

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

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Volume 116

Inquiry Proceedings



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1 Transcript of Proceedings

2 (Reconvened at 9:00 a.m.)

3 COMMISSIONER MacCALLUM:

4 JAMES ALEXANDER JOHNSTON FERRIS, continued:

5 BY MR. HODSON:

6 Q I'll ask Dr. Ferris to return to the stand. Good
7 morning, Dr. Ferris.

8 Yesterday when we adjourned we
9 were just talking about the work that you were
10 doing in 1997 relating to the DNA and I think you
11 told us a bit of the history of your lab, you
12 described it as a research lab rather than a
13 forensic lab; is that correct?

14 A That's correct.

15 Q And I just want to go through that a bit further.
16 What would be -- a forensic lab, the purpose of
17 that would be to do work with the purpose of
18 presenting your results in court; is that correct?

19 A That's correct. All of the forensic science
20 laboratories that I'm aware of in Canada are
21 responsible for the collection and analysis of
22 samples submitted to them, the purpose of which is
23 ultimately the presentation of evidence in court.

24 Q And would there be, for a forensic laboratory, a
25 protocol or a set of rules about the handling of



1 exhibits, the transferring of exhibits and the
2 dealing with exhibits?

3 A Yes, there is, there are extremely strict
4 protocols, even to the extent of maintaining lab
5 books and records with regard to everything that
6 has been done. In particular, in forensic
7 laboratories careful documentation is made of all
8 of the individuals who handle and test samples.

9 Q For example, the issue of continuity with an
10 exhibit would be important for a forensic lab to
11 ensure that the -- who had the exhibit at all
12 times; is that right?

13 A That's correct.

14 Q And would there be also a concern about
15 contamination so that steps would be taken to
16 ensure that there's not cross-contamination or
17 contamination of an exhibit?

18 A Yes. Even in the early days that would have been
19 standard to most of the protocols.

20 Q And am I correct that one of the purposes of that
21 is so that if your forensic work resulted in
22 evidence that would have to be put forward in any
23 type of legal proceeding, that you as a forensic
24 pathologist or as a scientist could come forward
25 and say from the moment I received this exhibit I



1 can tell you exactly what happened to it, where it
2 was, what was done with it and I now have it?

3 A Yeah.

4 Q And here's all the notes to cover everything that
5 was done?

6 A That's correct.

7 Q Now let's talk about a research lab. Would the
8 same, would the research lab have the same
9 concerns or reasons as a forensic lab about
10 continuity, avoidance of contamination, etcetera?

11 A Well -- excuse me. Not all laboratories, not all
12 research laboratories would have those concerns,
13 but I was a trained forensic pathologist. We were
14 engaged in what we thought of as forensic research
15 and because there were so few people involved in
16 the laboratory work on a day-to-day basis, it was
17 a total of four people, we did in fact keep
18 records that would have been similar to the
19 records kept by a forensic science laboratory, but
20 would not have been necessarily within their
21 standard format, but we knew that any results that
22 we had obtained in our research project would be
23 subject to quite intense peer review. We were
24 hoping that if we did produce publishable results
25 on DNA degradation, that in fact it could then



1 become part of forensic laboratory protocols, so
2 that although we were not actually a forensic
3 laboratory, I think we would, we were doing things
4 that would have met the standards that would be
5 normally expected of a forensic science
6 laboratory.

7 Q And do I take it from that that your objective
8 when you undertook the work with respect to the
9 Gail Miller exhibits, that your objective, if
10 things went well, was to publish a paper or some
11 type of document on the issue of DNA degradation?

12 A No, I don't think that particular case would
13 necessarily have become part of our research
14 publications. We may, with appropriate consent,
15 probably from Mrs. Milgaard and from David, we
16 might have been able to use that case as a case
17 example to justify the work that we were doing or
18 to give an example of the type of degradation that
19 we were recognizing in our research, but we
20 weren't -- we really hadn't considered that. We
21 were doing this case simply because of our own
22 interest in degradation and we were interested to
23 see whether, in a sample that was an historic
24 sample, that we had some idea of how the sample
25 had been obtained in the court registry in



1 Saskatoon, that it was interesting for us to see
2 what sort of degradation was occurring.

3 Q And so from your lab's perspective, to take an
4 exhibit that was 20 years old, look at it and look
5 at the degradation issue, that was your focus and
6 interest as a researcher; is that correct?

7 A That's correct, although clearly we were doing the
8 actual examination at the request of Mrs. Milgaard
9 to see whether or not we could obtain any results
10 that might assist her.

11 Q And a result that might assist her would be, for
12 example, if you could get DNA, enough DNA from the
13 clothing, compare it to David Milgaard's DNA and
14 if it did not match, then that would be something
15 that might be of assistance to her?

16 A That's correct.

17 Q And if that had happened, based upon the work that
18 your research lab had done, would that have been a
19 result that would be the equivalent of what a
20 forensic scientist would do and would present in
21 court or would further, would further steps need
22 to be taken?

23 A I think -- obviously we never got that far, but
24 certainly at that time it was in my mind that if
25 we got an interpretable negative result, which was



1 what we were effectively looking for, a sample
2 that did not match, I would have reported back to
3 Mrs. Milgaard and Mr. Wolch and would have said
4 look, these results indicate that this is not
5 David's sample and that I think you need now to
6 get it properly tested in a reputable DNA
7 laboratory, some of which were available, and
8 probably in those days the only place to go would
9 have either been the home office in Britain or the
10 FBI.

11 Q So do I take it from that, and I mean no
12 disrespect, but you said you would then have it
13 tested in a reputable DNA lab. Was your research
14 lab a reputable -- let me take out the word
15 reputable. Was it a DNA lab?

16 A Well, we were a DNA research lab. I think --
17 remember, for expert testimony to be given in
18 court, particularly in North America, the
19 technology has to be proven, it has to be
20 established and it has to be given by trained
21 people who have experience of giving this evidence
22 in court. I mean, for the first five years of the
23 presentation of DNA evidence almost every single
24 case was challenged on the issue of credibility,
25 reproducibility, even the statistics were



1 challenged, and we simply would not have been up
2 to that, that was not our area of interest, and I
3 think we would have been misleading people if we
4 claimed that we could do that.

5 Q So if you would have had a result that you could
6 match and it excluded Mr. Milgaard, am I correct
7 that what you are saying is that you, Dr. Ferris,
8 would not have come forward and said here's my
9 opinion, this DNA does not match, I exclude David
10 Milgaard as a suspect, things of that nature?

11 A Well, if I had said that, it would have been
12 simply as a preliminary study. I would probably
13 have said this sample does not appear to match and
14 this sample is inconsistent with David within the
15 criteria of our laboratory.

16 Q So -- and I think you said earlier, you talked
17 about a preliminary test, so is your work simply
18 an initial screening then to see if the DNA lab,
19 another DNA lab could do further work, is that
20 what you are telling us?

21 A Yes, but the problem is of course we never got
22 that far. I'm sure Mrs. Milgaard was hoping that
23 we could come out with a black and white answer
24 and if we had got a black and white answer, it's
25 hard to say exactly what would have happened, but



1 I know from my own forensic experience in those
2 days that I would have wanted someone else to, at
3 the very least, back up our results and probably
4 take them over.

5 Q You told us that at that time, you said the
6 reputable DNA labs would be the home office in
7 Britain and the FBI lab. Can you tell us if you
8 have any knowledge, what would they have done or
9 be doing at that time that you weren't doing in
10 your lab, like, what would the difference be?

11 A The biggest difference would be the number of
12 cases that they were dealing with which gave their
13 cases -- they had case experience, they were
14 dealing with multiple cases. They were also
15 developing the technology, remember there was
16 different technology being used on both sides of
17 the Atlantic, but they were working towards the
18 same end, and within their own laboratories they
19 were reproducing good enough results to be, by
20 that stage, beginning to be tested in court.

21 Q And if we could just go back to some of the
22 ancillary work then that would be part of -- let's
23 talk about the forensic work of testing Gail
24 Miller's clothing, I think you talked about
25 extracting, or attempting to extract DNA. What



1 about tests to determine the identity of the
2 substance, to determine whether it's semen, things
3 of that nature, what other lab tests would need to
4 be done as part of a forensic review of Gail
5 Miller's clothing to see whether or not, (a), you
6 could extract DNA, and (b), whether you could
7 match it with David Milgaard's DNA?

8 A Well, if a forensic scientist approached that
9 sample and I, you know, to some extent I can't
10 speak for forensic scientists working in a
11 laboratory, but their protocol would have been
12 first of all to establish that the stain that they
13 were looking at was probably semen and they would
14 have done screening tests for that, they would
15 have done ultraviolet florescence which gives an
16 indication of a seminal stain, they would probably
17 have looked for sperm heads or sperm tails --

18 COMMISSIONER MacCALLUM: I'm sorry, you
19 were blocked out, I'm sorry, sir. Just repeat
20 that again?

21 A I'm sorry. They would have done screening tests,
22 they would probably have done ultraviolet
23 florescence which will help identify a possibility
24 of semen, they will have looked for the presence
25 of sperm heads and tails and then they will have



1 gone with the extraction process.

2 BY MR. HODSON:

3 Q Okay. Now what did your labs -- so let me just
4 back up so that I understand this. The process
5 would be, I think you've identified three methods
6 to try and identify substance?

7 A Yes.

8 Q Umm --

9 A There are other chemical tests that could be used
10 such as acid phosphatase.

11 Q And what did your lab do, then, in 1987-1988?

12 A Well we were not set up to do any of those
13 screening tests, and since we were only concerned
14 with the identification of DNA, --

15 Q Yes?

16 A -- we fluoresced the sample, we selected an area
17 that appeared to show fluorescence and therefore
18 could have been semen, and we took that sample and
19 extracted it. But we did not try to prove, before
20 we extracted DNA, that that was semen.

21 Q And do I understand, from that, that if a forensic
22 lab had been doing the work they would have
23 started with that, to try and identify the
24 substance, and would have done the -- the acid
25 phosphatase -- I'm not going to pronounce it



1 right -- the acid P test? What -- explain what
2 that is?

3 A This is a method of detecting an enzyme which is
4 present in large amounts in semen, and although
5 it's present in some other tissues it's got high
6 concentrations in semen and is relatively easy to
7 detect, and it's a very good screening test for
8 semen.

9 Q And does it in any way damage the garment if you
10 do this acid phosphatase -- what is it --
11 phosphatase?

12 A Phosphatase.

13 Q Phosphatase. If you did an acid phosphatase test
14 on the panties would that, in any way, harm the
15 garment for future testing?

16 A Almost certainly not.

17 Q Okay. So let's just go back to the work that your
18 lab did. Am I to understand, then, that you took
19 the panties, and that it would be visually using
20 the -- you talked fluoresce, that's --

21 A That's correct.

22 Q I take it that's an ultraviolet light?

23 A It's a ultraviolet lamp which fluoresces
24 particular types of protein.

25 Q And so, based on that, the -- you believed, then,



1 that there was semen, or what appeared to be
2 semen, on the panties; is that right?

3 A Yes.

4 Q And that's where you focused your attention, and I
5 think the reports indicate you cut out one or two
6 pieces of cloth, is that right?

7 A Correct.

8 Q And did you do the acid phosphatase test on the
9 panties?

10 A No, we did not.

11 Q And why; would there be a reason you didn't do
12 that?

13 A We simply were not set up to do that. We could
14 have done it, but again, it was -- as I said at
15 the beginning, we were not doing this as a primary
16 forensic investigation, we were doing this simply
17 to see if we could link DNA from David Milgaard
18 with stains on the clothing retrieved from Gail
19 Miller.

20 Q Okay. Now let's just turn our attention to the --
21 or let me just pause on the panties. It's my
22 understanding then that based on the work that you
23 did and what you extracted, that there was not
24 enough nuclei or material in what you extracted
25 from the panties to allow you to get a reliable



1 DNA graph, is that the right word, or plate?

2 A DNA plate. The normal, identifiable pattern of
3 DNA that you see on an x-ray plate when you have
4 separated the DNA fragments is quite
5 characteristic and allows you to match and compare
6 one sample with another. It's a sort of, it's
7 almost like a simplified bar code -- this was the
8 method we were using -- and you can compare the
9 lines, where they are, across the bar code system.

10 What was happening with us was
11 that instead of getting nice, identifiable, clean
12 lines in the bar code we were getting smears, and
13 the smears represented degradation of DNA. There
14 was a possibility that the beginning of the smear
15 might have represented something of significance,
16 because we were seeing that in comparable research
17 samples, but we couldn't be sure, and as we went
18 through the tests we came the conclusion that we
19 were not getting an interpretable result. It
20 appeared to be DNA but we couldn't interpret it.

21 Q And so did you then stop the work on the DNA?

22 A Yes, we did.

23 Q And so was it a question of -- let me just back up
24 then. In simple terms, if you would have had more
25 substance to work with, would that have assisted



1 you in getting something that you could use to
2 match?

3 A I doubt it. We might have been. Remember, we had
4 very limited experience of looking at this type of
5 sample, and I think once we identified the
6 problems that were, we thought, beyond us, we
7 decided it was best to leave it.

8 Q What do you mean by "beyond us"?

9 A That we simply didn't have the techniques yet
10 developed which would allow us to get rid of the
11 breakdown products and the, what might possibly
12 have simply been contamination.

13 Q All right.

14 A Because we couldn't even say whether the smearing
15 was due to the breakdown of the DNA or the
16 smearing was due to contamination and breakdown of
17 other products such as bacteria. I mean we were
18 -- this was what our research was about, was to
19 try and see if we could sort this out.

20 Q When you say "it was beyond us", did others in the
21 field with perhaps different focuses or different
22 specialties have greater abilities to try and
23 unsmear the smear, if I can put it that way?

24 A They might have. I don't know. Because certainly
25 the FBI were doing research in conjunction with



1 some of their routine work, because they were
2 actually testing different methods of doing DNA,
3 and some of them were giving better results than
4 others, and I don't know whether another lab might
5 have been able to do it.

6 Remember, the technology was
7 advancing extremely fast. These samples were
8 looked by us, looked at by us, I believe, at the
9 beginning of 1988.

10 Q Yes.

11 A I suspect that even within another 12 months, if
12 we had had an opportunity to re-examine them, we
13 might have got better results. But, by that time,
14 we were no longer really in a position to do
15 samples, and it was much better that the samples
16 would then be tested by laboratories that were
17 advancing the science specifically for the
18 purposes of forensic examinations.

19 Q Right. Now let's just talk about Gail Miller's
20 dress, that was one of the exhibits that was sent
21 to you by the Court; is that correct?

22 A That's correct.

23 Q What, if anything, did you and your lab do to
24 examine the dress?

25 A We looked at the dress and we simply decided that



1 it was too big a garment for us to attempt to
2 identify potential stains.

3 Q Did you do a fluorescent test of the dress to see
4 if there was any semen or substance on the dress?

5 A I can't recall. I know we looked at the dress but
6 I can't recall whether we fluoescd it.

7 Q And did you do an acid phosphatase test?

8 A No.

9 Q Now we know from reports, and we'll hear
10 subsequent evidence, that in 1997, when the DNA
11 testing was done again, that semen and sperm were
12 found on the dress. And I'm wondering if that --
13 are you able to tell us, Dr. Ferris, whether the
14 techniques you had at the time, in 1988; would you
15 have been able to detect semen on the dress?

16 A Umm, we might have been able to. I suspect that
17 probably a forensic science laboratory that is
18 accustomed to doing this type of clothing
19 examination would have been able to do that but,
20 you know, in retrospect I'm very glad we didn't
21 extract or cut pieces out of that dress because we
22 -- you know, it was bad enough us removing some
23 potentially significant samples way back in 1988
24 and, fortunately, leaving enough materials to be
25 further identified.



1 Q What do you say "it was bad enough"; what do you
2 mean by that?

3 A Well I mean this is in hindsight, I mean we were
4 doing our best at the time, but clearly we -- I
5 think nobody anticipated how advanced and how
6 sensitive DNA technology would become, and I think
7 if we had known that we wouldn't -- we would have
8 simply left it for another few years.

9 Q I see. When did your lab, I think you told us
10 yesterday that your lab, your research lab shut
11 down?

12 A Yes, we began closing the lab in 1989.

13 Q And why was that?

14 A Well, first of all the research funding, we had a
15 grant for two years from the Law Society of
16 British Columbia and from the provincial
17 government. We then decided that we would try and
18 fund the lab by doing paternity testing, and we
19 were certainly capable of doing that and that
20 would allow us to continue with our research, but
21 there was a company in British Columbia that had
22 obtained the patent for this type of testing and
23 was already set up as a paternity testing
24 laboratory and was offering a commercial service
25 for this, and after some somewhat difficult



1 meetings between the company executives and the
2 university and myself it was decided that we would
3 stop doing the paternity testing, which meant
4 effectively that we had no funding to continue our
5 research, and my DNA research in fact stopped
6 completely until the mid-'90s when I got
7 additional funding from a private company to carry
8 on in a different area, once again looking at DNA
9 degradation, but this time in terms of using DNA
10 degradation to identify time since death.

11 Q And so the work that you did on Gail Miller's
12 clothing, the analysis that you did, was that of
13 assistance in your research in looking at the
14 issue of degradation?

15 A No, except it was simply a case example that, if
16 you like, we could use to justify the research.

17 Q If we could go to 182095, please. And this is a
18 memorandum, I think from David Asper, that just
19 puts a date on things, February 26th, 1987. And
20 it's referring to a telephone call he had with
21 Joyce Milgaard about -- and I think she became
22 aware of this genetic fingerprinting, and I think
23 you told us yesterday that your research work or
24 what you were doing had been in the news or had
25 been in the media, is that right, around this



1 time?

2 A Yes, they -- the publicity related in part to the
3 research funding that had been given by the
4 British Columbia Law Society.

5 Q If we can then go to 155420. And this is a letter
6 from Mr. Wolch to you that I think is your
7 original set of instructions, and it references
8 discussions first with Joyce Milgaard and David
9 Asper; do you have a recollection of what, what
10 would have been the nature of those initial
11 discussions?

12 A Umm, I don't remember very much other than
13 Mrs. Milgaard phoning me and giving me a very
14 brief outline of the case and telling me that
15 David was prepared to submit blood samples for
16 comparison purposes, and I was impressed by that
17 offer, and it seemed to me that it gave some
18 credibility to her claims and it certainly
19 justified my efforts in trying to take on the
20 case.

21 Q Okay. And what did you tell her you could do?

22 A I can't remember. I hope I did not promise too
23 much, but I certainly told her that we would try,
24 but I can't remember exactly what we said.

25 Q And "try"; and is it correct to say that you would



1 try to do a comparison to either exclude Mr.
2 Milgaard, or I suppose the other option is it
3 could be a match?

4 A That's correct.

5 Q And I think Mrs. Milgaard was asking you to do
6 that, that was the objective, to do the matching,
7 to do --

8 A That's right. And she certainly placed no
9 conditions on our testing, which I know that I
10 made it aware to her that I could not guarantee
11 that there would be a result that would
12 necessarily please her.

13 Q And what about; did you make any comments or what
14 did you tell her about your confidence or optimism
15 in being able to get DNA material from a
16 20-year-old exhibit or an 18-year-old exhibit?

17 A I can't remember what I said, I hope I was not too
18 optimistic, but I may well have told her that we
19 would do our best.

20 Q And so again, if we can just scroll down just to
21 the bottom of this paragraph, up to the first
22 paragraph. Mr. Wolch, it appears he has already
23 talked to the Crown office about getting:

24 "... the panties of the victim which
25 contained traces of semen plus viles of



1 frozen substance which we are advised
2 are semen and were found at the scene of
3 the body."

4 Let me pause there. We have heard a fair bit of
5 evidence that there were two frozen lumps of
6 semen found at the scene of the crime and were
7 analysed by the RCMP at the time. It's my
8 understanding that those vials were sent to you
9 in 1988, from the Court exhibits, and were found
10 by you to be dried up; is that correct?

11 A Umm, they were, as far as we were concerned, empty
12 and appeared to be clean.

13 Q I see. So no residue at all?

14 A Not that I recall. We did nothing with those
15 tubes other than just visually examine them.

16 Q I see.

17 A And, remember, in those days you had to have a
18 visually-identifiable sample in order to test it.

19 Q Okay. And then just scroll down. Mr. Wolch says:

20 "In other words, I am seeking from you
21 at this point your assistance as to what
22 steps we should take in this rather new,
23 to the writer at least, area."

24 And is that fair that Mr. Wolch was asking you
25 "what do you need us to do for you to do your



1 work"?

2 A Yes.

3 Q And if we can go to 267809, and this is your
4 letter of August 24, 1987 back to Mr. Wolch, and I
5 just want to go through parts of this. The second
6 paragraph you say:

7 "You have asked me whether or not it
8 might be possible to apply the new
9 techniques of DNA genetic typing to your
10 case to see whether or not it would be
11 possible to associate or exclude the
12 stains on the panties of the victim with
13 other samples obtained at the scene."

14 And I'm wondering, at this point, the "other
15 samples obtained at the scene" might have been
16 the vials of frozen semen; would it not also
17 relate to David Milgaard's sample?

18 A Umm, the sample that I was receiving, or going to
19 receive from David, was a sample that was going to
20 be taken from him in prison.

21 Q Yeah. I'm sorry, let me rephrase that. When I
22 looked at that I thought what you had told us was
23 that you were going to look at the stain on the
24 panties of the victim to see if you could
25 associate or exclude that stain with David



1 Milgaard's DNA as opposed to other samples at the
2 scene?

3 A Umm, yes, in fact it was we were going to look at
4 all of the samples and compare them.

5 Q Okay. If we can just scroll down. And I think
6 you talk here about:

7 "DNA genetic typing ... has not ...",
8 reached:

9 "... the point of routine service within
10 the forensic community. Nevertheless,
11 in Vancouver we are actively engaged in
12 a research and development program and
13 hope to be in a position to present
14 evidence in court within twelve months."

