judge's mental processes, I have enough difficulty
21 trying to revive my own.

22 Q So on this point, just before we leave this then,
23 I think what the judge is saying, even when she
24 describes the incident and what happened, he's
25 picked up on one point, is that lookit, you know,



1 you've told us about what happened there, you got
2 out of there, surely you must know how you got out
3 of there, you were in the front seat, in a way of
4 doubting -- is it fair to read that that he was --

5 A That's why I used the term skeptical.

6 Q Yeah, that he was maybe doubting her answer about
7 "I don't remember"?

8 A Yes.

9 Q Is that a fair read of that?

10 A Yes, that's what I was trying to convey when I
11 used the term skeptical.

12 Q If we can go to 003111, and again just for the
13 record, I don't think we need to go through this,
14 we've covered it before, she talks about the
15 cosmetic bag and again gives similar evidence
16 about the contents of the cosmetic bag or the
17 compact and it being thrown out.

18 And then if we can go to 003115,
19 and again this is where she testifies that:

20 "A Nobody said anything and Dave - all of a
21 sudden Dave grabbed it and he threw it
22 out the window anyway."

23 And again I think we've touched on that with
24 other witnesses and I think, I'm assuming the
25 same would apply with Nichol John that your



1 approach on the compact bag with her would be, in
2 cross-examination, to ignore it because you could
3 not dispute it?

4 A You are correct.

5 Q And 003123, again these are questions from Mr.
6 Caldwell confirming that neither Nichol, Ron or
7 David Milgaard were under the influence of liquor
8 or drugs during the morning of January 31, 1969.

9 And then if we can go to 003126,
10 this is where Mr. Caldwell has concluded his
11 examination and asks for an opportunity to raise,
12 and here's where we get into the section 9(2).

13 A Yes.

14 Q And I think you may have told us this, but would
15 you -- and I think you told us that you would have
16 anticipated this as a possibility and that you
17 would have briefed this area and had a position
18 ready to put forward to the judge?

19 A Yes, I was familiar with the change in the law and
20 I'm quite sure that not only had I followed or
21 sort of tracked this development, but that that
22 was a point that I had to be prepared for, and
23 that's why I'm able to say that at that time there
24 were no reported cases or even unreported cases in
25 this jurisdiction dealing with the application of



1 section 9(2).

2 Q And again, just to sort of refresh our minds about
3 9(1) and 9(2) of the Canada *Evidence Act*, 9(2)
4 states:

5 "Where the party producing a witness
6 alleges that the witness made at other
7 times a statement in writing or reduced
8 to writing inconsistent with his present
9 testimony, the Court may, without proof
10 that the witness is adverse, grant leave
11 to the party to cross-examine the
12 witness as to the statement and the
13 Court may consider such
14 cross-examination in determining
15 whether, in the opinion of the Court,
16 the witness is adverse."

17 And then subsection 9(1) allowed a party calling
18 a witness to cross-examine where that witness was
19 hostile or adverse. Is that correct?

20 A Yes, I think you fairly state the situation.

21 Q And it's my understanding that prior to section
22 9(2), the challenge was if you had an earlier
23 inconsistent statement that you wished to use to
24 establish the witness was hostile, it was a
25 difficult process to do that, to cross-examine



1 your own witness before you got the ruling on
2 adversity; is that correct?

3 A Yes.

4 Q I'm oversimplifying it, but --

5 A No, but I think that distills the point. The only
6 thing I would add to that is that I think that by
7 that time, although it wasn't involved here, but
8 before section 9(2) came in, I think the *Coffin*
9 case had been described and been decided in the
10 Supreme Court and trial judges often allowed a
11 fair degree of latitude to Crown counsel in having
12 a witness look at a statement that they had given,
13 read it over of course without doing it out loud,
14 and then inviting them to refresh their memory by
15 looking at the statement.

16 Now, that wasn't applicable
17 here, but just so that you understand that I was
18 well aware of the, of that procedure and I'm sure
19 that I had it briefed in case that path had been
20 chosen as an alternative to begin with. Indeed,
21 some -- I recall on occasion some trial judges
22 would direct that that be done first.

23 Q And so that just so that I have this right, and
24 please correct me if I'm wrong, that under section
25 9(2) it was contemplated that in this case, for



1 example, Mr. Caldwell could take a prior
2 inconsistent statement under 9(2), seek leave of
3 the Court to cross-examine his own witness as to
4 the statement?

5 A Yes.

6 Q And then use that cross-examination if its allowed
7 to then say to the judge I want her declared
8 adverse, and if that's granted under 9(1), a full
9 cross-examination going beyond?

10 A Yes.

11 Q And under the 9(1) cross-examination, at that
12 stage the previous inconsistent statement could be
13 used by the prosecutor then to try and undermine
14 the credibility of his own witness; is that a
15 fair --

16 A Yes, under 9(2) as I recall it, the
17 cross-examination, of course it was not in any way
18 limited to the statement once the witness was
19 declared adverse or hostile.

20 Q Right.

21 A It could become a wide-ranging cross-examination.

22 Q Under -- I think under 9(1)?

23 A That's right.

24 Q Yeah. Just so we have it clear, under 9(2) you
25 get one crack to cross-examine on the previous



1 inconsistent statement for the purposes, I
2 presume, of having the witness declared adverse.
3 Once that's done, if successful, then under 9(1)
4 you are entitled to cross-examine the witness on
5 broad-ranging matters, including the statement?

6 A Yes.

7 Q If we can then just go through some of these
8 submissions. Mr. Caldwell restates the section.
9 If we can go to the next page, and think,
10 Mr. Tallis, the key issue here and at trial, and
11 we're going to spend some time on this, is the
12 question of whether or not the cross-examination
13 under 9(2), the initial cross-examination, is done
14 in the presence or absence of the jury, and
15 perhaps as well the scope of that initial 9(2)
16 examination; in other words, what witnesses are
17 called and what are the parameters. Is that a
18 fair --

19 A Yeah, I think you've identified the crucial area.

20 Q And so here Mr. Caldwell submits that he should
21 be, the cross-examination of Nichol John on the
22 earlier statement should be done in the absence of
23 the jury, that was his position, and I believe
24 that was your position as well; correct?

25 A Yes. I think Mr. Caldwell was well aware of the



1 position that I was taking, I'm sure that I had
2 indicated that to him, and I'm also not only --
3 well, the record makes it quite clear to me that
4 he was in agreement with the procedure that you
5 have just outlined and that is that the matter
6 should be dealt with in the absence of the jury.

7 Q If we can maybe simplify this a bit because we
8 went through this with Mr. Caldwell, would you
9 agree with the following, that -- I mean,
10 ultimately the Court of Appeal ruled on this issue
11 and set out a test under 9(2), and you are
12 familiar with that test; correct?

13 A Yes. I couldn't recite the seven steps or
14 whatever they are, but I certainly --

15 Q And I will show them to you in a moment.

16 A Yes.

17 Q But that test, is it fair to say that in making
18 submissions to Chief Justice Bence, that both you
19 and Mr. Caldwell, number one, were in agreement on
20 how section 9(2) should be applied, and secondly,
21 that your respective submissions, both of you,
22 were consistent with or identical to what the
23 Court of Appeal ultimately ruled how the section
24 should be interpreted; is that fair?

25 A I think that's quite an accurate and fair



1 assessment.

2 Q And the judge didn't agree; is that correct?

3 A No, and I think somewhere during the course of the
4 proceedings, I just want to put this in
5 perspective, I think that he indicated that he had
6 discussed it with at least some of his judicial
7 colleagues, and since this was a new section, I
8 thought that the consultation that had occurred
9 reflected, I can't say the view of every member of
10 the trial Court, but at least the view of not only
11 the presiding judge, but some colleagues on the
12 Court who probably were available for consultation
13 in Saskatoon.

14 Q I'll go through --

15 A I surmise that from I think a comment perhaps that
16 you had directed my attention to.

17 Q Sure, and we'll go through that. If we could just
18 go to 003129, please, and here's where the judge
19 says -- I think his initial position is that based
20 on the previous law:

21 "... all examinations prior to the
22 enactment of this section for the
23 purpose of determining whether a witness
24 was adverse or not, was always in the
25 presence of the jury."



1 And I think what he was saying is lookit, if it's
2 a question of determining adversity of a witness,
3 that's done in front of the jury, so his
4 inclination, at least initially, was that this
5 should be as well. He then says he wants a few
6 minutes to consider this because he didn't know
7 it was coming up, and then down at the bottom you
8 say:

9 "... I would like to outline my position
10 on the interpretation of this section
11 and prior to the enactment of this
12 section it has always been my
13 understanding of the law that before
14 counsel could be permitted to
15 cross-examine on a previous statement of
16 his own witness there had to be a ruling
17 by the ... judge . ."

18 "Now the enactment of this
19 section makes an exception to that rule
20 and as I understand it you may, that is
21 there is a discretion to grant leave to
22 cross-examine a witness as to the
23 statement and the Court may consider
24 such cross-examination in determining
25 whether in the opinion of the Court the



1 witness is adverse."

2 And then you go on, if we could scroll down, you
3 say:

4 "... with deference I find myself in
5 disagreement with Your Lordship's
6 observations ..."

7 Judge Bence says:

8 ". . but, Mr. Tallis, the thing is so
9 plain. If the legislature . ."

10 And then you say:

11 "If Your Lordship would hear me . ."

12 He says:

13 ". . may I finish - if the legislature
14 had intended anything otherwise then it
15 should have been in the section. Do you
16 want me to read something into the
17 section that isn't there?"

18 And then you go on to talk about subsection 9(1),
19 and then the next page, and I'll just touch on,
20 if we can just scroll down -- the entire
21 transcript is in for the record for the purposes
22 of this Inquiry, Mr. Tallis, so I just want to
23 touch on some of the key parts.

24 A Yes.

25 Q This is you speaking:



1 "... I think it would be most improper
2 for Your Lordship to permit
3 cross-examination on such a statement in
4 the presence of a jury and then having
5 so permitted that to make a ruling at
6 that stage that the witness is adverse;
7 because if you do it in that manner -
8 and I say this with deference - whatever
9 observations you would then make to the
10 jury with respect to your findings -
11 suppose you said: Well, having regard
12 to the situation I am not prepared to
13 say that this witness is adverse - I
14 cannot see with respect a jury
15 necessarily following that comment, and
16 it is my contention that there is an
17 issue that must be determined by the
18 Court not by Your Lordship and the jury
19 and that is whether in the light of all
20 the circumstances the witness is
21 adverse; and I say that in considering
22 whether or not the witness is adverse
23 Your Lordship should also look at what
24 she has said here in court, her
25 demeanour, what was said in the



1 preliminary hearing which is before Your
2 Lordship --"

3 Etcetera. And then if we can scroll down, I
4 think there's some further disagreement. Maybe
5 go to the next page, here you say:

6 "I say with respect that when the
7 amendment came out I can honestly say
8 that I have not been able to find a case
9 which deals with the interpretation of
10 this section ..."

11 And I take it that that was the status of the law
12 at that time, there was not a definitive ruling
13 on this section?

14 A Well, and I think it's during the course of my
15 submissions I indicated that I had been unable to
16 find any case on it, and that included any
17 unreported cases, but of course we didn't have
18 computers in those days where we could dig up
19 cases the way we can now.

20 Q And then if we can go to page 00 --

21 A I might say, I think Mr. Caldwell and I were in
22 agreement that there were no reported cases, so
23 his research hadn't turned up any either.

24 Q Then if we can go to 003135, and then the judge
25 says, and this is again still in the initial



1 argument, the judge says:

2 "I think I had better look at the
3 statements. Have you any objection to
4 my looking at the statements now,
5 Mr. Tallis?"

6 And you say:

7 "No."

8 But you say he should also look at the
9 preliminary hearing. We'll come back to that a
10 bit later. He says:

11 "Why should I look at the preliminary
12 inquiry evidence?"

13 You say:

14 "... because the section vests you with
15 a discretion. It says "may", not
16 "must", and in determining whether or
17 not to grant a request to my learned
18 friend it is my submission that you must
19 look at all of the circumstances."

20 Can you maybe just elaborate on that for us,
21 Mr. Tallis, on that position?

22 A Well, when I talk of all the circumstances, I had
23 in mind that this is the type -- the circumstances
24 should be inquired into in the absence of the
25 jury, and although this was not dealing with the



1 admissibility of a confession on a *voir dire*, I
2 thought that it was very important that a *voir*
3 *dire* be conducted even though the learned trial
4 judge disagreed almost at the very beginning of
5 the argument, and my reason for that was that I
6 thought that there would then be an obligation on
7 the Crown to call evidence of the relevant
8 circumstances under which this statement was made
9 so that the presiding judge would have those
10 circumstances before him in deciding whether or
11 not to exercise his discretion to permit that type
12 of cross-examination, and I felt that of course
13 the previous testimony that she had given at the
14 preliminary hearing was part of -- part of the
15 circumstances that might be relevant. Now, I've
16 tried to distill it without being too long winded
17 and, if I have, just tell me that I'm being too
18 long winded.

19 Q No, that's fine, no. And I think when we go to
20 the actual application of the test, I'll ask you
21 to touch on this issue again.

22 If we can go to 003139, please.
23 I think then after, and I've skipped over some of
24 the discussions back and forth, but the record
25 does reflect that you and Mr. Caldwell are in



1 agreement regarding the exclusion of the jury.
2 The judge then decides to adjourn to consider the
3 point overnight, and the next page, 003140, he
4 comes back with his ruling.

5 You had mentioned, Mr. Tallis,
6 that you had a recollection, and I may have missed
7 it in the transcript, it may be in there, that
8 Chief Justice Bence either had or intended to
9 consult some of his colleagues on the bench?

10 A Well, I think somewhere he made a reference --

11 Q Okay.

12 A -- to that.

13 Q I'll maybe look for it on the break.

14 A But my recollection could be wrong, but --

15 Q And then again he asks for any further points, you
16 make a submission regarding the *Hunt* case, and
17 then he goes on to make his ruling.

18 If we can go to the next page,
19 he says:

20 "At this stage Mr. Caldwell has not
21 asked to have the witness declared
22 adverse. He has merely asked for
23 permission to cross-examine under the
24 amendment. Presumably he will after
25 such has been done ask that the witness



1 be declared adverse if he thinks such
2 has been demonstrated.

3 There is nothing in the section
4 to state that such cross-examination is
5 for the purpose of determining
6 adversity. If Parliament had intended
7 otherwise it should and I believe would
8 have said so. It provides, however,
9 that I may consider such
10 cross-examination if the question of
11 adversity arises."

12 Ask then scroll down:

13 "I have determined that the
14 cross-examination under the section
15 shall take place in the presence of the
16 jury."

17 And calls the jury back in.

18 Now, before I go through what
19 happened in Mr. Caldwell's examination and your
20 cross-examination of Nichol John, I want to take
21 a look at what the Court of Appeal subsequently
22 concluded was the correct procedure and I want to
23 go through that and get your comments, and then
24 we'll go back and look what actually happened at
25 the trial, what you did based on Chief Justice



1 Bence's ruling, and secondly, what you could and
2 would have done if he had made the correct ruling
3 that the Court of Appeal said he should have
4 done. Do you follow where I'm going to go?

5 A Yes.

6 Q And if we can go to 009340, and this is the Court
7 of Appeal, if we can go to 009363, and in fact one
8 of the grounds of your appeal to the Court of
9 Appeal was the fact that Chief Justice Bence erred
10 in the application of section 9(2); correct?

11 A That's correct.

12 Q And so this starts at the bottom, we can just skip
13 ahead to 009365, and I think it might be
14 worthwhile just to go through this. The Court
15 says:

16 "It is to be noted that the right to
17 cross-examine one's own witness
18 respecting a statement in writing, or
19 reduced to writing, previously made by
20 the witness inconsistent with the
21 evidence given, is not an absolute
22 right. The Judge, in the exercise of
23 his discretion, may or may not grant
24 that permission. This requires some
25 preliminary inquiry by the Judge. That



1 being so, I think the consideration and
2 disposition of the application in jury
3 trials should be made in the absence of
4 the jury. Allegation in the presence of
5 the jury that the witness had, on
6 another occasion, said something
7 inconsistent with what she said in
8 evidence, when leave to cross-examine is
9 refused, might have a very adverse
10 effect on the jury's deliberations,
11 particularly as to the effect to be
12 given to the evidence of that witness."

13 I think that's one of the points that you had
14 raised that we touched on in front of Chief
15 Justice Bence; correct?

16 A Yes.

17 Q And then the next page, the Court sets out the
18 seven steps which I think became known as the
19 Milgaard Rule; is that correct, Mr. Tallis?

20 A Yes, certainly that was one way of expressing it
21 in shorthand.

22 Q And let's just quickly go through them. The first
23 step is:

24 "(1) Counsel should advise the Court
25 that he desires to make an



1 application ..."

2 Mr. Caldwell did that.

3 (2) When the Court is so advised, the
4 Court should direct the jury to retire."
5 I think that was partly done.

6 (3) Upon --"

7 Actually, the jury did retire to consider the
8 application.

9 "(3) Upon retirement of the jury,
10 counsel should advise the learned trial
11 Judge of the particulars of the
12 application and produce for him the
13 alleged statement in writing, or the
14 writing to which the statement has been
15 reduced."

16 That happened.

17 (4) The learned trial Judge should read
18 the statement, or writing, and determine
19 whether, in fact, there is an
20 inconsistency between such statement or
21 writing and the evidence the witness has
22 given in Court. If the learned trial
23 Judge decides there is no inconsistency,
24 then that ends the matter. If he finds
25 there is an inconsistency, he should



1 call upon counsel to prove the statement
2 or writing."

3 I think that was done as well.

4 (5) Counsel should then prove the
5 statement, or writing. This may be done
6 by producing the statement or writing to
7 the witness. If the witness admits the
8 statement, or the statement reduced to
9 writing, such proof would be sufficient.
10 If the witness does not so admit,
11 counsel then could provide the necessary
12 proof by other evidence.

13 (6) If the witness admits making the
14 statement, counsel for the opposing
15 party should have the right to
16 cross-examine as to the circumstances
17 under which the statement was made. A
18 similar right to cross-examine should be
19 granted if the statement is proved by
20 other witnesses. It may be that he will
21 be able to establish that there were
22 circumstances which would render it
23 improper for the learned trial Judge to
24 permit the cross-examination,
25 notwithstanding the apparent



1 inconsistencies. The opposing counsel,
2 too, should have the right to call
3 evidence as to factors relevant to
4 obtaining the statement, for the purpose
5 of attempting to show that
6 cross-examination should not be
7 permitted.

8 (7) The learned trial Judge should then
9 decide whether or not he will permit the
10 cross-examination. If so, the jury
11 should be recalled."

12 Next page:

13 "The cross-examination provided for in
14 Section 9(2) must be in the presence of
15 the jury."

16 So again, that's once it's done. And then at the
17 bottom of the page, we'll just finish up on what
18 the Court ruled:

19 "In the present case, the learned trial
20 Judge did not pursue the procedure which
21 I have suggested be followed. After
22 deciding that the statement of Nichol
23 John previously made, was inconsistent
24 with the evidence she had given, he
25 recalled the jury. Proof of the



1 statement was then made in the presence
2 of the jury.

3 Had the learned trial Judge not
4 permitted the cross-examination, then I
5 think strong exception could have been
6 taken to the procedure which he
7 followed. In the present case he did
8 allow the cross-examination and there is
9 nothing that took place in the
10 cross-examination of the witness, either
11 by Crown or defence counsel, that would
12 not have occurred had he followed the
13 procedure I have outlined."

14 And then goes on to say at the bottom:

15 "Under these circumstances, if he erred
16 in law, I would apply the curative
17 provisions ..."

18 -- of the code. So in other words, it was an
19 error that was not significant enough for the
20 Court to reverse the verdict; is that fair?

21 A Yes.

22 Q So if we can just go back to the previous page and
23 maybe spend a bit of time -- actually, one back,
24 009367, and I want to talk about five and six, and
25 in particular six, so let's talk about five and



1 let's talk about what should have happened.

2 I think what we know, if I can
3 just back up, what we know from the facts and the
4 record, that Nichol John was interviewed by a
5 number of police officers prior to May 23rd, she
6 was then interviewed by Inspector Roberts on May
7 23rd at the Cavalier Hotel, was not polygraphed.
8 We've heard some evidence that that interview may
9 have been recorded or listened in by some other
10 police officers based on the information of Mr.
11 Chartier. We also know that she was then kept
12 overnight at the Saskatoon police station and then
13 the following morning she gave a sworn statement
14 to Ray Mackie, and I suppose we could go back even
15 further and say that we know on March 11th, '69
16 she gave her initial statement to Inspector
17 Riddell and the record also shows that she was
18 interviewed by the police on at least one more
19 occasion in between the two statements.

20 If we go back, Mr. Tallis, and
21 look at what the Court of Appeal said about -- and
22 talk about the circumstances. Certainly what we
23 know, and I'll take you to this, Nichol John, when
24 she was examined by Mr. Caldwell, or
25 cross-examined, said basically yes, I signed the



1 statement, I gave the statement, I remember giving
2 it to Mr. Mackie, but I don't remember, I think in
3 essence, telling him certain parts of it, and I
4 don't remember those parts of it happening, and so
5 as far as the giving of the statement, I think she
6 acknowledged that it was hers, but if we can talk
7 for a moment on what you could have or would have
8 done if -- let's talk about paragraph 6, applied.

9 Can you tell us -- for example,
10 let's start off with Nichol John. If you had --
11 if you would have been allowed to cross-examine
12 her in the absence of the jury with respect to the
13 giving of the statement and the circumstances
14 under which the statement was made, can you tell
15 us some of the areas you may have canvassed with
16 her given that opportunity?

17 A Well, in general terms, it would have been safe to
18 conduct a much more wide-ranging cross-examination
19 and, in particular, to deal with her contact with
20 the polygraph operator and the circumstances there
21 as well as with respect to -- as well as with
22 other police officers. Now, that sums it up
23 because this would be consistent with the position
24 I took, and which I think the judgment on appeal
25 recognized, that the judge should, on this



1 Inquiry, have an opportunity to consider all of
2 the circumstances, and that would include all the
3 background to the giving of the statement that is
4 in question.

5 And if it were done in the
6 absence of the jury, as it ought to be done, I'm
7 quite sure that I would have taken the position
8 that the onus was on the Crown to call the
9 evidence of other law enforcement people that were
10 involved, either directly or indirectly, in the
11 taking of this statement. That would include, of
12 course, Mr. Roberts as well as some of the other
13 witnesses that you have mentioned, and if there
14 was a recording of the interviews, then of course
15 I would contemplate that those recordings could be
16 produced and played.

17 Now, I don't want to be too long
18 winded about this, but the circumstances under
19 which the statement was given might well be
20 analogous, and I'm sure I would have argued this,
21 to the taking of a confession, and at that time,
22 if my recollection is correct, there was, I think,
23 very respectable authority for the proposition
24 that on a *voir dire*, to determine the
25 admissibility of a statement, there is a duty or



1 burden on the Crown to call all the witnesses who
2 had anything to do, either directly or indirectly,
3 with the taking of that statement, and that
4 includes, in some cases, quite a number of
5 witnesses, and unless there's a very good reason
6 for the absence of such a witness and failure to
7 call a witness, then that was the principle that
8 was applied and could, in some circumstances,
9 result in an inference being drawn that if the
10 witness, police witness had been called, he or she
11 would not support the position advanced with
12 respect to admissibility of the confession.

13 Q And what would be your objective, and we'll go
14 through in a bit more detail, Mr. Tallis, about
15 who might be called and specific approaches, but
16 in this scenario what would be your objective,
17 what would you be trying to establish in front of
18 the judge with respect to the circumstances under
19 which Nichol John gave her previous inconsistent
20 statement?

21 A Well, to raise the question as to whether or not
22 she had been pressured in any way or whether she
23 had been led into believing certain things, and
24 here in the light of what I now know about some of
25 it from what you have told me, I think the



1 polygraph operator, particularly if, you know,
2 particularly if the discussions with him had been
3 monitored and recorded even though no polygraph
4 test was administered, that could be very relevant
5 and material.

6 Now, I appreciate that I'm
7 speculating here because I don't have all of that
8 information, but I think that I draw the analogy
9 between that and the rule with respect to
10 confessions as I recall it. You will understand
11 what I'm talking about.

12 Q Right. In fact, I think if we, apart from that
13 law, the Court of Appeal judgment says you would
14 have the right to call evidence as to factors
15 relevant to obtaining the statement for the
16 purpose of attempting to show the
17 cross-examination should not be permitted because
18 the Court says it may be able, that you will be
19 able to establish that there were circumstances
20 which would render it improper for the learned
21 trial judge to permit the cross-examination,
22 notwithstanding the apparent inconsistencies, and
23 so I think what you are telling us is that yes,
24 the objective would be there to put forward all
25 the circumstances under which the statement was



1 obtained and then you would urge upon the trial
2 judge to say notwithstanding the inconsistencies,
3 it's not proper to allow the statement?

4 A That's right.

5 Q And let's just go --

6 A And one of the reasons that I indicated earlier in
7 my submissions before the Court, that the judge
8 should look at the preliminary hearing, I thought
9 that it would be a relevant consideration or
10 circumstance that this witness had given testimony
11 under oath at that preliminary hearing. In other
12 words, this evidence "I don't remember" was not
13 something that just happened at trial.

14 Q Would you -- let me throw an example. Would you
15 equate then that type of evidence at the
16 preliminary hearing -- for example, if on May
17 25th, 1969 Nichol John had given a sworn statement
18 saying I don't remember anything that happened
19 after David left the car, that type of -- would
20 that be an analogy there where --

21 A That would certainly -- yes, and that would be a
22 relevant consideration in my view that should be,
23 should have been placed before the trial judge in
24 the absence of the jury, because in this
25 particular case I've already told you, I think it



1 would be very hazardous to start cross-examining
2 in the presence of the jury about a polygraph
3 operator.

4 Q Right.

5 A Whether he took the -- whether he administered the
6 test or not.

7 Q Right. Let's just talk about, and you had
8 mentioned, and we'll go through this when we look
9 at the actual questioning that took place and the
10 judge's involvement, but you have told us that it
11 was your observation and, you believed, possibly
12 or likely the jury's observation as well, that the
13 judge -- that the judge was of the view that
14 Nichol John was holding back and that that's why
15 she was not repeating the contents of her
16 statements and saying more, that she was trying to
17 hold back, and I appreciate these were your
18 observations, but I think you said a reasonable
19 bystander might take that view that she was trying
20 to help David in holding back information.

21 If you would have been given an
22 opportunity in the *voir dire* contemplated by the
23 Court of Appeal regarding the circumstances of the
24 taking of the statement, would that have given you
25 an opportunity to try to persuade the judge that



1 he might be wrong on that view and that there are
2 other circumstances that might explain why a
3 witness would give a sworn statement saying she
4 witnessed a murder, but then later said she
5 couldn't recall; in other words, something more
6 favourable to Mr. Milgaard's position?

7 A Yes, and I should just say this, that if the Crown
8 declined to call the witnesses as to the
9 circumstances, then as a defence counsel I would
10 have had to make a decision whether or not I would
11 call them even though, in effect, I would be going
12 into the opposing camp, but that's something that
13 we never reached, but I think the judgment of the
14 Court of Appeal certainly contemplated situations
15 where defence counsel might well call witnesses on
16 this issue, but in most cases, when a statement is
17 taken, basically you just have police witnesses
18 around, but suppose the boy's -- this girl's
19 mother or father had been present when the
20 statement was being taken, one might well decide
21 to call the parent or parents if the Crown did not
22 do so, but I still think that at the end of the
23 day this is the type of situation where the burden
24 is on the Crown to call evidence of the
25 circumstances of the taking of the statement.



1 Q Based upon your dealings with Mr. Caldwell, and in
2 particular based upon the fact that he brought in
3 Inspector Roberts both for the preliminary hearing
4 and the trial at your request, what is your sense
5 as to, if you would have gone and asked him, if
6 this procedure had been employed, to say would you
7 please call Inspector Roberts and Mr. Mackie and
8 others who may have been involved?

9 A Frankly, I think that if the ruling had gone the
10 way it could have gone on the basis of our joint
11 submission, that there should be a *voir dire*, I
12 think in all likelihood he would have called him
13 to give evidence on the *voir dire*.

14 Q And so again -- and if he didn't, I know we're
15 speculating, but if he didn't, for example, call
16 Inspector Roberts, you would have the right to
17 call him?

18 A Yes.

19 Q And I suppose you would lose the right to
20 cross-examine him as opposed to examine him, but
21 you would get to question him in the absence of
22 the jury?

23 A That's right.

24 Q And let's just talk again about what approach you
25 might take with these witnesses if the jury were



1 not present. We've talked about Nichol John a
2 little bit. I think you said you would be, be
3 prepared to go into areas that you might not if
4 the jury were present; is that fair?

5 A That's correct.

6 Q For example, in front of the jury you might not
7 want to be too hard on her, is that fair, you
8 wouldn't want the jury to think you were being
9 mean to her, things of that nature?

10 A I think that's a fair assessment.

11 Q In the absence of the jury might you consider
12 taking a harder approach with her to try to get to
13 the truth?

14 A Yes, and also, and in the course of that probing,
15 what Mr. Roberts had told her, all this type of
16 background.

17 Q Now, let's just talk about the risk that you
18 talked about before in examining Nichol John in
19 the presence of the jury, and there's a couple of
20 things I think you've told us, number one, you
21 would be worried that she might turn on you and
22 adopt the statement and say, okay, sorry, I do
23 remember, I did witness the murder, that would be
24 one scenario. The second scenario we talked
25 about, the concern would be is how do you



1 challenge the credibility of that part of her
2 statement that she doesn't adopt; in other words,
3 if she doesn't adopt it, it's harder to challenge.

4 Now, let's go back and deal with
5 both of those. The first one is the risk of her
6 turning on you. If in the course of this
7 proceeding, if it would have happened, can you
8 tell us what you might have done in the course of
9 that if she did in fact change her evidence in the
10 course of your cross-examination, would you be
11 left with any arguments to keep, to still keep the
12 statement and her evidence out of the jury, away
13 from the jury?

14 A It would be very difficult. I think the trial
15 judge would have ruled that that was the answer,
16 but, you know, I'm speculating here.

17 Q Would you have available -- and I appreciate that
18 in argument to say that lookit, this is so
19 unreliable because on the one hand you've given a
20 sworn statement, then under oath at the prelim you
21 can't remember, then at the trial you can't
22 remember, then at the trial you do remember, I
23 take it it would give you some --

24 A Oh, I would have made that type of argument. I
25 think you've pointed to basically the, oh,



1 probably the only argument you could make under
2 those circumstances.

3 Q And then I suppose if she did adopt it, you would
4 then have the ability to cross-examine her on the
5 credibility of the statement, which I think you
6 told us yesterday you, I think, and correct me if
7 I'm wrong, I think you said you would have been
8 better off, your position would have been better
9 off if she had adopted it and allowed you to
10 cross-examine than how it ended up going in at
11 trial; is that correct?

12 A Probably, yes.

13 Q So that's the one risk. The second one we talked
14 about is in the absence of the jury could you see
15 yourself cross-examining her on the basis of
16 saying lookit, this statement that you supposedly
17 swore is so ridiculous I don't know how you could
18 have said it, and go through some of the things,
19 and how could you say you just witnessed a murder,
20 or just realized you witnessed a murder when you
21 talked to Inspector Roberts, that sounds pretty
22 foolish, things of that nature, is that something
23 that you would have --

24 A Oh, yes, and that's why I mentioned a moment ago
25 you would want to know what Mr. Roberts had told



1 her and then try to get the circumstances from him
2 or other police officers under which he uttered
3 certain things to her.

4 Q Let's talk about Mr. Roberts. Assuming you get
5 him there in the absence of the jury and are
6 entitled to either cross-examine him or examine
7 him, can you tell us what types of things you
8 would ask him or what areas you would cover or
9 what tact, and I appreciate this is -- you are
10 looking back and saying here's what I might have
11 done, but what types of things -- well, let me
12 back up. I think in fairness, you considered his
13 position, you knew what he told you at the time,
14 you were suspicious of him. If you were given an
15 opportunity to cross-examine him in the absence of
16 the jury, what would you have done?

17 A Well, of course it would depend a great deal on
18 the examination-in-chief testimony that he would
19 have given had Mr. Caldwell had called him.

20 Q Right.

21 A But I would have of course probed some of the
22 areas that I mentioned to you yesterday, the types
23 of questions that he put to her, but what details
24 he told her and where did he get those details
25 from, if he got any, and of course you've



1 mentioned that there probably was a recording of
2 some of these proceedings, and if one had access
3 to that recording that had been over -- had been
4 made, I don't know now what questions I would have
5 asked, but they would have been governed by some
6 of that information that I gather you indicated
7 was probably available at the time.

8 Q We've heard some evidence from Mr. Chartier, I
9 don't think from anybody else, that he set up the
10 tape.

11 A I see.

12 Q But if that were available, then that's something,
13 if you learned of it in the course of the
14 examination, you would probe into; is that fair?

15 A That's correct.

16 Q What about Mr. Mackie, he is the officer who took
17 the statement. Would you examine him?

18 A Well, I certainly would examine him. Of course,
19 if he was involved in overhearing any of the
20 discussions between Mr. Roberts and Miss John or
21 was aware, you know, of things like that, then of
22 course I would ask him about it, and also ask him
23 about what Mr. Roberts had told him. In other
24 words, there may -- one would want to consider
25 whether there was a chain of information that was



1 used in ultimately taking the statement.

2 **Q** What about the officers who dealt with Nichol John
3 on the day or two prior to her meeting with
4 Inspector Roberts who drove her around and
5 interviewed her, would you seek to have those
6 officers called?

7 **A** Well, it would -- my view is that that would be
8 part of the circumstances that should be inquired
9 into and I would expect that that evidence would
10 be called, and I think if the ruling had gone on
11 the basis of our joint submission, I think Mr.
12 Caldwell would likely have called it.

13 **Q** Would you go so far as to go back to March 11th,
14 '69 and considered Inspector Riddell, who took the
15 very first statement from Nichol John, as a
16 witness about that statement?

17 **A** At this stage that's a little more difficult for
18 me to answer. I'm inclined to think that one
19 could make a persuasive argument that that too was
20 relevant in light of the subsequent statements.

21 **Q** If Nichol John's statement of May 24th had not
22 been, if the jury had not been made aware of the
23 contents of that statement, and I appreciate that
24 the judge gave a direction that they weren't to
25 consider the unadopted portions, can you give us



1 an assessment of how significant that would have
2 been in the result, and I'm not asking you to
3 guess what the jury might have done differently,
4 but can you tell us, as defence counsel, the
5 significance of the section 9(2) proceedings and,
6 in particular, how it was handled and the fact
7 that the May 24th statement contents, the jury,
8 (a), became aware of them, and (b), how it all
9 played out and the demeanour of Nichol John and
10 the judge with respect to how she was asked about
11 why she couldn't remember those things?

12 A I'm not sure that I can give you an unbiased
13 comment, but I'll do my best to apply the
14 objective bystander test that I mentioned to you.

15 Q I'll take both, your biased view and your
16 objective bystander.

17 A You can have your cake and eat it too then. I
18 know that my personal assessment of it was that
19 this was a devastating turning point in all
20 likelihood and using the objective bystander test,
21 if I may use that term, I think that the reference
22 to that particular statement in some of the
23 contents, crucial contents, in light of the
24 testimony of Mr. Wilson, probably marked a turning
25 point in the proceedings.



1 Now, I'm trying to look at it
2 objectively when I apply this test, but I think,
3 looking back and trying to capture the atmosphere,
4 I have made a fair assessment. Others might take
5 a different view, but from being there, that is
6 the way I would answer the two limbs of your
7 question.

8 Q If we can just go a bit further, and once we go
9 through and see what happened, I'll ask you the
10 question again about your observations about how
11 it unfolded and how that may have impacted the
12 jury. Let's go back, and let me put it to you
13 this way, if the statement -- if the Court had
14 ruled that the previous statement could not be
15 used to cross-examine Nichol John, so in other
16 words, all that the jury heard was her evidence
17 that we met a lady, asked for directions, got
18 stuck, then went to the Trav-a-leer -- that David
19 and Ron left, then went to the Trav-a-leer, and
20 there was no evidence whatsoever regarding
21 portions of her statement that she did not adopt,
22 I take it you would have an argument to say, well,
23 lookit, jury, the two people in the car with Mr.
24 Milgaard, surely if Ron Wilson saw and heard all
25 these things and claimed that Nichol was



1 hysterical and, etcetera, and Nichol John says
2 nothing of the sort, would that undermine Ron
3 Wilson's credibility?

4 A Yes, I think it would undermine his credibility
5 and considerably weaken the prosecution's case.

6 Q And so conversely, did the fact that her statement
7 did get in front of the jury in the manner that it
8 did, and again we'll talk about that demeanour, in
9 your view did that enhance the credibility of Ron
10 Wilson's evidence in your view?

11 A I think it probably did.

12 Q So in addition to -- let's just talk about the
13 damaging impact of Nichol John's, I think you said
14 a devastating turning point with respect to not
15 only the fact that the jury heard the statement,
16 but the circumstances, is it fair to say that in
17 addition to her evidence and how it went in
18 hurting David's case, in addition it may have
19 bolstered other evidence that may have been
20 unreliable?

21 A Yes, and I think in the consideration or
22 observations I made, I should have made it clear
23 that part of my assessment involved her demeanour
24 as others likely perceived it in the courtroom.

25 Q Right, and we'll go through that.



1 A Yes.

2 MR. HODSON: This is probably an
3 appropriate spot to break, Mr. Commissioner.

4 *(Adjourned at 10:24 a.m.)*

5 *(Reconvened at 10:48 a.m.)*

6 BY MR. HODSON:

7 Q Mr. Tallis, I now want to go, I think we've spent
8 some time looking at what the Court of Appeal said
9 should have happened with respect to the 9(2)
10 proceedings. I now want to go back to the
11 transcript and walk through what did happen, and I
12 want to keep two things in mind that I will ask
13 you about, one is I would like your, you to tell
14 us your recollections of, to give us some idea of
15 the atmosphere in the courtroom based on your
16 recollection, how you perceived it, whether it was
17 your own view or a reasonable bystander's view,
18 and secondly, I'll ask you from time to time to
19 comment on what you might have done if the jury
20 had not been present, so if we can go back to
21 00 --

22 Actually, before I do that,
23 Mr. Fox has provided me with a reference about
24 Chief Justice Bence referring to his colleagues,
25 003128 is the page number. Actually, maybe it's



1 at the top, maybe just go up to the top. Yeah,
2 here's where he says:

3 "- the point hasn't come up before me,
4 it's been discussed amongst my
5 colleagues and it was felt that I should
6 be or the presiding judge should inquire
7 with respect to the application ...

8 Etcetera. So again I think that's the reference
9 that in this case Chief Justice Bence may have in
10 fact talked to some of his colleagues; is that
11 your understanding?

12 A That's the comment that I had in mind when I spoke
13 to you earlier during the course of my testimony.

14 Q Right. Okay. If we can go back to page 003143,
15 and I think just again I'll restate it, under
16 section 9(2) it's really a two step process. 9(2)
17 is the cross-examination regarding the previous
18 statement to prove that the statement was given
19 and the circumstances and what's contemplated then
20 is the judge then says yes, I will admit the
21 statement, or I will then rule on the adversity of
22 the witness and I will allow a much fuller
23 cross-examination, so here's where he starts, and
24 if we can go to page 003145, and we went through
25 this before, Mr. Tallis, with both Nichol John and



1 Mr. Caldwell, so I won't cover all of the
2 questions and answers. Here's cross-examination
3 by Mr. Caldwell and talking about the statement:

4 "Q And did you have the opportunity - who
5 did the writing, by the way?

6 A Sergeant Mackie did."

7 And:

8 "Q And did you have the opportunity to read
9 it over?

10 A Yes I did.

11 Q And did you read it over?

12 A Yes.

13 Q And did you sign it in due course?

14 A I think so.

15 Q Now, Miss John ..."

16 And I want to pause here because here he's asking
17 her the questions did you sign it, I think so,
18 and the Court says:

19 "Q ... well, you would know whether you
20 signed it or not?

21 A Yah, I believe I did, yah."

22 Are you able to tell us whether again your -- and
23 maybe just generally through this part, what was
24 your observations about Chief Justice Bence and
25 his demeanour towards Miss John?



1 A Well, at that stage it was certainly one of
2 skepticism as I said to you earlier.

3 Q And would this --

4 A Skepticism with respect to the answers.

5 Q And would this be an example of that?

6 A Yes.

7 Q If we can go over the page, 003147, I don't think
8 there's any reference here about the meeting with
9 Inspector Roberts, at least to this point, and
10 then asked about meeting with Detective Mackie,
11 just to two of us, and where it was located.

12 And then go to page 003148, and
13 he actually shows the statement and the judge then
14 intervenes and says:

15 "May I suggest that you ask about the
16 signatures."

17 And then to the next page, Mr. Caldwell goes
18 through every page and she confirms her
19 signature, and then the next page:

20 "Q And I ask you now whether or not you
21 made that statement?

22 A I did."

23 And then Mr. Caldwell asks her to read it. And
24 if we can go to the next page. So he's asked
25 Miss John to read it to herself silently and then



1 he says:

2 "Q Are pages 3, 4 and 5 true?"

3 And pages 3, 4 and 5 of the statement are
4 essentially the incriminating parts, or at least
5 the parts that describe observing David Milgaard
6 in the alley, grabbing the girl, stabbing her and
7 things of that nature and the purse in the
8 garbage can, those are contained on pages 3, 4
9 and 5. She answers:

10 "A I don't know."

11 The judge says:

12 "Q What do you mean you don't know? You
13 signed them?

14 A Yah, I know I did but I don't know - I
15 don't remember saying that.

16 Q You signed the pages each one at the
17 bottom of the page?

18 A Yes.

19 Q And you gave a detailed statement with
20 respect to what you said had taken
21 place, didn't you?

22 A Yes.

23 Q Now, having read it - having read it,
24 does that refresh your memory
25 sufficiently that you can now tell this



1 Court what happened on January the 31st?

2 A No it doesn't; I don't remember saying
3 that."

4 And again, do you have anything else to add
5 regarding Chief Justice Bence and his demeanour
6 with respect to the witness other than what
7 you've told us? Would this be -- fall into that
8 category of skepticism?

9 A I think it would be a sterner type of skepticism
10 at this point, if I may use that term.

11 Q And I guess the first question, you know:

12 "Q What do you mean you don't know? You
13 signed them?"

14 Was he upset, was it your observation that he was
15 upset with her?

16 A Yes, I believe so.

17 Q Then at the end of that Mr. Caldwell says:

18 "Now, My Lord, if your Lordship pleases,
19 with that question I am ending my
20 cross-examination of this witness and
21 I'm going to next ask Your Lordship for
22 the ruling as to adversity. I suppose,
23 My Lord, ought this statement ... just
24 be marked for identification?"

25 And then just at this point, if we go back to



1 what we looked at early, I think what the Court
2 of Appeal said, is that before the section 9(2)
3 process is complete, that you should be given an
4 opportunity to cross-examine, actually in the
5 absence of the jury?

6 A Yes.

7 Q But that you should be entitled to cross-examine
8 with respect to giving the statement and the
9 circumstances; correct?

10 A Yes.

11 Q Before the judge rules --

12 A Yes.

13 Q -- on the adversity. So here Mr. Caldwell says I
14 am done. The judge says:

15 "Q You recall giving the statement to
16 Detective Sergeant Mackie; you've
17 already admitted that?

18 A Yes I do."

19 And then the next page, this is again the
20 judge -- actually, I think this is -- actually,
21 I'm not sure. If we can just go back to the
22 previous page. This in fact, this may be Mr.
23 Caldwell, I may have misread that. Then to the
24 next page, it goes through the giving of the
25 statement that was read over to you, and then if



1 you can scroll down:

2 "Did you have any discussions about this
3 statement with anybody outside of the
4 police officers afterwards?

5 A No.

6 Q Afterwards?

7 A Afterwards with what?

8 Q With anybody afterwards as to what you
9 had said?

10 A Are you talking about Mr. Caldwell -
11 including Mr. Caldwell?"

12 And from that answer, I'm sorry, I believe this
13 to be the judge.

14 A Yes, that's the way I read it, and I recall that
15 type of question being asked.

16 Q Right. So I think if we just, sorry, go back to
17 the previous page, I think Mr. Caldwell is done,
18 he says -- he asks -- he says, I'm ending my
19 cross-examination, and I think from here on is the
20 judge who questions about the giving of the
21 statement, and then the next page, and the judge
22 says:

23 "Q And you remember quite clearly that it
24 was read over to you?

25 A Yes.



1 Q You remember quite clearly that you
2 signed every page?

3 A Yes.

4 Q Well, can you tell me why you can't
5 remember what you said on that occasion?

6 A I don't know.

7 Q Did you have any discussions about this
8 statement with anybody outside of the
9 police officers afterwards?

10 A No.

11 Q Afterwards?

12 A Afterwards with what?

13 Q With anybody afterwards as to what you
14 had said?

15 A Are you talking about Mr. Caldwell -
16 including Mr. Caldwell?

17 Q No, no; I mean anybody else?

18 A No."

19 Would that be the exchange? I think you
20 mentioned earlier about the fact that you
21 inferred that Chief Justice Bence thought someone
22 maybe got to Nichol John, someone from David
23 Milgaard's camp, if I can call it that; is that
24 right?

25 A Yes, and I think that's the area that I was



1 alluding to when I mentioned that to you, but of
2 course this is much more specific than the general
3 statement I made.

4 Q And this part that I read to you, was it your
5 perception at the time that he was trying to
6 ascertain or inquiring as to whether or not
7 someone on behalf of David Milgaard, either you or
8 others, got to Nichol John and influenced her to
9 change her evidence from her statement and not
10 remember?

11 A Yes, that's the way I interpreted it.

12 Q And again, I'm not asking you to look into the
13 minds of the jurors, but was it a concern of yours
14 that the jury might have had that view as well?