15 And was that your plan at the time then?

16 A Yes, it was.

17 Q And so that would be to convert it into a forensic
18 lab?

19 A Yes. It was a question, then we were, we actually
20 were discussing with the RCMP in Vancouver how we
21 might liaison this, with this, and one of the
22 options that we considered, but I don't think the
23 RCMP seriously considered, was that in fact we
24 would provide a DNA lab for the RCMP.

25 Q Okay. So this did not happen I take it?



1 A It did not happen.

2 Q If we can go to the next page, please. And you
3 talk here about:

4 "The handling of the samples and the
5 transportation of the samples would be
6 best done as for any other forensic
7 sample and I believe should be sent to
8 Vancouver by courier in a sealed
9 container.",

10 and then about deep-freezing, etcetera. So would
11 that be the protocol that you would have used for
12 a forensic lab?

13 A That -- those are the protocols that we use for
14 the handling of samples, and I think that's the
15 way samples are handled by -- between the forensic
16 science laboratories, although often they will use
17 couriers that the police have agreements with.

18 Q What we have seen in 1992, when they did some
19 testing, is Sergeant Pearson of the RCMP
20 physically took custody of the exhibits, flew down
21 to North Carolina, I think kept them in his room,
22 took them to the lab, took them back, took them on
23 the airplane with him, and brought them back, and
24 is that -- would that have been different than
25 what your research lab was --



1 A Well clearly, in terms of continuity, it would be
2 preferable. But remember, dealing with us, with a
3 small research lab staffed entirely by a
4 technologist and a research fellow, it would not
5 have been possible for us to have gone to
6 Saskatoon to get the samples and I -- my
7 understanding at the time was that the Court
8 registry were the ones who were going to make the
9 arrangements to have the samples --

10 Q I see.

11 A -- sent.

12 Q And then, if we can just scroll down, it -- you
13 say:

14 "I have spoken to Mrs. Milgaard on a
15 number of occasions by telephone and I
16 have cautioned her about expecting too
17 much from these results. There are many
18 reasons why the tests may not be
19 helpful. While it is possible that we
20 could reasonably exclude David Milgaard,
21 it is also possible that the testing,
22 because of the age of samples and the
23 technical problems associated with the
24 handling of a case so many years after
25 the event, might not allow for the



1 exclusion of David Milgaard."

2 And would that be a fair summary of what you
3 would have talked to Mrs. Milgaard about?

4 A I think so, yes.

5 Q Did you have, going into this -- "experiment" is
6 probably the wrong word -- into this task, did --
7 were you optimistic or doubtful as to whether or
8 not you could get anything from the clothing?

9 A Umm, I think I was hopeful. "Optimistic" is
10 certainly not, is too strong a word, but I was
11 hoping that we might be able to do it.

12 Q And, based on the research that you had done to
13 date on degradation of DNA samples, did you have
14 any views about whether a, I guess, 20-year or
15 probably 18-year-old sample might have degradation
16 problems?

17 A Well we knew there would be degradation problems,
18 but we also knew that drying of DNA is actually
19 one of the means of preserving it, so we simply
20 didn't know how much DNA would be preserved and
21 how much would be degraded.

22 Q Then, if we can go to 001585, this is an
23 affidavit -- if we can go to the next page,
24 please -- it's an affidavit that Mr. Wolch filed
25 on -- or swore November 9th, 1987. This was to



1 get a court order to get the exhibits from the
2 Court. If we can just go to the next page,
3 paragraph 5 and 6, first if we can go to paragraph
4 5:

5 "... I am informed and do verily believe
6 that there is a new system of "DNA
7 genetic typing", the results of which
8 have been entered as evidence in English
9 courts (see Exhibit "A" attached) and
10 which is presently available in the
11 experimental stages in Canada, which
12 will be of assistance in David
13 Milgaard's application for clemency."

14 And if we could go to 001590, this is Exhibit A,
15 and if we could just call this up. This is an
16 article in the *London Times*, *The Sunday Times*,
17 August 2nd, '87, and you told us yesterday about
18 Dr. Alec Jeffries, who I think was the pioneer,
19 is that correct, in using DNA in a court setting?

20 A Yes.

21 Q And so, again, this would be, I think, the first
22 case, I think is that fair to say, the first case
23 where DNA was used -- and I think this was a
24 sexual assault case -- this was to be used in a
25 criminal Court for the first time? Now that may



1 simply refer to Britain but presumably, to your
2 knowledge, would that have been the first time
3 that DNA was used in court anywhere?

4 A Yeah, I'm not -- I'm quickly trying to -- there is
5 a reference to, I'm not sure whether this article
6 refers to two cases. I think the very first case
7 that was published was a refugee application on an
8 issue of paternity.

9 Q Okay.

10 A And the next case was a criminal case involving
11 the sexual assault and murder of two little girls.

12 Q Yeah. There is -- if you look at the, where I've
13 drawn out:

14 "The genetic test was developed by Dr.
15 Alec Jeffries ... already been used in
16 an immigration case ..."

17 A Ah yes. Okay. The -- then this case refers to
18 the murder of two girls. I think the accused was
19 a man called Pitchfork, an unusual name, but it --
20 actually, it's been written up I think by Joseph
21 Wambaugh in a book called *The Blooding*, and it's a
22 very, very famous case because it truly was the
23 first case where mass testing of a male population
24 in one village in England was carried out, and
25 then ultimately that resulted in the



1 identification of the assailant.

2 Q And would that have been in and around 1987 then?

3 A Yes, it was.

4 Q All right. So if we could go back to the
5 affidavit, 001587, just at the bottom it says:

6 "... I am informed and do verily believe
7 that Dr. James Ferris, of Vancouver,
8 B.C. (See Exhibit "B" attached) is an
9 acknowledged expert in DNA genetic
10 typing in Canada, and that Dr. Ferris is
11 prepared to conduct such tests ..."

12 And, again, do you take issue with anything
13 stated in there about your expertise?

14 A Well I think it's flattering. I think this, we
15 were clearly in at the beginning in terms of
16 pioneering the work, but I'm not sure that I would
17 have classified myself as an expert.

18 There were in fact, I would
19 think it would be fair to say there were no real
20 experts, certainly within the forensic context.
21 The RCMP were looking at the methods, they were
22 being very cautious as to what way they would go
23 with regard to developing the techniques, but they
24 were working hard with the FBI and the Home Office
25 in Britain to sort something out. We were



1 liaising in Vancouver with a number of other DNA
2 labs, there was one in Calgary, a private research
3 facility. We hosted a joint meeting with the RCMP
4 and some of these other people interested in
5 Vancouver to try and sort out some of the basic
6 problems but, you know, it became clear to me that
7 the future of the technology was such that it was
8 going to leave us a long way behind.

9 Q If we could then go to page 001604, I think it's
10 still part of the affidavit, just to try and
11 identify for the record what -- this is the
12 listing of exhibits from the original trial. Is
13 this document familiar to you, would you have
14 circled these, or was that -- would someone else
15 have done that?

16 A Umm, I -- I've seen that document before. I know
17 that I saw this document in connection with the
18 *Fisher* case, --

19 Q I see.

20 A -- but I don't know what -- who circled those, it
21 may have been me, but I don't -- doesn't look like
22 my writing.

23 Q And if we can just go to 277663.

24 And this is, Mr. Commissioner,
25 this is just a document that I have pulled that



1 has the index of exhibits, and I just want to go
2 through, if we could call that up.

3 I don't think there's any issue
4 with any of this, but just so that we see, each of
5 the exhibits at trial had a P number, and I'll
6 show you the court order in a moment as to what
7 you, at least what the court order says you
8 received; P.5 is the coat, P.6 is the panties, P.7
9 is the girdle, P.8 is the slip, P.9 is the
10 brassiere, P.10 is the uniform dress, and P.13 is
11 the envelope containing two vials. If we could
12 then go --

13 COMMISSIONER MacCALLUM: These were
14 exhibits in which trial?

15 MR. HODSON: These were the exhibit numbers
16 in the original trial, if you see at the top
17 August 10, 1971, so this is the index.

18 And then, when we look at the
19 court order, if we go to 255115 -- actually, we
20 could put this document on the left-hand side and
21 put 255155 on the right-hand side. Go to the
22 next -- no, I'm sorry, on the right-hand side
23 should be 255115, I think the doc. ID is 114 but
24 go to page 115. So here is the court order of
25 January 12th, 1988 that orders these exhibits



1 entered at the trial:

2 "... be released to the care and custody
3 of Dr. James ... Ferris ...".

4 So if we take a look here -- we can just call
5 that out -- it actually looks as though you did
6 not get the coat, but -- is that right, P.5, do
7 you remember getting a black coat?

8 A I don't remember the coat, and I actually, I know
9 we did get the dress, but I don't have an image of
10 the dress in my mind, but yet all the other doc --
11 all the other garments I can clearly visualize.

12 Q Okay.

13 A And that is -- really confirms in my own mind that
14 we did not do much in the way of an examination of
15 the dress.

16 Q Okay. So P-5, the black coat, is not one of the
17 exhibits that you received. Do you remember, did
18 you ask -- did you ask or indicate what you wanted
19 to receive?

20 A No. I had no idea what exhibits were available.

21 Q Okay. So P-6, P-7, P-8, P-9, P-10 are the ones
22 that I outlined being the panties, the stockings,
23 the slip, the brassier and the dress; correct?

24 A Correct, and it's the white uniform dress that I
25 don't have a visual memory of.



1 Q I think -- did you acknowledge that you received
2 it?

3 A Oh, yes, I'm sure we received it, but, you know, I
4 examined all of the smaller articles very
5 carefully, but for some reason I just don't have
6 in my mind an image of that white uniform dress.

7 Q Okay. Then we go down to P.14 which is the sample
8 of pubic hair from the body of Gail Miller. Do
9 you recall whether anything was done with that?

10 A No. I mean, I would not have examined that.

11 Q Okay. If we can go to the next page of the
12 left-hand document, please, or down to P.24.
13 P.24, P.25, if we can just zoom in there, P.24 is
14 the envelope containing, a further envelope
15 containing two vials and I think those were the
16 two vials, the frozen semen, I think you told us
17 that were empty or appeared to be empty; is that
18 right?

19 A Yes.

20 Q P.25 would have been the head hair from David
21 Milgaard. Would you have done anything with that?

22 A No, we would not have examined that.

23 Q And then if we can scroll down to 35, the toque in
24 a brown envelope, and I think the evidence at the
25 original trial was that that may have had some



1 blood on there. Do you remember doing anything
2 with the toque?

3 A No, I did not examine the toque.

4 Q And down, P.41, the blood sample identified as
5 that of Ronald Dale Wilson, did you do anything
6 with that?

7 A No, we didn't.

8 Q Okay. If we can then just go back, we'll have the
9 court order up, please, on the right-hand side.
10 Sorry, just the court order. If we can go to the
11 next page, and they talk about the exhibits being
12 mailed to you; correct?

13 A Yes.

14 Q And then if we can scroll down to (c), it says:

15 "The exhibits are to be returned in any
16 event within one month by Dr. Ferris by
17 registered mail."

18 And I think we'll see some documents later that
19 it was quite some time later that they went back.
20 Do you recall that?

21 A Yes. I think it was almost a year.

22 Q Yeah. And what -- do you recall how that came
23 about or why they were not returned within 30
24 days?

25 A First of all, it took us almost 30 days to get set



1 up to start the experiments and then they were,
2 after we had finished with them, we locked them
3 back in the filing cabinet and I suspect the
4 reason that they were not sent back was simply my
5 negligence, I did not send them back when I should
6 have, but they remained locked in that cabinet and
7 I think the next request, I received a request, I
8 can't remember whether it was from Mr. Wolch or it
9 was from Saskatoon asking me to return them. They
10 were then returned immediately.

11 Q Yeah, and I'll show you a letter a bit later, I
12 think there was a letter back, and it appears to
13 just have been inadvertence that they were not
14 returned; is that fair?

15 A That's correct, yes.

16 Q And then when you were asked, you returned them?

17 A Correct.

18 Q And where were they kept in your lab then?

19 A They were in a vertical filing cabinet. As you
20 came in through the door we had a series of
21 lockable filing cabinets where we kept the, any
22 dried clothing exhibits and each individual drawer
23 was lockable and these were kept in that locked
24 drawer and the samples themselves were sealed.

25 Q Okay. And then down to paragraph (d), it says:



1 "Dr. Ferris is to retain the exhibits
2 during the period required for
3 scientific testing within his sole
4 possession and is, insofar as is
5 possible to preserve the exhibits in
6 their original state."

7 And I think we have heard that part of your
8 testing was to remove part of the panties to do
9 the test?

10 A Yes.

11 Q And is it fair to say that that was necessary for
12 you to do the work that you had to do?

13 A That's correct.

14 Q Again just for the record, a couple of documents,
15 155463, and this just confirms, January 18th, '88,
16 that the Correctional Services provided you with
17 Mr. Milgaard's blood sample; is that right?

18 A Correct.

19 Q And did you ever do any comparisons then in your
20 lab, did you ever use Mr. Milgaard's blood for any
21 purpose?

22 A Well, we extracted DNA from that and we got a good
23 profile from that, but we obviously weren't able
24 to compare it with anything from the clothing.

25 Q And then if we can go to, just try and keep this



1 in chronological order, I'm going to jump ahead to
2 a letter that contains some notes, 230988, and
3 I'll come back to this letter a bit later, it's
4 April 1, 1992 to Mr. Williams and you enclose
5 laboratory working documents and x-ray
6 radiographs, represent the actual pages from our
7 working laboratory files and are not specifically
8 organized as a Milgaard file and include other
9 cases, so I take it from this, I just want to
10 quickly go through these and see if you can just
11 help us understand what they are. Am I to take it
12 from this that you would have sent a copy of all
13 of your lab files and notes relating to the work
14 you did to Mr. Williams?

15 A That's correct. At that stage the laboratory had
16 closed and we simply had file folders with
17 documents relating to all of the case work that we
18 had done and each case was separately identified
19 by number, but clearly at any particular point in
20 time the research technologist and my graduate
21 student could have been working on other research
22 projects, but we kept a detailed daily record of
23 everything that went on in the laboratory and in
24 order that I didn't miss anything for Mr.
25 Williams, we sent him the entire records.



1 Q Okay. If we can just go to the next page, I don't
2 want to spend a whole lot of time on this, but
3 these would be notes from someone in your lab; is
4 that right?

5 A Yes. I have, I think, probably got copies of the
6 entire document that I sent to Mr. Williams.

7 Q Yeah, and I'll go through these, I've got the
8 document as well, you are certainly welcome to
9 follow the paper or on the screen, but whose notes
10 would these be?

11 A These would have been written either by Kelly
12 McNeill, who was the research technologist, or
13 Lorie Chung who was my Ph.D. student. I can't
14 tell you which, whose the writing is.

15 Q And so again here it looks as though you would
16 have put Exhibit B, letter exhibits to the stuff
17 that you were -- the items that you were testing?

18 A Yes. Remember, they are actually doing the lab
19 work. All that would happen normally in this sort
20 of a case is I would go into the laboratory at
21 some stage during the day and we would go over
22 what they had done and perhaps review the lab book
23 for the previous day's work, so a lot of the
24 writing and notes here don't really mean much to
25 me.



1 Q Okay. Let's go to the next -- I mean, I think
2 what they talk about, it's self-explanatory, about
3 cutting out the spot on the panties, etcetera?

4 A Yes.

5 Q If we can go to the next page. Are you able to
6 tell us what any of this relates to?

7 A This will relate to the actual laboratory methods
8 they are using, the type of chemicals they are
9 using, the time that each individual step is done.
10 For example, you can see the reference there a
11 third of the way down the page to the spinning of
12 the sample and then the ending of a particular
13 step of the analysis, then the amount of different
14 chemical constituents that are used, that's all
15 documented. I'm not actually sure that in a
16 forensic science laboratory they would detail all
17 of these documents because their protocols would
18 have these details, but they will simply follow
19 step 1, step 2 without necessarily giving the
20 detail, but in a research lab where you need to be
21 able to go back and check and see if you've
22 altered your method at all between one day and
23 another, you have to keep a detailed record of
24 every drop that you put in a particular sample so
25 that you can reproduce it.



1 Q So would this relate to the process of extracting
2 substances from the garments and trying to extract
3 the DNA; is that --

4 A That's correct.

5 Q And the next page?

6 A That's a photograph of one of the x-ray profiles.

7 Q Sorry I don't have a better copy. If you can
8 just go -- and so again, this would have been the
9 x-ray plate that would have shown the blurring?

10 A Yeah, that's right, and in fact you can see on the
11 left-hand side of the image a nice clear, distinct
12 band and that would have been our control sample.

13 Q Is that where I've circled it?

14 A Yes, that's correct.

15 Q Go to the next page. I think this is another
16 matter.

17 A This is a different case.

18 Q And keep going, next page, next page, page 994,
19 and again this would be another photograph of the
20 x-ray graph?

21 A That's right, and if you look across the top, in
22 the gelatin plate that you put the samples, and
23 you may have seen on television samples being
24 dropped into little grooves on a gelatin plate,
25 except nowadays they do it with a whole row of



1 pipettes and they press one button and deliver an
2 exact sample. We were individually putting drops
3 into each of these little troughs in the gel and
4 you can see here that after -- this would be
5 after, it looks as if it's about 23 -- 22 hours of
6 electrophoresis, that even after that time there
7 isn't an identifiable separation of the samples.

8 Q And so would this be the correct date then,
9 February 9th, February 10th of 1988 that --

10 A Yes. It looks as if the sample, the
11 electrophoresis started at 12:50 p.m., that would
12 be at lunchtime on February the 9th at the top of
13 the page, and ended at nine a.m. on February the
14 10th.

15 Q Okay.

16 A And then it would be plated out and the x-ray,
17 development of this, that black picture, that
18 would not have been created for probably another
19 two or three days, but it would then have been
20 referred back to that sample and clipped to that
21 page.

22 Q And would this then tell you then two days, three
23 days after February 10th that you could not get a
24 DNA extraction?

25 A That's essentially -- there's nothing there.



1 Q Okay.

2 COMMISSIONER MacCALLUM: Your phrase was no
3 identifiable separation was it?

4 A That's the way I would interpret that image now,
5 but without having the actual plate in front of
6 me, I'm not sure how far I could go, but it
7 clearly, even then, it would not have been
8 interpretable.

9 BY MR. HODSON:

10 Q We can then go to 996, skip ahead two pages, and
11 this is a report March 7th, '88. Can you tell us
12 what this is? It's got at the top Restriction
13 Digest Information.

14 A This is simply an account of the different
15 solutions and the quantities of the buffer and
16 other chemicals that we used in each of the tubes
17 that were then plated out on the erectophoretic
18 plate.

19 Q And then if we can go to the next page, it looks
20 as though March 10th, doing a bit further work on
21 the Milgaard case as it says at the top; is that
22 right?

23 A Yes.

24 Q Are you able to tell us what that was?

25 A The x-rays were not developed very well. I have a



1 feeling this was one of our controls actually with
2 the control person being, I suspect one of our
3 technologists from somewhere in the lab,
4 downstairs, that we would have gone and taken
5 blood from to provide us with controls, probably
6 called Thomas Heidt. If you look at the
7 right-hand image, the one marked March 14th --

8 Q Yes.

9 A -- and if you look at, there's a long vertical
10 streak, and if you look slightly to the left of
11 that, or sorry, to the right of that, you can see
12 actually three faint horizontal bands. I don't
13 know that I can point them out.

14 Q I might find you a better -- if we can call up
15 068982?

16 A Yes, here you can see the type of banding on the
17 left-hand side, these are the bands that you would
18 hope to get, and the big vertical smear, which
19 almost looks like a comet tail, is what we were
20 getting, the best that we were getting from David.

21 Q So the left-hand side would be the control sample?

22 A Yes.

23 Q So that would be likely Mr. Milgaard's profile?

24 A I'm not even sure whether this is his case.

25 Q There's a reference there to the --



1 A Oh, yes, it is. Yes, it is.

2 Q So then on the right-hand side, this would be --

3 A That might well have been a sample from Gail
4 Miller.

5 Q And so that would be typical then of the results
6 you were getting at the time?

7 A That's correct, and as you can see, if you want to
8 compare those horizontal bands, there's nothing to
9 compare them with. Looking at these today in
10 2006, it's almost embarrassing because, you know,
11 I mean, this is, by today's standard, very amateur
12 work.

13 Q If we can go to 164573, it's a letter from Mr.
14 Wolch to Legal Aid, but it talks about:

15 "Preliminary reports by telephone from
16 Dr. Ferris are very favourable."

17 Would you have been reporting on your work then
18 as you go along by phone to either Mr. Wolch or
19 Mrs. Milgaard or Mr. Asper?

20 A I think I was dealing entirely with Mrs. Milgaard
21 on the phone. I don't -- I may have spoken to Mr.
22 Asper on a number of occasions. I think probably
23 what we had said was that we think we found DNA,
24 but that so far we haven't been able to identify
25 it.



1 Q Okay.

2 A And that would be -- I mean, we had not been able
3 to do any more than that. If I communicated more
4 than that, I was wrong, and I hope I didn't.

5 Q And so again, the notes that I went through around
6 this time anyway that the work was there, once you
7 found, I think you said what you think was DNA and
8 the smear, at what point did you make the decision
9 to stop the work on the DNA?

10 A I cannot remember the date, but I know that we
11 tried a number of different methods of cutting the
12 DNA chemically, plating it out using different
13 types of electrophoresis, different types of
14 labelling, but I think that probably we finished
15 after about three months and decided that this
16 really was going nowhere.

17 Q And how -- I'm sorry?

18 A I think actually even after I told Mrs. Milgaard
19 that we had gone as far as we could, I think in
20 fact we tried again as our own methods became a
21 bit more refined, but we still got nothing.