15 A Yes, and I think I did my best to try to remove
16 that suggestion or minimize the effect of the
17 question.

18 Q And so again the fact that this type of question
19 being asked in the presence of the jury as opposed
20 to in the absence of the jury as contemplated by
21 the Court of Appeal, did you find that to be
22 prejudicial?

23 A I'm sure I'm not being unbiased when I say this,
24 but I certainly did.

25 Q And then once Chief Justice Bence is done, he



1 says:

2 "I am declaring this witness to be
3 adverse in the sense that she is hostile
4 within the meaning of "hostility" as
5 referred to in the decision ..."

6 Etcetera, and the statement is marked. Now, let
7 me pause there. You did not have an opportunity
8 to cross-examine her on that before he made that
9 ruling did you?

10 A No. The ruling was made then and there.

11 Q In the presence of the jury?

12 A Yes.

13 Q And so I take it when we look back at what the
14 Court of Appeal said, in addition to having the
15 jury excluded you were supposed to have the
16 opportunity to cross-examine her before he made
17 that ruling; correct?

18 A Yes.

19 Q Now, I suppose, did you give any thought at that
20 time to rising and asking to -- or was the horse
21 out of the barn?

22 A I'm sure I did, but given the fact that it was in
23 the presence of the jury, I had to make a judgment
24 call on that because at that stage you are still
25 thinking of what the jury, you know, how the jury



1 might be charged later on.

2 Q So then Mr. Caldwell goes on and now asks, seeks
3 to cross-examine the witness on the statement and
4 asks for leave under section 9(1) to prove that
5 the witness at another time made a statement
6 inconsistent with her present testimony. So now
7 he's asking to cross-examine her as a hostile
8 witness using this previous statement; correct?

9 A Yes.

10 Q And the judge says very well, which presumably is
11 the leave that Mr. Caldwell is seeking and then he
12 carries on to cross-examine her.

13 If we can then go to the next
14 page, and then what we have seen, and we've been
15 through this, is that basically Mr. Caldwell goes
16 through the entirety of the statement and asks
17 questions, did you tell Detective Sergeant Mackie
18 the following, and in some cases she said yes.

19 "Q You remember telling him that?

20 A Yes.

21 Q And was that true?

22 A Yes."

23 That's an example. And then on the next page,
24 and we're talking -- this is about stopping --
25 actually, go back a page, I'm sorry, about



1 stopping the woman for directions, and she says
2 yes, that was true, and I told Detective Mackie.
3 Scroll down. And here the judge says:

4 "Q You distinctly remember saying that?

5 A Yes, I remember saying that."

6 Then scroll down, and this is the comment about
7 offered her a ride and the comment the stupid
8 bitch.

9 "Q Did you tell Sergeant Mackie that?

10 A Not all of it. I don't remember
11 saying part of it."

12 And then the judge:

13 "Q You said you didn't say it - did you say
14 it?

15 A The first part I said but I don't
16 remember saying the last part here.

17 Q Well just a minute - that's the kind of
18 thing I suggest you might not easily
19 forget - the expression "Stupid Bitch"?

20 A I don't remember him saying anything.

21 Q Well, do you remember telling Sergeant
22 Mackie that?

23 A No.

24 Q You're suggesting that he wrote it in
25 then?



1 A I don't remember saying it."

2 Would it be fair to characterize that as a testy
3 exchange between the judge and Miss John?

4 A Testy might be too strong a word, but it was
5 certainly in the form of an interrogation in stern
6 terms.

7 Q And again, was it your perception that the judge
8 was skeptical of Nichol John's explanation that
9 she could only remember saying part of it?

10 A Yes. I think I would put it this way, by this
11 stage the indication was that there was a high
12 degree of skepticism.

13 Q Okay. If we can then go to the next page, we
14 then talk about the statement, about Ron and David
15 leaving.

16 "Q "Do you remember telling him that?"
17 Yes. Was it true? And then the judge says:

18 "Q So he did go back in the direction of
19 the girl?"

20 And this is referring to David when they left the
21 car for help.

22 "A Yes."

23 And he says:

24 "Q Yesterday you told us you couldn't
25 remember?



1 A I said that . .

2 Q You said that one went left and the
3 other . .

4 A . . one went right. And the girl was
5 coming from . ."

6 And the judge says:

7 ". . Alright. Go on."

8 And then the next page --

9 COMMISSIONER MacCALLUM: What page was
10 that, please?

11 BY MR. HODSON:

12 Q I'm sorry, the doc ID is 003157.

13 And then here we get the next
14 page, and this is the part where Mr. Caldwell
15 reads to her about the part of the statement where
16 she says that she saw David get ahold of the same
17 girl he spoke to a minute before, grab her purse,
18 it says:

19 "Q Did you tell Sergeant Mackie those
20 things?

21 A I don't remember."

22 And then the judge:

23 "Q Do you remember any part of it?

24 A No.

25 Q Are you saying you didn't tell Sergeant



1 Mackie that?

2 A I'm saying I don't remember if I did
3 or if I didn't.

4 Q Well, if you did see the accused grab
5 the purse it's something you would have
6 remembered, isn't it? Isn't it?
7 Witness?

8 A I don't know.

9 Q Take a drink of water and stop crying.

10 A If I could tell you what happened I'd
11 telling you. I don't remember. I
12 can't remember."

13 Let me pause there. Do you remember that
14 exchange, Mr. Tallis?

15 A Yes, I do.

16 Q Can you tell us what your observations were of
17 your perceptions of the judge's demeanour and as
18 well Nichol John's demeanour?

19 A Well, from this particular part of the transcript
20 it's clear that she was crying, and the -- I'm
21 trying to use words to describe it. I think I can
22 fairly describe this as a stern admonition by the
23 judge and I've thought about and it's probably,
24 although maybe my words don't express it well,
25 somewhat like the admonition of a stern father.



1 Whether that assists you or not, I don't know, but
2 that's what I feel is a fair way of expressing it.
3 I think you used the term testy exchange earlier
4 with respect to the matter and I think testy is
5 probably, conveys a different meaning than the one
6 I'm conveying.

7 Q And what about Nichol John at this time, other
8 than the part that she's crying, what was your
9 sense of, I guess her credibility, or what did you
10 observe her for and how do you think a jury might
11 have, or a reasonable bystander might have viewed
12 what was happening to her?

13 A I think that a reasonable bystander or objective
14 bystander, and I think the judge and quite likely
15 the jury thought that her demeanour was such that
16 she was deliberately holding back.

17 Q And when you say holding back, what she would be
18 holding back would be the contents of her
19 statement?

20 A Yes. In other words, putting it another way, I
21 could see people feeling that this was not an
22 honest "I don't remember".

23 Q Okay. And would it be fair to say that if they
24 believed that it was not an honest "I don't
25 remember", that the only alternative available to



1 the jury to consider for what she might remember
2 would be in her May 24th statement?

3 A Yes, I think that's a fair assessment, Mr. Hodson.

4 Q And I'll come back to that a bit later. If we can
5 just finish up here:

6 "Q The point is this. You told Sergeant
7 Mackie on March the 22nd according to
8 this statement."

9 And I think he's got the month wrong.

10 "Now are you saying you did tell
11 Sergeant Mackie or you didn't tell him?

12 A I don't know if I did.

13 Q Did you see Dave have ahold of the girl?
14 Did you see Dave have ahold of the girl?

15 A I don't remember anything. My mind is
16 a blank. Nobody understands. Nobody
17 wants to believe me.

18 Q You remember the other things, don't
19 you?

20 A Yes I do."

21 And then the judge says "go ahead".

22 Then Mr. Caldwell goes
23 through -- if we can then scroll down -- the
24 statement where she said that Dave reached into
25 one of his pockets.



1 "Q Did you tell Mackie that?

2 A I don't remember."

3 Etcetera. Now, I take it as well, Mr. Tallis,
4 that it would appear from going through this that
5 she remembers parts of her statement; in other
6 words, she has a recollection of observing things
7 that are in her statement that she says yes, I
8 remember that, for example, stopping the woman
9 for directions, I remember that and I remember
10 telling Mr. Mackie that, but that the parts that
11 are very incriminating, it's only those parts
12 where she says I don't remember that and I don't
13 remember telling Mr. Mackie that?

14 A Yes.

15 Q And putting aside any reasons for that, would it
16 be fair to say that, again the objective
17 bystander, that that might be suspicious, that a
18 witness would remember only parts of the statement
19 clearly but not others; is that fair?

20 A Yes. I think that the way it unfolded, this could
21 convey, and probably did, the notion of a
22 selective memory the way it was coming out.

23 Q And the suggestion might be why do you only forget
24 those parts that are damaging to your friend, that
25 type of thing?



1 A Yes, and I think that's what undoubtedly gave
2 rise, at least in my mind, to the trial judge's
3 high degree of skepticism.

4 Q If we can go to the next page, please, and Mr.
5 Caldwell, and again they've gone through the
6 incriminating parts which she says she didn't
7 remember, Mr. Caldwell says:

8 "Q Now, Miss John, I put it to you that
9 that is something that you absolutely
10 would never forget if you saw that
11 happen?

12 A As far as I'm concerned I don't know
13 what happened. I don't even know if I
14 was on that trip or not."

15 Do you remember that exchange at all?

16 A No, I don't specifically, but it's clear to me
17 that it took place.

18 Q And then the judge says:

19 "Q Well, you've already given evidence that
20 you were on the trip - very extensively
21 yesterday. Have you forgotten since
22 yesterday that you told us you were on
23 the trip."

24 And again, I'm not sure if that's a sarcastic or
25 rhetorical question, do you recall this exchange,



1 and the answer is:

2 "A If you just stop and think how much this
3 bothered me - I'm beginning to wonder if
4 I even did it or not."

5 Do you recall that?

6 A No, I don't recall that specifically, but I'm sure
7 that, you know, that took place as recorded.

8 COMMISSIONER MacCALLUM: That page number
9 was what, please?

10 MR. HODSON: That page is 003160.

11 COMMISSIONER MacCALLUM: I'm sorry, 160?

12 BY MR. HODSON:

13 Q 160, yes. And what about the comment where she
14 says, "I'm beginning to wonder if I even did it or
15 not," and I'm not clear, it's hard to tell from
16 the transcript whether that was said in
17 seriousness or whether it was trying to explain
18 that --

19 A It's difficult for me to say now.

20 Q Okay. If we can then go ahead to 003162. So
21 we've gone through, and I haven't touched on them
22 all, but basically Mr. Caldwell went through those
23 incriminating parts of the statement, pages 3, 4
24 and 5, and she said she didn't remember them, nor
25 did she remember telling Mr. Mackie, and then he



1 gets to the compact and reads to her the statement
2 where she says she saw the compact, and then the
3 next page, Mr. Caldwell asks:

4 "Q Did you tell Mackie those things?

5 A Yes I did.

6 Q And do you remember telling Sergeant
7 Mackie those things?

8 A Yes.

9 Q And are those things true?

10 A Yes."

11 And the judge says:

12 "Q How is it you can remember that?

13 A I don't know. If I had a solution for
14 it --"

15 And the judge:

16 "Alright - go ahead."

17 Again, would that fall into the same category
18 we've talked about as far as the perception you
19 had of both -- of the judge's demeanour towards
20 the witness?

21 A Yeah. I would say also indicative of his
22 assessment of the witness.

23 Q In other words, how can you remember that detail
24 when you didn't remember the others?

25 A Yes.



1 Q Now to page 003164 and I think Mr. Caldwell is
2 finishing up here and he says:

3 "Q So that your position today is, as I
4 understand you, that you don't know
5 whether you saw Dave in the alley with
6 the same girl that he had spoken to
7 shortly before for directions?

8 A No I don't.

9 Q Alright; and you don't know whether you
10 saw him grab her purse . . . ?"

11 And then the judge:

12 "Excuse me a minute, just a minute -"

13 And then says to the witness:

14 "It's very easy for you to stop crying
15 because you've done it several times
16 when you were asked a question with
17 which you would agree - so would you
18 please stop crying."

19 Do you have a recollection of that exchange?

20 A Yes, I remember that, and I would characterize
21 that in my recollection as a very stern
22 admonition, and I think maybe I'm even erring on
23 the side of modesty when I use that term.

24 Q And again, it appears to be along the lines of how
25 can you remember some things, not the others and



1 here how come you only cry on the questions that
2 you don't remember?

3 A Yes, that's what I was trying to capture when I
4 used the term selective memory.

5 Q Right. Then if we can go to the next page, and
6 Mr. Caldwell finishes up. No, sorry, just a sec.
7 478, the previous page, Mr. Caldwell finishes, and
8 then the next page the judge then asks some
9 questions, I think asking about Wilson's evidence.

10 "Q ... when Wilson returned to the car were
11 you crying?

12 A I don't know.

13 Q Were you hysterical?

14 A I don't know.

15 Q Were you hysterical and crying at the
16 time during the early hours of that
17 morning?

18 A No, not as far as I can remember."

19 'Did you notice any blood? No. Did you notice
20 some on the trousers? No.'

21 "Q Do you know why the accused and Wilson
22 changed their clothes?

23 A Yes I do.

24 Q What was the reason?

25 A Ron had - acid was eating through his



1 pants; and Dave's pants were ripped."

2 And then if we can go to the next page, and this
3 is where Mr. Caldwell says:

4 "And that is, having made the ruling, My
5 Lord, to ask Your Lordship for leave to
6 prove that the witness made at another
7 time a statement inconsistent with her
8 present testimony; and what I propose of
9 course is calling Sergeant Mackie to
10 deal with parts of that document which
11 is P.31 for identification. That's what
12 I would ask Your Lordship and I of
13 course will abide by your ruling."

14 And it would appear here that Mr. Caldwell, again
15 going back to 9(2) and 9(1), is looking at
16 calling Mr. Mackie as part of the process to
17 prove the statement, he being the fellow who took
18 the statement, and the Court says no, and I
19 believe, I think the judge has already ruled that
20 it's proven.

21 A Yes.

22 Q He already ruled before that it was proven --

23 A Yes.

24 Q -- based on her statement and before you
25 cross-examined. Is that a correct read of that?



1 A Yes, that's the way I read it.

2 Q And scroll down, you say:

3 "My Lord, if I may, I feel duty-bound to
4 interject here if Your Lordship is going
5 to give the direction which I anticipate
6 your Lordship is going to give. I think
7 it only proper to observe that in my
8 submission to Your Lordship the witness
9 should be out of the courtroom when you
10 give that direction, because I haven't
11 even started my cross-examination."

12 And I think at this point the judge is going to
13 give the direction to the jury to not consider
14 those parts of Nichol John's statement that she
15 didn't adopt; is that correct?

16 A Yes, I believe this is the sequence of it.

17 Q And then to the next page. So this is all before
18 you've had a chance to cross-examine; correct?

19 A Yes.

20 Q The judge then says:

21 "... that except where the witness has
22 admitted the truth of any particular
23 part of the statement that the contents
24 of the prior statement - the contents of
25 that statement which has been referred



1 to - are not to be taken as evidence of
2 the truth of the statements contained
3 therein. They are not to be taken as
4 evidence of the truth of the statements
5 contained therein. They merely serve to
6 test the credibility of the witness. I
7 want to make that quite plain now. I
8 will repeat my directions when I come to
9 address you later in my charge ..."

10 And then called the witness back in, and then you
11 say there's a point I wish to make.

12 Now, did you have concerns
13 about the fact that, and I think just in
14 fairness, the next part, which we'll go to, I
15 think you go back to the judge and say lookit, I
16 don't think you did a good enough job in that
17 direction to the jury, I want you to go further.
18 But again, did you have any concerns at this time
19 that you had not even cross-examined this witness
20 and the judge was going to give a direction to
21 the jury about the use of the statement?

22 A I don't recall one way or the other on that now at
23 this stage. I may well have, but I certainly
24 wanted a strong direction on this point. Whether
25 it was at this stage or not I don't remember,



1 but --

2 Q I want to --

3 A That's the best I can do to assist you.

4 Q I raised this point a bit earlier, but I just want
5 to come back to this, this notion of utilizing a
6 previous inconsistent statement to challenge the
7 credibility of a witness, which is the process we
8 went through, and certainly in cases where a
9 witness might in an earlier statement say I saw
10 Bob do something and in his second, evidence at
11 trial saying I saw John do it, certainly there
12 it's easy to see how you might take the previous
13 inconsistent statement and say lookit, don't
14 believe the witness when she says John did it
15 because earlier she said Bob did it.

16 A Yes.

17 Q And so that's pretty straightforward. Where you
18 have a situation as here where Nichol John is
19 basically saying I don't recall -- now, some might
20 debate, and I might debate, whether or not a
21 previous statement that has a recollection is
22 inconsistent with that, but let's assume for the
23 moment it is. If the objective of using the
24 earlier recollection of that statement in
25 challenging the credibility of the witness and



1 challenging the credibility of the statement "I
2 don't recall", is it fair to say that if you are
3 successful in that and the jury says okay, I don't
4 believe her when she says "I don't recall", that
5 the jury then will have to -- saying, okay, she
6 must recall something, that the only other
7 available recollection before them is the earlier
8 statement which, (a), they are supposed to ignore
9 the truth of it and only use it to challenge the
10 credibility, are they not put in the position of
11 basically accepting the earlier unproven statement
12 as the recollection? I'm not sure if I've stated
13 it that way, and again, is that not the effect of
14 what happened here?

15 A Yes, I think generally speaking that is, and of
16 course as you, I think, illustrated, composed some
17 very practical difficulties.

18 Q And I suppose the first one is that the, if I can
19 call it, the substituted recollection, being the
20 earlier one that they are not supposed to accept,
21 if that becomes the -- if they say yes, I don't
22 believe her when she says I don't recall, she
23 recalls something, it must be this, (a), you are
24 precluded from the opportunity of challenging the
25 credibility of that, aren't you, the substance of



1 the earlier statement?

2 A Yes.

3 Q Because you can't cross-examine a witness about
4 something she says I don't remember --

5 A That's right.

6 Q -- seeing or saying.

7 A Yeah.

8 Q We may come back to that point. If we could go to
9 the next page, 003169, I think, Mr. Tallis, here
10 you are saying that you don't think the judge's
11 direction was sufficient, it should go further:

12 "... and make it abundantly clear in
13 language which the jury will understand
14 that those statements are not evidence
15 against the excused ..."

16 Etcetera. Now, let's just pause there, because
17 the judge did not only here go back and give a
18 direction, but gave a direction to the jury at
19 the end that said please disregard those parts of
20 the statement which he didn't adopt.

21 Now, in a general sense,
22 Mr. Tallis, if the jury hears something and then
23 are told by the Court or by the judge lookit, you
24 have to disregard that, would it be fair to say
25 that it may be difficult for jurors to take out



1 of their mind something that they've heard?

2 Would that be a concern of defence counsel, that
3 notwithstanding the direction, you never know
4 how, what a juror has heard might impact their
5 thinking; is that fair?

6 A Yes.

7 Q And so that's always a risk when they've heard
8 something like that. If we go a bit further, and
9 back to the question that I just asked you, that
10 where they are being asked to find that Nichol
11 John is not credible when she says "I don't
12 recall" and they have this piece of evidence that
13 they are not supposed to consider and they are
14 trying to figure out, okay, well, we don't believe
15 her, can we try and figure out what maybe she did
16 recall and see, again, would you agree that once
17 again there would be a concern that the jurors
18 might, even more so in that case, consider
19 something that they are not supposed to consider?

20 A I think the potential is there because that's a
21 very difficult concept at the best of times, I
22 think, to get across.

23 Q And if we can scroll down, I'm not sure where this
24 fits in, but I think I have to read it because you
25 say here:



1 "Well, Courts of Appeal have been wrong
2 too, My Lord."

3 And then you go on --

4 A That was prophetic.

5 Q I'm not even going to touch that. But I think
6 what you are saying is Chief Justice Bence had
7 talked about, I think what he was saying is
8 lookit, I used the direction approved by the
9 Court, the Court of Appeal, and then you go
10 further, and if we can go to the next page, I
11 won't read it, I just highlight it because this is
12 part of the record, but again, you go on to urge
13 the judge to be more specific in the direction to
14 the jury at this point.

15 And then to page 003172, and
16 think, in effect, what you are saying, if I can
17 sum it up, Mr. Tallis, what you were saying to him
18 was you may have given the legal direction to the
19 jury, but I want you to put it in layperson's
20 terms, not legal terms so that the jury
21 understands it I think is what --

22 A Yes, you understand what I was saying, or trying
23 to say at that time.

24 Q And so here then the judge comes back and gives
25 another charge, what he says is:



1 "... the warning I gave you a few
2 minutes ago is a proper one and a
3 correct one but I wish to put it another
4 way ..."

5 And:

6 "... the only evidence which can be
7 considered as being against the accused
8 are statements which she has accepted
9 under oath in the witness box as being
10 the truth, and that any statement which
11 she has not admitted as being the truth
12 are not evidence against the accused."

13 Then we go down to the bottom, this is where you
14 start your cross-examination.

15 Now, at this point, and,
16 Mr. Tallis, if we compare the position you are in
17 right here at this point in the trial where Chief
18 Justice Bence has already allowed Mr. Caldwell to
19 cross-examine on the statement in the presence of
20 the jury, he's already concluded that the
21 statement was voluntary and that the
22 circumstances are such that he should allow it to
23 go in, he has declared her hostile and he has
24 allowed Mr. Caldwell to cross-examine her as a
25 hostile witness, if you compare that, before you



1 get up to ask any questions with what the Court
2 of Appeal said should have happened, it may be
3 stating the obvious, but would it be fair to say
4 that you were put in a far worse position at
5 trial than you should have been?

6 A I think that's an objective assessment of the
7 situation.

8 Q And then as far as your approach to Miss John at
9 this point, can you tell us, and again I'll go
10 through this with you and it may become evident,
11 but can you shed any light on what concerns you
12 would have had at this point as to where you could
13 go with this witness in light of what just
14 happened?

15 A I'm sure that I felt that I had to be very
16 cautious in light of the way matters had unfolded.

17 Q Did you think you could rehabilitate this witness?

18 A Well, she wasn't my witness to begin with, but --
19 so --

20 Q Sorry, that's maybe the wrong word.

21 A Yes. In the strict sense of the word, it wouldn't
22 be rehabilitating the witness. I thought I might
23 still be able to get some concessions from her on
24 certain things, but I knew that I had to tread a
25 very cautious path the way things had unfolded.



1 If she had suddenly come across as very
2 co-operative with me, that would have just, I
3 think, aggravated what was already a bad
4 situation, but I did recognize that I should try
5 to get what I could from her that would be of
6 assistance to David.

7 Q Are you saying in effect that you wanted to get
8 some favourable evidence, but if you got evidence
9 that was too favourable, it might backfire and the
10 jury might think that she was simply trying to
11 help you?

12 A Yes, that's something you have to always consider
13 in my view under these circumstances, and one of
14 the things I thought that I could erase was any
15 notion that people representing or supporting
16 David had gotten to her, to use your term.

17 Q And I think the first question that you asked her
18 was:

19 "Q Miss John, you have been asked a number
20 of questions here this morning and I
21 must ask you a few. First of all during
22 the course of your questioning here you
23 were asked whether or not you had seen
24 anyone else about this case apart from
25 the police and you mentioned Mr.