22 Q I see. And did you prepare a written report on
23 the DNA work?

24 A I don't think so, I think I simply phoned and said
25 we really have failed. I may have sent a letter,



1 I don't recall it, but I did not do what I would
2 call a proper forensic report.

3 Q And why not?

4 A Mainly because at that stage my association with
5 the case had moved into another phase.

6 Q And what phase was that?

7 A Well, having failed to obtain any answer from the
8 DNA, I suggested to Mrs. Milgaard, because I
9 wasn't sure that anyone would be able to get a
10 decent DNA result, that maybe the best thing to do
11 would be to go back to the original forensic trial
12 evidence and I would be prepared to review that,
13 and certainly I would have been much more
14 comfortable at that stage doing that because that
15 was the sort of thing I was doing on a day-to-day
16 basis, and I would have said I would be very happy
17 to look at the forensic science evidence and see
18 if by any chance there was anything in that
19 evidence that might offer an opportunity to look
20 again at the case.

21 Q And so would this have been around the time then
22 that you communicated the results on the DNA
23 testing?

24 A Yes.

25 COMMISSIONER MacCALLUM: Can I see the full



1 page there again, please?

2 MR. HODSON: I'm sorry?

3 COMMISSIONER MacCALLUM: Just the full
4 page, that's all. It's March 7, '88.

5 BY MR. HODSON:

6 Q So you then switched gears from DNA to, I think
7 what you said is work that you regularly did; is
8 that right, the forensic pathology?

9 A Well, yes, essentially reviewing evidence and
10 reviewing statements and forensic science reports.

11 Q Were you more comfortable doing that than you were
12 the work on the DNA?

13 A Well, the work on the DNA was research, it was
14 very sophisticated, it was dealing with laboratory
15 methods that I was learning on a day-to-day basis.
16 I mean, I was certainly not familiar with this,
17 this was all new to me. As far as reading
18 forensic science reports, reading transcripts is
19 something I had been doing for pretty well all of
20 my forensic working life.

21 Q And so just on that point, would this be similar
22 to what you might do, for example, if an accused
23 in a criminal case came to you or their counsel
24 came to you and said look at the Crown's evidence,
25 review it and give us an opinion as to what might



1 assist us in the defence of the matter, is that a
2 fair --

3 A Exactly, and, I mean, I still do that, I do that
4 on a regular basis.

5 Q And would that have been your specialty at the
6 time?

7 A Well, I suppose as a practicing forensic
8 pathologist, it is a part of being that.

9 Q And so that's -- was that your suggestion then to
10 Mrs. Milgaard, let me take a look at things and
11 see if I can come up with anything that might
12 help?

13 A Yes.

14 Q Then if we can go to 002486, this is your report
15 of September 13, 1988 to Mr. Wolch, and I believe
16 this is your next written report. I showed you
17 the one letter in 1987, I think this is your next
18 report, and if I could just -- well, maybe go to
19 page 002492 and deal with the DNA first. There's
20 a reference here:

21 "As you know, several months ago we had
22 an opportunity to examine the clothing
23 and to attempt to retrieve DNA from
24 samples of clothing including the
25 panties and panty girdle of the victim.



1 As I communicated with you by telephone,
2 all of these attempts to obtain
3 sufficient DNA to carry out a genetic
4 typing analysis were unsatisfactory. At
5 no time did we obtain sufficient
6 quantities of DNA to allow us to do a
7 detailed typing. The extent of the
8 breakdown of the samples was such that
9 it would be my opinion that the type of
10 DNA synthesis which is becoming
11 available and allows for the artificial
12 manufacture of sufficient quantities of
13 DNA from tiny traces recovered at the
14 scene would probably not be appropriate
15 in this case. Also there is no evidence
16 that the DNA would have remained
17 unaltered during its period of storage
18 following its examination in 1969."

19 And again, would that be -- I believe this is the
20 only written report at the time; is that correct,
21 about the DNA work?

22 A Yes, that's correct, and it just shows how wrong
23 you can be.

24 Q In what respect?

25 A Well, I was saying effectively that I didn't think



1 PCR would help and that was because we believed
2 that the amplification methods that PCR involved
3 would simply, would magnify the degradation
4 process, that in fact all that would happen is
5 that you would end up with very large amounts of
6 degraded DNA which would again not be
7 identifiable, and of course we were completely
8 wrong because the very opposite is the case.

9 Q And you talk here about:

10 "... that the type of DNA synthesis
11 which is becoming available and allows
12 for the artificial manufacture of
13 sufficient quantities of DNA from tiny
14 traces ..."

15 Are you referring there to the PCR?

16 A Yes.

17 Q So at this time, September 13th, 1988, was PCR
18 then at least in existence in the scientific
19 community?

20 A It was in existence in the scientific community,
21 it was present in its early phases, and I don't
22 think it had been adopted in the forensic
23 community, although they, people who were, like
24 the RCMP and the FBI and the home office, were
25 clearly very interested. This was technology



1 which was being advanced by people like Sir Alex
2 Jeffries in Lester.

3 Q And so again at this time it was your view that
4 that technique that was being developed wouldn't
5 work?

6 A Well, that was --

7 Q Sorry, wouldn't be appropriate?

8 A Well, I didn't think it would be appropriate. In
9 fact, the reason I knew about this technique was
10 that I had actually attended a conference with
11 Alex Jeffries in Madras in India and we had a long
12 talk about, you know, where DNA was going, and it
13 didn't take me long to realize that he was moving
14 into an area which was going to be well beyond my
15 abilities to cope with in our small facility in
16 Vancouver.

17 Q Did you have any discussions with anybody, Joyce
18 Milgaard, David Asper, Hersh Wolch, around this
19 time about other resources that might assist on
20 the DNA front, do you recall anything about that?

21 A I don't recall anything about that.

22 Q And your comment here, you say:

23 "Also there is no evidence that the DNA
24 would have remained unaltered during its
25 period of storage following its



1 examination in 1969."

2 What was your concern there, what did you mean by
3 that?

4 A Well, what I was saying is that our research on
5 degradation indicated that in an equivalent period
6 of time samples did degrade and I didn't think
7 that it was likely that there would ever be
8 sufficient identifiable, undegraded DNA that would
9 help solve this case.

10 Q Okay. If we can go back to page 1, it would look
11 like you were sent various information by Mr.
12 Wolch or his office; is that correct, for you to
13 look at?

14 A Yes.

15 Q And then in your opinion you recite, and we won't
16 go through it all, it's self-explanatory, but
17 certainly many of the key lab reports, a list of
18 exhibits -- if we can go to the next page --
19 evidence from the preliminary hearing from many of
20 the RCMP lab technicians, we see Bruce Paynter.
21 Go down to the transcript of the evidence at
22 trial, it looks again to be the evidence of many
23 of the ident officers, you were also given the
24 evidence of some of the police officers who were
25 involved, again Bruce Paynter, Dr. Emson, and it



1 doesn't look like a complete transcript of the
2 evidence, but a significant part of it; is that
3 correct?

4 A Yes. I can't remember what my communications with
5 Mr. Wolch or Mr. Asper were at that stage, but I
6 know that I was really only interested in looking
7 at any evidence that had to do with the recovery
8 of the body, the examination of the body and the
9 retrieval of the samples and the examination of
10 the samples. I was not interested in general
11 witness statements about the circumstances, and in
12 fact I never saw those.

13 Q Now, it's my understanding that you did not get a
14 copy of either Mr. Caldwell's or Mr. Tallis'
15 closing address to the jury; is that correct?

16 A That's correct.

17 Q And so when this opinion was prepared, is it fair
18 to say you didn't know what the Crown and defence
19 counsel said to the jury in their closing
20 addresses?

21 A Correct.

22 Q And I provided you with copies of that, or the
23 excerpts of that a couple of weeks ago; is that
24 correct? You've had a chance to look at that?

25 A Yes, I have.



1 COMMISSIONER MacCALLUM: How about the
2 charge of the judge?

3 BY MR. HODSON:

4 Q Yeah, the charge to the jury, was that something
5 you had?

6 A No, I did not. I've seen extracts of that.

7 Q Then if we go, you state here:

8 "However, the above material examined by
9 me relates principally to the forensic
10 evidence and I think it is appropriate
11 that I should confine my comments to
12 that evidence. There are a number of
13 different topics which merit
14 comment ..."

15 Before I go through this, what was your objective
16 when you went through this material, what were
17 you looking for and what were you hoping to
18 achieve?

19 A I think I was approaching it as a potential
20 defence expert. I reviewed all of the evidence to
21 see whether or not there was anything in the
22 evidence that might assist with the defence of
23 David Milgaard as if I had been a potential
24 defence witness at the original trial.

25 Q And at this time you knew that Mr. Milgaard was,



1 (a), claiming his innocence, and (b), had made an
2 application to the Federal Minister of Justice to
3 have his conviction reviewed; were you aware of
4 that at that time?

5 A Yes, I was aware of that, and remember I was also
6 aware that Mrs. Milgaard and presumably David had
7 great faith in this new DNA technology, and
8 probably maybe even exaggerated faith in the DNA
9 technology, and the fact that David was willing to
10 provide a blood sample for comparison purposes was
11 perhaps an incentive for me to go through the
12 material in very great care to see if there was
13 anything I could do to help.

14 Q And so you, then, would be looking for anything
15 that might assist Mr. Milgaard in his case,
16 seeking to have his conviction set aside, is that
17 correct?

18 A Yes.

19 Q And I think you said your approach would have been
20 similar or the same as if you had been retained,
21 back at the time of trial, to look at the case
22 against him; is that fair?

23 A Yes.

24 Q And I suppose the one difference might be that in
25 1988 you are looking at all the evidence that went



1 in, whereas if you had been retained at the time
2 of trial would it be fair to say that you would
3 not have the benefit of the same material, maybe
4 similar but not the same material?

5 A Well, I might even have been available even to sit
6 in and listen to some of that evidence. But yes,
7 I mean, usually during the process of trial, as an
8 expert for one side or the other, you don't hear
9 all of the evidence.

10 Q Now, prior to preparing this opinion, did you
11 speak to any of the witnesses directly?

12 A No. That's, well, that's not quite correct.

13 I came to Canada in 1975 from
14 Britain, and I think it was in 19 -- it was either
15 the end of 1975 or early in 1976 I attended a
16 Canadian Society of Forensic Sciences conference
17 in Toronto, at which time I met Dr. Emson, and he
18 presented this case at that meeting. Now I don't
19 recall what he said about the case, actually, I
20 just remember his -- him discussing the case. And
21 I met him at that time, and in fact I had
22 communicated with him as another forensic
23 pathologist in Canada on several occasions, but to
24 the best of my knowledge we never actually
25 discussed this case.



1 Q So in preparing this opinion, then, is it your
2 evidence, sir, that you would not have discussed
3 matters with Dr. Emson?

4 A Correct.

5 Q And what about, for example, Bruce Paynter or any
6 of the other lab people; did you talk to any of
7 them?

8 A No. I don't know Mr. Paynter and I have still not
9 met him.

10 Q If we can go to the next page, I just want you to
11 comment on a couple areas where I think you took
12 issue with what some of the witnesses of the day
13 had said, you say here:

14 "It would be my opinion that the stab
15 wounds as described by Dr. Emson were
16 neither immediately fatal nor even
17 immobilizing. In my experience
18 individuals with this type of injury may
19 live for several minutes following the
20 injuries. It is possible that in fact
21 she could have survived for at least 15
22 minutes following the injuries."

23 If I can just pause there, I think Dr. Emson's
24 evidence at the trial, and indeed before this
25 Commission of Inquiry, is that the fatal wound



1 was a stab to the lung, and that caused bleeding
2 into the lung, and that the death would have
3 happened, and I can't recall whether he said how
4 many minutes, but I think the essence was that it
5 would be fairly quickly; and do you take issue
6 with that then?

7 A It depends, really, on -- I mean I'm not going to
8 argue with him over a matter of minutes, but this
9 is not a death that would be as quick as perhaps a
10 stab wound to the heart or a stab wound to one of
11 the great vessels, and in essence I think the
12 significance of this is that where her body was
13 found is not necessarily where the stabbing took
14 place. She could have been capable of movement
15 following this stab wound and I don't know, even
16 to this day, whether that was factored into the
17 examination of the scene.

18 Q Okay. So your view -- and that would be based on
19 what, the autopsy report?

20 A Based on the autopsy report, plus my own
21 experience of hundreds of cases of stab wounds to
22 the chest.

23 Q And so your evidence is that she could have been
24 stabbed elsewhere and either on her own, certainly
25 on her own, walked to where her body was



1 ultimately found?

2 A Or staggered a few yards. All I can say is that
3 where she ultimately, where her body was
4 ultimately found is not necessarily exactly where
5 she received her fatal stab wounds, it may be, but
6 it is possible that she could have moved some
7 yards, it's possible that in fact the stabbing
8 could have taken place somewhere else and she got
9 there for other reasons, I don't know. But I
10 don't know whether this timing, that clearly the
11 assault and her death represent two separate
12 times, separated perhaps by minutes, and I don't
13 know whether that has been factored into this
14 reconstruction of the case.

15 Q And so here you say for at least 15 minutes
16 following the injury she could have survived?

17 A Yes.

18 Q And that is your opinion today, still?

19 A Yes. Although, again, it's the sort of opinion
20 that I would like to be able to discuss with Dr.
21 Emson, because he saw the body, he saw the nature
22 of the injuries, and he, you know, his opinion
23 actually may therefore be more valid than mine.

24 Q And I think -- and, again, I won't do justice to
25 try to repeat his evidence -- but I think he, what



1 he said at the time and what he told us was that
2 the bleeding would have been into the lung, and
3 fairly rapid, and I think that formed his opinion
4 that it would be fairly quickly; do you have any
5 comment on that?

6 A Well, even if it would take -- even if she died
7 within two or three minutes, since she does not
8 have any injury to her brain and her loss of
9 consciousness will be as a result of blood loss,
10 she clearly is going to be cognitive and capable
11 of movement for -- even within Dr. Emson's short
12 time of, I don't know, perhaps two or three
13 minutes she is still capable of moving.

14 Q And so you are saying it could have been 15
15 minutes?

16 A Yes. And that's based on my observations. But,
17 again, the best evidence for this type of
18 interpretation needs to come from the pathologist
19 who performed the autopsy, but he needs to be
20 specifically questioned about this, you know, he
21 needs to be asked, you know, "what is the longest
22 period of time she might have survived", and I
23 don't know the answer to that, and I have not
24 heard Dr. Emson's answer to that.

25 Q Okay. If we could just go down to the next



1 paragraph, you say:

2 "If this is the case ...",
3 and I take it you are referring to being alive
4 for at least 15 minutes after?

5 A Yes.

6 Q "... and if as we know from the
7 examination of the clothing she was
8 wearing her coat at the time that the
9 injuries were inflicted, then it is
10 highly likely that she was alive at the
11 time of the apparent rape."

12 And can you just explain how you arrive at that
13 conclusion?

14 A Well in order to, I suppose, be subject to any
15 form of violent rape the clothing has to be at
16 least partially removed.

17 Q Yes.

18 A And yet my interpretation of the evidence that I
19 read was that her clothing, although a bit
20 confused in its distribution on her body, it
21 didn't look as if her panties and so on had been
22 removed from her body, or at least they were
23 present on her body.

24 Q Right. I think the evidence is that the panties
25 were around her ankles, she was wearing her coat,



1 her nurse's uniform was pulled down to her waist,
2 and her arm was out of the arm holes of the dress
3 but not the coat.

4 If we can just carry on, you
5 say:

6 "This would tend to indicate that her
7 inner clothing had been removed before
8 the injuries were inflicted."

9 And I take it that would be based on the fact
10 that the -- well, you say here:

11 "While this would explain the apparent
12 absence of knife wounds to the nurse's
13 dress, it also suggests that the
14 circumstances of the rape/murder were
15 complex, probably prolonged, and in my
16 opinion, incapable of having occurred
17 within the time frame suggested by the
18 evidence at the trial."

19 Can you tell us what you meant by and how you
20 arrived at the conclusion it was probably
21 prolonged and how it would have been incapable of
22 having occurred within the time frame suggested
23 by the evidence at trial?

24 A Well we have evidence of, if you like, partial
25 disrobing and perhaps re-organization of clothing,



1 we have evidence of multiple stab wounds, and we
2 have evidence of sexual assault, we have evidence
3 that she didn't die immediately, albeit maybe a
4 few minutes, and I don't remember exactly what the
5 time frame was but I believe it was about 15 or 20
6 minutes, it was --

7 Q I think I can try and tell you what evidence we've
8 heard. I think the judge's charge to the jury
9 suggested 6:45 to 7:10 a.m. as the window, I stand
10 to be corrected on that; I think some of the
11 evidence -- I think the evidence, in fairness,
12 varied a bit as to the window of opportunity, but
13 I think the charge to the jury put it in that time
14 frame.

15 A Yes.

16 Q So, again, when you say it was:

17 "... incapable of having occurred within
18 the time frame ...",

19 when you gave this opinion what was on -- what
20 did you think the time frame was?

21 A I -- my recollection was that it was about 15 to
22 20 minutes.

23 Q And, in fairness, I should also tell you that I
24 think the evidence at trial from Ron Wilson as far
25 as how long Mr. Milgaard was away from the



1 vehicle, although that varied a little bit, would
2 be in the range of 15 minutes, perhaps 10 to 15
3 minutes would have been his evidence as to when
4 Mr. Milgaard left and when he came back. So would
5 that have been the time frame, then, you were
6 thinking of when you gave this opinion?

7 A Yes.

8 Q And so it was your opinion that that was not, that
9 based on what you saw with the body and the
10 autopsy report, that the attack would have taken
11 longer than that?

12 A Umm, yes. Although, in looking at this opinion, I
13 wonder if I was expressing my doubt a bit
14 strongly, but I think the reality is that I'm
15 saying that there are issues relating to the
16 timing of this event which need to be looked at.

17 Q Okay. And would you have been aware that that was
18 one of the issues raised at the time of trial,
19 certainly in the examination of some of the
20 witnesses and in closing remarks to the jury?

21 A I don't think I had that evidence.

22 Q If we can then scroll down. Just at the bottom,
23 we have heard some evidence of this, and you say:

24 "Unless there was clear proven evidence
25 of frank blood in the vagina, I would



1 not consider the presence of apparent
2 bloodstain secretions in the vaginal
3 cavity of any significance."

4 And I take it that was your opinion at the time?

5 A Yes.

6 Q Go to the next page. Seminal stains at the scene,
7 you say:

8 "I have real concerns as to the
9 integrity and continuity of the samples
10 of alleged semen that were recovered on
11 February 4th at the scene."

12 And, presumably, this is the frozen semen that
13 was found at the scene and then subsequently
14 analysed; is that what you are referring to?

15 A Correct.

16 Q What concerns did you have about the integrity and
17 continuity?

18 A Well, any sample that is retained from a crime
19 scene has to be specifically related to the crime
20 scene in a number of ways, there has to be some
21 forensic link with the scene, and there must not
22 be the potential for significant contamination or
23 disruption of that sample before it is retrieved
24 and secured.

25 Now my understanding, at the



1 time that I wrote this letter, was that this
2 sample had not been retrieved for at least two
3 days after the body had been found. I saw some
4 photographs of the scene and it clearly showed
5 quite heavy distribution of blood in the snow,
6 much of the scene was heavily tramped, and I
7 believe, at one stage, that efforts were made to
8 melt the snow and look under the snow for
9 potential weapons, and it was only after all of
10 this had been done that the semen sample was
11 identified.

12 Q Was it your opinion at the time, then, that that
13 sample would have no probative value?

14 A Umm, it would be, in my opinion at the time and in
15 my opinion today that it would simply not be
16 acceptable as a valid, uncontaminated sample.

17 Q And would it be fair to say -- or what you are
18 saying is it would not be reliable?

19 A Correct.

20 Q Okay. That's probably an appropriate spot to
21 break.

22 (*Adjourned at 10:29 a.m.*)

23 (*Reconvened at 10:50 a.m.*)

24 BY MR. HODSON:

25 Q We'll go back to page 002489. Okay. And I think,



1 when we left off, you told us that it was your
2 opinion that the samples of semen, the frozen
3 semen or alleged semen at the scene, you said,
4 were of no probative value, and you talked a bit
5 about your observations of I think you told us,
6 one, the fact that it was at least two days later,
7 and I think it actually may have been four, three
8 or four days later; the trampling of -- in the
9 area -- if we can just go down I think you
10 elaborate on that in this letter -- you talk here
11 about reading the statements and of being trampled
12 extensively, movements by the victim, a large
13 number of people attended the scene, it was:

14 "... clear that there was considerable
15 blood and bloodstaining of the snow
16 around ... the body. ... evidence that
17 the snow was shovelled to one side ...",

18 and you say:

19 "In view of the porosity of snow
20 particularly deeply frozen snow, mixing
21 of evidence and soiling with blood from
22 the area around the body would be almost
23 bound to happen. There is also evidence
24 that the area was melted during the
25 searching process ...",



1 and then you say:

2 "In view of the extensive disturbance of
3 the scene and the obvious potential for
4 contamination of the scene, I find it
5 quite remarkable that two small pools of
6 semen were identified four days after
7 the initial examination."

8 And then you say:

9 "On the basis of the forensic testing
10 that was done I have no doubt that semen
11 was recovered as described."

12 And, what, can you tell us what caused you to say
13 that? What --

14 A Well I, simply, I would accept that if the
15 forensic science service in the RCMP say "this is
16 a seminal sample", I would not argue, I mean they
17 are experts in that and it's not for me to contest
18 that sort of evidence.

19 Q And then you say:

20 "I am surprised that with this clear
21 inability to prove either the continuity
22 or integrity of these seminal samples,
23 they were considered admissible
24 evidence."

25 And is this what you told us before the break,



1 then, that your view was that these should not
2 have had any probative value?

3 A Yes. I mean that's, again, that's not a decision
4 for me to make, but it certainly -- I mean this
5 would be in the mind of any forensic scientist or
6 forensic pathologist who is asked to present
7 evidence related to a sample where the integrity
8 of the sample not only can't be proved but, in
9 fact, can be proved to be unreliable.

10 Q And so "unreliable" because, I think as you told
11 us, the three or four days later, the trampling in
12 the area, contamination, things of that nature?

13 A Yes. I mean now, in retrospect, we know that
14 there are opinions that have been expressed that
15 this may have been dog urine, it may have been
16 contaminated with the victim's blood, and there
17 are various other things that might have happened
18 to this sample prior to its analysis.