1 Caldwell - and this is no reflection on
2 Mr. Caldwell, as you know - you remember
3 his Lordship asking you a question about
4 that?"

5 And then the judge says:

6 "You're talking about exclusive of the
7 police and exclusive of any counsel."

8 Next page, you say:

9 "Q Now, you recall being here as a witness
10 at the preliminary hearing?

11 A Yes.

12 Q And at that particular time I believe
13 it's fair to say that you had already
14 met Mr. Caldwell?

15 A Yes.

16 Q And is it also accurate to say that the
17 first time you ever saw me to hear my
18 voice was when you were cross-examined
19 by me in the witness box there?

20 A Yes."

21 And again, would that be to address the point
22 that you just talked about?

23 A Yes.

24 Q And is it fair to say that you wanted the jury to
25 know that you had not talked to this witness



1 prior, other than at the preliminary hearing?

2 A Yes, because I didn't want any such suggestion
3 visited upon David.

4 Q And then as well you go through, the bottom, you
5 ask prior to coming to the prelim you saw the
6 police, you were brought up by the police, with my
7 dad.

8 The next page, and then a number
9 of questions to show that she had spent a fair bit
10 of time with -- not a fair bit of time, but to the
11 extent that she was involved in this case, she was
12 dealing with the police and the Crown; is that
13 fair?

14 A Yes.

15 Q And then the next page, just a couple of points.
16 Let me just pause here for a moment. Back on your
17 earlier point about how, I think you said you were
18 concerned that if she was too co-operative the
19 jury might view that as, and these aren't your
20 words, but perhaps fueling the suspicion that
21 maybe she was holding back to help David; is that
22 fair?

23 A Yes. I felt one had to be cautious and try to
24 avoid creating that impression, inadvertently of
25 course.



1 Q And again if you were able to, I'm just trying to
2 think here, if you were able to get her to the
3 point of lookit, I now realize, I just, you know,
4 I made that stuff up in the statement, or you got
5 something so favourable in the sense that she
6 recanted the statements, I take it that might be
7 viewed with some skepticism; is that fair?

8 A Yes.

9 Q Here's reference, I'll just go through a few
10 questions here to identify what areas you were
11 dealing with her about, that she had testified
12 about being by the funeral home and you say:

13 "Q Well, was it a policeman that told you
14 it was a funeral home?

15 A Yes it was."

16 And then the next page, it looks as though,
17 Mr. Tallis, you were having her go through her
18 contact with the police and perhaps trying to
19 infer or suggest that some of the information in
20 her statement may have come from the police; is
21 that fair?

22 A Yes, or arisen from the contact during the course
23 of being driven around.

24 Q Then to 003177, it looks like you then get into
25 meeting at the Cavalier, and I think you've told



1 us at this point you would be leery of having the
2 polygraph come out; is that fair? I mean, she
3 didn't take the polygraph, but she met with --

4 A No, but very concerned that no reference be made
5 to the polygraph operator.

6 Q And then you talk about being together with Ron
7 Wilson, and what would be the purpose of
8 establishing that she spent time with Ron Wilson
9 before she gave her statement?

10 A Well, to show that maybe some of it emanated from
11 his suggestions, or his comments.

12 Q Then to 003180, I'll go through this, but I want
13 to compare this to what you might have done if the
14 jury had been absent and this had been before she
15 had been declared hostile, etcetera. It says:

16 "Q During the course of this discussion
17 with this police officer whose name you
18 don't recall in the room at the Cavalier
19 Hotel, is it fair to say that this
20 discussion took place before you were
21 with Mackie? In other words, perhaps
22 you don't understand me - you told my
23 learned friend about being with Mackie
24 on the 24th."

25 And so here it looks like you are establishing



1 that before she gave the statement to Mackie, she
2 was in a room with the police officer at the
3 Sheraton Cavalier discussing matters; is that --

4 A Yes.

5 Q Were you concerned about going further on that
6 subject matter?

7 A Yes, I'm sure I was treading cautiously.

8 Q And what would you -- again, what would you be
9 concerned about? Why would you not get into
10 some -- for example, I think you told us that you
11 would canvass with her and with Roberts if the
12 jury was not present. Why would you not explore
13 these now?

14 A Well, first of all, I wouldn't want any reference
15 to the polygraph operator to come out, and
16 secondly, one had to be as careful as possible not
17 to elicit too much hearsay that might be damaging.

18 Q Then on the next page you ask a question here, and
19 I think we have heard evidence, maybe it was even
20 in Inspector Roberts' Supreme Court evidence,
21 where I think he said that he showed the bloody
22 dress to Nichol John, and here you ask the
23 question:

24 "Q I see; and do you recall now whether the
25 dress -- "



1 And this is about the meeting with the man at the
2 Cavalier, I don't think you ever used his name, I
3 think he was referred to as the man, you say:

4 "Q I see; and do you recall now whether the
5 dress was held up having blood on it,
6 that is apparent blood stains?"

7 And the judge answered:

8 "She doesn't remember any dress."

9 And then you say:

10 "Well, I just want to try and see
11 whether or not that refreshes her
12 memory, My Lord."

13 And again, I'm wondering on that, whether that
14 would be unusual, to have the judge answer the
15 question you put to Miss John?

16 A Well, I think this points up what you raised
17 earlier, and that is if her responses quickly
18 appeared to be quite favourable to my questions,
19 there might be an inference that she had held
20 back, but if she thought it was helping out David,
21 she would say something, and I think this, you
22 know, is a follow-up to the judge's skepticism
23 about the question of this nature in light of what
24 she had said and her demeanour earlier.

25 Q And again, would it be fair to say that when the



1 judge answers the question before she does, saying
2 she doesn't remember any dress, that that might
3 affect her subsequent answer?

4 A Yes, and it might -- I think probably the jury
5 would be watching the judge's assessment too of
6 the situation.

7 Q And again, I take it the dress and the blood being
8 shown to her would be relevant to whether that
9 might be a circumstance that gave rise to the
10 statement, or might explain why the statement came
11 about; is that fair?

12 A Yes.

13 Q And then if you can go to 003182, and at the
14 bottom you say:

15 "Q And is it fair to say that under oath at
16 that time --"

17 And you are talking to her about the knife she
18 identified and talking about the knife blade,
19 keeping in mind that the knife blade was found
20 under Gail Miller's body and the matching maroon
21 handle was found in a back yard, and you say:

22 "Q ... at the preliminary that my learned
23 friend showed you a knife blade?

24 A Yes.

25 Q And is it fair to say that under oath at



1 that time you indicated to Mr. Caldwell
2 that the blade of the maroon handled
3 knife that you saw in the car was longer
4 than the broken blade?

5 A Yes.

6 Q Yes; and that is the actual knife blade
7 was longer?

8 A Yes.

9 Q And you're satisfied with that, are you?

10 A Yes."

11 Now let me just pause there. It would seem from
12 this answer that although she identified a
13 maroon-handled paring knife on David Milgaard in
14 the car, she's saying the one she saw, the blade
15 was longer; is that a fair reading of that?

16 A Yes.

17 Q And that would be considered favourable evidence
18 from Mr. Milgaard's perspective?

19 A I thought so.

20 Q Were you concerned that the jury might view that
21 as helping, as being not credible and helping Mr.
22 Milgaard?

23 A Well, I suppose there was that risk, but I thought
24 in some of these areas I could pursue them without
25 as great a risk as others.



1 Q If we can go to 003185, and then you ask her about
2 the hunting knife, the bone-handled hunting knife
3 and engravings, etcetera, on it, and at that time
4 I think you've told us that you would have been
5 aware of the fact that a hunting knife, a
6 bone-handled hunting knife had been located in the
7 alley where Gail Miller's body was?

8 A Yes.

9 Q Would you have had concerns that that might be
10 tendered as evidence in light of what these
11 witnesses were saying?

12 A I think that Mr. Caldwell indicated he wasn't
13 going to tender it.

14 Q If it had been tendered as an exhibit as being
15 found in the alley and possibly the murder weapon,
16 would you have pursued this line of questioning
17 with these witnesses?

18 A It's hard for me to say at this time whether I
19 would have pursued it with her.

20 Q Okay. If we can go to 003195, I just wanted to
21 ask you here, and again this is your
22 cross-examination, you say:

23 "Q Well now, apart from Mr. Mackie and a
24 man in the Cavalier Hotel were you
25 interviewed by any other police officers



1 in Saskatoon?

2 A Not really."

3 And again, your reference -- I'm assuming that's
4 Inspector Roberts?

5 A Yes.

6 Q And would that be deliberate not to refer to him
7 by name?

8 A Yes.

9 Q And again to 003198, I won't go through this, but
10 again you have similar questions as you did with
11 Ron Wilson regarding Nichol John's use of LSD and
12 hallucinations, and the same question I had with
13 respect to Mr. Wilson, would you be trying to
14 establish in the minds of the jury that Nichol
15 John at the time, around the time she was
16 interviewed by the police had been using LSD and
17 had hallucinations and that maybe inferring that
18 some of what she put in her statement might be an
19 hallucination?

20 A That's correct, something that may have affected
21 her imagination.

22 Q And again, what you've told us with respect to
23 this issue when you were examining, or
24 cross-examining Ron Wilson, I think you said but
25 there was a risk, the flip side is that the jury



1 might associate that drug use with David Milgaard;
2 is that fair?

3 A Yes.

4 Q And so it would apply to your questioning of
5 Nichol John as well?

6 A That's correct.

7 Q And then again on 003204, you ask her.

8 "Q ... did you tell the man in the Cavalier
9 about taking LSD?

10 A Well, he asked us questions like that,
11 yes.

12 Q I see; and he's the only one that you
13 told?

14 A Well, there's one more person."
15 And then it goes on to say Raymond Mackie. So
16 again this would be probing a bit about what
17 might have been discussed with Mr. Roberts?

18 A Yes.

19 Q Actually, then at 003209, I think here you get to,
20 back to the Cavalier.

21 "Q ... you were told by a police officer
22 there - he was a man in plain clothes I
23 believe?

24 A Yes."

25 And then you ask her about the name and she says



1 yes, Roberts, so it does come out at the end.

2 And then the next page, the
3 judge says:

4 "Q Excuse me, I thought you told me this
5 morning you didn't recall that?"

6 And she says:

7 "A I didn't say that; like Mr. Tallis said
8 that I didn't recall his name and I was
9 going to add that but he finished the
10 question too fast."

11 And then down at the bottom -- actually, we can
12 skip ahead to page 003214, and here, Mr. Tallis,
13 we get into questions relating to Nichol John's
14 stay at the Saskatoon City Police building on the
15 night of May 23rd and I believe May 22nd, and
16 again you spend some time cross-examining her on
17 who took her where, etcetera, and we get to this
18 point:

19 "Q And is it then that you were taken up to
20 the little room that you described to
21 His Lordship?"

22 And that's the room where I think she gave the
23 statement to Raymond Mackie. She says:

24 "A Not right away.

25 Q ... where were you taken first?"



1 And she says:

2 "A To the cells."

3 And you say:

4 "Q Pardon?"

5 She says:

6 "A To the cells."

7 And you say:

8 "Q To the cells - well were you under
9 arrest?

10 A No, I wasn't.

11 Q I see; were you put up in the cells?

12 A Yes."

13 Now, when I look at the preliminary hearing
14 transcript --

15 A I think you said "put up in the cells".

16 Q Or put in the cells.

17 A Put in the cells.

18 Q I'm sorry, "Were you put in the cells." When I
19 look at the preliminary hearing transcript, and I
20 stand to be corrected, but I don't believe this
21 area came up at the preliminary hearing, and I'm
22 wondering, Mr. Tallis, if you are able to recall
23 whether this information about Nichol John being
24 in the police cells, whether this would be the
25 first time you learned of it, at this point in the



1 cross-examination, or whether you had been aware
2 of that prior?

3 A I think I was aware of it prior, but I couldn't
4 tell you how it came about. At the preliminary
5 hearing of course she didn't give the testimony
6 that was expected and indicated she didn't
7 remember in crucial areas and so there wouldn't be
8 the same reason to go into it as there was at this
9 stage.

10 Q So it's -- I see. So at the preliminary hearing
11 there would be no reason to question her about the
12 circumstances of giving the statement because the
13 statement didn't go in at the prelim, nor did any
14 of the incriminating contents?

15 A That's right.

16 Q And I think you are telling us your memory is that
17 you would have been aware of that fact before the
18 trial?

19 A I'm quite sure that I was.

20 Q Then if we can go to the next page, and -- I'm
21 sorry, go right to the top.

22 "Q ... you weren't arrested for anything?

23 A No.

24 Q What cells were you put in?

25 A In the women's and then I didn't want



1 to be in there so they put me in the
2 little room where the matron stays.

3 Q I see; and you were in the charge of a
4 matron there?

5 A No, I was there by myself.

6 Q Oh, you were in the room - but they put
7 you in the cells first?"

8 "Q And how long were you in the cells?

9 A Only about two minutes.

10 Q I see; and you complained about that?

11 A Yes.

12 Q And then you were in the room where you
13 understand the matron stays?

14 A Yes.

15 Q And is this the room just up near the
16 women's cells?

17 A Yes.

18 Q Just opposite the women's cells?

19 A Yes.

20 Q So that when a woman prisoner is in
21 there the matron has this room to wait
22 in?

23 A Yes.

24 Q And you were left in there for some
25 little time, were you?



1 A Yes."

2 Next page. Would you have been familiar with the
3 area of the police cells that she was talking
4 about?

5 A I believe I was, but to describe them now I
6 couldn't, but --

7 Q At that time would you have been aware of what she
8 was talking about do you think?

9 A Oh, yes.

10 Q And then if we can scroll down -- and what would
11 be the purpose in probing in this area?

12 A Well, she had given some damaging evidence at
13 trial and even though there was a direction with
14 respect to other portions of the statement, these
15 were part of the circumstances of course that
16 would have been explored in much more detail if
17 one had had a *voir dire*, but at this stage that
18 wasn't going to happen, so I endeavoured to get
19 whatever I could to show that perhaps she felt she
20 was under significant pressure, and one of those
21 aspects to that potential pressure was the fact
22 that she was being held in the cells.

23 Q Now, if we pause there, if you were using the
24 procedure that the Court of Appeal said you should
25 have used, your objective in getting into that



1 area, I think you told us, would be to try and
2 convince the judge that there are circumstances
3 relating to this statement which should cause you
4 not to allow it to be used in cross-examination;
5 correct?

6 A That's correct, I thought that would support an
7 argument that he ought to exercise his discretion
8 in our favour and not allow cross-examination on
9 the statement.

10 Q And what actually happened, I think by the time
11 that you got to cross-examine Nichol John, the
12 statement had already been put before the jury;
13 correct?

14 A That's correct.

15 Q So at this point, is it fair to say that putting
16 forward these circumstances, that it would be too
17 late to say judge, look at these circumstances,
18 that statement, the circumstances of that
19 statement being given are unsafe, don't let it go
20 before the jury, it's too late for that; do you
21 agree?

22 A That's right.

23 Q So the objective --

24 A In a sense, this was an alternative path in the
25 hope that one could salvage something from the



1 situation.

2 Q Now, let's just talk about, I guess in the eyes of
3 the jury, it might be to say that lookit, the
4 circumstances that gave rise to this statement are
5 somewhat suspect; is that fair, therefore --

6 A Yes.

7 Q Here might be an explanation as to why she would
8 give a statement that she doesn't now adopt?

9 A And there's a subsidiary aspect to that as well.
10 I thought that evidence of this nature might cause
11 the trial judge to take a slightly different view
12 of the situation and perhaps that could be
13 reflected in the final charge or instructions to
14 the jury.

15 Q Did you consider that there might be a risk based
16 on what you had said earlier, that if the jury was
17 of the view and the judge was of the view that she
18 was holding back to help her friend, that somehow
19 this, the fact that she was in jail might have
20 been attributable to that fact; in other words,
21 that she wasn't cooperating with the police, so
22 she had to put her in jail, something of that
23 nature? Was that a consideration?

24 A Oh, I'm sure that I thought of that, but that on
25 balance I thought that if one was careful you



1 could take a calculated risk in putting the
2 questions of this nature, albeit in a rather
3 limited fashion.

4 Q If we can then go ahead to 003219, you ask here:

5 "Q Well, when you were put in the cell on
6 the night of the 23rd did you complain?

7 A Not especially."

8 And the judge:

9 "Q Well, did you complain at all?

10 A Well, something happened when I was in
11 there so they had to bring a matron
12 that night."

13 The judge says:

14 "Q But you didn't complain before you went
15 there about the cell.

16 A No."

17 The Court:

18 "The cell block I should say."

19 "Yes."

20 And then you go on about the matron. Did you
21 have any sense of how the judge was viewing this
22 evidence based on his questions or demeanour or
23 anything of that nature?

24 A Well, I think the question he put tended to
25 minimize perhaps the atmosphere that I had



1 established at least to some extent.

2 Q And the next page, there's a reference here about
3 she called the matron, banged on the door.

4 "Q ... and was that matron Mrs. Tetreault?

5 A I don't know what her name was."

6 Would you have talked to the matron to get
7 information about that night?

8 A I've thought and thought about that because I know
9 you've asked me, and I can't recall whether I
10 talked to the matron or not. I'm inclined of the
11 view that I may well have because I used the name
12 here.

13 Q And again, there's some further questions that
14 we've gone through with other witnesses, just
15 further exploring the point.

16 If we can go to 003224, and you
17 ask:

18 "Q Is it fair to say that at that
19 particular time you didn't know how long
20 you were going to be kept at the
21 station?

22 A No, I didn't."

23 And then:

24 "Q Well now, were you getting - let's put
25 it this way - were you still unhappy



1 about being kept there?

2 A Yes I was.

3 Q And were you still anxious to get out of
4 the place as quickly as you could?

5 A Yes."

6 And then:

7 "Q Well now, somewhere along the line I
8 suppose that you were told that you were
9 going to be taken up to get a statement
10 from you?

11 A Yes."

12 So again, this would be along the lines you
13 discussed earlier about trying to establish the
14 circumstances under which she was kept there?

15 A Yes, and of course I don't want to be too
16 repetitious, but it illustrates the type of thing
17 that, in my view, would be canvassed on a *voir*
18 *dire*.

19 Q Right. Now, what about the March 11th statement,
20 her first statement, and we went through that,
21 which I think you told us had some significant
22 omissions compared to her May 24th statement, and
23 I think when we went through it that there were
24 some omissions of things she said on May 24 that
25 were true and not disputed; for example, the



1 compact, stopping the woman for directions and
2 David leaving the car. Can you tell us why you
3 wouldn't have used the March 11th statement with
4 her?

5 A Well, for essentially the reasons I've given to
6 you on earlier occasions with respect to the other
7 witnesses, but in this particular case I had the
8 information and I thought that I could make better
9 use of that information by putting questions to
10 her. I think that in the circumstances, if one
11 were to have put the statement in, it would have
12 opened up the potential for an awful lot more
13 expansive type of re-examination by Crown counsel
14 and undoubtedly, in my view, the learned trial
15 judge would have asked quite a lot of questions
16 having regard to the way this unfolded.

17 Q Would there be a risk that that initial statement
18 would be viewed by the judge and perhaps the jury
19 as being consistent with this thought that she was
20 holding back and trying to help a friend?

21 A Yes.

22 Q And similarly, with respect to the preliminary
23 hearing evidence, I don't think -- at the
24 preliminary hearing she did not, I think what her
25 evidence there was that once they got to the alley



1 and that David left and got back, she then
2 remembers driving away I think to the Trav-a-leer?

3 A Yes.

4 Q And again, would the same reasons apply as to why
5 you wouldn't put that to her, saying lookit -- I
6 suppose, though, it would be consistent with what
7 she said at trial?

8 A Yes.

9 Q So there would be no reason to put the preliminary
10 hearing evidence to her at the trial?

11 A No, and it might even open up things that I didn't
12 want to see opened up at that stage.

13 MR. HODSON: This is probably an
14 appropriate spot to break.

15 *(Adjourned at 11:58 a.m.)*

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

17 BY MR. HODSON:

18 Q Mr. Tallis, I just want to finish up on Nichol
19 John, I finished your cross-examination. If we
20 can go to 031255 which is your address to the
21 jury, and go to 031292, and again just, I'll
22 provide the caution that there are breaks in this
23 transcript that were not able to be transcribed.
24 At the bottom you start about, I think this is
25 where you talk about Nichol John's evidence and



1 referring to Mr. Caldwell:

2 "Now he anticipated that I was going to
3 refer to the circumstances under which
4 she gave a statement, and members of the
5 jury I have no intention of rehashing
6 that. Those circumstances are before
7 you and they are, in my submission,
8 factors which you can quite properly
9 take into account."

10 And again, some breaks there, and:

11 "Now my learned friend urged some ... to
12 you, and once again My Lord will give
13 you direction as to the relative value
14 of this particular nature, but certain
15 ... were urged and my learned friend put
16 it to the witness and quoted, as I
17 recall it, there was a reference to
18 seeing the girl stabbed right there.
19 There was some reference to that. Now
20 members of the jury I am not going to
21 rehash the physical evidence ... and is
22 that statement in that form even ... a
23 possibility? I suggest to you that it
24 isn't. After all it is common ground I
25 think that those stabbing wounds on the



1 back were inflicted when the coat --
2 after the coat had been taken off, the
3 dress taken down and the coat put back
4 on."

5 And then some further marks. And let me -- I
6 think, Mr. Tallis, as I read that,
7 notwithstanding the fact that the part of the
8 Nichol John's statement where she said she saw
9 David grab the girl and stab her was not
10 evidence, it appears that to the jury you
11 indicated that putting aside the circumstances,
12 etcetera, that the stabbing, as put forward in
13 that statement, does not fit with the physical
14 circumstances, is that fair, and in particular
15 the clothing?

16 A Yes.

17 Q And I think as well there's a reference to it
18 being from a right-handed person as well, so I
19 take it you would have made the decision to try to
20 address the part of the statement that the jury
21 was not to consider as the truth; is that fair?

22 A Yes, and to focus on the physical evidence that
23 you've just alluded to.

24 Q So in other words, jury, even though you are not
25 supposed to accept it as evidence in the event



1 that you look at it, it doesn't fit because, it
2 doesn't fit the evidence for a couple of reasons,
3 one, the dress had to be pulled down first if what
4 Nichol said was true, and secondly, David was
5 left-handed; is that fair?

6 A That's correct, and of course bear in mind that,
7 you know, there were other things said by the
8 Crown about their theory of the killing and this
9 addressed that aspect of it.

10 Q And would that be the type of thing you might have
11 put to Nichol John if she would have adopted the
12 statement?

13 A Yes.

14 Q I now want to move -- we've covered Cadrain,
15 Wilson and John. I now want to move to the motel
16 reenactment evidence, and if I could call up
17 007070, and this is a letter from Mr. Caldwell to
18 you, January 21st, 1970. We've heard from Mr.
19 Caldwell and gone through some documents that
20 suggest the time frame for how this all played out
21 and I just want to go over parts of that with you.