19 Q So just so we can go back, I think in 1988 you
20 expressed the opinion that it was of no probative
21 value, and would it be fair to say that if I had
22 asked you that question in 1969 or 1970 you would
23 have given me the same answer then?

24 A Yes. I mean, to me, this -- it was a sort of a
25 fundamental that was hammered into me in my



1 training, that issues relating to continuity and
2 integrity of samples, I mean relating even to the
3 human body, is an issue, and everything that you
4 interpret has to be qualified by how reliable is
5 the sample that you are looking at.

6 Q And so just if I can put it this way; from -- it's
7 not a question of science, forensic science being
8 different in 1969 than 1988 or even today, is that
9 correct, that --

10 A Yeah. I mean I really believe that issues
11 relating to the quality of forensic evidence were
12 really well-established as early as the 1940s, and
13 every laboratory was well aware of issues of
14 integrity of sample and continuity of sample, and
15 although our protocols may not have been as strict
16 then as they are today the principles were there.
17 I mean nowadays, because of the sensitivity of
18 some of the testing that is available such as DNA
19 testing, we have to go almost to extremes to
20 preserve the integrity of scenes far further than
21 we would ever have gone 20 years ago.

22 Q But between 1969 and 1988 there was no advances in
23 science or changes in the forensic pathology
24 community relating to the integrity of samples; is
25 that fair?



1 A I think that's correct.

2 Q Yeah.

3 A The observable differences would be that by 1988
4 when we would go to scenes we would be wearing
5 protective clothing, that was probably not done in
6 1969, but that was not done because we didn't
7 realize that we had the potential for
8 contaminating the scene.

9 Q Right.

10 A If we thought in 1969 that, by being there, we
11 would have contaminated the scene we'd have done
12 something about it.

13 Q So then if we can go on to the next page, please,
14 you talk about this issue of blood, serology of
15 seminal stains. And we've heard a fair bit of
16 evidence about this, and I think the evidence at
17 trial was that the hemostix testing of the seminal
18 stain was done by Staff Sergeant Paynter of the
19 RCMP lab, showed evidence of apparent blood. You
20 say:

21 "There is no question that the Hemostix
22 is a reliable hospital test for the
23 presence of blood but it is not positive
24 proof of blood."

25 And then it goes on to say:



1 "However, even assuming that the semen
2 sample was stained with blood, I do not
3 believe that the presence of this blood
4 significantly alters the final
5 conclusion as to the meaning of the
6 serological test carried out on the
7 seminal stains."

8 Can you explain that for us, or just this whole
9 issue of the serology?

10 A First of all, dealing with the hemostix test, it
11 is a presumptive test for blood, and that is all,
12 it is never claimed to be anything else.

13 Q What do you mean by "presumptive", maybe that's --

14 A If it is positive then we can presume that the
15 sample contains blood. For example it's used for
16 testing for the presence of blood in urine in a
17 hospital urine sample. Now there isn't really
18 much opportunity for the urine sample to contain
19 anything else that would be positive or give a
20 false positive other than blood, and that's where
21 it is valuable. You don't write down that "there
22 is blood in the urine" in a hospital, you say "the
23 hemostix test is positive", and you then examine
24 the sample under the microscope to see if you can
25 see blood cells, and you take it further.



1 Q Right.

2 A And the same applies within the forensic science
3 use of this. And this business of the positive
4 hemostix test misleading, giving misleading
5 results, I mean this is not unique to the *Milgaard*
6 case. I gave evidence in the *Chamberlain* case in
7 Australia where exactly the same thing had
8 happened. Hemostix was used to identify stains,
9 and there was a presumptive test for blood which
10 later turned out to be a false test, and so you
11 have to be careful how you do that. And --

12 Q And -- I'm sorry, go ahead?

13 A And as I recall, in the evidence in this case, at
14 the trial someone said that the hemostix test
15 actually meant that there were minute traces of
16 blood present. Well, that's not correct.

17 Q I think what Staff Sergeant Paynter, certainly his
18 evidence before the Inquiry and I believe his
19 evidence at trial, was that it was presumptive, a
20 presumptive test for blood, but that it could have
21 resulted -- it could have been a false positive
22 if, I think, it was leather or leafy vegetables,
23 certain things could cause the sample -- could
24 contaminate the sample and cause a false positive
25 test for blood, and I think he ended up saying "I



1 can't say that it is blood".

2 Now there is other references in
3 the transcript or in the closing address that I
4 will refer to you later, I know, that you have
5 brought to my attention, but just on the evidence
6 of Staff Sergeant Paynter that the positive
7 hemostix testing doesn't necessarily mean it's
8 blood, you agree with that?

9 A Oh, absolutely. That's what I would expect him to
10 say. I mean, again, this is -- this is not -- was
11 not new to forensic science in those days, people
12 were well aware that it was simply a screening
13 test.

14 Q Correct.

15 A It's, you go to the scene, and you use your
16 hemostix to try and identify samples that you will
17 then collect and carry out more sophisticated
18 tests on.

19 Q Right. If we could just scroll down here, and
20 let's get to the issue of the secretor and the
21 antigen, you say:

22 "My understanding of the serology
23 evidence is that Gail Miller was Blood
24 Type O ... it does not matter whether or
25 not ..."



1 she was.

2 "... a secretor.

3 It is also apparent that
4 serological testing of the semen
5 revealed the presence of Type A
6 antigens. I have also accepted as fact
7 that David Milgaard is Blood Type A,
8 non-secretor."

9 And let me just pause there. On what did you
10 base that assumption or that you accepted that as
11 fact?

12 A Because that was my understanding of the evidence,
13 that he was in fact a type A non-secretor.

14 Q Did you examine the test or consider the test that
15 was done at the time and how they did the test and
16 reach any conclusions or opinions in your mind
17 about whether or not the test that was done to
18 determine Mr. Milgaard's secretor status was a
19 proper test?

20 A I don't know what test they did. I believe they
21 tested saliva, --

22 Q Yes, they did.

23 A -- and that was -- that contained, or presumably
24 contained no blood type, and they made a
25 conclusion that this was a non-secretor test.



1 Q Did --

2 A Now there were other tests that they could have
3 done.

4 Q Did you have any concerns, when you gave this
5 opinion, as to whether or not David Milgaard was
6 in fact a non-secretor?

7 A Umm, no, because my purpose in this opinion was to
8 review the evidence that was presented at the
9 trial.

10 Q And so when you say "I accept it as fact", would
11 that be based upon the evidence at trial?

12 A Yes.

13 Q And then, if we can carry on, I think just before
14 I go through this part, I think what we've heard
15 is that if the frozen semen came from the
16 perpetrator, the frozen semen had A antigens, and
17 if it was to be linked to David Milgaard, who was
18 a non-secretor, there would have to be some
19 explanation as to how A antigens could be in his
20 semen sample if he is a non-secretor. And then
21 certain witnesses looked at the possibility that
22 his blood could be in the semen, and that that
23 might explain where the A antigens came from, and
24 as well it ties back to this hemostix test about
25 the blood; is that fair?



1 A That's correct.

2 Q And so the issue, I think when we go through here,
3 is where you look at the evidence at trial that --
4 if I can summarize it this way -- that tried to
5 explain how a non-secretor could have A antigens
6 in his semen; is that fair?

7 A Yes.

8 Q And then you carry on:

9 "Semen which is proven to contain Type A
10 antigens is most likely to have come
11 from an individual who is Blood Type A
12 and a secretor."

13 Now you say "is most likely" and you say:

14 "Clearly this would exclude David
15 Milgaard."

16 Can you explain that?

17 A Well if it came from an individual who was a type
18 A secretor then the evidence states that, at that
19 time, David Milgaard was thought to be a type A
20 non-secretor and, by definition, that would
21 exclude David.

22 Q Then you go on:

23 "Semen which contains Type A antigens
24 could have come from a secretor or
25 non-secretor and have been contaminated



1 with antigens from Type A blood. In
2 this case it is alleged that the
3 apparent bloodstaining of the seminal
4 fluid recovered near the scene must have
5 been contaminated by blood from David
6 Milgaard. Not only is this idea
7 unlikely, but it is not supported by any
8 of the evidence. In order for David
9 Milgaard to have contaminated his semen
10 with his own blood, he would have had to
11 have been suffering from some bleeding
12 injury, either an injury to the penis or
13 his urethra. This injury may be on the
14 basis of a direct injury inflicted
15 before or during the sexual assault or
16 more likely would be as a result of an
17 injury to the urethra caused by an
18 internal infection. I have not found
19 any evidence from the material that I
20 examined that David Milgaard was
21 suffering from any such bleeding injury.
22 I have also spoken to a number of
23 personal contacts in other forensic
24 science laboratories and on the basis of
25 their experience and my own experience,



1 we are not familiar with a single case
2 where seminal fluid or stains have been
3 found to be contaminated by blood from
4 the alleged assailant. It would be my
5 opinion therefore that even if the
6 contamination of the seminal sample can
7 be proven to be blood, there is no
8 evidence that this blood came from David
9 Milgaard and therefore there is no
10 evidence that this Type A semen can be
11 linked with David Milgaard."

12 And I think, just on the point about the injury
13 where you talk about your experience not being
14 familiar with that, at the trial Dr. Emson -- at
15 the original trial Dr. Emson testified about --
16 and I can't recall his exact words -- but to the
17 effect that it was not uncommon for young males
18 to bleed into their semen. And I may have
19 overstated it, but he certainly talked about that
20 being a possibility, and I think here you are
21 saying "lookit, that's fairly rare, I've never
22 heard of it"; is that correct?

23 A Yes.

24 Q And I think Dr. Emson subsequently has more or
25 less agreed with your opinion on that point, that



1 it's unlikely.

2 Am I correct in summarizing what
3 you are saying here is that there is no evidence
4 at trial -- which was the case, there was no
5 evidence at the trial that David Milgaard had bled
6 into his semen -- that you are saying if the A
7 antigens in the semen came from someone's blood --
8 and that's the only ex -- or one explanation --
9 there's nothing to say that it came from David
10 Milgaard's blood?

11 A Correct.

12 Q And would that be as much a proof issue, if I can
13 call it that, as a forensic issue; in other words,
14 you are saying this is an evidentiary matter?

15 A I think it's an evidentiary matter. In order to
16 link this so-called blood-stained semen with David
17 Milgaard, there were theories advanced as to how
18 this link might occur, but none of those theories
19 had any evidential foundation that was presented
20 at the trial as far as I know and therefore, if
21 there is no evidential foundation to support a
22 hypothesis, my understanding is that really has to
23 be taken out or ignored or else directed to be
24 ignored.

25 Q So in other words, if the fact that there's no



1 evidence that David Milgaard bled into his semen
2 and assuming he's a non-secretor, assuming the
3 frozen semen came from the perpetrator of the
4 crime, then on that evidence that should have
5 excluded David Milgaard?

6 A Yes.

7 Q If we can go down to paragraph 3, you say:

8 "In my opinion there is clear evidence
9 from the circumstances of the scene and
10 also from the apparent contamination of
11 the scene by the victim's blood that if
12 this seminal sample was contaminated
13 with blood, it was almost certainly
14 contaminated with Type O blood from the
15 victim. Type O blood would not contain
16 antigens A and B and therefore a seminal
17 stain or sample which is typed as
18 containing A antigens and is
19 contaminated with O blood from the
20 victim would have originated from an
21 assailant who was a Type A secretor. I
22 believe that this is the most likely
23 explanation for the serological findings
24 in the seminal stains in this case. I
25 also note that this opinion completely



1 excludes David Milgaard as being the
2 source of the seminal fluid."

3 Is what you are saying there is lookit, if there
4 was blood in that frozen semen, it likely came
5 from Gail Miller?

6 A Yes.

7 Q And Gail Miller's blood in that semen would not
8 account for the A antigens which were found in the
9 semen?

10 A Correct.

11 Q And I don't dare go into type AB secretor issues
12 because I don't -- I'm not sure that that bears on
13 matters here.

14 You then also talk in this last
15 paragraph about the hair and fibre material
16 recovered from the nurse's badge and you say that:

17 "As presented in court I believe it
18 could even have been misleading to the
19 jury."

20 Can you tell us what you meant by that?

21 A I actually can't remember the details of that. I
22 just remember being confused myself reading about
23 that evidence.

24 Q Yeah. I think there was evidence that there was a
25 brown fibre found in the name tag pin of Gail



1 Miller's coat and I don't know that there was any,
2 I don't believe there's any evidence that linked
3 it to anything else. Do you recall anything else
4 about the fibre?

5 A No, I don't remember that.

6 Q You say at the bottom:

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

11 And can you elaborate on why you reached that
12 conclusion?

13 A It's difficult now, after so many years, but my
14 recollection of the photographs is that the body
15 was lying at the side of a road on top of a
16 snowbank, presumably a bank of snow that had been
17 piled up there as a result of snow clearing.
18 There was a lot of blood around the body and it
19 would be an unusual place for somebody to die
20 following an assault, right beside a road with
21 heavy blood staining and some circumstantial
22 evidence to suggest that the body may have been
23 able to move.

24 Q Okay.

25 A And therefore it seemed to me that one of the



1 considerations should be that the murder had taken
2 place and that the body had been bumped, and then
3 take into that the environmental factors such as
4 the temperature, the arrangement of the clothing,
5 it was all, to me, very confusing. It wasn't an
6 area that I had gone into in detail, but if I had
7 been the forensic pathologist at that scene, I
8 would have questioned whether or not this was
9 actually the primary scene or whether in fact it
10 might be a secondary scene.

11 Q Go to the next page, please, you say here:

12 "On the basis of the evidence that I
13 have examined, I have no reasonable
14 doubt that serological evidence
15 presented at the trial failed to link
16 David Milgaard with the offence and that
17 in fact, could be reasonably considered
18 to exclude him from being the
19 perpetrator of the murder."

20 And this paragraph, in your opinion, was repeated
21 many, many times in subsequent media articles,
22 and I want to spend a bit of time with this. Is
23 what you are saying here -- let's just talk about
24 the failing to link David Milgaard with the
25 offence. Is what you are saying there is that



1 there's nothing there in the semen sample that
2 says it came from David Milgaard?

3 A Yes.

4 Q Secondly, you are saying it could be reasonably
5 considered to exclude him from being the
6 perpetrator of the murder, and would that be on
7 the basis that he's an A secretor -- or pardon me,
8 an A non-secretor, or you believed him to be an A
9 non-secretor; the semen sample, if it came from
10 the perpetrator, had A antigens and therefore
11 couldn't have come from David Milgaard?

12 A Correct.

13 Q How are -- tell me how you, I guess, rationalize
14 that opinion with what you say the page earlier
15 which you told us this morning, that this frozen
16 semen had no probative value because of lack of
17 integrity?

18 A If you like, it's a two-phase opinion. I have to
19 accept the fact that this semen sample was put in
20 in evidence and became an issue for argument.
21 It's not for me to comment on how the court
22 directed the jury to view the weight that should
23 be placed upon this sample, but my recollection
24 was that integrity and continuity of the sample
25 was not an issue, simply the results of the



1 analysis were in issue.

2 So setting that aside and
3 assuming therefore that the sample was in
4 evidence, which it was, I feel that simply looking
5 at the analysis alone provided sufficient evidence
6 that one would reasonably exclude David.

7 Q If I called you as an expert witness at David
8 Milgaard's trial, would you have been prepared to
9 give the opinion at that time that the frozen
10 semen, knowing what you knew about how it was
11 collected, exonerated David Milgaard?

12 A I think I would have said to you what I've said
13 this morning, is that I do not think that this
14 sample should be considered in evidence because of
15 the high risk of contamination; however, if you
16 intend to put this in in evidence, I will say that
17 the most likely source of the blood staining in
18 that sample, if it is blood, is as a result of
19 crime scene contamination by the victim and
20 therefore cannot be used to link David Milgaard
21 with the evidence and effectively excludes him.

22 Q And if I were -- so let me just back up. Are you
23 telling us that you would have concerns -- I mean,
24 if I asked you the question at trial, you are a
25 defence witness, in your opinion should we be able



1 to rely upon this frozen semen to tell us who the
2 killer of Gail Miller might be, what would your
3 answer to that question be?

4 A No, you cannot.

5 Q If we go back and at trial you are again giving an
6 opinion for the defence and there's no issue taken
7 with respect to integrity, I think that's the
8 second point, would you then say that this
9 evidence would tend to exculpate David Milgaard as
10 opposed to incriminate him?

11 A I would, but remember, we still have the problem
12 of proving that this is blood, but even assuming
13 that it is, it excludes David.

14 Q I suppose, am I correct in saying that if you are
15 on the stand at Mr. Milgaard's trial as an expert
16 witness, the question put to you that let's assume
17 David Milgaard is a non-secretor, if his blood got
18 in that semen somehow, granted there's no proof of
19 that, but if it did, would that explain why there
20 are A antigens, could that explain why there are A
21 antigens in there?

22 A I would hope that the court would direct that the
23 evidence, the proof of contamination or the proof
24 that allows you to say David's blood is in that
25 sample would have to be provided before I answered



1 that because that hypothetical has in fact no
2 evidential foundation.

3 **Q** In fact, Mr. Caldwell tried to put that question,
4 I think worded it better than I did, to Staff
5 Sergeant Paynter and the judge did provide that
6 direction, that there's no evidence of blood, but
7 again just back, if David Milgaard is a
8 non-secretor, that's the assumption at the time,
9 then the only way, and that there's A antigens in
10 the semen, the only way that it could have come
11 from him would be one of two reasons, either the
12 secretor test was wrong, or (b), somehow his blood
13 or some blood of someone else that was an A
14 secretor got into -- or blood type A, pardon me,
15 got into the semen; is that correct?

16 **A** That's correct.

17 **Q** And again, whether it was in there and whether
18 there was proof of that, I think what you are
19 saying is lookit, I can't, I mean, there's got to
20 be a foundation for that before I would answer?

21 **A** Correct.

22 **Q** So when you gave this opinion on September 13th,
23 1988, what were you saying about David Milgaard's
24 guilt or innocence, if anything, what was your
25 opinion based on what you reviewed, and in



1 particular the frozen semen?

2 A I was saying that based on the forensic evidence
3 that I had reviewed, evidence that was presented
4 at the original trial, reasonably interpreted,
5 meant that David was excluded from being the
6 source of that semen.

7 Q Okay. If we pause there and change your
8 assumption, because we now know that David
9 Milgaard is a secretor, if you would have been
10 aware of that at the time and assumed that fact,
11 what would your opinion have been?

12 A Then from the defence perspective, the issue would
13 have been the admissibility of that sample.

14 Q No, I'm sorry, I just -- I appreciate, and I'll
15 come to that. Just September 13th, 1988, if I
16 said what is your opinion on David Milgaard's
17 guilt or innocence based on the work you did, you
18 told me that based on what was presented at trial
19 it would exclude him, and I'm saying now if you
20 would have accepted as a fact that he was a
21 secretor, and I'll come back to the integrity
22 issue, but what would your opinion have been just
23 changing the one assumption of him being a
24 secretor?

25 A Well, then clearly he is not excluded.



1 Q Okay. So then when you say from a defence
2 practice, are you saying that if you knew he was a
3 secretor, you would then focus on the integrity
4 because the sample now does not eliminate him, so
5 now you eliminate the sample; is that fair?

6 A Yes. Effectively I would assume that from the
7 defence point of view, you attack the sample which
8 is the source of this pretty damning evidence from
9 the point of view of the integrity of the sample
10 and the issue of the identification of the blood
11 within the sample.

12 Q If the secretor test had been done proper -- well,
13 I shouldn't say properly. If the secretor test at
14 the time of trial had shown that David Milgaard
15 was a secretor, which was shown later, what would
16 your observation be about the evidence against him
17 at trial, would it be more incriminating than it
18 otherwise was?

19 A I think it would have been, yes. I mean, there is
20 a lot of other evidence that I was not aware of,
21 but clearly on the forensic side, the evidence was
22 not as exclusive as it appeared to be at the time
23 of the trial.

24 Q And so again just getting back to sort of the
25 essence of your opinion on September 13th, 1988, I



1 think what you said is that, and tell me if I'm
2 wrong here, the qualifier is that based on what
3 was presented at trial, that should have excluded
4 David Milgaard; is that right?

5 A Yes.

6 Q How -- let's just go back to the integrity of the
7 sample, though, because I think what you say in
8 your opinion is lookit, no one should be relying
9 on this sample because of its integrity?

10 A That's correct.

11 Q And so if I had asked you on September 13th, 1988
12 to say, well, would you stand up in a court and
13 give your opinion and say that this sample
14 exonerates him, would you be able to say that?

15 A Only from the forensic perspective.

16 Q From the forensic perspective?

17 A Yes.

18 Q And what about the integrity -- what about the
19 integrity of the sample though?

20 A That is working on the assumption that the Court
21 has accepted the integrity of the sample.

22 Q What if I just say September 13th, 1988, forget
23 what happened at court, I want you to tell me
24 right now, based on what you looked at, can you
25 tell me that this frozen semen exonerates David



1 Milgaard?

2 A Well, again I would say yes, it does.

3 Q Would you be --

4 A I think I'm --

5 Q Sorry, let me try this again. If I would have
6 said tell me based on your review and your
7 comments about the integrity of the sample, not
8 what was accepted or assumed at trial, but can you
9 give me your opinion and tell me that that frozen
10 sample exonerates him?

11 A I think it does.

12 Q And what about your concern about its integrity?

13 A Then it comes back to the issue as to whether or
14 not the evidence should even have been presented.

15 Q No, and that's what I'm trying to get at, because
16 I'm asking you as an expert, tell me, should I
17 rely on this frozen semen.

18 A Oh, I see. No, the answer is you should not, that
19 sample should not be considered reliable for the
20 reasons that I've argued here, in that the most
21 likely source of blood, even assuming that it is
22 blood, is actually contamination.

23 Q Okay, I think I understand. If we can then turn
24 to, call up 141905, please, and this is a
25 document, this is Mr. Caldwell, the prosecutor's



1 address to the jury, and I provided this to you a
2 couple of weeks ago, Dr. Ferris, and I think
3 you've -- this is his closing address and I think
4 you've told us that you did not have an
5 opportunity to review this when you gave your
6 opinion; is that correct?

7 A That's correct.

8 Q And if we can go to page 141937 and I just want to
9 take you through parts. This is where we started
10 talking about, it's page 32 of the address to the
11 jury, and if you've got your paper, I think it's
12 the same copy as I provided to you.

13 A Yes. I don't have all of the pages with me.

14 Q Yeah.

15 A I highlighted a number of issues and pages and
16 just brought those with me.

17 Q Sure. If you've got them, we can follow along
18 here. If you want to refer to your notes, you are
19 welcome to do so. And the Crown here is talking
20 about the three locations of spermatozoa, submit
21 desperate struggle:

22 "... quite possible the person who raped
23 her achieved penetration, ejaculated
24 into the body of the deceased, that some
25 of the seminal fluid got on the panties,



1 where it was later found ... at the
2 laboratory; that other seminal fluid
3 drained from the body on to the snow
4 where it froze into one of these lumps
5 that was collected by Penkala."

6 Now again, just on that, do you see anything sort
7 of -- I mean, it's a theory. Do you see
8 anything -- I'm not asking for you to accept that
9 that happened, but is there anything there that
10 jumps out as being not possible or contrary to
11 what you observed?

12 A No, that -- but it clearly glosses over the issue
13 of integrity of the sample.

14 Q And I'll get to that in a moment I think.

15 "Now remember that Corporal Molchanko
16 found human pubic hair in that same lump
17 that had contained --"

18 And then go to the next page, and then he talks
19 about:

20 "... it is clearly a possibility that
21 this is how, the explanation of how the
22 frozen lump of material came to be
23 there, and you don't need to have expert
24 evidence on ... you know it from your
25 common sense ..."



1 And I think this is saying, trying to explain to
2 the jury how it came to be that there was frozen
3 semen in the snow, that it came from the scene,
4 and again I'm not asking you to agree with that,
5 but is there anything from that that you have
6 concerns with?

7 A Probably not. Remember, we're talking about one's
8 understanding of forensic science evidence in
9 1969. I mean, the way we handle scenes today,
10 clearly the description of the collection and
11 identification of that sample in the snow would be
12 much more expansive, but, you know, I'm sure that
13 that probably was considered a reasonable
14 explanation for the identification and collection
15 of a sample in '69.

16 Q And if we assume that the frozen lumps were semen
17 from the perpetrator, then this explanation as to
18 how it might have got there is one that you don't
19 quarrel with; is that fair?

20 A Well, it seems reasonable.

21 Q So then we go down:

22 "You remember that the spermatozoa in
23 the body was blood stained ..."

24 And I think that related to the vaginal aspirate
25 that was in the autopsy,



1 "... and he tested, later, the same
2 sample."

3 Let me just pause here to make sure I've got that
4 right. So he's talking about spermatozoa, the
5 body was blood stained, and that's referring to
6 the autopsy:

7 "... and Staff Sergeant Paynter found
8 "A" antigens in the vial which contained
9 the lump and he tested ..."

10 So this is the frozen lump, and:

11 "... later, the same sample for the
12 presentation of human blood and got a
13 reaction indicating the presence of
14 either blood or those two other extracts
15 he mentioned, mainly leafy vegetables or
16 leather, and that his evidence was
17 finally to the effect that he could not
18 say definitely if the person whose
19 seminal fluid he examined was a secretor
20 or was not a secretor.

21 The evidence of Dr. Emson, as I
22 said, was that the spermatozoa in the
23 body was blood stained and that there
24 are a number of ways in which blood can
25 get into the spermatozoa within the male



1 person and all of this, I submit, while
2 it does not have the effect of
3 identifying Milgaard alone as the source
4 of that spermatozoa, certainly had the
5 effect of not eliminating him either,
6 and that is the effect I ask you to give
7 it. I am not saying it could only be
8 him, I am saying that it certainly has
9 the effect of not eliminating him, he is
10 one of the thousands.

11 Now the reason for that is
12 that, of course, the spermatozoa found
13 frozen came from a person with type "A"
14 blood; this is established. That
15 includes the accused and, of course, it
16 includes many thousands of other people,
17 but it certainly doesn't eliminate him
18 as the possible source of that
19 spermatozoa, it is consistent with being
20 his. I ask you to remember now that he
21 does not have to be a secretor to get
22 "A" antigens in to his spermatozoa if
23 the antigens are found there as a result
24 of whole blood being in his spermatozoa
25 for the kinds of reasons that Dr. Emson



1 mentioned. It could have got there from
2 secreting -- because the person was a
3 secretor, but "A" antigens are a
4 consistent constituent of "A" blood and
5 could be found there for the reason that
6 whole blood was there."

7 Let me just pause there. Is there anything that
8 Mr. Caldwell has said there that you take issue
9 with?

10 A Yes, I do. That's extremely misleading because
11 what he has --

12 COMMISSIONER MacCALLUM: Extremely what?

13 A Misleading.

14 COMMISSIONER MacCALLUM: Okay.

15 A Because what he has done is he has equated the
16 sample retrieved by Dr. Emson from within the
17 vagina has exactly the same status as the sample
18 that was retrieved from the snow, and even
19 Dr. Emson I believe indicated that the causes of
20 blood contamination of the semen sample in the
21 vagina could have been from her own blood, could
22 have been menstrual blood and that was not an
23 issue that was ever raised dealing with the snow
24 sample, but to read that paragraph, the
25 implication is that the quality of both the



1 seminal sample obtained from the vagina and the
2 seminal sample obtained from the snow are
3 identical and that's not correct.

4 BY MR. HODSON:

5 Q Okay. And apart from -- I suppose could you look
6 at it the other way and say that if the semen came
7 from Gail Miller, in other words -- I can't recall
8 what Mr. Caldwell said, but that it could have
9 leaked from her, would that be an explanation,
10 could it be her blood in there?

11 A Oh, these are all explanations, but they are
12 explanations which need evidential foundation.

13 Q Sure. So your concern then is the fact, the
14 evidentiary base for what's stated; is that fair?

15 A Yes.

16 Q And then putting aside -- well, I don't mean to
17 say it that way, but apart from the concern that
18 you don't think there was evidence of this, what
19 he puts forward as an explanation of how this
20 semen could be connected to David Milgaard, apart
21 from the fact that you say there isn't evidence of
22 his blood being in there, do you quarrel with
23 what's said there, take issue with it?

24 A Well, not really, because what he is doing is
25 outlining what he, under normal circumstances,



1 would be going to prove during the course of the
2 presentation of his evidence.

3 Q Yeah.

4 A And what I'm saying is that in fact that proof did
5 not appear.

6 Q Okay. If we can just carry on a bit more here, he
7 says:

8 "Now the other thing I ask you to
9 remember about that is that the "A"
10 antigens in that frozen lump could not
11 have been put there in any way, shape or
12 form from the blood of Gail Miller or
13 from the blood of Ron Wilson. You know
14 what their blood is: Gail Miller's is
15 "O"; Wilson's is "B"."

16 And that do you take issue with?

17 A Well, that's wrong.

18 Q In what respect?

19 A Well, in fact my view is that the most likely
20 source of blood in the sample, if it was blood in
21 the sample, was Gail Miller.

22 Q Yeah, I think what he says is not the blood, but
23 that the A antigens in that could not --

24 A I'm sorry, yes, correct. I'm sorry.

25 Q So if it was blood, you are saying it could have



1 come from Gail Miller?

2 A Yes.

3 Q As far as A antigens, you don't take issue with
4 the fact that they could not have been put there
5 from Ron Wilson or Gail Miller's blood?

6 A Yes. I'm beginning to have sympathy with the jury
7 already because I'm getting confused.

8 Q Okay. It goes on:

9 "It must have been from a type "A"
10 person, and type "A" persons include the
11 accused."

12 And again, I think what he's saying there, and
13 you've touched on this, is that if whole blood is
14 the explanation for antigens in the frozen semen,
15 it had to come from someone who is blood type A
16 and that includes the accused?

17 A Correct.

18 Q And:

19 "So I leave that phase of the matter by
20 stressing again that while this part of
21 the evidence does not, of itself,
22 identify the accused, it most certainly
23 does not eliminate him."

24 And what is your response, do you take issue with
25 that?



1 A No. I mean, that, as presented by Mr. Caldwell,
2 what he is saying is correct, you know, I would
3 take issue with individual parts of it and the
4 validity of some of the foundation, but, I mean,
5 what he is saying is correct.

6 Q And so that (a), it doesn't identify him as, does
7 not of itself identify him, it most certainly does
8 not eliminate him?

9 A Correct.

10 Q Then if we can go to 212178, please, and this is
11 the address to the jury by Mr. Tallis, and again I
12 provided you with copies of this a couple of weeks
13 ago, and if we can go to page 212217, and I should
14 tell you that this transcript, Dr. Ferris, was
15 obtained from shorthand notes and was transcribed
16 I think by a different shorthand reporter, so
17 there are some spots in here where the transcript
18 may not be complete, but I think we can get a
19 sense of what was said, and here at page 39, this
20 is Mr. Tallis, what he says to the jury, he said:

21 "Now I think it's pretty clear that
22 there is nothing in the nature of
23 fingerprints. That I suggest must be
24 ... But on the question of hair samples,
25 there is no suggestion of any matching



1 of hair samples. And ... it is fair
2 that you have these -- there may be
3 these ... samples that cut from a piece
4 of frozen ... that had been taken frozen
5 ... but I suggest that is not of too
6 much significance.

7 There is no matching of any
8 blood type, of body hair, pubic hair.
9 And these are factors that I suggest you
10 consider very carefully. While it is
11 true the observations were made after
12 the date of this offence, there has been
13 no suggestion of scratch marks or
14 anything else on David."

15 Go to the next page and get onto now, call that
16 up:

17 "Now in the area of the seminal fluid, I
18 have one or two observations to make.
19 First of all, this is no criticism of
20 Dr. Emson, but I think it is unfortunate
21 that the sample that was from the
22 vaginal cavity was not saved, because if
23 it had been saved it is quite clear from
24 his evidence that the blood could have
25 been analyzed for grouping."



1 Now let me just pause there, and I'm not sure if
2 you recall, but when they did the autopsy they
3 did a vaginal aspirate, Dr. Emson looked under
4 the microscope and identified spermatozoa and I
5 believe I think some traces of blood and it was
6 discarded, not saved. You are aware of that
7 happening?

8 A Yes, I am.

9 Q And here I think Mr. Tallis is saying it's
10 unfortunate that it wasn't saved because it could
11 have been analysed for blood grouping. Is that
12 fair?

13 A Yes. Again, I have to come I think to Dr. Emson's
14 defence in this case. In those days many
15 pathologists routinely examined aspirate from the
16 vagina specifically to identify the presence of
17 spermatozoa and identify semen and it would be
18 quite common to find red blood cells and I suspect
19 that his initial impression was that the blood
20 cells would be normal contamination from the girl
21 herself. I can't defend his discarding of the
22 sample, but it may be that at that time he decided
23 that there would be ample other evidence to help
24 identify semen and any blood.

25 Q And am I correct that if that had been saved, that



1 could have been analysed, and if A antigens had
2 been discovered in the vaginal aspirate you can
3 exclude it coming from Gail Miller.

4 And I think the other point that
5 may have been raised by Dr. Emson or someone else,
6 I'm not sure that you could exclude other partners
7 that she may have had prior to the assault, is
8 that fair?

9 A Yes. Effectively, we could have ended up with an
10 identical result to the seminal stain in the snow,
11 and the issue then would have been the relative
12 integrity of each sample, and clearly the vaginal
13 sample would have been much preferable in terms of
14 its ability to interpret.

15 Q Right, and if it would have showed A antigens,
16 then certainly that would have supported the fact
17 that it came from an A secretor?

18 A Yes, and it would be much less likely that
19 contamination had resulted from it coming from an
20 A secretor.

21 Q Okay. So then we go back, and Mr. Tallis says:
22 "Now much is said of ... this really is
23 of no significance. Now members of the
24 jury there is no suggestion that other
25 than a non-secretor -- and the



1 possibility of secreting the blood
2 factor in his seminal fluid is great --
3 ...",

4 and I think we've heard evidence that 85 percent
5 of the people secrete; is that correct?

6 A Correct.

7 Q "... the effect of that evidence that the
8 seminal fluid contained what are called
9 "A" antigens. Now this may be, and I
10 suggest is something that you should
11 consider pretty carefully, and as you
12 see, if in fact the donor of that
13 seminal fluid was an "A" group secretor,
14 and there was no blood, as such, in the
15 seminal fluid from that person with that
16 "A" grouping, it cannot have been, the
17 man could not have been the ..."

18 and then, unfortunately, it tails off. Then:
19 "Now it is suggested that the traces of
20 blood that Sergeant Paynter found --
21 that might have been blood -- now
22 frankly I am not here to argue that
23 there was ... at that time of year and I
24 am not -- ... anything to suggest that
25 there is ... out in that alley at that



1 time, but what I say to you, members of
2 the jury, is this: when you get down to
3 the question of reasonableness ..." --

4 MR. PRINGLE: Could I just --

5 MR. HODSON: Sure.

6 MR. PRINGLE: Mr. Hodson said it "trailed
7 off" there, and I know he didn't mean that, but
8 there's an affidavit from the court reporter that
9 indicates that where you see three dots -- this
10 is the court reporter that ultimately prepared
11 the transcript -- that means several words are
12 missing. So it's not a situation where it trails
13 off, but many of the words, some of the words
14 that Mr. Tallis said at that point are not on the
15 transcript.

16 MR. HODSON: Yeah. I'm sorry, I should
17 have clarified that, and I probably didn't
18 explain it enough. It is not -- it was taken
19 from a shorthand report, and certainly Mr. Tallis
20 will be asked to expand upon what was said, and
21 Mr. Pringle is correct that where it does trail
22 off, it's not that he stopped talking, it's just
23 that the shorthand was not decipherable by the
24 court reporter; is that fair, Mr. Pringle?

25 MR. PRINGLE: Yes.



1 BY MR. HODSON:

2 Q Umm, okay. So here:

3 "... when you get down to the question
4 of reasonableness, first of all, Dr.
5 Emson points out that the blood in the
6 seminal fluid in the vagina that he
7 threw away -- spermatozoa -- could well
8 have come from Miss Miller's "O" group.
9 It could have come from her in two ways:
10 from the inflammation that was referred
11 to, or from the possible onset of
12 menstruation; or from the donor."

13 So we pause there, and is that correct?

14 A Yes.

15 Q Yes. And would that respond to Mr. Caldwell's
16 comment about trying to relate the blood in the
17 vaginal aspirate to the frozen semen?

18 A Yes.

19 Q And so in other words saying "well no" -- tell me
20 if I'm wrong about this please, Dr. Ferris -- but
21 "here is the reason why there was blood in the
22 vaginal aspirate as opposed to" -- he does say it
23 could come from the donor?

24 A Yes.

25 Q "And then let's examine another point in



1 this connection, when that frozen lump
2 was found out in that area that had been
3 ...",

4 and again a break:

5 "... may I suggest to you that if there
6 was blood in this sample, as he thought
7 there might be, he could not say that
8 for sure, but let's forget what ...",

9 and then a break:

10 "... for the moment and be reasonable
11 about this. Is it not more likely that
12 since he scooped up the area to get the
13 patch where the blood had seeped
14 through, that it was some other blood in
15 the snow? Is this reasonable? I
16 suggest not. And as you see, if the
17 blood that got into that seminal fluid
18 was "O" group, and the donor didn't have
19 any secreted blood in his seminal fluid,
20 then of course, the result would have
21 proved it. There is no suggestion in
22 respect of the sample that that was
23 done."

24 And, again, do you agree with that?

25 A Yes I do.



1 Q And scroll down:

2 "There is no evidence that David is a
3 person who is afflicted with any
4 condition which caused blood to be in
5 his seminal fluid, and I suggest to you
6 that these other matters that I raised
7 with you are more probable than the
8 possibilities that have been urged upon
9 you."

10 And I believe what he is referring to there is
11 about how blood got into the semen.

12 "Now ...",

13 and then there's some breaks:

14 "... in this way because I suggest to
15 you that it is reasonable."

16 And then a couple of breaks:

17 "Frankly, for any counsel to suggest in
18 these circumstances, and I think that
19 you would have felt the same way and
20 while you would not ...",

21 and then a break, and then he says:

22 "Now those are factors when you are
23 assessing the forensic evidence, that I
24 invite you to consider very critically
25 and I suggest to you that they ...",



1 or:

2 "... I suggest to you that they tell

3 ...",

4 and that might be "fall":

5 "... heavily in favour of David. These
6 are factors which are dealt with by
7 honest and reliable witnesses, and I say
8 this with regard to the crime detection
9 laboratory people and the identification
10 officers who dealt with this ... very
11 fairly and very frankly, and I am not
12 here to suggest that someone taking a
13 syringe and drawing a little blood ... I
14 am not suggesting that, but I am putting
15 it to you on the basis of that, I think
16 ...",

17 and then a break:

18 "... and draw to you that when you
19 consider this, when you consider the
20 nature of the alleged struggle and so
21 forth the question of hair samples and
22 so forth, you just bear this in mind."

23 Now we'll pause there. And, again, what is your
24 comment on what Mr. Tallis said -- and I
25 appreciate that it's not a complete transcript --



1 but from what I read to you as far as what he put
2 forward about the value or the exculpatory nature
3 of the frozen semen?

4 A Well I think it's clear that he is highlighting
5 all of the issues that relate to integrity and
6 contamination of all of these samples, and I think
7 it's not for me to suggest what would be in the
8 minds of the jury, but remember these are
9 arguments that he is presenting to negate the
10 effect of other evidence that has been presented
11 against David Milgaard, and clearly the problem is
12 that once the jury have a picture in their mind,
13 raising issues such as contamination and so on are
14 difficult to put into effect. But, I mean, he has
15 very correctly, I think, and very eloquently
16 listed all of the issues relating to the very
17 problem of contamination.

18 Q And so the contamination being the explanation as
19 to why there might have been a presumptive test
20 for blood in the semen?

21 A Correct.

22 Q What about his comments that no evidence that
23 David Milgaard bled into his semen and the effect
24 of whether or not the frozen semen is
25 incriminating or exculpatory?



1 A Well, again, those are absolutely correct and
2 valid comments to make.

3 Q Would -- and, again, I appreciate that you said
4 things differently in your opinion than what Mr.
5 Tallis did, but are they, would you view them as
6 being inconsistent or similar approaches to the
7 evidence?

8 A I think he's got a different approach to my view,
9 I mean I was looking very specifically at the
10 issue of the presence of a blood type and the
11 issue of secretor status, and I really was only
12 linking those.

13 Q Yes.

14 A He is presenting the jurors with a much broader
15 view of this issue.

16 Q If the evidence was such that the frozen semen was
17 exculpatory in that it would exclude David
18 Milgaard because he was believed to be a
19 non-secretor, would there be maybe a reason not to
20 challenge the integrity of the sample? In other
21 words if it's helpful, I think what you referred
22 it to earlier, once it's harmful you can attack
23 the integrity, but if it's exculpatory might you
24 simply let it go and not challenge something that
25 might be exculpatory?



1 A Well the answer is that sure, I mean, you can
2 argue it either way. This is a judgement call for
3 counsel in every issue relating to forensic
4 evidence. You get to a point where the very
5 presence of the evidence at all can confuse the
6 jury, and no matter how careful you are at
7 explaining what you mean -- and I am aware of this
8 as a forensic pathologist -- it's not unusual for
9 the lawyers and the jurors to get the wrong end of
10 the stick, so it's a, it's a judgement call for
11 counsel as to whether or not they make an issue of
12 this sample.

13 Q Did -- and, again, I went through your initial
14 opinion of September 13th, 1988; if you would have
15 been provided with copies of Mr. Caldwell and Mr.
16 Tallis' closing address to the jury would that
17 have, in any way, affected what you said in your
18 opinion?

19 A It might have in that I think most of the
20 arguments that I made in my opinion had already
21 been presented to the jury, but I think within
22 some of the transcripts they -- there is an
23 evidence -- there is an emphasis on, for example,
24 the presence of blood in the seminal sample, which
25 in fact was not proved but may have left the jury



1 with very limited options in terms of working out
2 how that blood got there. I don't know whether I
3 can ask the Court to refer to a page in
4 transcript?

5 Q Yes, you may. Are you referring to Sergeant
6 Paynter's transcript?

7 A It's page 210902.

8 Q Yes, we can have that called up.

9 A And if we look at just line 19, --

10 Q Maybe --

11 A -- just above line 20, may I read?

12 Q Yes?

13 A "... that he got what he calls a positive
14 presumptive test for blood in the
15 sample, which in our language means that
16 he found a minute trace of blood as such
17 in the sample."

18 Someone is actually saying, positively, that
19 blood was present.

20 Q If we could just pause here for a moment. If we
21 go back to page 1, I think this is Mr. Caldwell's
22 opening address, but maybe we can go back to page
23 1 of this document which would be 858. Yes, this
24 is Mr. Caldwell's opening remarks, so if we could
25 go back to the page 210902.



1 A Effectively what has happened here is that the
2 jury are being primed to believe that there is
3 blood in the sample, and even though all of the
4 subsequent evidence says that this may not be the
5 case, at no time are the jury told -- I believe
6 except from a couple of important cautions by the
7 judge -- that this statement was wrong.

8 Q There is reference -- and maybe I can bring it up
9 after the break -- in the course of Mr. Caldwell's
10 examination of Staff Sergeant Paynter on a
11 question that was objected to by defence counsel,
12 and the judge stated "there is no evidence of
13 blood in the sample", and I think I'll maybe bring
14 it up after lunch; were you aware of that
15 reference?

16 A Not at the time I did my opinion. But, I mean,
17 this is what I mean, I think the Court were well
18 aware of the fact that the integrity of that
19 sample was an issue, and that blood was not -- had
20 not been proven to be present.

21 Q So just back to the question of whether, now
22 having read what was said in the closing address
23 by Crown and defence, I think you are saying that
24 might have affected your opinion; is that correct?