22 So this is January 21, the trial
23 started on January 19th, and Mr. Caldwell says:

24 "You will recall me advising you, on
25 Sunday, January 18th, that I had learned



1 that day of an alleged incident in
2 Regina, in which Milgaard was supposed
3 to have stated in front of witnesses
4 that he had stabbed or killed the nurse
5 in Saskatoon."

6 And then he goes on to say:

7 "I had Detective Karst go to Regina on
8 January 19th to interview the people
9 supposedly involved ..."

10 Let me pause there. Do you have a recollection
11 of getting a call like that the eve of the trial,
12 the Sunday before the trial?

13 A No, I don't, but I have no doubt from the material
14 here that I would have.

15 Q And then he goes on to say that I arranged to get
16 statements from these people, Craig Melnyk, George
17 Lapchuk and Ute Frank and copies are enclosed, and
18 if we can scroll down:

19 "I intend to arrange, somehow, to
20 interview these witnesses in the very
21 near future and depending on the results
22 of these interviews, as I mentioned to
23 you earlier, I may well attempt to lead
24 evidence in the present trial from one
25 or more of these three witnesses as to



1 the admissions allegedly made by
2 Milgaard in their presence."

3 And we'll get into the statements in the
4 evidence, but was this -- and it sounds like this
5 was new evidence that came to the attention of
6 the authorities a day or two before the start of
7 the trial. Did you give any thought to seeking
8 to adjourn the trial on the basis of this
9 evidence coming to light at this late hour.

10 A I'm sure I did, but I can't recall the mental
11 processes that I went through at the time. This
12 was in a time period when we had moved some years
13 before to fixed dates, and adjournments, if
14 opposed, and even if by consent once there had
15 been a date fixed were not easy to come by, and I
16 undoubtedly would have taken into account any
17 publicity that might have attached to such an
18 application, but one of the things that I do
19 remember is that as soon as I got details, I spoke
20 to David about it as soon as possible and I think
21 he was brought down actually a little before the
22 trial. I mentioned to you that I think that it
23 was, that I arranged to have him brought down a
24 little earlier than usual, and the other thing is
25 once I became aware of these witnesses, I know I



1 immediately caused inquiries to be made in Regina,
2 particularly about Melnyk and Lapchuk.

3 Q Okay. And we'll come to that once I get to their
4 statements. Maybe if we can call up 007069 and
5 we'll just try and get the time frames down and
6 then we'll get into the substance of their
7 statements. This is a note that Mr. Caldwell
8 prepared, and I can't recall when he prepared it,
9 but I think you said it summarized what he had
10 done with the witnesses, Lapchuk, Melnyk and
11 Frank, and I just want to go through this as far
12 as the time line and see if this accords with your
13 recollection. We've already talked about this,
14 Sunday, January 18, Saskatoon police learned for
15 the first time of an alleged admission by Milgaard
16 in Regina to killing a nurse in Saskatoon.

17 Same date they advised me, and
18 same date I advised "T", which you said was
19 Tallis, by phone of what I knew of this and that
20 depending on interviews I might call them.

21 Same date I arranged for
22 investigator to go to Regina, Monday, January 19,
23 and interview these persons.

24 This done Monday, January 19,
25 and on Tuesday, January 20 I received three



1 statements from these persons.

2 Wednesday, January 21, I
3 delivered copies of all three statements to Tallis
4 and advised I would interview them ASAP and may
5 well call evidence from one or more at the trial.

6 And then had two to Saskatoon
7 Friday, January 23 and interviewed and advised
8 Tallis Saturday, January 24. I would plan on
9 calling these two late in Crown's case.

10 And we'll come in a bit to Ute
11 Frank, but putting Ute Frank aside, does that
12 sound generally right time wise about, or do you
13 have any reason to dispute that?

14 A I have no reason to dispute it, even though on
15 some of the aspects of it I would have no personal
16 knowledge.

17 Q I appreciate that, and I should have raised that.

18 A As far as talking to, or getting calls from Mr.
19 Caldwell, I know that he contacted me, but in
20 terms of the specific times, I don't recall at
21 this stage.

22 Q Is it fair to say that he would have advised you,
23 it appears, the day before the trial, generally of
24 the information that he was going to get
25 interviews, and then according to the letter I



1 showed you about the third day of the trial I
2 think you got copies of the statements of Melnyk,
3 Lapchuk and Frank, and then I think they were
4 called towards the tail-end of the trial; is that
5 correct?

6 A Yes, Lapchuk and Melnyk.

7 Q Melnyk and Lapchuk?

8 A Yes.

9 Q If I could call up 178215, please, and I just want
10 to go through the statements of Melnyk, Lapchuk
11 and Frank and then I'll have some questions about
12 what steps that you took, so the first one is
13 January 19th in Regina, Craig Melnyk, and we've
14 been through these before, Mr. Tallis, so I'll
15 just touch on a couple of points.

16 He mentions in his statement
17 that Debbie Hall was in the motel room when this
18 happened, I think she's in Vancouver now, and then
19 the next page, he describes what Mr. Milgaard did
20 in the hotel room as follows, that he grabbed the
21 pillow with his hand and was saying:

22 "I killed her, I killed her, I fixed
23 her! Then he rolled on the bed awhile &
24 laughed hysterically."

25 And then down at the bottom he says, the night I



1 stayed -- sorry, here, he says:

2 "Knowing David I think he is capable of
3 murder because of his personality. One
4 moment he is real --"

5 And I'm not sure,

6 "-- and the next he goes off the deep
7 end."

8 I'm not sure what that word is. Anybody?

9 UNIDENTIFIED SPEAKER: Nice.

10 BY MR. HODSON:

11 Q Nice? Thank you.

12 "One minute he is real nice and the next
13 he goes off the deep end. I have never
14 had a fight or any ill feeling towards
15 Hoppy."

16 So that's his. Next, 155218, this is George
17 Lapchuk's statement of the same date, he also
18 identifies Ute Frank and Debbie Hall being in the
19 room and again his version of events is that he
20 started bugging Hoppy about murdering the nurse
21 and then he said I didn't -- or:

22 "He said yeh, I did it. Then he blew up
23 & started to stab with his hand & asked,
24 "Where's my paring knife." He said yeh,
25 I stabbed her. I stabbed her 14 times &



1 then she died. I got scared & dropped
2 the subject & no more was said about
3 it."

4 And then Ute Frank's statement is 277583 and she
5 describes Debbie Hall as being present and in her
6 statement she simply says:

7 "I was quite stoned & sometimes wasn't
8 aware of what was going on around me. I
9 was also hallucinating quite a bit. I
10 recall asking Hopy if he killed that
11 nurse they were talking about & he just
12 looked at me & smiled oddly. I had
13 become involved with David on this
14 occasion ..."

15 Etcetera. So again there's no, that's the only
16 reference of what went on in the motel room.

17 So those would be the three
18 statements that Mr. Caldwell provided. Can you
19 tell us, sir, what you would have done with this
20 information?

21 A Well, with respect to Lapchuk and Melnyk, I may
22 have got some details orally before there were
23 actual statements. I'm not sure of that, but I
24 know what I did do was --

25 Q Sorry, would that be from Mr. Caldwell?



1 A Possibly from him. I think that's where I got
2 some oral details. And depending on when David
3 was brought down, the date he came down, as soon
4 as I became aware of it, this information, I spoke
5 to him; that is, visited with him, here in
6 Saskatoon I'm sure it would be, because I think he
7 was brought down earlier, so it wouldn't be by
8 phone, and discussed whether or not there was an
9 instant in the motel, and he told me that, you
10 know, he didn't recall, he couldn't deny it, but
11 he said that in any event it would be a joke, he
12 said he was stoned I think was the term that he
13 used, which I understood to be based on the use of
14 drugs.

15 Q Did he recall or acknowledge being in the room
16 with Melnyk, Lapchuk, Ute Frank and Deborah Hall?

17 A Well, certainly at one point he emphasized that he
18 thought he was, he thought Ute Frank was
19 essentially a friend of his and, frankly, with
20 respect to Deborah Hall, I sensed he didn't feel
21 the same way about her as he did Ute Frank, and so
22 I found out some information about Lapchuk and
23 Melnyk. Whether it started even before I got the
24 statements or not I can't say, but I did
25 immediately make some inquiries in Regina.



1 Now, I'm not sure who I first
2 went to there. I have a pretty good idea who it
3 was because it would be the logical person I would
4 speak to, and that would be the late Mr. McIntyre,
5 but, you know, I can't recall all the details or
6 anything like that, but that's the most probable
7 thing, but in any event, I got some details and
8 information that would indicate to me they were of
9 an unsavoury nature.

10 And then with respect to Ute
11 Hall --

12 Q Sorry, Ute Frank?

13 A Ute Frank -- I tried to locate her and Deborah
14 Hall. I couldn't and I spoke to the Crown, Mr. --
15 I'm sure it was Mr. Caldwell or somebody in his
16 office about locating them and making them
17 available to me, and as I recall it, Miss Hall
18 couldn't be located, but the one that David
19 particularly focused on was Ute Frank.

20 Q Let me just stop you there for a moment. Why did
21 you try and locate those two to interview as
22 opposed to Melnyk and Lapchuk?

23 A Well, having regard to what I believed their
24 character to be, I thought it would be unwise to
25 interview them.



1 Q Did David Milgaard give you reason to believe that
2 Ute Frank might be co-operative?

3 A Certainly that was the impression I had, that not
4 only would she be co-operative, but would be
5 inclined to be favourable toward his position, and
6 I think he thought that she would be a pretty
7 reliable person.

8 Q So you arranged though Mr. Caldwell then to locate
9 Ute Frank?

10 A Yes, and arranged to have her brought up.

11 Q From Regina?

12 A Yes, I'm sure that's where they located her, and
13 she was brought up and I interviewed her in a room
14 at the courthouse, but it was completely separate
15 from Mr. Caldwell. I don't know whether -- at
16 that time I didn't know whether he had talked to
17 her beforehand to any extent, but after talking to
18 her in the room, I learned that he had spoken to
19 her, but I got the impression, or probably not the
20 impression, my recollection is that she told me
21 that she really had not co-operated with him, she
22 had a few words with him, but I then proceeded to
23 discuss matters with her, and she, I thought,
24 opened up quite a bit to me and I had no reason to
25 think that she was trying to mislead me.



1 She emphasized in our
2 discussions that she had found faith and having
3 found faith she condemned, in her words, the
4 lifestyle that she had been leading as well as the
5 lifestyle of her friends, and that of course
6 included David. I know I probed this with her at
7 some length because I wanted to see whether, at
8 least my assessment of the sincerity of what she
9 was telling me about her approach, and she
10 indicated that she had found something much better
11 than she had been living and that was a different
12 lifestyle.

13 Now, I don't recall all the
14 details, and I had an inkling from somebody that I
15 spoke to in Regina, and I can't recall who it was,
16 that Ute Frank had given every indication that she
17 had found faith. Now, she may well -- I think she
18 probably used the term Jesus Christ or something
19 like that, but our discussion was conducted in a
20 very civil way and --

21 Q Did she come across as credible and reliable to
22 you?

23 A Very much so, and that's why I probed her
24 description of how she had changed her style of
25 living and why she had changed it.



1 Now, sometime during this
2 discussion I got the impression, and yet I can't
3 recall why or the basis for it, that something had
4 been said or otherwise when Mr. Caldwell had
5 spoken to her that caused her to be a bit
6 antagonistic toward him, I just can't recall the
7 extent to which I probed that or the nature of the
8 information that gave rise, that she outlined,
9 but -- now, she acknowledged that she had been on
10 drugs, there had been, in effect, a drug party in
11 the room and she was with David, and I'm going
12 into the salacious details of it.

13 Q Tell us about what she told you about her
14 observations of David in the motel room and, in
15 particular, with respect to the allegation that he
16 had reenacted or admitted the murder?

17 A Well, during the course of our discussion she said
18 that he had reenacted it, and I can't recall all
19 the details, but there were quite a few details
20 that she mentioned and comments that she
21 attributed to him, but I recall that she did not
22 treat it as a joke, I mean, she didn't go
23 overboard the other way, but she treated it
24 seriously and certainly conveyed that information
25 to me.



1 Now, without my notes, I simply
2 cannot give you all the details that I would like
3 to be able to give you, but at the end of the day
4 I realized that her testimony would not be of
5 assistance to David and I discussed the matter
6 with her quite carefully because of what he had
7 told me about her in terms of feeling that she
8 would be co-operative and likely reliable and
9 favourable.

10 Q If we can go back just, and again, as far as the
11 details of what she described to you of David
12 Milgaard's actions, would it be consistent with
13 what Mr. Melnyk and Mr. Lapchuk were saying as far
14 as, I think, grabbing a pillow in a stabbing
15 motion, would it be generally of that nature do
16 you recall?

17 A Yes. I think that most of what she told me was
18 quite consistent with what I had been given in
19 that connection, but of course she always
20 emphasized that she had found faith, found
21 something much better in terms of a lifestyle and
22 indicated that this was the path she was now going
23 to follow, and she was quite critical of herself
24 as well as her friends for the lifestyle and
25 things that they had been doing.



1 She was quite candid about the
2 sexual relationship in the motel, she certainly
3 referred to that, but as I say, I wasn't
4 particularly interested in sort of too many
5 salacious details. I'm sure I asked at the time,
6 but --

7 Q Just --

8 A -- I can't recall them now.

9 Q Just on that point, are you able to tell us
10 whether, and again I think Mr. Melnyk and
11 Mr. Lapchuk as well talked about some of those
12 salacious details, but would it be fair to say
13 that what she had to tell you about what was going
14 on in the motel room would be consistent with what
15 others had said?

16 A Generally speaking, yes, without having my
17 specific notes.

18 Q But, for example, she didn't say anything that
19 might cause you to say, okay, well, Melnyk and
20 Lapchuk were wrong about what they said, for
21 example, David was doing when they entered the
22 room or some of the details that might cause you
23 to challenge the credibility of Melnyk and
24 Lapchuk's story?

25 A No, she didn't.



1 Q And as far as what she told you about the words
2 that David spoke as part of this, this
3 reenactment, did she indicate that he had
4 admitted, or had made words to the effect "I
5 stabbed her, I killed her," anything of that
6 nature, "yes, I did it"?

7 A Well, I know that she used words to that effect in
8 describing it to me, but to give you the sequence
9 or the precise words --

10 Q And she said that she did not, I think you told us
11 she did not think that David was joking; is that
12 correct?

13 A Well, she took it seriously and so from that I
14 took it that David was not joking in her mind.

15 Q Did she, or did you ask her whether she felt that
16 David Milgaard had killed Gail Miller?

17 A No, I don't remember whether I did or not, without
18 my notes.

19 Q Based on your interview --

20 A With her taking it -- the way she framed it about
21 taking it seriously, I think it's a fair inference
22 that she thought that he may well have. That's
23 the fairest way I can frame it.

24 Q Did you, and again I think you told us that David
25 Milgaard told you that he was there, he was stoned



1 and he couldn't deny it and if it did happen it
2 was a joke?

3 A Yeah, that's essentially the way he characterized
4 it.

5 Q In light of what Ute Frank told you, can you tell
6 us what your thoughts were about what Mr. Melnyk
7 and Mr. Lapchuk were having to say and whether, to
8 what extent you could challenge their version of
9 what went on in the motel room?

10 A Well, I thought the opportunity for challenge was
11 limited in light of the information.

12 Q For example --

13 A The --

14 Q Oh, I'm sorry.

15 A Go ahead.

16 Q Did you think you could go in there and say
17 lookit, Melnyk and Lapchuk, this never happened,
18 you are making this up, you are lying?

19 A No, I didn't feel so in the light of what David
20 told me about Ute, and particularly what Ute had
21 told me.

22 Q Now let's talk about the issue of joke versus
23 seriousness. I think David had told you that if
24 he said it, it would be a joke?

25 A Yeah.



1 Q Ute Frank said she took it as being serious; is
2 that correct?

3 A Yes.

4 Q Do you recall whether you asked her how others in
5 the room may have considered it or what she
6 observed of Melnyk and Lapchuk and Deborah Hall?

7 A I'm sure I asked, but I can't recall, you know,
8 those details.

9 Q And, for example, did she convey to you the sense
10 that others in the room took it the same way that
11 she did, or may have taken it the same way she
12 did?

13 A I think she probably did, but here again, you
14 know, it's very difficult to summon up that type
15 of detail.

16 Q In your view --

17 A -- without notes.

18 Q Yeah. In your view, would Ms. Frank have been a
19 more damaging witness against David Milgaard than
20 Craig Melnyk or George Lapchuk?

21 A That was certainly my conclusion.

22 Q And why is that?

23 A Well, for one thing, the backdrop of her finding
24 faith, and my sense was that she was very sincere
25 in this, we talked about it a great deal and she



1 seemed to open up, I thought, a great deal to me,
2 on why she was changing her lifestyle, or actually
3 had changed it and what she felt was wrong with it
4 and all those details, and I knew that if she was
5 called -- and at that time I thought there was
6 still a good light maybe the Crown will end up
7 calling her, but I thought that if there was this
8 bit of antagonism, they may well elect not to, but
9 if I called her, she would be subject to
10 cross-examination, and I was quite sure what she
11 would say about her assessment of those comments
12 as being taken seriously, and whether she could be
13 persuaded to say that the others took it the same
14 way I couldn't tell you at this time.

15 Q Do you know why Mr. Caldwell did not call her as a
16 witness?

17 A No, I didn't know why he elected not to call her,
18 but I wondered, and it occurred to me that there
19 was this antagonism that had arisen just based on
20 one or two comments. Let's put it this way, she
21 told me she was telling me the whole story and
22 that she had not told Mr. Caldwell.

23 Q And did she tell you that?

24 A Oh, yes, and I didn't get what happened that made
25 her feel, I thought, a bit of a sense of



1 antagonism.

2 **Q** We read her one page statement and there's nothing
3 in that statement along the lines of what she told
4 you other than there's maybe a few details. Did
5 she tell you that she did not tell the police
6 about the full details either?

7 **A** I think she did, but I'm not sure now.

8 **Q** The evidence that we heard from, I think, both Ute
9 Frank and Mr. Caldwell before this Commission of
10 Inquiry was to the effect that the meeting between
11 Mr. Caldwell and Ms. Frank, that she did not tell
12 him much of anything, that she was stoned and
13 didn't remember anything and didn't want to
14 testify and wouldn't testify and so Mr. Caldwell
15 said he did not think it was anything of value.
16 Her version of that is that she didn't want to
17 testify and therefore told him nothing of value
18 basically. Now, does that, is that consistent
19 with what she told you?

20 **A** No, I don't recall her saying words to that
21 effect. I think she appreciated why I was
22 interviewing her, that is, as a potential witness
23 for the defence, because I had told her, you know,
24 that I had spoken to David, I mean, I laid the
25 background out and I didn't in any way deceive her



1 as to why I was talking to her.

2 Q But as far as what she told you, she did tell you
3 that the story, or the version of events she told
4 you she did not tell Mr. Caldwell and you don't
5 think she told the police that either?

6 A That's my recollection now.

7 Q In light of the fact that Mr. Melnyk and Mr.
8 Lapchuk were called, is it fair to presume that if
9 what she told you she had told the Crown
10 prosecutor, that she would have been a witness at
11 trial?

12 A Yes, I think if she had told the Crown and
13 co-operated with the Crown the way she did with
14 me, she would be a better witness at trial than
15 either Melnyk and Lapchuk because of her new-found
16 faith, and I'm not saying that in a derogatory way
17 of anybody's faith, I just want to make that
18 clear, because that's a very private matter and I
19 don't want to be taken as belittling her faith or
20 anyone else's.

21 Q And I think you told us that you found, that the
22 reason that she was telling you these things, to
23 be reliable and credible; is that correct?

24 A Yes.

25 Q Now, let's just go back to Deborah Hall for a



1 moment. She was mentioned as being the fourth
2 person in all of the statements and the one
3 statement of Mr. Melnyk said that he thought she
4 was in Vancouver. You earlier told us that you
5 tried to locate both Ute Frank and Deborah Hall
6 and you went through Mr. Caldwell to try and find
7 them and you found Ute Frank?

8 A Yes. Well, I first tried to find them myself by,
9 this would be by phone, but I wasn't, so I then,
10 bearing in mind the obligation on the Crown, as I
11 understood it to be, I got ahold of Mr. Caldwell
12 and I thought that there was a likelihood that
13 they wouldn't have too much difficulty locating
14 them.

15 Q After you talked to Ute Frank, did you still want
16 to find Deborah Hall?

17 A Frankly, I didn't see how she would be of
18 assistance because David did not have the high
19 regard for her that he had for Ute Frank and I
20 don't know now why he made some comments, but this
21 is the sense that I had.

22 Q And the evidence that we have heard is that
23 Deborah Hall, I'm not sure if she ran away from
24 home, but was out of the province at the time, and
25 I just want to -- if we can call up 047622, and



1 this is Deborah Hall's evidence at the Supreme
2 Court reference where she testified under oath
3 about her recollection of what happened in the
4 motel room. If we could go to page 047631, and
5 here she's being examined by Mr. Wolch, the news
6 comes on, talks about Melnyk and Lapchuk being in
7 the room:

8 "While David was on the bed and such
9 forth this news telecast came on about
10 Gail Miller. I guess they had said they
11 didn't have any suspects in custody at
12 the time."

13 And then to the next page, and then she talks
14 about the news cast coming on and Melnyk --

15 "... and said to David, "You did it
16 didn't you?" I recall George Lapchuk
17 chiming in, like kind of cajoling him,
18 saying, "`fess up, Hoppy. You know you
19 did it."

20 And then down at the bottom, and what was David
21 doing:

22 "A Well, he was in the process of jumping
23 around on the bed, being a fool and
24 playing with the pillow, kind of
25 punching it up and things at the time he



1 was asked."

2 And then the next page:

3 "Q Tell us exactly what he said to the best
4 of your memory.

5 A He responded to the question while he
6 was -- and he was actually bouncing on
7 the bed too and punching up this
8 pillow. He said, "Yeah, sure. I
9 stabbed her and fucked her brains out,
10 that's a really good -- you know, it's
11 a really good time for me.

12 Q He made a comment -- take your time.

13 A I think -- it was very -- it was a
14 crude remark and it was sarcastically
15 said."

16 And I think then she went on to say that she took
17 it as a joke or that it was not said seriously.
18 And there was other excerpts that -- just give me
19 a moment. Based on what I've read you there, if
20 you would have been aware of that being Deborah
21 Hall's recollection of events in the motel room,
22 if you would have known that in 1970 would you
23 have called her as a witness at the trial in
24 defence of David Milgaard?

25 A I rather doubt it based on what he had told me



1 about his feelings toward her, and particularly
2 having regard to what Ute Frank had told me and
3 the type of person that she came across as.

4 Q And what about Deborah Hall's version of what was
5 said by David and what he did in the room, would
6 that be helpful evidence or harmful evidence?

7 A Well, it would -- portions of it would certainly
8 be confirmatory.

9 Q And then her comment about it was said
10 sarcastically or a joke, would that --

11 A Yes, I don't recall anything, a salacious detail
12 like that being mentioned by Ute Frank.

13 Q I think I can say that the remark, her version of
14 what was said goes beyond what Melnyk and Lapchuk
15 testified was said.