25 A Umm, yes, it -- well, it certainly would have. I



1 would have had to reword the opinion. I think
2 what I would have been stating was "look, I am
3 simply confirming what was effectively presented
4 in court as evidence".

5 Q And then I think your subsequent comments are
6 that, based on what you read, you would have
7 concerns about what the jury might be thinking and
8 what they might understand or not understand about
9 this evidence; is that --

10 A That's right. And it's the old problem of towards
11 the end of the trial the jury may already have
12 acquired tunnel vision and it's very hard,
13 sometimes, to switch on the lights.

14 Q And would it be fair to say that, since you viewed
15 the evidence on the frozen semen as being
16 exculpatory, that in order for the jury to have
17 convicted Mr. Milgaard they either disregarded it,
18 misunderstood it, or understood it but found some
19 -- and we don't know -- but found some way to
20 rationalize that with their verdict; is that fair?

21 A Yes. I suspect they disregarded it, but I don't
22 know.

23 Q Right. And I'm not sure any of us will ever know
24 because we are unable to talk to the jurors, but
25 -- okay.



1 If we could go ahead to 155426.
2 And this is a follow-up letter from Mr. Wolch to
3 you asking for clarification on a point, and I
4 think what -- maybe I'll just try and summarize
5 this, maybe speed things up. I think what he was
6 asking you is to say that if, when you look at the
7 frozen semen sample and there's blood in there, if
8 you are not -- if there is not enough blood to do
9 a proper test to identify it for blood does that
10 mean that it's also not possible to test for A
11 antigens, I think is what he is saying?

12 A Umm, yes. Now that is, that really is beyond me,
13 my -- I don't know what they were capable of doing
14 in 1969.

15 Q And --

16 A I would have thought that if they could not
17 identify blood then the antigen tests, which were
18 fairly crude, may not have been reliable.

19 Q Okay.

20 A But I don't know.

21 Q Actually, let me restate it, I didn't properly
22 state the issue. I think what Mr. Wolch was
23 asking you is that "lookit, if there is not enough
24 blood in there, in the frozen semen to give a
25 positive, reliable test that there's blood in



1 there, does it follow that there can't be enough
2 blood to leave A antigens in the sample"?

3 A Okay. Well, again, I can't answer that
4 definitively today. I'm not sure what I said in
5 the letter.

6 Q Yeah. I think you --

7 A But in fact I think they might have been able to,
8 but I don't know.

9 Q I think you went to a fellow by the name of
10 Mr. Brian Jay -- if we can call up 002486, and go
11 to page 493 -- and I think you asked -- now Brian
12 Jay is someone you knew from the Centre of
13 Forensic Sciences in Toronto?

14 A Yes, that's correct.

15 Q And when you say, he:

16 "... agrees with ...",

17 you:

18 "... that it is quite likely that if
19 there was not sufficient blood in the
20 seminal specimen to positively identify
21 it as blood, then it is unlikely that
22 there would have been sufficient blood
23 for this sample to have been grouped as
24 Type A."

25 A Yes. I have to tell you that I also spoke to, at



1 that time the Head of the Biology Division of the
2 Home Office central research establishment in
3 Aldermaston, Mr. Russell Stockdale, and he gave me
4 the same answer as Brian Jay.

5 Q And so that, if I understand that correctly, that
6 I think what Mr. Wolch was getting at is that if
7 you can't, if there is not enough blood to confirm
8 the test for blood, then there can't be enough in
9 there to explain the A antigens?

10 A That's correct.

11 Q And so that if -- the test for blood saying "there
12 is not enough blood in there to confirm blood", it
13 follows then that the blood can't be the source of
14 the A antigens, is that --

15 A That's correct. The one unknown in this is that
16 as, if I remember from talking to Mr. Jay and to
17 Mr. Stockdale, is that they were giving their
18 responses on the basis of first principles and
19 hadn't actually got case experience to tell me you
20 can or you cannot make this test work.

21 Q Now you also say in this letter, if he we can go
22 down, you say:

23 "The problem seems to be knowing exactly
24 what techniques were available to the
25 R.C.M.P. in Regina twenty years ago.



1 What he does tell me, however, was that
2 there was no accurate means of
3 determining secretor status in the
4 Forensic Science Laboratory at that time
5 since the Lewis antigen, which is the
6 modern method of determining secretor or
7 non-secretor status, had not been
8 adopted as a routine laboratory
9 procedure."

10 Can you elaborate on that, please?

11 A Yes. This is, my understanding is that the
12 forensic labs had not accepted the Lewis antigen
13 test, which does identify secretor status. There
14 are three principal Lewis antigens, which are
15 similar to the ABO secretor types, but they are
16 different proteins. This is a method of
17 determining secretor status, it was a method that
18 was discovered and I believe first written up
19 about 1947-'48, it's referred to in most of the
20 old textbooks. It was a standard procedure in
21 hospital laboratories, but it was not used in
22 forensic science laboratories because they
23 normally dealt with bloodstains, and the Lewis
24 test was not reliable on bloodstains. But they
25 could have tested whole blood from David and got



1 secretor status, but because the forensic science
2 laboratories were not using it, I believe that was
3 probably the reason they didn't do it.

4 Q Let's just go back to 1969. What you are telling
5 us I think -- and please correct me if I'm
6 wrong -- that forensic labs, at that time, were
7 not using the Lewis antigen test to test for
8 secretor status?

9 A As far as I know, that's correct. Remember, as I
10 said earlier, in those days a lot of forensic
11 science, certainly as far as biology was
12 concerned, was transfer technology from hospital
13 laboratory work, and it's only really relatively
14 recently that forensic science research has become
15 independent and is evolving on its own.

16 Q And what Mr. Jay appears to be telling you is that
17 in 1969:

18 "... there was no accurate means of
19 determining secretor status ..."?

20 A Other than looking at samples of saliva and other
21 body fluids.

22 Q Do you recall either hearing from Mr. Jay or from
23 others elsewhere that the method of testing David
24 Milgaard for secretor status in 1969 may not have
25 been accurate or may have been suspect?



1 A I recall someone saying that, but I don't remember
2 who.

3 Q Okay. And around this time would you have had any
4 discussion with Mr. Wolch about that, or Mr.
5 Asper?

6 A Not as I recall.

7 Q Then, if we can talk about this Lewis antigen, so
8 in 1988 are you saying, here, that the secretor
9 test can be done with blood?

10 A Yes.

11 Q Okay.

12 A The Lewis antigen test can be identified under --
13 it's, I think, one or two of the Lewis antigens,
14 if identified, indicate secretor status.

15 Q Now you would have had David Milgaard's blood for
16 the DNA work; is there any reason that you did not
17 conduct the Lewis antigen test on this blood to
18 determine his secretor status?

19 A I didn't because secretor status was not an issue
20 for me. Remember, at the time that I examined
21 David's samples for DNA, I didn't even know of the
22 secretor status issue.

23 Q No, I'm sorry, at this time, October of 1988 or at
24 a later date, --

25 A Oh, yes.



1 Q -- whether you could have -- you would have -- you
2 had Mr. Milgaard's blood, presumably?

3 A I'm not sure that -- whether we still had it at
4 that time.

5 Q Oh, okay.

6 A I suspect we didn't. But even then, if I had
7 received a call asking me to determine secretor
8 status, I would not have done it because that
9 would have been inappropriate. It would have been
10 better done within a proper haematology laboratory
11 and not our --

12 Q I see.

13 A -- forensic pathology laboratory.

14 Q Okay. That's probably an appropriate spot to
15 break.

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

17 *(Reconvened at 1:32 p.m.)*

18 BY MR. HODSON:

19 Q Good afternoon, Dr. Ferris. Just to clarify
20 something, this morning I had referred to
21 Mr. Tallis' closing address to the jury and after
22 Mr. Pringle rose to indicate that the breaks in
23 the transcript were not Mr. Justice trailing off,
24 but rather due to the transcription, and having
25 raised that concern and me having agreed with it,



1 I think after that I referred, when I was reading
2 part of it, that he trailed off again and I
3 apologize for that, so just for the purposes of
4 the record, I think that transcript, and certainly
5 we'll hear from Mr. Tallis on that, that the
6 breaks in there are from the shorthand report and
7 the transcription as opposed to Mr. Tallis
8 trailing off.

9 If we could go to 000002,
10 please, and this is the application that was made
11 by Mr. Milgaard in December of 1988 to the federal
12 minister, and were you aware that that application
13 was made at that time, or around that time?

14 A I was made aware of that later, but I was not made
15 aware that it was going to be made.

16 Q And I take it you would have known, the work you
17 were doing for Mr. Milgaard, that one of the, or
18 that their objective was to present whatever they
19 could to the Federal Minister of Justice as part
20 of a review process?

21 A Yes.

22 Q And so that part of your opinion, I guess your
23 September 13th, 1988 opinion, would form part of
24 that?

25 A Yes.



1 Q You would have known that? Just at the bottom
2 here, there's a reference to again:

3 "Dr. Ferris's evidence and credentials
4 as explained in the Application that
5 follows is scientific evidence of a very
6 compelling nature which, in our opinion,
7 had it been available at the time, would
8 have clearly resulted in an acquittal."

9 And again, these aren't your words, but just, if
10 I could get your take on that, whether your
11 opinion, had it been available at the time, in
12 your view do you think that would have resulted
13 in an acquittal? Are you able to comment on
14 that?

15 A I think I've been a forensic pathologist and given
16 enough opinion evidence in court to know that
17 that's not necessarily the case. I think juries
18 can often make decisions that don't necessarily
19 coincide with what seems obvious science.

20 Q And I'm just trying to understand, and again I
21 appreciate these aren't your words, but whether --
22 what was it that you were putting forward that was
23 not available at the time that would have made a
24 difference in the jury's verdict?

25 A Well, I think if we look at the opinion as I wrote



1 in the light of the final addresses to the jury
2 that I am now aware of, it could be argued, in
3 fact, that my opinion would at the most have
4 simply reinforced the position, or some of the
5 positions that the defence were taking. I don't
6 think that it necessarily would have overridden
7 other witnesses' evidence of which I'm aware.

8 Q If we could go to page 000016, just get a comment
9 on this, and again I appreciate these are not your
10 words, Dr. Ferris, the application states:

11 "The scientific evidence was presented
12 at his trial but it is submitted that it
13 was not understood. Perhaps it was too
14 new an issue for counsel and for the
15 Judge."

16 And then goes on to talk about:

17 "The Trial Judge simply ignores the
18 issue in his charge to the jury and more
19 particularly does not point out that on
20 the evidence given at trial the evidence
21 exonerated David Milgaard."

22 Did you have any views or opinions at the time
23 that you would have expressed about this being
24 too new an issue for counsel and/or for the
25 judge?



1 A No, I don't. I certainly agree that the
2 presentation of scientific evidence is always a
3 problem and making a jury understand its
4 importance may sometimes be very difficult, if not
5 impossible, but again, in retrospect, having read
6 the statements and the addresses to the jury, it
7 was quite clear to me that the judge certainly
8 understood the import of that evidence.

9 Q If we could go to 000074, actually 073, and this
10 is part of the application, and you had mentioned
11 this morning your concerns about what the evidence
12 was about blood. If we could actually just go up
13 a bit, and this is actually part of the
14 application, and this is where Staff Sergeant
15 Paynter says:

16 "A Yes, sir; there was insufficient blood
17 in this sample - or coloring in this
18 sample that I was able to attempt any
19 confirmation tests to absolutely prove
20 that there was blood present."

21 And the judge says:

22 "Q It turned out to be useless then, didn't
23 it?

24 A Chemically I could not say that it was
25 definitely blood there."



1 And scroll down, Mr. Caldwell then asks:

2 "Q And as I understand you, Staff, this
3 would be a matter of the quantity you
4 had to work with?

5 A That is correct, sir.

6 Q And can you describe or not the quantity
7 of blood revealed to you in this way?"

8 And then Mr. Tallis objects saying:

9 "My Lord, my learned friend is using the
10 question of quantity of blood and with
11 the utmost ..."

12 Deference I think it should be, and then The
13 Court says:

14 "There is not evidence whatsoever of
15 blood."

16 "And I think accordingly the question
17 should be framed differently."

18 And then the next page, The Court says:

19 "Well, there is no proof of any blood."

20 Do you recall reading that part of the evidence
21 about -- when you expressed your opinion?

22 A Not at the time that I expressed my opinion, this
23 is evidence that I didn't have until a few weeks
24 ago, but if you go back to the top line of the
25 previous page --



1 Q Yes.

2 A -- I think there's an important statement and an
3 important answer there and it says:

4 "A I obtained a positive result for blood
5 with this test."

6 And clearly that was wrong, and I know that all
7 of the subsequent questions and answers are
8 directed to clarifying that, but nevertheless, a
9 statement was made, "I obtained a positive result
10 for blood with this test," and I think this is
11 part of the problem in this case, is that
12 occasionally there were statements made which
13 were in fact incorrect and the difficulty then is
14 can you be sure that subsequent clarification
15 will correct that error.

16 Q If we could maybe just go back on this point, to
17 the previous page, I'm sorry, and again this is
18 from Staff Sergeant Paynter and he's talking about
19 the false positive reaction, and:

20 "Q In other words, it's something from the
21 vegetables that's there and not blood
22 and mistaken for blood, is that what you
23 mean?

24 A No sir; I'm saying that the test -
25 when tested against other substances -



1 a few other substances will give a
2 false positive and for that reason I
3 cannot positively say that a substance
4 is blood from using this test alone."

5 And I think that's what you told us?

6 A Yes.

7 Q That you can get a positive test result for blood,
8 but that doesn't mean it's blood?

9 A That's correct.

10 Q And is that -- would you agree that's what Staff
11 Sergeant Paynter is saying there?

12 A That's correct.

13 Q And he says:

14 "Q It's not much good then, is it?

15 A Well, we use it as a screening test to
16 eliminate stains and then if it is
17 positive we attempt to do a further
18 test to positively identify it as
19 blood if there is sufficient there."

20 And I think you agree with that; is that correct?

21 A That's correct.

22 Q And then scroll down:

23 "Q But those are the two subjects if you
24 will on which you found it to give a
25 false reading so to speak?



1 A That is correct.

2 Q And have you found it did give a false
3 reading with any other substances you
4 have tested?

5 A No, sir.

6 Q Now, when you on the second occasion
7 tested the contents for the presence of
8 blood as such, what result did you
9 obtain?

10 A I obtained a positive result for blood
11 with this test."

12 And is Staff Sergeant Paynter not saying the same
13 as he said before, it's a positive test for
14 blood, but that doesn't mean there's blood?

15 A No, you can't have a positive test on a
16 presumptive test.

17 Q Okay, can you --

18 A Because -- well, a presumptive test is what this
19 has always been called, and in fact Sergeant
20 Paynter has previously referred to it as a
21 presumptive test for blood, and all that it is is
22 it's positive as a presumptive test for blood --

23 Q Okay.

24 A -- it is not a positive test for blood, and this
25 is -- it really is a problem when you changed that



1 emphasis.

2 Q If we can go to 155493, please, this is a letter
3 from you to Mr. Asper, April 11th, 1989, and
4 there's an earlier letter, just to give you a bit
5 of context, where once the application was filed
6 on behalf of David Milgaard, Federal Justice asked
7 Mr. Asper to send in copies of various documents,
8 and I think Mr. Asper then wrote to you about
9 them, and if we can just scroll down, you say:

10 "We still have retained in our
11 possession the following exhibits which
12 were released ..."

13 Etcetera. And then further down you say:

14 "I shall await your instructions as to
15 the best way to deal with these
16 exhibits."

17 So this would be approximately 14 months, 15
18 months after you received them; is that correct?

19 A Yes, it would appear so.

20 Q And then down at the bottom it says:

21 "I did hear from the CBC that they were
22 interested in doing a program on the
23 Milgaard case but I suspect that with
24 the recent CBC strike, their plans have
25 been somewhat derailed."



1 Were you involved in discussions with Mr. Asper
2 or the CBC about a program on the Milgaard case?

3 A I actually can't remember anything about that at
4 all. I don't even remember whether there was a
5 program. I don't recall at all.

6 Q Then 155495, this is a letter May 3, 1989 from Mr.
7 Asper to you advising that the Fifth Estate is not
8 proceeding:

9 "However, a reporter from the Winnipeg
10 Free Press as well as a local CBC news
11 reporter are currently investigating the
12 situation. We have provided both
13 reporters with your name and address
14 etc."

15 Would that be -- and we'll see a bit later, Dr.
16 Ferris, media reports. Would that be common, for
17 you to -- where you give an opinion of this
18 nature, to then be involved in the media
19 discussing what you concluded, etcetera?

20 A It would be unusual for me to discuss a case that
21 was subject to continuing investigation, I
22 wouldn't normally do that.

23 Q And why not?

24 A Well, as far as I'm concerned, this was -- I may
25 be incorrect in the term, but certainly in my, as



1 far as I would understand, this case was back as
2 *sub judice*, it was no longer a completed case, it
3 was effectively being reinvestigated.

4 Q Right. And that would be the application to the
5 Federal Justice Minister?

6 A Well, that would be my understanding. I'm not
7 clear of what the legal status would be, but I
8 certainly wouldn't normally discuss that without
9 the direct consent of the lawyers involved.

10 Q Okay. Now, in this case do you recall discussing
11 that with Mr. Asper, Mr. Wolch or Mrs. Milgaard
12 about the extent to which you should be publicly
13 commenting about the case?

14 A I don't remember that.

15 Q And I will take you to some -- let me back up.
16 Certainly your report, were you aware that your
17 report was forwarded to the media and quoted
18 extensively in media publications?

19 A Yes, I became aware of that.

20 Q And did you have any issue with that?

21 A I probably was a little concerned about it, but,
22 you know, clearly there were reasons why Mrs.
23 Milgaard and Mr. Wolch wanted that report
24 released.

25 Q What would your concerns have been?



1 A I suppose I have an inherent distrust of trial by
2 press.

3 Q And could you elaborate?

4 A Well, we have already been discussing this morning
5 the difficulty of getting jurors to understand
6 evidence in what has to be recognized as probably
7 the ideal situation and to have the lay public
8 understand an extracted piece of evidence which
9 may be taken out of context in the newspapers is
10 obviously very risky and I would have thought that
11 it's very difficult to control.

12 Q And that would be the concern with your report,
13 that parts of it might have been taken out of
14 context?

15 A Yes.

16 Q Do you have any recollection of that happening
17 or --

18 A I don't.

19 Q We'll go through some articles here and I may ask
20 you that question. If we can go to 277637, and
21 just for the record, so this is July 5, sending
22 the exhibits back to the Court of Queen's Bench.

23 Now, I see at this time, if we
24 can just go up to the top, this is a different
25 letterhead than from before, D.N.A. Genetic Typing



1 Laboratory. Was this the same lab that you had
2 used before?

3 A Yes. At that stage we had an established
4 laboratory and we had our own letterhead.

5 Q And I think you told us that the lab shut down at
6 some point after you did the work in February,
7 March of '88. Would it have still been operating
8 in July of '89?

9 A Yes, the lab was still operating. Funding had
10 ceased, but my Ph.D. student was still working in
11 the laboratory and in fact we didn't, I suppose,
12 completely close the laboratory and empty the
13 facility until about 1991.

14 Q If we can then go, I showed you the May 3, 1989
15 letter where Mr. Asper told you that he gave you
16 your name to some reporters. If we could go to
17 025909, please, and this is an article by Dan
18 Lett, August 5, 1989, if we can just go to the
19 next page, and I don't believe that you are
20 quoted, your report is quoted here from my review
21 of the article, it doesn't look like you would
22 have talked to Mr. Lett. Let me just go through
23 this and maybe you can tell us that. It says:

24 "In an attempt to further analyse
25 forensic evidence presented at the



1 trial, Asper sought the services of
2 Dr. James Ferris, a noted Canadian
3 forensic pathologist."

4 And then the headline, "Proves -- or byline,
5 "Proves Innocence":

6 "According to Ferris's report, in which
7 he re-examined extensively the trial
8 transcripts and physical evidence, the
9 semen sample was incorrectly analysed by
10 RCMP pathologists and in fact proves
11 Milgaard's innocence."

12 Would you agree with that headline and that
13 paragraph?

14 A No, I would not.

15 Q Why not?

16 A Well, first of all, I don't believe that I ever
17 claimed that the sample had been incorrectly
18 analysed by the RCMP pathologists, I mean, that's
19 not correct at all, and that, on the basis of that
20 fact it proved Milgaard's innocence, I mean,
21 that's non-sequitur, that's a very loose
22 interpretation of my opinion, and that's exactly
23 the sort of problem that I think I was alluding to
24 earlier. They've taken an opinion, they have
25 extracted parts of it and they have applied it. I



1 mean, to say even I re-examined extensively the
2 trial transcripts, that's not correct. I examined
3 extensively the trial transcripts relating
4 specifically to the forensic evidence, but not any
5 others, so it's very easy to create a misleading
6 impression and that's exactly the sort of
7 paragraph that does concern me.

8 Q And then it goes on to say the quote from your
9 report:

10 "On the basis of the evidence that I
11 have examined, I have no reasonable
12 doubt that the serological evidence
13 presented at the trial failed to link
14 David Milgaard with the offence," the
15 report stated, "and in fact, could be
16 reasonably considered to exclude him
17 from being the perpetrator of the
18 murder."

19 And I read that this morning, and I think what
20 you told us is that that assumed the integrity of
21 the sample; correct?

22 A That's right, and it does not prove Milgaard's
23 innocence, which is what the introductory
24 paragraph says.

25 Q Okay. And then as well the reference to the body.



1 From having read this part of the article, I think
2 this is the only part that refers to you. Are you
3 able to tell us whether you would have spoken to
4 Dan Lett before he wrote this article?

5 A No, I don't think I did, and I actually haven't
6 seen this before.

7 Q If we could go to 155497, and this is an August
8 8th, 1989 report from Patricia Alain to Mr. Eugene
9 Williams, and I believe Ms. Alain was a serologist
10 or -- yes, I think a serologist with the
11 Government of Canada. Are you familiar with her
12 at all?

13 A Yes, I have met her, but not for many years.

14 Q And just a couple of parts here. They are viewing
15 the comments of you in the report that was
16 submitted to Justice and if we can go to the next
17 page, she reports here:

18 "Therefore, assuming that the donor of
19 the saliva is a non-secretor becomes a
20 questionable assumption. As serologists
21 are aware, the quantity of antigens
22 present in the saliva of secretor
23 individuals will be variable during the
24 day. Dilution can be a factor,
25 particularly if someone has consumed a



1 large amount of liquids e.g. water,
2 coffee, etc. It is known that the body
3 itself will produce variable amounts of
4 antigens during the day. In other
5 words, the absence of "A" or "B"
6 antigens in a stain that has been
7 identified and proven to contain saliva
8 does not definitely prove that a person
9 is a non-secretor."

10 Would you agree with that comment or are you in a
11 position to comment on that?

12 A Yes, I would agree with that, but remember, she is
13 not addressing that from the perspective of the
14 evidence that was presented at the trial, that's
15 her conclusion based on all the evidence that she
16 is aware of at that time. I was only at the time
17 reviewing the evidence that had been presented to
18 the jury.

19 Q I see. But as far as what she says in that
20 paragraph about the, and I think it's the
21 reliability of the saliva test that was described
22 at trial, do you take any issue with what she says
23 there?

24 A No, she's quite right.

25 Q And then this paragraph talks about the:



1 "... screening or presumptive test which
2 can be indicative of blood was
3 positive."

4 And then it goes on:

5 "A positive reaction does not mean that
6 blood is present, only that it could
7 be."

8 And would you agree with that?

9 A Yes.

10 Q If we could now go to, there's a couple of video
11 clips and some newspaper articles at the time. If
12 we could call up 230 -- sorry, let me back up.
13 Yeah, 230046, I think just if I can see it on the
14 screen, the tape recording -- no, actually 230173,
15 and I believe there's a video exchange here. If
16 we could -- I'm going to play just part of a news
17 clip here that you were interviewed, it's at the
18 three minute mark, it's just a short clip. Just
19 go back. Sorry, if we could just scroll back, and
20 I think the date on this is October, 1989, but I
21 stand to be corrected. Just go back 10 seconds on
22 that tape.

23 **VIDEO CLIP PLAYED**

24 "REPORTER: ... in the snow four days after
25 the murder. David Milgaard has spent 20



1 years in prisons across this country, in
2 part because he has always refused to
3 admit guilt. Even saying sorry would
4 have improved his chances for parole,
5 but Milgaard wants vindication and now
6 he says there is new evidence compelling
7 enough he hopes to have the Justice
8 Department reopen his case.

9 DR. FERRIS: I would not have found him
10 guilty.

11 REPORTER: Dr. James Ferris heads the
12 forensic pathology department at the
13 Vancouver General Hospital.

14 DR. FERRIS: If I was to look at it purely
15 analytically as a forensic scientist, I
16 think I would probably have said there
17 was not enough evidence to convict.

18 REPORTER: Dr. Ferris was approached by
19 Milgaard's family to examine the court
20 transcripts and evidence presented at
21 the trial. He believes the semen sample
22 discovered in the snow bank four days
23 after the murder did not match
24 Milgaard's and that the court did not
25 understand the forensic evidence as



1 presented.

2 DR. FERRIS: There is almost no element of
3 the entire case which does not raise
4 some questions and the validity of the
5 semen itself collected three or four
6 days after the assault, clearly an issue
7 with that, there's the whole question of
8 an assault at minus 40 degrees Celsius,
9 that's an area of concern. The question
10 of the timing of his alibi is an area of
11 concern. The reliability of many of the
12 witnesses. I think there are many areas
13 that certainly would give rise for
14 concern."

15 **TAPE ENDS**

16 BY MR. HODSON:

17 Q Okay. That's the only part that refers to it.
18 Just on the latter part, your comments about the
19 alibi and the reliability of witnesses, on what
20 basis were you making those comments?

21 A Well, that was made on the basis of additional
22 information which had come to me, I think, at that
23 stage from either Mr. Asper or Mr. Wolch.

24 Q And would that be in any way related to the
25 forensic work that you were doing or are you



1 talking forensic witnesses?

2 A No, I'm not, I'm talking about other witnesses.

3 Q And then as far as your comments -- let me just
4 find -- actually, for the record, we don't need to
5 bring it up, 001548 is a transcript of that, but
6 there's some parts that are marked out.

7 COMMISSIONER MacCALLUM: What's the number?

8 MR. HODSON: 001548.

9 COMMISSIONER MacCALLUM: Thank you.

10 BY MR. HODSON:

11 Q And just on your comment that, "As a forensic
12 scientist, I think I would probably have said
13 there's not enough evidence to convict," can you
14 elaborate on that, please?

15 A Well, I think that really is exactly what I've
16 been saying so far today, that in fact if we look
17 at the forensic evidence that was presented at the
18 trial and you look at the issues of integrity of
19 samples, continuity of evidence and interpretation
20 of those samples, they really would not allow, on
21 the basis of that forensic evidence, a presumption
22 of guilt.

23 Q So am I correct what you are saying, based on the
24 forensic, based on that frozen semen, that that in
25 and of itself would --



1 A I think that on its own could not be used to
2 convict because in my view there were so many
3 issues relating to possible interpretation of the
4 sample and even the integrity of the sample that
5 it does not form a reasonable foundation for
6 evidence to convict.

7 Q Yeah. And again, we talked about this this
8 morning, we don't know what caused the jury to
9 reach the conclusion they did. In the closing
10 addresses of the Crown and defence counsel that we
11 looked at this morning, and again I appreciate
12 that the jury may view it differently, but the
13 Crown position, at least in the closing address,
14 was this doesn't implicate and it doesn't
15 eliminate; is that correct?

16 A I think that's correct, yes.

17 Q And so are your comments, when you talk about, "As
18 a forensic scientist, I think I would probably
19 have said there's not enough evidence to convict,"
20 are you limiting your opinion to the forensic
21 evidence or are you taking everything else into
22 the non-forensic evidence?

23 A No, I'm limiting myself in that comment to the
24 forensic evidence.

25 Q Okay. If we can go ahead to 230046, please. This



1 is -- just put the video cover up on the screen --
2 this is March 15th, 1990, so this would be about a
3 year and a half -- I think your opinion was
4 September 13th, 1988, and at this time the
5 application before the minister was still pending,
6 and there is a clip here on the video, I think
7 it's at the 30, if you go to 34 minutes and 50
8 seconds.

9 **VIDEO CLIP PLAYED**

10 "REPORTER: ... says the physical evidence
11 that helped convict him in 1970 should
12 actually have cleared him. Sperm
13 samples were found at the scene of the
14 crime. Like blood, it can be tested for
15 type, and it tested out as type A.
16 David Milgaard's blood is type A, but he
17 is one of the few people who doesn't
18 leak that typing into other bodily
19 fluids.

20 A forensic pathologist who has
21 reviewed the evidence says that means
22 the semen that helped convict David
23 Milgaard wasn't his.

24 DR. FERRIS: My view would be that the
25 defence did not exploit many of the



1 weaknesses in the Crown case. The jury
2 were probably left with only the Crown
3 case to consider. I think, if the
4 defence had been more active in
5 criticizing the forensic evidence, then
6 the outcome might have perhaps been
7 different.

8 "REPORTER: The man who is Milgaard's
9 lawyer..."

10 **TAPE ENDS**

11 BY MR. HODSON:

12 **Q** Again, if you had been aware of what was presented
13 by Mr. Tallis to the jury at the conclusion of the
14 case, would that have changed what you had to say
15 in that?

16 **A** Yes, it would. That really is not correct, what I
17 said, because I think, in fact, Mr. Tallis did go
18 through all of the problems associated with these
19 elements of the Crown evidence.

20 **Q** If we could go to 159867, this is May 12th, 1990,
21 and it's an article by Dan Lett. And, again, the
22 date is here, so this is about, I was going to say
23 about almost 18 or 20 months after your report,
24 and about 16 months after the application was
25 filed with the minister, and this is just at the



1 time, I think, that the Milgaards indicated that
2 Peter Markesteyn was going to give a follow-up
3 opinion. And you say:

4 "Ferris added he thought a
5 thorough analysis of his original report
6 should have been conducted by Justice
7 Department officials months ago."

8 And then over to the next column:

9 "'That has to be done,'
10 Ferris said of Markesteyn's efforts.
11 'They need another opinion.'

12 However, Ferris said it is even
13 stranger that although the Justice
14 Department was given his report 16
15 months ago, none of the investigators
16 have ever contacted him.

17 'I don't think they really have
18 a reasonable excuse for not having at
19 least contacted me directly,' Ferris
20 said. 'I'm surprised at that.'

21 And, again, would that be an accurate quote of
22 what you would have said at the time?

23 A Umm, well I don't remember the words, but that may
24 well be correct. That's certainly how I felt
25 about it at the time.



1 Q Right. And I think, at least from the documentary
2 record, it doesn't look as though you were
3 contacted until I think June of 1990, about a
4 month after this article; does that accord with
5 your recollection?

6 A Yes, that's correct.

7 Q And were you surprised by that?

8 A I just assumed that the contact had been
9 stimulated by Mr. Asper.

10 Q Were you -- were you waiting to hear from somebody
11 on your report?

12 A Yes, I was.

13 Q And who were you waiting to hear from?

14 A I had no idea.

15 Q Okay. But someone?

16 A Someone.

17 Q If we can then go to 048870. And this is now --
18 just trying to see the date here -- June 8th,
19 1990, and this is I think when we first hear about
20 the dog urine theory, and:

21 "The evidence doesn't
22 exclude it (as dog urine),' Markesteyn
23 said from Winnipeg. 'There are various
24 sources of yellow stains in a snowbank.'

25 David Asper, Milgaard's lawyer,



1 is more blunt about the report.

2 'It concludes that what Penkala
3 found in the snow could very well be dog
4 urine,' said Asper."

5 Did you become aware or involved in these
6 discussions or theories about the frozen semen
7 being dog urine?

8 A Not until after Dr. Markesteyn had written this
9 opinion, and then I met him at a meeting, and we
10 discussed it.

11 Q And do you recall whether you formed any
12 conclusions as to whether or not the frozen semen,
13 or frozen lump, was dog urine or wasn't?

14 A No. The -- what I did, in essence said to Dr.
15 Markesteyn and I believe it was Dr. Merry, is I
16 felt that they were better qualified to give that
17 opinion than me and that I really had no
18 particular knowledge or expertise in this area.

19 Q And would it be fair to say that, if the frozen
20 semen was dog urine, that it could not be used to
21 exonerate or prove Mr. Milgaard's innocence; is
22 that fair?

23 A Yes. I mean, in essence, it was another reason
24 for questioning the continuity and integrity of
25 the sample.



1 Q Right. It would mean it would have no value in
2 either linking or not linking someone to the
3 crime?

4 A Correct.

5 Q If we can go to 002483, please. This is a memo of
6 June 12th, 1990 by Mr. Eugene Williams to his
7 file, and it talks about interviewing you on June
8 11th, 1990 at your Vancouver office; do you recall
9 being interviewed by Mr. Williams?

10 A Yes, I do.

11 Q And do you remember what -- did he tell you what
12 his purpose in interviewing you was?

13 A Umm, well he, he just simply said that he was here
14 as part of the investigative process for the
15 Justice Department.

16 Q And what did you understand his role to be then?

17 A Well I, I'm not sure exactly what his role was,
18 but he, he questioned me fairly vigorously about
19 my opinion, and most of his questioning related to
20 the fact that it was now known that David was a
21 secretor and how that would have affected my
22 original opinion, and I was unable to, I think,
23 make him understand that my original opinion was
24 based on the evidence as it was apparently
25 understood at the time of the original trial, and



1 he was not concerned with that, he wanted to know
2 how the new results would have affected my
3 opinion.

4 Q If I might, just by way of assistance, Dr. Ferris,
5 this -- what you may be referring to is a later
6 discussion with Mr. Williams. Let me just tell
7 you -- and maybe in fairness I should go through
8 the memo with you first. I think at this time the
9 test for secretor had not been conducted, it was
10 February of 1992, and then I think there is a 1993
11 discussion or exchange, maybe a meeting, and I'll
12 take you to those documents where that happened.
13 So --

14 A I may be confused about it.

15 Q Sure. And so maybe what I will do, in fairness,
16 is just go through this memo and maybe that will
17 assist you. Now please keep in mind these are his
18 notes of the meeting with you, and I just want to
19 get your comments on what is said and what is
20 attributed to you. He says he interviewed you
21 about your September 13th report:

22 "Of particular interest was Dr. Ferris'
23 assertion on page 7 of his report that
24 the serological evidence presented at
25 the trial of David Edgar Milgaard could



1 be reasonably considered to exclude him
2 (David Milgaard) from being the
3 perpetrator of the murder of Gail
4 Miller."

5 And then it also talks about comments upon Dr.
6 Markesteyn's report. And then if you can scroll
7 down:

8 "Initially, our discussion centred on
9 identifying all the sources to which Dr.
10 Ferris referred, during the preparation
11 of his opinion and the formation of the
12 conclusions contained therein. Dr.
13 Ferris confirmed that the only sources
14 to which he referred were those noted on
15 pages 1, and 2, of his September 13,
16 1988 letter."

17 And then, if I can pause there, would that be
18 accurate?

19 A I think so, yes.

20 Q I think that's what you told us today.

21 "He readily admitted that he had not
22 seen Dr. Emson's autopsy report, the
23 photographs of the murder scene, which
24 showed the position and the condition of
25 the body. Apparently, he had not read



1 the evidence of the Crown's key
2 witnesses, the prosecutor's address to
3 the jury and the judge's charge to the
4 jury."

5 And, again, would that be accurate?

6 A Yes.

7 Q And then, next paragraph:

8 "Secondly, Dr. Ferris was invited to
9 comment upon Dr. Markesteyn's report
10 concerning the identity of the frozen
11 lump of yellow sperm found in the snow
12 four days after the body was discovered.
13 Dr. Ferris indicated that he was in
14 general agreement with the findings of
15 Dr. Markesteyn in that 'he could not
16 exclude the yellow frozen lumps which
17 contained sperm, as having originated
18 from a dog.' He noted that there was a
19 reasonable doubt that it was human
20 because of its colour and the fact that
21 dogs secrete semen in their urine."

22 And would that be accurate of what you said at
23 the time?

24 A Yes, I think I was passing on information that I
25 had obtained from Peter Markesteyn.



1 Q As a forensic pathologist -- and, again, I'm not
2 sure if this is your area -- but are you able to,
3 using scientific methods, determine whether a
4 sample of semen is human or dog?

5 A Oh, that can certainly be done, but not by me.

6 Q I see. And that's an area that you are not
7 familiar with; is that right?

8 A I have some rudimentary familiarity with the
9 technology, but I wouldn't do it.

10 Q I would ask you to read Dr. Merry's evidence
11 before the Inquiry, but I think that I'll leave it
12 there.

13 So as far as the distinguishing
14 between the two, was it your understanding that
15 tests could be conducted to exclude the sample as
16 being from canine origin?

17 A Yes.

18 Q And were you aware whether those tests were ever
19 done?

20 A No.

21 Q So, doctor, if I could just scroll down to the --
22 actually, go to the next page, please. And I
23 don't mean to jump over parts of these, I just
24 want to go to -- the entire memo is in as
25 evidence, but I just want to ask you about parts



1 of these. It says:

2 "Dr. Ferris noted that the serological
3 evidence should not have been admitted
4 because the continuity of the sample had
5 not been satisfactorily established. He
6 readily admitted that the semen was
7 probably contaminated as a result of
8 being piled up with the blood-stained
9 snow outdoors for four days."

10 Is that correct?

11 A Yes.

12 Q Then the next paragraph:

13 "He also acknowledged that the testing
14 performed on David Milgaard's saliva may
15 have been wrong. Therefore, the
16 non-secretor status attributed to David
17 Milgaard may be wrong."

18 Is that accurate as to what you would have said?

19 A Umm, it may be. It sounds a bit strong for an
20 opinion on this subject from me, but I may have
21 said that, I simply -- I can't confirm because I
22 don't remember.

23 Q Okay. And then the next page. Mr. Williams then
24 says:

25 "I then asked Dr. Ferris to take into



1 account the contamination of the semen
2 specimen, to which he alluded on page 4
3 of his report, and which is noted in Dr.
4 Markesteyn's report, and indicate
5 whether the evidence excluded David
6 Milgaard. Dr. Ferris then stated that
7 the serological evidence did not link
8 David Milgaard to the offence, however,
9 you could not say it (the serological
10 evidence) excluded him."

11 And is that something that you would have said to
12 Eugene Williams?

13 A Umm, I may have said that, but I don't understand
14 the context. I think that would relate to the
15 reliability of the secretor status, so I don't
16 know. I certainly -- if he was referring to the
17 evidence of the secretor status and the testing as
18 performed at the trial then I would not have said
19 that, but if he was referring to the discussion
20 that we obviously had about the reliability of
21 secretor status then that's correct, I'm -- I
22 would have to say that, if there are doubts about
23 the secretor status, then you would have to say
24 that the serology -- the serological testing did
25 not exclude David.



1 Q Okay.

2 A But I go back to the point that my brief
3 originally was to look at the evidence that the
4 jury heard.

5 Q Okay. So, just so that I understand this, if the
6 secretor status of David Milgaard is in doubt, in
7 other words that you can't assume that he is a
8 non-secretor, are you then saying "yes, I could
9 have or would have said, or I believed at the time
10 that you could not say that it, the serological
11 evidence, excluded him"; is that correct?

12 A That's correct.

13 Q Secondly, if you assume or have the opinion that
14 the frozen semen is contaminated and is not
15 reliable, would you also have said or thought at
16 the time that:

17 "... you could not say it (the
18 serological evidence) excluded him."

19 A I don't think I could say that. I think if the
20 serological, if the tests and the sample, if the
21 sample cannot be relied upon then the tests cannot
22 be relied upon, and if the tests can't be relied
23 upon, you can't use that as evidence against him.

24 Q Can you use it as evidence to exclude him?

25 A No.



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

10 And again, in fairness, the quotes above are just
11 from doctor -- from Dr. Emson. And, again, we
12 may have touched on this, the -- David Milgaard's
13 status as a non-secretor you told us was assumed
14 because you were giving a brief based on what was
15 before the jury at the trial; is that correct?

16 A Correct.

17 Q And would it be fair to say that in the comment
18 here that the contamination of the samples that
19 were collected, I think you've told us you did not
20 ignore that, in fact I think that was your first
21 opinion that they should not be relied upon; is
22 that correct?

23 A Correct, yes.

24 Q Go to 185365. And this is a report or a letter
25 June 12th, 1990 from Patricia Alain to Mr.



1 Williams, and I may have asked you this, so I will
2 be a bit more specific. She says to Mr. Williams:

3 "The morphological differences of human
4 spermatozoa and canine spermatozoa are
5 several. The experienced examiner would
6 not have any problems in distinguishing
7 between human and canine spermatozoa."

8 Are you able to tell us whether you agreed with
9 that or not?

10 A I would have no experience of that.

11 Q Okay. If we could go to 185372. This is Dr.
12 Markesteyn's report of June 4th, 1990. You are
13 familiar with the fact that he gave a report
14 reviewing some of the same things you did?

15 A Yes.

16 Q And in this report he says:

17 "I have been informed that the original
18 notes on which this evidence by Staff
19 Sgt. Paynter was based are no longer
20 available. Staff Sgt. Paynter informed
21 me that he does not remember (some
22 twenty years after the event) whether or
23 not he performed specific tests to
24 determine the human origin of these
25 specimens."



1 And this relates to the dog urine issue. Do you
2 have any recollection of contacting Staff
3 Sergeant Paynter to get his notes?

4 A No, I have never contacted Staff Sergeant Paynter.

5 Q Would those notes have been of assistance to you
6 in the opinions that you were providing?

7 A Umm, they might have been. Umm, the difficulty is
8 that for someone like myself reviewing this work,
9 I would start probably with his conclusions, and I
10 would only look at the data on which he formed
11 those conclusions if I was going to question the
12 conclusions, and if you read all the evidence that
13 I have seen so far his conclusions that the
14 serological sample was type A and that the, that
15 David was a non-secretor, are really not
16 conclusions that I would necessarily want to
17 question, so I would have been more inclined to
18 simply accept his conclusions and not go back to
19 his notes.

20 Q Okay. If we can go to 004374, please. And this
21 is a memorandum of August 28th, 1990 from Mr.
22 Williams, who you met with, to Mr. Bruce
23 MacFarlane, Deputy Attorney General, and it's
24 outlining various issues. If I could go to page
25 004376. And this is where Mr. Williams is



1 commenting on basically his review of the report
2 and his meeting with you, and he refers to the
3 quote from your September 13th, 1988 report which
4 says:

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

13 And then, if we can just scroll down to the next
14 paragraph, it talks about them going to Pat
15 Alain.

16 "In her written report and in later
17 conversations, she indicated that the
18 likelihood of contamination, and the
19 state of the scientific art was such
20 that:

- 21 1. the serological evidence did not
- 22 link David Milgaard to the offence;
- 23 2. the forensic evidence, in view of
- 24 the circumstances under which the
- 25 samples were collected, did not exclude



1 David Milgaard from being the
2 perpetrator of the murder."

3 And would you agree with those comments?

4 A I don't think I would agree with number 2 if she
5 is talking about the forensic evidence that was
6 presented at the trial.

7 Q I think what -- it refers to the -- if we can just
8 scroll back up a bit, she talks about the
9 likelihood of contamination, and then goes on to
10 say:

11 "I believe ...",
12 scroll down to paragraph 2, that:

13 "... in view of the circumstances under
14 which the samples were collected ...",
15 and I'm assuming that refers to the issue of
16 contamination. And I think you told us earlier
17 that, in light of your opinion on contamination,
18 the sample was of no value one way or the other;
19 is that --

20 A Yes, but she is actually specifically saying here
21 that that sample, because of contamination, does
22 not exclude David Milgaard. What she should have
23 said is that it cannot be used to either include
24 him or exclude him.