16 A Oh, as I said, I don't recall Ute Frank even using
17 that kind of a description --

18 Q Putting aside --

19 A -- in terms of the sexual aspect of it.

20 Q Putting aside whether it was said sarcastically or
21 jokingly or not, would the words that she
22 attributed to David Milgaard, that is, Deborah
23 Hall, be more damaging than what Melnyk, Lapchuk
24 and Frank attributed to him?

25 A Having looked at it, since you brought it up to



1 show me, I think they probably would have, but I
2 would put it on this basis at least that they
3 would tend to be confirmatory in the sense that
4 you have four people in the room saying that
5 certain comments at least were made, rather than
6 there being some saying that it happened and some
7 saying it didn't happen.

8 Q And then I take it the only question might be then
9 whether it was said seriously or not, or taken
10 seriously or not?

11 A Yeah, that's right.

12 Q If we can go to 002134, I'll go through part of
13 Melnyk and Lapchuk's evidence. Do you recall,
14 based on their evidence, of Melnyk and Lapchuk,
15 was it your view, sir, that they had taken David
16 Milgaard's remarks in the motel room and his
17 conduct as being serious or whether they took it
18 as being in a joking manner?

19 A I haven't read their testimony.

20 Q I will go through it for you.

21 A No, my recollection is that they may have come
22 across as taking it seriously and that may today
23 be a misperception on my part, but I'm trying to
24 do my best to recall it for you.

25 COMMISSIONER MacCALLUM: I'm not sure what



1 we're speaking of, at the Supreme Court or at the
2 trial?

3 MR. HODSON: No, I'm talking at the trial,
4 I'm sorry, at the original trial.

5 A Yes.

6 BY MR. HODSON:

7 Q I'll go through parts of the evidence here and
8 then I'll ask you some further questions. Go to
9 002143 -- actually, to 002144, again the evidence
10 is similar to what's in the statement, Mr. Melnyk
11 talks about David Milgaard grabbing the pillow,
12 sitting upright:

13 "A ... and he started hitting the pillow
14 like he was stabbing something.

15 Q Just a minute please - go ahead?

16 A He was hitting the pillow like he was
17 stabbing something and he said - I
18 killed her or something fourteen
19 times."

20 "A I'm not sure if it was - I killed her -
21 but 14 times was in there. It was
22 either "I killed her . ." or "I stabbed
23 her 14 times."

24 "A And then he said: "I fixed her."

25 And then the next page:



1 "A And then he sort of rolled on his side
2 and started laughing."

3 And then he was asked:

4 "Q Now, what happened when this took place?

5 A The room sort of - just everybody just
6 sat there and just sort of looked in a
7 daze like."

8 And then to the next page, I think he's asked the
9 question about whether he was on drugs and he
10 said no.

11 And then if we can go to --
12 actually, this is -- to 002146, this is where you
13 start cross-examination, and in the
14 cross-examination I don't believe, Mr. Tallis,
15 that you asked the question of Mr. Melnyk, did
16 you, to the effect that did you think David was
17 joking or did you take it as a joke. Can you
18 tell us why you did not ask that question?

19 A Well, earlier you ran through testimony here in
20 chief where I think that there were, you might
21 say, different interpretations that can be put on
22 it, but in the latter part when he described them,
23 all there in a daze, I then, in my sort of
24 analysis now, likely backed off from pursuing that
25 because he, in my view, would probably have said,



1 if I had put the question directly, "No, I took it
2 seriously." I thought there was a margin of
3 difference there from an earlier comment than the
4 last one.

5 Q And were you influenced at all in exercising your
6 judgment with respect to that question by what Ute
7 Frank had told you of her observations in the
8 room?

9 A I have no doubt that I was.

10 Q And if you had received the answer to that
11 question of "No, I don't think he was, I took him
12 seriously," what effect would that have had on
13 your position before the jury about the subject
14 matter, if any, or tell us how that might have
15 affected your case?

16 A Well, I think it would have been damaging.

17 Q If you can go to 002153, it appears that you asked
18 some questions here highlighting the fact that
19 David was laughing hysterically when he was doing
20 this:

21 "Q And you said he started to laugh. I
22 suggest to you that a better
23 recollection is that he started to
24 laugh, as you describe it hysterically?

25 A Yah, well, he was laughing.



1 Q ... well, didn't you tell the police
2 that he turned over on his side and was
3 laughing hysterically?

4 A Yes."

5 So would you be trying to send a message that
6 maybe David thought it was a joke through this
7 witness?

8 A Yes.

9 Q Go to 002155, you then go through some questions
10 here about Craig Melnyk's criminal past, and I
11 think I can summarize it this way. He was --
12 charges were pending for armed robbery, in fact,
13 it may have been that the day he was in Court
14 testifying for the Crown in the David Milgaard
15 case may have been a date very close to when he
16 was in some Regina proceedings, and I take it
17 that's something you would have been -- you would
18 have found out in your inquiries; is that correct?

19 A Yes, I had obtained that information and that's
20 why I was able to put these particular questions.

21 Q And what were you trying to do with that line of
22 questioning?

23 A Well, I was trying to set the stage for possible
24 direction on, I'll say, unsavoury witnesses, or
25 witnesses of unsavoury character would be a better



1 way of putting it, and in particular to compare
2 the type of people that were some of the main
3 Crown witnesses with what I think I would call,
4 you know, lunch bucket witnesses, who go to work
5 every day, and I'm thinking of Mr. and
6 Mrs. Danchuk, people like that, and some of the
7 other people that were called.

8 Q So here --

9 A In other words, witnesses like this and, say,
10 witnesses like Cadrain were far different from
11 witnesses like the ones I have described.

12 Q And did you have any sense that Mr. Melnyk and/or
13 Mr. Lapchuk were being motivated to either improve
14 their evidence or fabricate their evidence to get
15 a better deal from the Crown or to get a break on
16 other unrelated matters?

17 A Well, that was certainly in my mind, that they
18 were the type of people that were capable of doing
19 that.

20 Q And capable of it, but did you have any
21 information that they had in fact made
22 arrangements with the Crown to exchange evidence
23 in this case for a break in their case?

24 A Nothing directly like that, but I think that's the
25 kind of thing that would be uppermost -- or would



1 be in their mind when they were --

2 Q And so you would --

3 A -- offering to testify.

4 Q So you would want the jury to think that these
5 people have a motive to either stretch their
6 evidence for other reasons?

7 A Yes.

8 Q And did you have the sense that they were
9 stretching their evidence?

10 A Well, I considered them to be unsavoury types, so
11 in a situation like that, it's difficult to
12 pinpoint specifically what their motives might be,
13 but I'm sure at the time I didn't think they were
14 good motives.

15 Q If Ute Frank had been called as a Crown witness
16 and gave the evidence that she told you, would you
17 have been able to take the same tact with her as
18 you did with Melnyk and Lapchuk to try and
19 discredit her evidence?

20 A No, particularly in the light of what she would
21 have said about how she had changed her lifestyle
22 and her approach to life, and even though one
23 might not have necessarily asked all those
24 questions, she was a very talkative person about
25 that time, and while I'm not saying she described



1 this change with evangelistic fervor, she
2 certainly portrayed to me a person who deeply
3 believed in the change that she had made.

4 Q I'll just go through parts, here you ask him:

5 "Q As a matter of fact you didn't tell this
6 story to any police officers until you
7 yourself had been charged with armed
8 robbery, isn't that right. Wasn't it
9 after you were charged with armed
10 robbery?

11 A Yes."

12 And skip ahead to 002158, and here's where you
13 ask him about whether he had ever been asked to
14 be a stooly or a stool pigeon and an informer and
15 getting paid to give evidence for the Crown. I
16 take it both of those things would be to try and
17 advance the position -- you were trying to get
18 the jury to think that these people were
19 unsavoury witnesses?

20 A Yes, and I hoped to get a direction from the judge
21 to that effect because I was, during the course of
22 the trial I always tried to keep my eye on
23 potential matters as well for a direction to the
24 jury as well as sorting through and including
25 certain things in the jury address.



1 Q So what you were hoping to get is that a direction
2 for the jury not to put much weight on the
3 evidence of Melnyk and Lapchuk?

4 A That's right, and in particular, to scrutinize
5 their evidence very carefully --

6 Q If we then --

7 A -- when you compare it or weigh it as against some
8 of the other evidence.

9 Q Go to 002161, you finish your examination, and I
10 take it that you told us you were careful in where
11 you went with Mr. Melnyk; is that fair?

12 A I tried to be.

13 Q Were there some risks that he might, based on your
14 questions, get into areas that might be more
15 damaging? You gave us the one example about the
16 joking versus serious that could potentially cause
17 damage. Were there any others?

18 A Well, I didn't want him to, you know, stray too
19 much into David's lifestyle or anything like that.
20 Now, there was some that you couldn't avoid
21 because it came out about his condition in the
22 room, but I just didn't want other details in
23 there.

24 Q Here, once you are done, the judge says:

25 "Now, Mr. Tallis, I'm not at all



1 satisfied if I may say so with respect
2 to some of the information which I think
3 should be obtained from this man and I
4 thought I'd ask the questions and I
5 think it would only be fair that I allow
6 you to cross-examine on anything arising
7 out of it in view of the seriousness of
8 this matter -"

9 And then just scroll down. Do you have any sense
10 of how the judge viewed the evidence of Melnyk
11 and Lapchuk, and again, just looking for your
12 observations as to how their evidence may have
13 came across, whether it came across as credible
14 or whether he had some doubts about it?

15 A Well, I really can't recall anything now, but
16 looking at the intervention, one might infer that
17 he was interested in probing areas that counsel
18 had not probed, and when I say counsel, I include
19 Mr. Caldwell as well as myself.

20 Q Okay. He then asks here:

21 "Q The only time you ever remember
22 mentioning it to anybody would be about
23 two weeks ago, is that right?

24 A Yes.

25 Q To whom?



1 A To Ron Wilson.

2 Q To Ron Wilson?

3 A Yes."

4 The same Ron Wilson.

5 "Q Where were you talking to him?

6 A Up town in Regina.

7 Q Was that before he gave evidence in this
8 case, do you know?"

9 Before the trial.

10 "Q Who raised the subject?"

11 A Ron; he was talking about coming up to
12 Saskatoon.

13 Q Yes? Did he ask you if you knew
14 anything about it or did you volunteer
15 to him?

16 A I asked him, like . .

17 Q . . just leave it at that, don't give
18 the conversation. Did he say to you
19 that he knew you knew something about it
20 or anything like that, or did you
21 volunteer it to him?

22 A I think I volunteered it to him.

23 Q And when is the next time that you
24 mentioned it to anybody?

25 A After that occasion?



1 Q Yes.

2 A The following Monday.

3 Q Was that to the police?

4 A Yes.

5 Q Did the police come to you or did you go
6 to them?

7 A They came to me.

8 Q Where?

9 A In Regina, like . .

10 Q . . to your home?

11 A No; they phoned me . . ."

12 So again this line of questioning I think brought
13 out the fact that it was Ron Wilson who got the
14 information initially right before the trial and
15 gave it to the police and the police contacted
16 them; is that a fair reading of that evidence?

17 A Yes, and that he had volunteered it to Ron Wilson.

18 Q Can you tell us that exchange or that information,
19 whether it was helpful, harmful to this evidence
20 against your client?

21 A I think that the response that the witness Melnyk,
22 from the witness Melnyk, that he had volunteered
23 the information to Wilson, was probably damaging
24 to the accused. Certainly I can put it at least
25 this way, that it was not helpful.



1 Q And so the theory that they had maybe gone to the
2 Crown with some information that I'll trade you a
3 break on my case if I help you over here, the fact
4 that it now looks like they volunteered it to Ron
5 Wilson and Ron Wilson gave it to the police might
6 undermine that argument a bit; is that fair?

7 A Yes.

8 Q And what about the credibility of Ron Wilson in
9 the eyes of the jury, or let me rephrase that, the
10 fact that it appears Ron Wilson was gathering
11 information and providing it to the police, or
12 obtaining information, what if anything did that
13 do to your views on Ron Wilson and how the jury
14 might view his evidence?

15 A Well, I think that one view of it might be that
16 this type of questioning tended to enhance
17 Wilson's credibility, or reliability, but that's,
18 you know, an assessment that I could be dead wrong
19 on it.

20 Q And then to 002164, Mr. Caldwell in re-examining
21 simply establishes that Mr. Melnyk's armed robbery
22 charges were in Regina and dealing with Regina
23 police and that the Saskatoon City Police were the
24 ones who interviewed him; is that correct?

25 A Yes.



1 Q If we can then go to 006010, this is Mr. Lapchuk's
2 transcript. Go to 006016, again he describes,
3 we've been through this, "Where's my paring
4 knife?"

5 And then the next page, he's
6 asked about what happened when the accused did
7 these things, he said:

8 "A Well, I was shooked, like I hadn't
9 expected a display like that, you know;
10 and I just started looking at him and I
11 believe everybody else was looking at
12 him also; and then he looked up and saw
13 that everybody - that I was staring at
14 him with my jaw hanging down."

15 And again, I think in the cross-examination of
16 Mr. Lapchuk you did not ask him the question did
17 you take it as a joke or take it seriously, and
18 would you have the same reasons as Mr. Melnyk?

19 A Yes.

20 MR. HODSON: This is probably an
21 appropriate spot to break. I'm moving on to a
22 different area, Mr. Commissioner.

23 *(Adjourned at 2:34 p.m.)*

24 *(Reconvened at 3:00 p.m.)*

25 BY MR. HODSON:



1 Q Sorry, Mr. Tallis, there's just a few more items
2 of Mr. Lapchuk that I should finish up on, and
3 again just for the record, 006026, and this is
4 Lapchuk talking about:

5 "Q You're expected to stand trial on what
6 is that that's coming up?

7 A Forgery and uttering and possession of
8 stolen goods ..."

9 And I think this may well have been theft, or
10 someone else may have been involved in a theft of
11 David Milgaard's wallet or ID. And again, so you
12 would have had the same approach with Mr. Lapchuk
13 as you did with Mr. Melnyk, trying to put
14 evidence before the jury that they were of
15 unsavoury character?

16 A Yes, I think that's a fair assessment.

17 Q And then if we can go to 031302, which is the
18 address to the jury, and here's how you deal with
19 Melnyk and Lapchuk.

20 Let me just, before we get into
21 that, what was your sense, this was right at the
22 tail-end of the trial, this evidence. Are you
23 able to give us some idea of how you thought it
24 affected the case against Mr. Milgaard?

25 A It's very difficult to assess, but speaking on a



1 comparative basis, I thought that it had nowhere
2 near the impact that the testimony of Nichol John
3 delivered in the manner in which it was and under
4 the circumstances had. I don't know whether that
5 answers your question, but that's the, that's my
6 sense of things trying to reflect back a good many
7 years. I think if you had asked me that question
8 not too long after that, I would have probably
9 addressed it in much the same way, that is, on a
10 comparative basis.

11 Q Would it be fair to say, though, that it was
12 damaging evidence?

13 A I think it was depending on the view that was
14 taken of these people.

15 Q And I think what Chief Justice Bence said in his
16 charge to the jury, there were really two issues,
17 one is can you believe Melnyk and Lapchuk when
18 they say David Milgaard said these things, and
19 then if you do, the second test is was David
20 Milgaard serious and truthful when he said them;
21 is that fair?

22 A Yes, and I know that's the type of direction I was
23 hoping to get, at least with respect to the latter
24 part of it.

25 Q And so here with Melnyk and Lapchuk you say:



1 "There's no real discrepancies in the
2 evidence as between them."

3 And then to the next page, you talk about their
4 background, you say:

5 "Not only are they not all America, but
6 they are not all Canadian."

7 And then go on to say --

8 A I guess Mr. Caldwell baited me a little.

9 Q That's right, I think he called them all America,
10 you went one step further.

11 A I didn't even think they deserved to be called all
12 Canadian.

13 Q If we can go to the next page -- actually, you
14 know, I think that finishes up. So again, it
15 would be the unsavoury -- the manner in which you
16 chose to deal with that evidence was to, it seems,
17 call into question their character, put in the
18 minds of the jury that there might be reasons to
19 question their modis in testimony, in particular
20 given their trouble with the law and some upcoming
21 charges; is that fair?

22 A Yes.

23 Q If we can now turn to the issue of the secretor
24 defence, and, Mr. Tallis, we've heard a fair bit
25 of evidence, we've heard from Mr. Paynter, Mr.



1 Penkala, Dr. Emson, Dr. Ferris on the subject
2 matter, so that we have canvassed it in a fair bit
3 of detail, and I want to go through with you what
4 your take was at the time about this evidence and
5 how it fit in, and you've already told us about, I
6 think you said before the preliminary hearing you
7 took steps to look at it. Can you tell us maybe
8 just generally what your view was of the frozen
9 semen, or the semen that was found in the snow and
10 how you intended and how you used that at trial to
11 assist Mr. Milgaard's case?

12 A Well, I proceeded on the footing that David was a
13 non-secretor and I did so because at that time I
14 thought there was an evidentiary basis for that.
15 That being so, I thought there would be an
16 advantage to him to have the seminal fluid
17 introduced in evidence. Now, of course bear in
18 mind that it had been established that the best
19 evidence with respect to seminal fluid had not
20 been retained as I recall it, so I proceeded on
21 that footing because if he was a non-secretor and
22 that the donor of that seminal fluid sample was a
23 secretor, it would exclude him as the attacker.

24 Now, I'm trying to summarize,
25 distill it so that I don't go into too much detail



1 because, as you've said, you already have all
2 that, so I think that's the way I would summarize
3 it.

4 Q And I think the issue at the preliminary hearing
5 and trial focused on, and I think what you say was
6 accepted by the Crown and the other witnesses
7 except for the fact that the Crown and some of the
8 witnesses then went further to try and explain --
9 tried to explain how the semen with A antigens
10 could have come from an A non-secretor, and I
11 think the question then became was, I think
12 initially -- let me start off by saying this, that
13 the initial response was, and I think what Staff
14 Sergeant Paynter said, that if it's pure seminal
15 fluid and the fact that there's A antigens in
16 there, then it would have to come from an A
17 secretor?

18 A Yes.

19 Q Is that --

20 A That's correct.

21 Q And then I think they went further and said okay,
22 if there was blood, whole blood in the semen and
23 that came from an A non-secretor, an A
24 non-secretor's blood would have A antigens in
25 there and that if the donor got his blood in his



1 semen in some way, that might explain why A
2 antigens would be in the semen and therefore you
3 could say that semen with A antigens could come
4 from an A non-secretor; is that fair?

5 A Yes, I think that summarizes it I think fairly.

6 Q And I think the issues that were canvassed with
7 Mr. Paynter and Dr. Emson were focusing on that in
8 the frozen semen, was there blood in there, number
9 one, or could they establish that there was blood
10 in there and, if so, what type of blood?

11 A Yes.

12 Q To try and, I guess not discount, but I think the
13 position of some of the people in response to your
14 position was, well, there could be blood in there
15 and that might explain the antigens; is that fair?

16 A Yes, I think you have the benefit of all this
17 other testimony you've heard, but I accept what
18 you've set forth.

19 Q Now, on the issue of David's secretor status, we
20 know now I think in 1992 he was tested and it was
21 determined that he is in fact a secretor, and
22 let's just go back to 1969, 1970, and I can tell
23 you that in the evidence presented by the Crown,
24 in particular, by Mr. Paynter, he confirmed that
25 in the saliva test that he conducted, that there



1 was no A antigens and on that basis he concluded
2 that he was a non-secretor.

3 Now, there's some, I think when
4 he testified here he said that that doesn't mean
5 you are a non-secretor, it just means on that test
6 you didn't have antigens in there, but I think at
7 trial everybody was proceeding on the basis that
8 he was a non-secretor. Did you have any doubts at
9 that time about whether he was or was not a
10 secretor or did you accept what the Crown had put
11 forward?

12 A Well, I had no reason to doubt the results of the
13 test by Mr. Paynter. I knew that he had given
14 expert evidence for many years in the courts in
15 this province, and I think other courts, and I
16 suppose I should also acknowledge that in my view
17 that analysis, which I assumed to be correct,
18 ought to operate in favour of David, and of course
19 he had, David had co-operated fully in making
20 available a saliva sample and there was no
21 suggestion that he had done anything to
22 contaminate it or anything like that, so it had
23 been taken under strict controls, and in the
24 circumstances I proceeded on the footing that
25 David was a non-secretor.



1 Q If you had been aware in 1969, 1970, and whether
2 the test was done right or not I'm not saying, but
3 if the test at that time had shown that David was
4 a secretor, would you have taken a different
5 position with respect to the admissibility of the
6 frozen semen that was tendered?

7 A I might -- I think I probably would have.

8 Q We have heard, and I think in particular Dr.
9 Ferris and perhaps others say that the fact that
10 it was found three or four days after the murder,
11 the risk of contamination was such that from a
12 forensic scientist perspective it was not a
13 reliable piece of evidence to be used to either
14 eliminate or implicate a suspect, and I'm just
15 wondering back in 1969, 1970 if you were of the
16 view that this semen was incriminating or damaging
17 to Mr. Milgaard, whether you might have taken
18 steps to challenge its admissibility on that basis
19 or a similar basis?

20 A I might have, but how successful I would have been
21 I cannot say, but as I say, I was, that's
22 hypothetical from my perspective because I was
23 proceeding on the footing that he was a
24 non-secretor and I certainly wouldn't want to do
25 anything to take away a potential piece of helpful



1 evidence from his perspective.

2 Q Would it be fair to say that going into trial, and
3 indeed at the preliminary hearing, that you viewed
4 the semen, the frozen semen, as being helpful to
5 David Milgaard's case?

6 A There's no question about that.

7 Q And in fact exculpatory?

8 A Yes, and I may add, I think the Crown viewed it as
9 such and that's why, you know, the explanation was
10 considered and advanced for blood in the semen.

11 Q And let me just understand that. In the absence
12 of evidence of blood being, whole blood being in
13 the semen, are you saying that the Crown viewed it
14 as being exculpatory then?

15 A That was my assessment, and I may be wrong because
16 I can't go into their mental processes on it, but
17 standing back, I would think that was likely, and
18 the fact that it was sent back for retesting, or
19 an additional test, would lend support, I think,
20 to the view that I took.

21 Q And when you talk about it being exculpatory, can
22 you tell us, what was your view or your position
23 at the time, are we talking something that is,
24 tends to favour him or would you go so far as to
25 say that it would prove his innocence or prove



1 that he didn't commit the crime, can you give us
2 some sense of where on the spectrum the weight of
3 this evidence would be?

4 A I always considered that it was entitled to great
5 weight.

6 Q Sufficient to raise a reasonable doubt as a
7 starting point?

8 A Yes.

9 Q And perhaps a bit further?

10 A Could well be.

11 Q And again before we get into the transcripts, I
12 think I might -- I'm sorry?

13 A And I would say this, and I don't mean to inject
14 improper things, but I remember after the case
15 was, the trial was concluded, and I have no
16 recollection of this, but I remember Miss Wilson
17 saying to me not too long before she passed away,
18 she said, you know, I remember you saying to the
19 sheriff, or whoever it was that was gathering up
20 the exhibits, according to her, but I have no
21 memory of it, made the comment that, you know,
22 these exhibits should be carefully preserved
23 because some day medical science may answer the
24 question that was raised here. Now, I have no
25 recollection of that, but she certainly did, and



1 that was consistent with my view of the importance
2 of this evidence.

3 Q And that discussion would have been after the
4 trial was concluded?

5 A That's right, and usually the sheriff gathered up
6 the exhibits, sheriff or Court official gathered
7 them up, but as I say, I'm passing along another
8 recollection, but it's certainly consistent with
9 my view of the importance of this evidence, and I
10 thought that right from the very beginning and
11 that's why I prepared well in advance to deal with
12 it for the preliminary hearing.

13 Q Do I take it from that then that your view was
14 that the scientific evidence, namely, the secretor
15 issue as you then knew it, was something that you
16 felt exonerated David Milgaard, or excluded him as
17 the perpetrator?

18 A I know that in my partisan thinking that that was
19 my view.

20 Q Again, just before we get into Mr. Paynter's, some
21 of his evidence, can we distill it this way,
22 that -- and I mentioned this a bit earlier, that
23 the real issue was whether or not there was blood,
24 whole blood in the frozen semen, that was the
25 focus, because if there was no blood, then there



1 was no explanation for the A antigens being in the
2 semen other than coming from a secretor?

3 A Yes.

4 Q And I think there was two issues that were really
5 alive, one is the test that Mr. Paynter did for
6 blood, I think he called it a presumptive test,
7 whether it actually proved there was blood in
8 there, and secondly, the evidence from Dr. Emson
9 about how medically a person may get blood in his
10 semen?

11 A Yes.

12 Q You told us earlier that you had read literature
13 on the subject and consulted experts; is that
14 correct?

15 A Yes, I think I've covered that with you as best I
16 can.

17 Q Did you have any doubts or concerns that this
18 frozen semen was human as opposed to from a dog?

19 A Well, knowing Mr. Paynter as the expert witness
20 that I knew him to be, I did not think that he
21 would present a conclusion that something was
22 human semen unless as a scientist he was sure of
23 that.

24 Q If we can go to 008027, and I think you told us,
25 Mr. Tallis, that you read literature, consulted, I



1 think you said you obtained some draft questions
2 from a publication on the subject and that after
3 you -- to prepare your examination of Mr. Paynter,
4 and that after you were done the preliminary
5 hearing you had the questions and answers reviewed
6 by an expert friend?

7 A Yes. I was put in touch by my medical friend here
8 in town with someone who had more expertise in the
9 area, and without my file I can't tell you who it
10 was, but I did it over the phone, so I know it was
11 long distance, but I actually had all the
12 questions and I received great co-operation on it
13 and read them carefully and then of course sought
14 advice.

15 Q And then I think you said after you got to Mr.
16 Paynter's answers, or perhaps Dr. Emson's as well,
17 you communicated those to your expert?

18 A Yes, that's what I'm talking about, I had reviewed
19 them with them.

20 Q And I think you told us that he told you that
21 that's as good as you are going to get, or better
22 than you might expect?

23 A Yes. I was told that and I had no reason to doubt
24 it at that time.

25 Q If we can go to 008031, please, again, this is the



1 preliminary hearing of Mr. Paynter, just a couple
2 of questions here that Mr. Caldwell asked.
3 Actually, if we can just go over to show the
4 question 31, it says:

5 "Q Now that's as far as you went in that
6 first examination."

7 And again, we're talking about I1 which was the
8 frozen semen.

9 "What would that, of itself, indicate to
10 you about the donor?"

11 He said he found A antigens. He said:

12 "A This would indicate that if the sample
13 was pure seminal fluid it would have to
14 come from a person of group A blood, who
15 was a secretor."

16 So again I think that's a point we made earlier,
17 if it's pure seminal fluid with A antigens, it
18 has to come from a secretor.

19 Then the next page, he talks
20 about, Mr. Caldwell asks:

21 "A ... I examined the fluid remaining in
22 the vial marked "I 1" for the presence
23 of blood.

24 Q Alright, had you specifically examined
25 it for the presence of blood the first



1 time?

2 A No, sir."

3 And then the next page, the top, it says at
4 question 40:

5 "Q I see. Alright, now, on this occasion,
6 what did you find about the two vials?

7 A In Exhibit marked "I 1", I conducted
8 what we refer to as a presumptive test
9 for blood. I found this to give a
10 positive result in the case of the one
11 marked "I 1".

12 And I think we've heard from a number of
13 witnesses that a presumptive test for blood
14 doesn't necessarily -- a positive presumptive
15 test for blood doesn't necessarily mean it's
16 blood. Do you understand that to be the case,
17 Mr. Tallis?

18 A Yes.

19 Q And then if we can skip ahead, 008036, again just
20 for the record I'll point this out, question 69,
21 sorry, 70 at the bottom, and he's asking if P.36
22 is Mr. Milgaard's saliva sample.

23 "A ... I examined the saliva sample ... for
24 the presence of any blood group ..."

25 And I think this is where the Crown led evidence



1 that a person would have to be a secretor to be
2 able to find them, and then scroll down to
3 question 75:

4 "A I found neither A nor B antigens in the
5 saliva stains."

6 So is this what you would be relying upon? I
7 think you told us earlier you proceeded on the
8 basis that the Crown's evidence about Mr.
9 Milgaard's secretor status, you accepted that?

10 A Yes.

11 Q And then if you go to page 008039, and here I
12 think right off the bat, question 2, you talk
13 about the testing for blood, what tests, it talks
14 about the hemostix test, checking for blood, is
15 this the only test you used on the articles? No.
16 And then -- actually, I think then the next page
17 you talk about a second test, a hemochromogen
18 crystals test which is a test I think they did on
19 perhaps some of the clothing, but not on the
20 frozen semen; is that correct?

21 A I believe you are right on that.

22 Q Then you went through a fairly detailed set of
23 questions about A, B, O and antigens. If you can
24 go to 008042, and again the question that your
25 blood type and grouping doesn't change from birth



1 to death. Next page, he agrees. And then you ask
2 him some questions about further grouping group A
3 into A1, A2 and A3, and do you recall what the
4 purpose of that was or whether that was just
5 general information or were you going anywhere
6 with that?

7 A Well, I know that I had done some work and had
8 been briefed on sub-groups and I wondered whether
9 or not, and this was at the preliminary hearing,
10 whether this breakdown would be of any relevance
11 to the tests that he might conduct, or might have
12 conducted I should say.

13 Q And I think we've heard some evidence that even
14 amongst A secretors you can actually eliminate, or
15 identify one A secretor from a different sub-type
16 of an A secretor. Was that your understanding?

17 A Looking at this, I'm sure that's what I had been
18 briefed on.

19 Q Yeah. And then to page 008045 you ask, question
20 47:

21 "Q Well now, in this particular case, did
22 you conduct any testing with respect to
23 sub-grouping?

24 A No, sir."

25 So it appears that you would have confirmed that



1 he didn't do any of that?

2 A That's right.

3 Q And then the next page, he confirms for you at 56
4 and 58 his report to the police, his opinion that
5 the seminal fluid was probably from a secretor of
6 group A, and if we could go ahead to 008048, here
7 I think you have some questions about the secretor
8 test on David, the saliva test, and confirms that
9 it was using an accepted test in the field, and
10 the next page, I won't go through it, but again
11 some further questions here on page 008049
12 confirming the testing he did and whether he did
13 any further tests on the saliva sample, but I
14 think confirming that at least according to Mr.
15 Paynter, the secretor test that he had done on
16 David Milgaard was done in accordance with
17 accepted practices; is that a fair summary?

18 A Yes, that was certainly my conclusion based on
19 what he said.

20 Q If we could then go to 008051, and then in his
21 examination-in-chief I think he had said something
22 about the positive tests for blood, and I1 is the
23 frozen sample --

24 A Yes.

25 Q -- of the semen. You say:



1 "Q ... and when you checked "I 1", you
2 indicated to my learned friend that you
3 found a trace of blood, did you?

4 A This is what was indicated, yes.

5 Q Now was this a very minute trace of
6 blood?

7 A I would say it was, there was no color
8 indication in the liquid that ...

9 Q ... in other words, from a microscopic
10 --"

11 A Macroscopic.

12 Q "-- macroscopic examination of the
13 liquid, you wouldn't know?

14 A That is correct."

15 And then:

16 "Q What particular test did you use to
17 check for the presence of blood in that
18 fluid?

19 A This is where I mentioned the Hemostix
20 test, the one used by hospitals to
21 identify ..."

22 And then to the next page, you ask:

23 "Q And I take it that would be due to the
24 fact that the amount was so minute?"

25 He says:



1 "A There was not sufficient there to
2 attempt a blood grouping in our normal
3 method."

4 Then you ask:

5 "Q So that as far as you were concerned,
6 there was no method that you knew of
7 that you could have used to test the
8 blood group of that blood that was
9 there?

10 A No sir, the test that I use to obtain
11 the antigens in the sample of liquid,
12 is one of the tests that we use in
13 grouping blood stains."

14 And then goes on to say -- just actually scroll
15 down to 112 -- at 113:

16 "Q And I take it --"

17 Again testing the seminal fluid:

18 "Q And I take it that you found antigens?

19 A I did. I could not say if they were
20 from seminal fluid or blood."

21 So in other words, he's saying I can't say
22 whether or not it's from an A secretor or from
23 type A non-secretor who had blood in his semen.

24 Then if we can scroll down, you
25 then ask:



1 "Q But the nature of the antigens that you
2 found indicated to you that they came
3 from a person who would be a secretor?"

4 He says:

5 "A If they were from the seminal fluid. If
6 they were from the blood, the person
7 would not have to be a secretor."

8 Again, I think that's what we're talking about.

9 "Q You just couldn't say one way or the
10 other?

11 A No, sir, if there was Group A blood
12 there, you would get that reaction,
13 whether or not the person was a
14 secretor."

15 Next page:

16 "If there was no blood there, you would
17 not get the reaction unless he was a
18 secretor."

19 And you say:

20 "Q So that what you are saying then is that
21 a person with Group A would have had to
22 lose some blood, in some way, under
23 those circumstances?

24 A Yes sir. There would be traces of his
25 blood in the seminal fluid, if the



1 seminal fluid was from a person of
2 Group A."

3 And again, that would be the situation if that
4 seminal, if that semen was to be attributed to
5 David Milgaard; is that correct, that there would
6 have to be his blood in there?

7 A Yes.

8 Q Then you ask:

9 "Q But would that - you say traces of the
10 blood, does seminal fluid ordinarily
11 have traces of blood in it?

12 A I couldn't really say on that, I would
13 not suspect so, the pure sample."

14 Scroll down:

15 "Q No, what I'm getting at is, this trace
16 of blood would have to come from - in
17 your view, from somewhere other than the
18 emission of ordinary seminal fluid?

19 A I would suspect it could be contained
20 in the seminal fluid as a result of a
21 strain, or something like that, or the
22 rupture of a blood vessel in the tract
23 where the seminal fluid was emitted
24 from."

25 And then scroll down to 120, I think then you ask



1 about:

2 "Q ... in this particular case, you know of
3 no way that one could test for blood
4 grouping with an amount of blood that
5 you found in this "I 1"?"

6 So in other words, I think you are confirming
7 that he can't, if there is blood in the frozen
8 semen, he can't group the type, because I think,
9 Mr. Tallis, in your closing address to the jury,
10 one of the suggestions you put forward, that if
11 there was blood in his frozen semen, or in the
12 semen found in the snow, the most likely source
13 would be from Gail Miller; is that correct?

14 A Yes.

15 Q And to the next page -- actually, I think we can
16 skip ahead to -- that's all for the preliminary
17 hearing.

18 So after you examined Mr.
19 Paynter at the preliminary hearing and based on
20 the discussions with your expert, did you conclude
21 that you had a basis to argue that this frozen
22 semen excluded Mr. Milgaard as a donor?

23 A Yes, I did.

24 Q If we can then go to trial, the trial transcript,
25 041925. Did you consider whether you needed to



1 have your own expert testimony on this subject
2 matter?

3 A Yes, but the advisors I had indicated to me that I
4 couldn't hope to get anything more than I did have
5 and with that, I thought that I should take their
6 advice and follow through on that basis.

7 Q So in other words, use the Crown witnesses to
8 prove the evidence that you needed to exculpate
9 your client?

10 A Yeah.

11 Q If we can then go ahead to 041941, again I won't
12 go through what I went through from the prelim,
13 just on the explanation, that here is where Mr.
14 Caldwell asks him about what he did to confirm
15 that it's human seminal fluid.

16 "One is a test for an enzyme produced by
17 the male prostate gland known as
18 phosphatase enzyme."

19 And a microscopic examination. And I take it,
20 Mr. Tallis, you did not take issue with Mr.
21 Paynter's evidence that this frozen semen was in
22 fact from a human?

23 A No, I didn't.

24 Q If we can then go to 041943, and then Mr. Caldwell
25 asks him to explain, again we'll just focus on the



1 issue of blood, whole blood being in the semen:

2 "A On this occasion examination was to
3 determine if there was any blood
4 present."

5 "Q And what was the result of this second
6 examination?

7 A If I may explain that test. This test
8 is one used by hospitals to test for
9 blood in urine and they find that it
10 is specific for their purpose for
11 testing for blood in this liquid. I
12 have used this test and tested it with
13 several substances and I found that it
14 will give a false positive reaction
15 with certain green vegetables and with
16 leather.

17 Q What do you mean by a false positive
18 reaction?

19 A It will give a positive result - the
20 same result with these substances as
21 it will with blood."

22 And so in other words, I think what he's saying
23 is if you have some semen with leather or leafy
24 vegetables, or certain green vegetables
25 contaminating them, you will get a positive test



1 for blood; is that right?

2 A That's my understanding.

3 Q So in other words, a positive test on this type of
4 test does not necessarily mean that there's blood
5 in the substance; correct?

6 A That's right.

7 Q And then if we scroll down, Chief Justice Bence
8 says:

9 "Q In other words, it's something from the
10 vegetables that's there and not blood
11 and mistaken for blood, is that what you
12 mean?

13 A No sir; I'm saying that the test -
14 when tested against other substances -
15 a few other substances will give a
16 false positive and for that reason I
17 cannot positively say that a substance
18 is blood from using this test alone.

19 Q It's not much good then, is it?

20 A Well, we use it as a screening test to
21 eliminate stains and then if it is
22 positive we attempt to do a further
23 test to positively identify it as
24 blood if there is sufficient there."

25 Again, the next page, and then -- so I think what



1 Mr. Paynter is saying, you do the hemostix test
2 to get past step 1, if it's positive doesn't mean
3 that there is blood, but then you go do a second
4 test to positively identify it as blood; is that
5 your understanding?

6 A That's right.

7 Q And then here he says:

8 "A I obtained a positive result for blood
9 with this test."

10 And then he says here.

11 "Q ... there was insufficient blood in this
12 sample - or coloring in this sample that
13 I was able to attempt any confirmation
14 tests to absolutely prove that there was
15 blood present."

16 And then the Court says:

17 "Q It turned out to be useless then, didn't
18 it?

19 A Chemically I could not say that it was
20 definitely blood there."

21 And again, would this be the type of evidence
22 that you had expected from Mr. Paynter?

23 A Yes.

24 Q And then we scroll down, Mr. Caldwell asks the
25 question:



1 "Q And as I understand you, Staff, this
2 would be a matter of the quantity you
3 had to work with?

4 A That is correct, sir.

5 Q And can you describe or not the quantity
6 of blood revealed to you in this way?"

7 You then object:

8 "My Lord, my learned friend is using the
9 question quantity of blood and with the
10 utmost deference . ."

11 And the judge says:

12 ". . there is no evidence whatsoever of
13 blood."

14 And you say:

15 ". . and I think accordingly the
16 question should be framed differently."

17 And then the Court -- if we can just actually
18 scroll down, the Court says:

19 ". . there is no evidence whatsoever of
20 blood."

21 ". . and I think accordingly the
22 question should be framed differently."

23 I'm sorry, I've read that already. The Court
24 says:

25 "Well, there is no proof of any blood."



1 And again, would that be the evidence and the
2 direction you were seeking, Mr. Tallis, based on
3 what your advisors had told you?

4 A That's certainly the direction I was trying to
5 point people.

6 Q And the next page, Mr. Caldwell goes at it a
7 different way and says:

8 "Q This was in effect - well, I won't
9 pursue that, My Lord -
10 Alright now, if indeed there was blood
11 as such - I'm asking about this time -
12 in the sample at the time you checked
13 for blood as such . . ."

14 And the judge says:

15 ". . . excuse me, but there was no blood."

16 And then says:

17 ". . . you just can't ask hypothetical
18 questions like that unless you're
19 prepared to prove that there was blood
20 there. If you can't prove that there
21 was blood there through some witness or
22 other I won't allow you to pursue it."

23 And then scroll down, about the test he says:

24 ". . . Well, it was positive for blood but
25 he has already said that that might be



1 false because of the other factors that
2 he mentioned and he said that there
3 wasn't enough to make a positive
4 identification as to whether it was a
5 false positive or not a false positive."

6 And then I think you interject:

7 ". . excuse me, if I may interject here.
8 He even went further, My Lord, and said
9 chemically I would not say it was
10 blood."

11 Next page, Mr. Paynter says:

12 "Chemically I could not positively
13 identify it as blood."

14 So at that point, Mr. Tallis, were you satisfied
15 that the evidence at least before the Court on
16 the issue of whether or not there was blood,
17 based on a scientific test of the semen, that
18 there was no evidence that there was blood in
19 that semen?

20 A Yes, and I thought that Sergeant Paynter was quite
21 direct in answering questions on that.

22 Q So the individual who does the scientific testing
23 says I can't say there's any blood in there,
24 there's no evidence that there's blood in the
25 semen, what you told us a bit earlier, that once



1 you establish that, then I think you were saying
2 there's no way the semen could have come from
3 David Milgaard; is that fair?

4 A That's right.

5 Q If we can then go to 041964, you were asked the
6 question here in your cross-examination
7 confirming:

8 "Q ... that about 85% of the population
9 secrete blood grouping factors in ...
10 fluids other than blood."

11 So I take it -- next page. I take it from that,
12 then, that a non-secretor would be in the
13 minority; is that correct?

14 A That's what I was trying to establish.

15 Q If we can go to page 041969. Actually, go to
16 041968, just at the bottom. I think Chief Justice
17 Bence interjects:

18 "I'm sorry, I'm going to have to
19 interrupt you, Mr. Tallis, to clear up a
20 point on this business of being a
21 secretor -"

22 And then the following couple of pages are some
23 questions:

24 "Q You said at the time you made your
25 report that in your opinion the seminal



1 fluid came from a secretor of group

2 "A"?"

3 Paynter says:

4 "A Probably came from a secretor of group

5 "A", I believe it was."

6 And then carrying on:

7 "Q Alright; and if the substance that you
8 found there turned out - that is the
9 free blood, which you thought was free
10 blood - turned out to be not free blood
11 - you understand what I mean? One of
12 those other substances that you referred
13 to that came from leafy lettuce and so
14 on? If it wasn't blood - if it came
15 from one of those other things, what
16 would that do - confirm or . ."

17 And then:

18 "A . . this would indicate that it came
19 from a secretor of group "A", or group
20 A-B, yes, sir.

21 Q If it was not blood?

22 A If the substance that gave me this
23 positive test was not blood."

24 And then:

25 "Q But if it was blood . ."



1 And the answer is:

2 "A . . if it was blood I could not say
3 whether or not it was a secretor because
4 . ."

5 And then the judge says:

6 "Q . . and yet you can't tell me or tell
7 the jury whether it was blood or it
8 wasn't blood, is that right?

9 A I cannot tell you definitely. In my
10 opinion it probably was blood but I
11 cannot tell you positively.

12 Q It might not have been blood?

13 A There is a chance, yes.

14 Q Alright; so that you can't say
15 definitely then that the person whose
16 seminal fluid you examined on this
17 occasion was a secretor or not a
18 secretor?

19 A I cannot say, no sir."

20 And I just want to pause there, Mr. Tallis, and
21 get your comments on that line of questioning and
22 what if any effect that had on your position
23 before the jury about the exculpatory nature of
24 this.

25 A Well, I can't recall exactly my reaction, but



1 reading it over, I think it's fair to say that the
2 questions cut down on the progress that I had made
3 in this area.

4 Q If I can maybe restate that to you. I think
5 before the judge asked the question you had
6 established that there was no evidence of blood in
7 the semen and therefore it could not have come
8 from David Milgaard; correct?

9 A Yes.

10 Q And I think that's what you were trying to
11 establish. If I look at this question and answer
12 here, what Mr. Paynter is saying is I can't tell
13 you, which is probably correct, but I can't tell
14 you whether this came from a secretor or not, and
15 I suppose to a juror might that be -- let me ask
16 you to --

17 A Well, I think it undermines what I consider to be
18 the position I had generally established.

19 Q And then he goes on to say:

20 "Alright. I'm sorry I'm a little dense
21 on that, Mr. Tallis, but I had to get it
22 through."

23 And then you carry on to the next page, 041977,
24 and you are now asking him about the semen and
25 the colour and about how much blood it would take



1 to turn the colour pinkish, he says:

2 "A It would not take a great deal to start
3 giving a pinkish color to the liquid.

4 Q That's right; and you had enough to do
5 with the samples that it's fair to say
6 that you didn't even detect a pinkish
7 color . .

8 A . . I did not suspect any blood in it
9 when I first received it, sir.

10 Q And when you looked at it even later on
11 there was no pinkish coloration or
12 anything like that that the naked eye
13 could see?

14 A No sir."

15 So again I take it this would go to the issue of
16 whether or not there was blood in that semen?

17 A Yes, and I think I asked these questions in light
18 of the questions that had been put by the Court.

19 Q Is it fair to say that you would have rather not
20 had the judge ask those questions?

21 A That's correct.

22 Q Go to 255230, please.

23 A I don't want to be facetious, but I sit here and
24 wonder if I didn't do some of this when I was a
25 trial judge. Tried not to, but --



1 Q I've got a number of your judgments I was involved
2 with that I'll deal with at the end.

3 255230 is Dr. Emson and this is
4 at the trial, Dr. Emson was the pathologist, and
5 if we can go to 255256, so -- and I think what we
6 talked about earlier, there was really two
7 components to this question of how can there be
8 blood in an A non-secretor's semen, and we just
9 went through Mr. Paynter's evidence which was look
10 at the substance and have a scientist chemically
11 analyze it and tell me whether or not there's
12 blood in there, which he said no, I can't, and
13 here Dr. Emson is asked the question about
14 medically can a person, how can a person and what
15 is the probability of a person getting his blood
16 in the semen, and this is an examination by Mr.
17 Caldwell, this is at trial, he says:

18 "Q Now, Doctor, your work involves the
19 examination of seminal fluid and its
20 constituent spermatozoa as you have told
21 us?

22 A Yes.

23 Q Are there conditions under which human
24 blood as such can get into seminal fluid
25 or spermatozoa in the male person?



1 A Yes.

2 Q Could you tell the Court what they are
3 please?

4 A One would be local injury to the male
5 genitals.

6 A second and quite common
7 occurrence would be any inflammation
8 either internal or external of the
9 male genitals.

10 Q Are there any other causes?

11 A There are rarer conditions but I think
12 the injury and the inflammation are
13 the most common ones.

14 Q You understood my question to be
15 speaking of blood as such as opposed to
16 any constituent of blood?

17 A Yes - blood cells."

18 And then it goes on:

19 "Q If you had some bladder trouble, blood
20 from the bladder that might . . ?

21 A . . yes, My Lord. Inflammation
22 anywhere in the genital or urinary
23 system."

24 Let me just pause there. Is that an issue that
25 you had raised with your expert advisors?



1 A Yes, I was aware of this possibility and --

2 Q Did your advisors tell you whether or not it was
3 possible for a male, or young male to have his
4 blood find its way into his semen in the manner
5 suggested by Dr. Emson?

6 A I was advised that that could be so.

7 Q We then go to 2 --

8 A Let's put it this way, that medical people that I
9 had spoken to would not have been able to, at that
10 time at least, to dispute, or would not have
11 disputed what he was saying.

12 Q And so that it was possible that that could
13 happen; is that fair?

14 A Yes.

15 Q And if you would have called an expert on that
16 subject matter, based on what your advisors were
17 telling you, what would your experts say?

18 A Well, they would essentially have supported the
19 position Dr. Emson took and, frankly, that's why I
20 had spent so much time with Mr. Paynter on the
21 tests and the inability to identify blood in a
22 positive way.

23 Q If we can go to 255272, this is where you question
24 Dr. Emson about that and you say:

25 "Q Now, you told my learned friend also



1 that blood is sometimes located in the
2 seminal fluid of a male person and you
3 told my learned friend, the jury and His
4 Lordship certain things that may cause
5 this. Now, would I be correct - well,
6 have you ever found blood in say a
7 sixteen and a half year old boy where
8 you have tested his seminal fluid - have
9 you personally ever found that
10 condition?

11 A I don't ever recollect having done it
12 before on a sixteen and a half year
13 old boy.

14 Q I see; you've never personally done it?

15 A No.

16 Q And I take it that - well do you
17 recollect ever having done it on we'll
18 say a seventeen or eighteen year old boy
19 - in that area?

20 A I'm afraid I can't give you the ages
21 of the patients on whom this has been
22 done. It is I think accepted medical
23 knowledge that small amounts of blood
24 commonly find their way into seminal
25 fluid of males of any age beyond



1 puberty, in conditions particularly of
2 slight infection anywhere in the
3 genital or urinary system; and less
4 commonly in the event of external
5 injury."

6 And again, would that have been consistent with
7 what your advisors were telling you?

8 A Yes, and I think the reason the question was
9 framed about whether he had personal knowledge of
10 something like that from his work was deliberate.

11 Q And for what purpose?

12 A Well, to at least raise a question perhaps about
13 the reliability of the opinion, although I knew
14 that if I called the people that were advising me,
15 they would have generally had to agree with that.

16 Q And in fact if you can scroll down, and you say
17 here:

18 "Q But you haven't personally conducted any
19 tests on any group . . ?

20 A . . I have never done any series of
21 this."

22 A That's right.

23 Q If we can go ahead to 031297. The doc ID is
24 031255, this is the address to the jury --
25 actually, go to page 031298, and I went through



1 parts of this when Dr. Ferris was here last week,
2 but I want to go through parts of this with you,
3 and this is your address to the jury. First of
4 all you talk about, you say there is no
5 criticism --"

6 "... this is no criticism of Dr. Emson,
7 but I think it is unfortunate that the
8 sample that was from the vaginal cavity
9 was not saved, because if it had been
10 saved it is quite clear from his
11 evidence that the blood could have been
12 analyzed for grouping."

13 And you may have already touched on this I think.
14 Are you saying that that would have been a better
15 sample than what was found in the snow?

16 A Yes. And of course if there was blood in the
17 sample and they extract it from the vaginal
18 cavity, the logical check to make would have been
19 the deceased, was it the blood of the deceased,
20 and we've alluded to this.

21 Q Right. So that if there was -- I think she was
22 blood type O. If in that sample there was the
23 deceased's blood in that seminal stain, I think
24 the argument made later was that the frozen semen
25 may have come from the deceased as she was laying



1 in the snow?

2 A Yes.

3 Q And therefore the blood, if there was blood in the
4 semen, it would have come from her?

5 A Yes.

6 Q And then if you might be able to help out where we
7 get some of these breaks, Mr. Tallis, if you are
8 able to fill in any of that:

9 "Now members of the jury there is no
10 suggestion that other than a
11 non-secretor -- and the possibility of
12 secreting the blood factor in his
13 seminal fluid is great -- ..."

14 There's a break there, but we did see evidence
15 that it's 85 percent:

16 "... the effect of that evidence that
17 the seminal fluid contained what are
18 called "A" antigens. Now this may be,
19 and I suggest is something that you
20 should consider pretty carefully, and as
21 you see, if in fact the donor of that
22 seminal fluid was an "A" group secretor,
23 and there was no blood, as such, in the
24 seminal fluid from that person with that
25 "A" grouping, it cannot have been, the



1 man could not have been the ..."

2 And then a break. Are you able to shed any
3 light?

4 A I'm sure that refers to the accused, David.

5 Q Okay. And then you go on to say:

6 "Now it is suggested that the traces of
7 blood that Sergeant Paynter found --
8 that might have been blood -- now
9 frankly I am not here to argue that
10 there was ... at that time of the year
11 and I am not ... anything to suggest
12 ..."

13 Again, I'm not sure, are you able to help us with
14 what might be in there?

15 A No, there's something missed there and it's pretty
16 difficult for me to say at this stage.

17 Q And then you get on to:

18 "... when you get down to the question
19 of reasonableness, first of all,
20 Dr. Emson points out that the blood in
21 the seminal fluid in the vagina that he
22 threw away -- spermatozoa -- could well
23 have come from Miss Miller's "O" group.
24 It could have come from her in two ways:
25 From the inflammation that was referred



1 to, or from the possible onset of
2 menstruation; or from the donor. And
3 then let's examine another point in this
4 connection, when that frozen lump was
5 found out in that area that had been ...
6 up, may I suggest to you that if there
7 was blood in this sample, as he thought
8 there might be, he could not say that
9 for sure, but let's forget what ... for
10 the moment and be reasonable about this.
11 Is it not more likely that since he
12 scooped up the area to get the patch
13 where the blood had seeped through, that
14 it was some other blood in the snow? Is
15 this reasonable? I suggest not. And as
16 you see, if the blood that got into that
17 seminal fluid was "O" group, and the
18 donor didn't have any secreted blood in
19 his seminal fluid, then of course, the
20 result would have proved it. There is
21 no suggestion in respect of the sample
22 that that was done."

23 And then:

24 "There is no evidence that David is a
25 person who is afflicted with any



1 condition which caused blood to be in
2 his seminal fluid, and I suggest to you
3 that these other matters that I raised
4 with you are more probable than the
5 possibilities that have been urged upon
6 you."

7 I pause there. I take it that that would be the
8 possibilities of him getting his own -- that it
9 was his whole blood in the semen; is that
10 correct?

11 A Yes.

12 Q And then down at the bottom, you finish up:

13 "Now those are factors when you are
14 assessing the forensic evidence, that I
15 invite you to consider very critically
16 and I suggest to you that they tell
17 heavily in favour of David. They are
18 factors which are dealt with by honest
19 and reliable witnesses, and I say this
20 with regard to the crime detection
21 laboratory people and the identification
22 officers who dealt with this ..."

23 So I take it that as you said earlier, you were
24 getting this evidence from the police witnesses;
25 is that correct?



1 A Yes, and the Crown experts, or people called by
2 the Crown as experts.

3 Q Dr. Ferris gave some evidence, or some commentary
4 about, just generally about whether juries
5 understand forensic-type evidence. Based on your
6 recollection or your observations at the time, did
7 you have any concerns about whether or not the
8 jury followed this evidence or not, and I
9 appreciate you can't go into the minds of the
10 jury, but do you, was it your sense that how this
11 evidence came out and was presented to them was
12 fairly straightforward?

13 A I thought that they followed it quite closely and
14 I suppose that part of my thinking is today and
15 would have been then that Mr. Paynter tended to
16 explain things quite slowly and respond to
17 questions clearly. Furthermore, having regard to
18 the way the trial proceeded with the jury
19 conveying questions that they wanted to have
20 answered, that is, to the judge to look over, and
21 also the fact that they would know that, from
22 observations the judge intervened from time to
23 time to ask questions, I thought that if there was
24 anything unclear in their minds about it, that
25 they collectively, through their foreman, wouldn't



1 hesitate to ask a question or questions that were
2 bothering them.

3 Q So do I take it from that that you had no reason
4 to believe that this evidence wasn't understood by
5 the jury?

6 A No, I thought Sergeant Paynter's evidence was
7 particularly clear, and he dealt, you know, in the
8 main with that more so than Dr. Emson.

9 Q I now want to move on to a couple of other
10 witnesses. The first is Shirley Wilson who is Ron
11 Wilson's mother, 032363. She was called, I think
12 you had asked her to come to testify at the
13 preliminary hearing, but then she wasn't called at
14 the trial -- 032363 -- and this is the preliminary
15 hearing evidence, and if you can go to 032370, and
16 I think your cross-examination related to the coat
17 that David was wearing that morning had been
18 returned to her and she threw it out after talking
19 to Ken Walters and that she had washed the
20 clothing of both David Milgaard and Ron Wilson
21 when they returned and did not -- go to the next
22 page -- was asked, did not see anything like blood
23 stains on it. That may be referring to the coat.
24 And I'm just wondering, Mr. Tallis, was there, if
25 you recall, what the reasons were that you had her



1 attend at the preliminary hearing and whether
2 there was any reason you didn't have her called at
3 trial or asked to have her called at trial?

4 A I recall that in some of the information I had,
5 and perhaps it was in her statement or somewhere
6 else, she had indicated that David had changed his
7 trousers in Regina, I believe my recollection is
8 correct, and I thought that would, calling her on
9 that, with that evidence would undermine what
10 seemed to be a pretty clear situation, that David
11 changed his trousers at Cadrains' because of the
12 rip that we've heard a great deal about, so I
13 thought there was a real risk of confusing the
14 issue on that aspect.

15 Q Sir, are you telling us that her evidence at trial
16 might have hurt David's position?

17 A Undermined --

18 Q Undermined?

19 A -- the position, yes.

20 Q The next one I want to deal with is Marie Indyk,
21 076620 is the preliminary hearing evidence, we've
22 I think read through some of this, and she had
23 provided a statement to the police about
24 observations on the morning of the murder around
25 St. Mary's Church, describing I think at the



1 preliminary hearing two women that she encountered
2 that morning, and I think she was also a witness
3 that you asked to have called at the preliminary
4 hearing and at the trial, and in fact at the trial
5 the jury asked to have her evidence read back to
6 them I believe; is that correct?

7 A Yes.

8 Q Do you recall what went into your request to have
9 her appear and give evidence?

10 A It's very difficult for me to go through, recall
11 the mental processes I was going through, but
12 trying to reflect back as best I can, I recollect
13 that at the, I believe that at the time when she
14 was there in that vicinity, she didn't recall or
15 mention any vehicle as such that attracted her
16 attention, and I'm not just sure now, but there
17 was an area where she observed I think a young
18 woman?

19 Q Yes.

20 A And I'm just not sure now in my mind the exact
21 area, exact location, but I know I was probably
22 thinking that her testimony might indicate that
23 some untoward incident had occurred that would be
24 unrelated to the one that had been described by
25 some of the witnesses and that that would raise a



1 question possibly about whether this business of
2 any car with young people in it had been involved
3 in anything. I know that my sense of things was
4 that she may not, in the end, have anything to
5 contribute, but having heard her evidence at the
6 preliminary hearing, I didn't see how she could
7 possibly do any harm or undermine David's
8 position. That's the best I can do at this stage.
9 I'm sure there were other thoughts in my mind at
10 the time, but I remembered feeling, when the jury
11 asked to have all her evidence read, I remembered
12 that I was glad that I had asked to have her
13 called.

14 Q Okay.

15 A Now, why I felt that way I can't tell you now.

16 Q If we could just -- I want to quickly deal with a
17 few other witnesses, and I don't propose to call
18 up their transcripts because we've had a chance to
19 look at them, but let's start with -- and they
20 come under the category of people who observed
21 David Milgaard on the morning of January 31, 1969
22 and I think they were all questioned by you about
23 what they saw, what they observed of Mr. Milgaard,
24 his demeanour, his clothing, the lighting
25 conditions, etcetera, and I think they all gave



1 evidence that they did not notice anything unusual
2 and did not see any blood on his clothing. The
3 first one would be Robert Rasmussen, the
4 Trav-a-leer Motel operator; correct?

5 A Yes.

6 Q And again, you would have questioned him about
7 what he saw of David Milgaard. According to the
8 Crown's theory, Mr. Rasmussen would have seen Mr.
9 Milgaard shortly after he had allegedly committed
10 the rape and murder; is that correct?

11 A Yes.

12 Q And again, what we have read, or had his evidence
13 read in, you questioned him about what he saw and
14 I think what you said to the jury is that with
15 Mr. Rasmussen, if one would expect the murderer to
16 be covered with blood, then you would expect
17 Mr. Rasmussen, who spent a bit of time with him,
18 to have observed that; is that fair?

19 A That's correct.

20 Q And that would have been your purpose in
21 questioning him on that?

22 A Yes.

23 Q And then Walter and Sandra Danchuk I think we've
24 talked about a fair bit, in fact, they both
25 testified before this Commission, and I think you



1 did question them in some detail about how long
2 they spent with this group, what the lighting was
3 like, what Mr. Milgaard did, what he didn't do,
4 and whether they observed anything unusual;
5 correct?

6 A That's correct.

7 Q And would it be fair -- how did you view the
8 evidence of Walter and Sandra Danchuk to be as far
9 as the importance of that evidence to your case?

10 A Well, I thought they were reliable and credible
11 witnesses who supported David's position. They
12 had ample opportunity to observe him and it seemed
13 to me that Walter, Mr. Danchuk in particular,
14 wondered what people were doing around that hour
15 of the morning and I thought it likely that he
16 would be more observant than if it was the middle
17 of the day and, frankly, I thought he came across
18 as that type of person.

19 Q Now, these were Crown witnesses and I think what
20 Mr. Caldwell said is that, words to the effect
21 that he called these people because they were
22 relevant witnesses or part of the narrative.
23 Putting that aside, would you -- I mean, if Mr.
24 Caldwell had not called them, would you have
25 called the Danchuks and Mr. Rasmussen?



1 A I'm quite sure that I would have.

2 Q And again, not that, I don't want to characterize
3 as to whose witnesses they were, but would you
4 have viewed the Danchuks and Mr. Rasmussen as
5 being witnesses favourable to David Milgaard's
6 position?

7 A Yes, I viewed them as honest and favourable to
8 him.

9 Q And their evidence being favourable?

10 A Yes.

11 Q And as well we have the evidence I think of
12 William Campbell who was the tow truck operator,
13 garage operator at Danchuks'?

14 A Yes.

15 Q I think the same approach there; is that correct?

16 A Yes.

17 Q And then George Davis who was the fellow at the
18 second garage when they were getting the
19 transmission fixed?

20 A Yes.

21 Q And again I think you questioned him as well about
22 what he observed of the group; is that fair?

23 A Yes.

24 Q I now want to turn and talk about the decision, or
25 your advice to Mr. Milgaard about testifying, and



1 we've already talked a fair bit about it when
2 we've covered various areas and you've identified
3 areas and concerns that you had based upon the
4 evidence and based upon some of Mr. Milgaard's
5 actions or statements that you felt might cause
6 him some problems if he testified; correct?

7 A Yes.

8 Q Can you tell us, just walk us through how that
9 decision happened, when it happened and what went
10 into it in a general way, and then I'll go through
11 some specific items that you've already
12 identified, but I'm thinking when did the
13 discussion take place, what was discussed and what
14 was Mr. Milgaard's reaction.

15 A Well, I had discussed that, you know, the issue of
16 whether or not he would be called at trial even
17 before the trial started. Before the preliminary
18 hearing I had explained to him in detail the
19 difference between a preliminary hearing and the
20 trial and so I discussed it. I -- you know, I
21 went to Prince Albert I now know on two occasions
22 after the preliminary hearing and I'm sure I
23 discussed it on at least one of those occasions,
24 and then during the course of the trial I know
25 that I discussed it with him, and of course there



1 came a time when the final decision had to be made
2 and I discussed that with him and reviewed with
3 him the areas that I thought would involve some
4 difficulty for him in cross-examination, and also
5 even if I lead it, which I intended to do in some
6 areas, but I don't want to repeat myself.

7 And I indicated to him that from
8 my assessment and based on my experience, and in
9 my judgment, that I thought it would be, that it
10 was a situation where I thought it would not
11 strengthen his hand. I thought that some of this
12 evidence would be supportive of the Crown theory
13 and on balance I thought that it would be in his
14 interest not to testify.

15 Now, I'm really narrowing this
16 down because I don't have all the details now and
17 notes or anything, but just to back up for a
18 moment, I was of the view as a counsel that when
19 you come to the question of whether or not a
20 client should testify, he or she was entitled to
21 the benefit of my advice and that of course would
22 be based on my assessment of the Crown's case, my
23 assessment of the testimony that would be elicited
24 from him by me and particularly my assessment of
25 any difficulties he might have explaining some of



1 the answers that he would give and which I knew he
2 would give to questions that might be put in
3 cross-examination. I think he understood that the
4 cross-examination would be far more robust than
5 the questions I would be asking him, and this was
6 conducted on a very civil basis as between the two
7 of us and I emphasized that I thought counsel
8 should accept the responsibility for giving that
9 kind of advice because I was aware and knew that
10 there were two schools of thought. One was that
11 you should take the time to assess the situation,
12 give advice and take instructions. The other
13 school of thought, and this was certainly a
14 minority view, but at least was held by some
15 leading English barristers, and that is that the
16 decision whether or not to testify was the
17 decision of the client and the client alone, and
18 accordingly, the written instructions were not
19 preceded by any advice as to the course that
20 should be taken.

21 I recall many years ago reading,
22 some of them just had a little piece of paper, "I
23 wish to give evidence, I do not wish to give
24 evidence," you strike out the one and sign it, and
25 I didn't subscribe to that view, and I don't know



1 of any lawyers in Saskatchewan that did at the
2 time.

3 And so having had that
4 discussion and giving that advice, I didn't take
5 any written instructions at that time. Indeed, I
6 indicated to him that at this stage he was free to
7 talk to his parents about it and to think about it
8 and that I think it was the following day that he
9 indicated to me, and I think maybe his parents
10 were even there at one phase, that they thought he
11 should take the advice that I gave him and
12 indicated that he had decided not to testify.

13 If he had decided to testify, I
14 would not have viewed that as any lack of
15 confidence in me, I understood that to be his
16 right to do so, but of course, as I've said, I
17 thought he was entitled to the benefit of my
18 assessment and advice, and with that, and here I'm
19 summarizing, he did give me written instructions
20 to the effect that I have just outlined.

21 One of the things I would like
22 to just add is that at no time did I tell him that
23 he had to take my advice. I know there were
24 suggestions at least in some of the writings at
25 that time that counsel might view a decision not



1 to take the advice as being a loss of confidence
2 and the question then would be how would counsel
3 handle it. I believe that it was before that time
4 there was a situation where counsel called an
5 accused in an open court in front of the jury and
6 said that against my advice I call the accused,
7 and that I think was held to be quite improper,
8 and I think the Supreme Court of Canada commented
9 on that, so nothing like that would ever happen as
10 far as I was concerned, and I would proceed to
11 then examine him in chief because in this case
12 there were no ethical constraints about doing
13 that.

14 Q And what do you mean by that?

15 A Well, if he had told me that he had done this,
16 then that would alter the situation; in other
17 words, I would not be able to lead evidence from
18 him that he did not, and there was no suggestion
19 to me that he would do anything but respond to the
20 questions that I was going to put, but of course,
21 as I've already indicated to you, there were some
22 areas, let's take, for example, the compact
23 field -- the compact figured, you know, as one of
24 the items in my consideration and questions like,
25 "Well, where did it come from? I don't know.



1 Well, why did you do it?" That is, why did you
2 throw it out. "I don't know." And these we had
3 gone over, and I knew that the prosecution would
4 really pursue this vigorously. And the same with
5 the looking over of the older lady with a view to
6 maybe robbing or snatching her purse and I knew
7 that would invite not only a robust
8 cross-examination, but a discussion of motive and
9 the need for money and so on, so these are things
10 that I had reviewed with him on more than one
11 occasion, and so that essentially is it. I know
12 that I've distilled it down, but I think that that
13 fairly summarizes the situation.

14 Now, I can also say this, I
15 always found that to be a very difficult area in
16 which to give advice, but I didn't think that as a
17 counsel one should shirk away from it, and
18 secondly, I always appreciated that it was a
19 difficult decision for an accused person, whether
20 a young person or an adult, and that is why I
21 would certainly have respected his decision if it
22 had gone the other way and I would have done
23 nothing by way of preamble or otherwise to
24 undermine him in the eyes of the Court and jury.

25 Q Do you recall whether or not, and again, what Mr.



1 Milgaard's view was, he ended up, I think you are
2 telling us, accepting your advice and instructing
3 you that he did not wish to testify, but did he
4 express a desire to do so?

5 A No. Of course if he had wanted to testify, I was
6 quite prepared to call him, but in light of my
7 advice, he made the decision not to testify.

8 Q Did you get any sense from him, though, in the
9 course of your discussions in explaining this to
10 him, that he wanted to get up there and tell his
11 side of the story?

12 A Well, I'm sure that he weighed and considered it
13 in the light of the discussion I had with him, but
14 at the end of the day I think he decided and
15 indicated to me that he decided he was going to
16 take my advice.

17 Q Did he at any time -- let's talk prior to this
18 discussion at the end when you are giving him the
19 advice. Prior to that did he indicate to you that
20 he wished to testify?

21 A Well, this had been a discussion that had taken
22 place more than once and we never really got to a
23 situation where he had to make a decision until
24 the appropriate time, so that I'm sure that we
25 weighed the -- well, I know that we discussed the



1 pros and cons of him testifying and that's really
2 the best I can do for you without my interview
3 notes of the various chats that we had had before
4 the final sessions.

5 MR. HODSON: This is probably a good spot
6 to break for the day, Mr. Commissioner.

7 COMMISSIONER MacCALLUM: Thank you.

8 *(Adjourned at 4:27 p.m.)*
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OFFICIAL QUEEN'S BENCH COURT REPORTER'S CERTIFICATE:

I, Karen Hinz, CSR, Official Queen's Bench Court Reporter
for the Province of Saskatchewan, hereby certify that the
foregoing pages contain a true and correct transcription
of my shorthand notes taken herein to the best of my
knowledge, skill, and ability.

_____, CSR

Karen Hinz, CSR

Official Queen's Bench Court Reporter



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