25 Q Fair enough.



1 A But it is quite wrong to say that a contaminated
2 sample doesn't exclude him unless there was
3 reasonable grounds to believe that the sample
4 should have included him.

5 Q Well let me maybe just scroll back up, and I don't
6 want to get into semantics over other people's
7 words -- up further. I think -- up further,
8 please -- I think what the response is, is to the
9 fact that in your opinion -- and, again, it's only
10 one paragraph -- talked about that evidence being
11 used to exclude him, and then I think -- and maybe
12 let me paraphrase what I take from the memo is
13 saying "lookit, because of the contamination, it
14 shouldn't be relied upon to exclude him or to
15 implicate him", and I think that's what you have
16 told us; is that correct?

17 A Yes, that's correct. But it's most important, and
18 I know that there it's just one or two words, but
19 those words can completely change the foundation
20 of the opinion and --

21 Q Go to the full page here, please.

22 A -- and reading that number 2 conclusion I think
23 what she appears to be saying is that this
24 evidence does not exclude David Milgaard.

25 Q Okay.



1 A And I -- that, that is not the correct
2 interpretation of that evidence.

3 Q It --

4 A That evidence is either irrelevant to his guilt or
5 innocence, or it can be used to exclude him, but
6 it cannot be used in the context of not excluding
7 him.

8 Q Well again, in light of your opinion about the
9 contamination, maybe I misunderstood what you
10 said. I think you told us the value of the sample
11 was nil, of no probative value?

12 A Yes.

13 Q And, in light of that, could that sample exclude
14 David Milgaard from being the perpetrator of the
15 murder?

16 A Ah, I see what you are arguing.

17 Q I'm asking.

18 A Umm, yeah, or what you are saying. I think
19 what -- yes, I mean the, in essence if the sample
20 is contaminated it has no relevance and,
21 therefore, it should not have been used at all.

22 Q To implicate or to exclude?

23 A Implicate or exclude.

24 Q Okay.

25 A But I think to say that -- to take just one part



1 of it and say "it doesn't exclude him" negates the
2 fact that it doesn't implicate him either.

3 Q Yeah. I think if you go up to paragraph 1 --
4 scroll up a bit -- it doesn't link him and it
5 doesn't exclude him. Now in fairness I think the
6 wording, you are saying you might have used
7 different language, and in fairness these are Mr.
8 Williams' -- Mr. Williams quoting what someone
9 else said to him, and I think I've heard your
10 position on that, so I can move on.

11 A Yes. Well, if I may say so, if you are writing an
12 opinion in which you do not want David Milgaard to
13 be excluded from the investigation you will write
14 exactly this. You will write as your number 2
15 paragraph, which is your final paragraph, that
16 this evidence does not exclude him. I mean I'm
17 sorry to be critical, but I -- and my opinion is
18 perhaps coloured by my interviews with Mr.
19 Williams, but I got the feeling, in talking to
20 him, that his -- he saw his role to make sure that
21 the evidence did not exclude David Milgaard.

22 Q Did he -- maybe we could just scroll up -- did he
23 challenge you in your conclusion -- no, scroll up
24 further, actually go back to the full page and
25 just call it out so we can get it all here -- did



1 he challenge your conclusion in this paragraph
2 that the frozen semen excluded Mr. Milgaard; was
3 that what he was taking issue with, that it really
4 didn't exclude him?

5 A I think he was. But that, I mean he has correctly
6 reported what I said, but it's -- it's very
7 difficult, as you know, when you are talking to an
8 individual you can get perhaps entirely
9 unreasonable impressions of what way the
10 conversation is going, and at the end of it I felt
11 that my association with Mr. Williams was, shall
12 we say, unhappy.

13 Q Okay. And would that be at this -- I think this
14 would be your first meeting with him, was this --

15 A I don't remember.

16 Q Yeah. When going through this memorandum, does
17 this assist you in your recollection of the
18 meeting with him then?

19 A No, it doesn't.

20 Q But you met with him once and you have an
21 unfavourable -- a memory of the meeting with him
22 that you did not -- I think your words were
23 "unhappy"; is that --

24 A Yes.

25 Q And, again, maybe you could, just so that we



1 understand it, is there anything else in the
2 exchange with Mr. Williams that made you unhappy?

3 A I can't, I truly can't remember, I just -- the --
4 if I met him twice, and I apparently did --

5 Q Actually, I'm not sure you did, I think the later
6 one might have been by correspondence.

7 A Okay. Well the impression that I had from him was
8 that the issue of secretor status was the key as
9 far as he was concerned and he, I know he asked me
10 on several occasions if it could be shown that
11 David Milgaard was a secretor, would that have
12 changed my opinion. And --

13 Q And what did you say to him?

14 A Well I kept saying to him at the time of the trial
15 the evidence was that he was a non-secretor, and I
16 -- if you tell me that he did not know his
17 secretor status until two years later I find that
18 interesting, because that was certainly not the
19 impression that I got from him.

20 Q And again, we have not heard from Mr. Williams yet
21 what this document suggests is that they doubted
22 the validity of the original secretor status. I'm
23 not aware that they'd actually done the test until
24 1992, but certainly -- and I can show you another
25 item.



1 Just back on this issue versus
2 what you looked at the trial and at the time, were
3 you aware that Mr. Williams was looking at, at
4 this time, whether or not the Minister of Justice
5 should set aside Mr. Milgaard's conviction or give
6 him some relief at that time?

7 A I probably was aware that that certainly was the
8 -- I mean the -- my meeting with Mr. Williams, I
9 assumed, was part of his response to the
10 applications by David Milgaard, by Mr. Wolch and
11 Mr. Asper.

12 Q If he would have said to you "one of my tasks is
13 to try and determine, or gather information to
14 determine today whether or not David Milgaard is
15 innocent of this crime", would David Milgaard
16 being a secretor or not in June of 1990 be
17 relevant to that question?

18 A He might -- it would have been relevant to that
19 question.

20 Q Okay.

21 A But, again, I would have had to go back and say
22 that that was not an issue for me in my original
23 opinion.

24 Q Okay. If we can go to the next page, and we may
25 have covered some of this the last ten minutes,



1 but there's -- and, again, this is Mr. Williams
2 reporting about a discussion with you:

3 "The investigation of this area was
4 completed with an interview of Dr.
5 Ferris. Dr. Ferris reiterated the
6 position he had stated in his report.
7 However, when he was questioned about
8 the effect that contamination of the
9 sperm sample obtained from the snowbank,
10 would have on his conclusion that the
11 forensic evidence could reasonably be
12 considered to have excluded Milgaard as
13 the culprit, Dr. Ferris stated that:
14 'Once you introduce contamination; once
15 the result may be wrong, you can't say
16 it excludes him or not.'

17 And would that be an accurate recording of what
18 you would have said?

19 A That's fair because it includes the qualifiers
20 that are necessary to allow for that
21 interpretation of 'excludes him or not'.

22 Q And then:

23 "Dr. Ferris noted that his report of
24 September 13, 1988 was intended to be a
25 re-interpretation of the evidence before



1 the Milgaard jury, and was not 'new
2 evidence'. On the basis of his
3 examination, he felt that the portions
4 of the evidence he examined could afford
5 reasonable doubt of Milgaard's guilt, or
6 should have been used by the defence to
7 exclude Milgaard as the culprit."

8 Would that be a fair recording of what you would
9 have told Mr. Williams?

10 A Yes.

11 Q If we could go do 001529, please. This is the
12 February 27th, 1991 letter from Minister Kim
13 Campbell to Mr. Wolch and this is when Mr.
14 Milgaard's first application was dismissed and he
15 then subsequently re-applied and got a hearing
16 before the Supreme Court, and in this letter she
17 deals with some of the forensic evidence that was
18 put forward. If we could go to 001534, please, I
19 just want to go through some of the paragraphs and
20 get your response. She says:

21 "At trial, the RCMP forensic analyst
22 testified that he found "A" antigens in
23 the sample taken from one of the lumps
24 of frozen snow, and concluded that the
25 sample was probably from a blood group



1 "A" person that was a secretor, or from
2 a blood group "AB" person. The analyst
3 also testified that Milgaard had blood
4 type "A", and the test he performed on a
5 saliva sample from Milgaard indicated
6 that Milgaard was a non-secretor. There
7 was, therefore, some evidence from which
8 the jury could have inferred, if they
9 felt it reasonable, that the seminal
10 fluid did not originate from Milgaard."

11 And would you agree with that statement?

12 A Yes, I probably would. I'm not sure if Mr. Tallis
13 would agree with that statement because I think it
14 was a lot more than "some" evidence.

15 Q Fair enough. So you might say it's a bit stronger
16 than "some" evidence that the jury could have
17 inferred?

18 A Yes.

19 Q And go down to the bottom, it talks about the
20 opinion that you provided, and I won't go through
21 it again, and then it starts here:

22 "Assuming that Milgaard is a
23 "non-secretor", he concluded that
24 Milgaard could not have provided the
25 seminal fluid. He also assumed that the



1 donor of that seminal fluid was Gail
2 Miller's assailant."

3 And then go to the next page, and then makes a
4 reference here to Dr. Markesteyn who says:

5 "Dr. Markesteyn added that, "(t)he
6 determination of the non-secretor status
7 of Mr. Milgaard, although perhaps
8 acceptable at the time, would now no
9 longer serve as proof of his
10 non-secretor status."

11 Would you have been aware of that opinion from
12 Dr. Markesteyn at the time?

13 A No, I was not aware of that.

14 Q And then if we can just go down to the bottom
15 paragraph:

16 "It is important to remember that it is
17 common ground, both on the basis of the
18 evidence tendered at trial as well as
19 the information from current experts,
20 that the probability of contamination of
21 the seminal fluid in this case, which
22 was found in the snow after several days
23 of activity at the scene, was such that
24 it was difficult to draw any inferences
25 from the evidence at all. Dr. Ferris



1 was aware of this, and on page 4 of his
2 report he expressed surprise that the
3 samples were admitted into evidence,
4 given the circumstances and timing of
5 their discovery. When interviewed, he
6 agreed that once contamination of the
7 sample was taken into account, the
8 forensic evidence neither inculpated nor
9 exculpated David Milgaard."

10 And would you agree with that comment, sir?

11 A Yes. I suppose technically that's correct,
12 although, as you know, my opinion is that it
13 should not have been used at all.

14 Q Right, okay. And then down at the bottom, I am
15 not sure the minister had the benefit of
16 Mr. Tallis' closing address to the jury when this
17 letter was written, it says:

18 "The trial judge did not comment on the
19 forensic evidence in his charge to the
20 jury. Despite this, counsel appearing
21 for the accused did not ask the judge to
22 provide direction to the jury through a
23 recharge. That is not surprising,
24 because the evidence, as tendered,
25 favoured Milgaard's position."



1 And just your comment on that, whether at trial
2 would you agree that that evidence on the frozen
3 semen favoured David Milgaard's position?

4 A Yes, it does.

5 Q And then the next page, it says:

6 "In the final analysis, the forensic
7 evidence presented at trial proved
8 nothing. With the benefit of hindsight,
9 it may have been preferable had the
10 evidence simply not been tendered.
11 Nevertheless, the case against Milgaard
12 was a strong one. The suggestion that
13 the forensic evidence exonerates
14 Milgaard misstates the value of that
15 evidence. The forensic evidence
16 tendered at trial, when elevated to its
17 highest probative value, is neutral,
18 establishing neither guilt nor
19 innocence. The recent opinions do not
20 establish that the evidence should now
21 be viewed any differently."

22 Now, if you can ignore this sentence about the
23 case against Milgaard was a strong one, do you
24 agree with the balance of that paragraph?

25 A No, I don't, because I believe that the forensic



1 evidence that was tendered at the trial elevated
2 to its highest probative value clearly, at the
3 least, indicates Milgaard's innocence and in fact
4 I believe could be reasonably interpreted as
5 making him not guilty of the offence. It's again,
6 it's part of the problem of all of these review
7 systems. Remember, the trial is to determine
8 guilt, not innocence.

9 Q If you were a Crown witness back at the trial,
10 giving advice to the Crown and said how do you use
11 this sample to establish guilt or innocence, what
12 would you have told the Crown?

13 A Well, I would have -- well, I mean, to me the
14 procedures are straightforward. The Crown meets
15 with the expert witnesses prior to the trial, the
16 expert witnesses give their opinions on the
17 strength of their evidence and I have no doubt
18 that the forensic science evidence would have
19 questioned the reliability of the sample. I would
20 have thought it was perfectly open within the
21 existing system for the Crown to have presented
22 the issues of the integrity of this sample and its
23 validity as evidence in the form of *voir dire*
24 where the judge could have ruled on it. I believe
25 that, quite honestly I believe that if the judge



1 had been properly informed on the question of
2 contamination and the unreliability of this sample
3 and the difficulty of interpretation of the blood
4 tests, he probably would have said this should not
5 go to the jury.

6 Q And so in that respect, if the defence wishes to
7 use it as exculpatory from the other side, the
8 counter argument to that would be, well, no, you
9 can't rely on it for anything?

10 A Clearly, and that's always the risk in putting
11 together a case for either the Crown or for the
12 defence, but I think bad evidence serves nobody.

13 Q And if we can go to 002623, and this is around the
14 time of the Supreme Court of Canada reference, and
15 there's a couple of letters here that you maybe
16 haven't seen, this one is from Murray Brown who is
17 with Saskatchewan Justice to the Federal Justice
18 lawyers about who were going to be witnesses at
19 the reference, and your name is listed as a
20 witness I believe that Mr. Wolch may wish to have
21 called. What -- do you remember talking to Mr.
22 Wolch or Mr. Asper about giving evidence at the
23 Supreme Court in the reference case?

24 A I do. I don't have very good recollection of it,
25 but what I remember, I think I was informed that



1 my name was on the witness list along with Peter
2 Markesteyn, but I believe that the decision was
3 made that the serological evidence would not
4 become part of the material which was ultimately
5 presented to the Supreme Court.

6 Q Okay. If we could go to 009878, and this is Mr.
7 Wolch's -- if we can actually go to page 4 of
8 that. This is Mr. Wolch's letter to Chief Justice
9 Lamer about witnesses, and then if we can go to
10 the next page, it talks here about:

11 "We would appreciate further information
12 from Justice as to time frames, as well
13 as some views as to how this impacts on
14 the calling of Drs. Ferris and
15 Markesteyn and perhaps Dr. Emsen ..."

16 And it appears from this letter that you were on
17 the list at this time. If we could call up
18 230797 and go to page 799, this is -- and you may
19 not have seen this, this is a February 3rd, 1992
20 report from the forensic lab that, where David
21 Milgaard was determined to be a secretor, and I
22 believe that this was the first secretor test
23 done, at least based on the documents we have in
24 our database and the evidence we've heard to
25 date, this is when the test was done on David



1 Milgaard's secretor status, that it was in the
2 midst of the Supreme Court reference. Do you
3 recall whether this test and the results, the
4 fact that David Milgaard was now -- well, he was
5 always a secretor, but the test now showed he was
6 a secretor, did that impact on your testifying at
7 the Supreme Court reference?

8 A Well, obviously it was not discussed with me, but
9 I'm quite sure it did impact on the presentation
10 of that evidence.

11 Q You are sure it did?

12 A I would imagine so. I mean, it almost makes the
13 conclusions that Dr. Markesteyn and myself had
14 reached no longer relevant given the strength of
15 the other arguments that were going to be
16 available.

17 Q Okay. If we can then go to 041911, this is a
18 letter of May 3, 1993 from Inspector Sawatsky of
19 the RCMP, and I'm sorry, earlier I indicated that
20 there was some correspondence you had with Eugene
21 Williams in '92 about getting copies of your file
22 notes and I think that's when you sent him the
23 file notes, and I don't have any other documents
24 that suggest a further meeting with Mr. Williams.
25 Do you remember more than one meeting with Eugene



1 Williams?

2 A No, I don't, but I actually -- I believe that I
3 remember that Mr. Sawatsky was the first person to
4 tell me that David Milgaard was a secretor.

5 Q Okay.

6 A I --

7 Q In fact, let me just go through --

8 A I think that is correct, but I don't know when
9 that happened.

10 Q Did that surprise you?

11 A That he was a secretor?

12 Q Yes.

13 A Not really, because, I mean, I was well aware of
14 the fact that the secretor tests from saliva were,
15 not to say unreliable, but not always correct.

16 Q Okay. Here Mr. Sawatsky, or Inspector Sawatsky
17 was doing some work for the RCMP, he attaches
18 copies of reports that may assist you. If we can
19 go to the next page, to 041913, and I won't go
20 through all, these are some internal reports about
21 testing, and then go to the next page where it
22 says both David Milgaard and Larry Fisher are
23 secretors, and I believe this would be the
24 information that he would have provided to you; is
25 that correct?



1 A Yes, that's correct, but I actually think he told
2 me verbally --

3 Q On the phone?

4 A -- maybe by phone.

5 Q Okay. Would it have been around -- I don't think
6 he was involved in this matter until late '92,
7 early '93, so would it have been around the time
8 that he also sent you this letter?

9 A I presume so, but I'm afraid I have no record -- I
10 may actually have the letters in my file, but --

11 Q Actually, 041916, this is your letter back June
12 4th, '93, and you say:

13 "As you know my original opinion was
14 simply addressing issues raised at the
15 time of the trial and I expressed an
16 opinion that based on the evidence
17 submitted at the trial which included an
18 interpretation by the Crown that David
19 Milgaard was a non-secretor that this
20 evidence could be reasonably considered
21 to have excluded David Milgaard.

22 As you may know one of the
23 arguments advanced by the Crown was that
24 not only was David Milgaard a
25 non-secretor but the apparent secretor



1 status of the seminal sample was based
2 on contamination by blood although no
3 evidence of Milgaard suffering from any
4 injury likely to contaminate his semen
5 was ever adduced."

6 Then scroll down:

7 "I also spoke to Mr. Wolch, lawyer for
8 David Milgaard, indicating to him that
9 the methods used to determine secretor
10 status at the time of the original
11 investigation would not necessarily
12 exclude David Milgaard from being a
13 secretor and it is therefore no
14 particular surprise for me to learn that
15 David Milgaard is in fact a secretor."

16 And again this is your letter of June 4, 1993,
17 and is that accurate?

18 A I presume so. My recollection of all of this is
19 not great, but, I mean, I'm assuming that this was
20 correct.

21 Q And it says here that you spoke to Mr. Wolch
22 indicating to him that the methods used to
23 determine secretor status at the time of the
24 original investigation would not necessarily
25 exclude David Milgaard from being a secretor.



1 When would you have had that discussion with Mr.
2 Wolch?

3 A I don't know, but it certainly would not have been
4 at the time of the original opinion and must have
5 been subsequent to that.

6 Q And why do you say that?

7 A Because I think at the time of the original
8 opinion I was not fully aware of the unreliability
9 of saliva testing for secretor status.

10 Q And so -- and when did you become aware of that?

11 A I don't know, I honestly don't know, but remember
12 the reports from Pat Alain had been in before
13 that.

14 Q If I might just assist, from what we have seen
15 from some other documents in evidence, in June of
16 1990 I believe Dr. Merry and as well possibly Dr.
17 Markesteyn in reports had indicated that the
18 secretor test may not have been reliable. Is it
19 possible that it would have been around that time
20 frame that you would have had those discussions?

21 A Well, that's correct, it might be. At that time,
22 you know, I had attended a number of conferences
23 with Dr. Markesteyn and clearly we discussed this
24 case and I don't know at what stage I became aware
25 of that.



1 Q Okay. If we can then go to 061498 and this, we're
2 now into I guess 1994 and the Justice Department
3 and/or the RCMP were looking at doing some further
4 DNA testing and there's a call from a Corporal
5 Wozney about the, it says you advised him:

6 "The portion of material extracted from
7 panties belonging to Gail Miller was
8 tested for D.N.A. results. There was no
9 success in this process and the entire
10 portion of exhibit was consumed during
11 the examination. Dr. Ferris states he
12 has nothing to report and is not in
13 possession of any exhibit which can be
14 returned."

15 Is that accurate?

16 A Yes, it is. Corporal Wozney was at that time
17 associated with one of the major crime units with
18 the RCMP and I think she was responsible for, I
19 think she came to the lab to see exactly what was
20 available.

21 Q And so when you did the testing on the cloth
22 removed from the panties, was that cloth destroyed
23 in the testing process?

24 A It would have been destroyed after the testing
25 process.



1 Q Or after the testing process?

2 A Yes.

3 Q If we can then go ahead to 314267, please, and I
4 will not go through this, this is the transcript
5 of your evidence. You testified at both the
6 preliminary hearing and trial of Larry Fisher; is
7 that correct?

8 A Yes, I did.

9 Q And this preliminary hearing transcript, I'm not
10 sure if you've read it recently, but I believe you
11 would have read this before you testified at the
12 trial; is that fair?

13 A That's correct, and I also read it before I came
14 here.

15 Q And are you able to tell us that what you
16 testified to in the preliminary hearing and indeed
17 at the trial remains accurate?

18 A Yes. In fact, it documents the handling of each
19 of the exhibits and so on much better than my
20 present recollection.

21 Q Okay. And if we could go to 314131, I just want
22 to finish up some -- this is the trial transcript,
23 and if we can go to 314143. Actually, go to
24 314147. I think in your evidence there you also
25 said that you did not recall examining the dress.



1 Here at 314147:

2 "And do you have any personal
3 recollection of whether or not the dress
4 was examined?

5 A No."

6 And you talked about the extraction of DNA being
7 done by the scientists, and then you say:

8 "We did extract material which we felt
9 was DNA, but we were not able to do any
10 characterization of it that would even
11 confirm that it was human or animal or
12 whatever, so we couldn't identify it.
13 We felt that we had DNA, but that was
14 all."

15 And would that be an accurate statement?

16 A Yes, and in fact I think the radiographs that we
17 saw earlier show exactly what we saw and what the
18 problems were.

19 Q If we could then go to 317002, please, this is an
20 article in *The Leader Post*, October 22nd, 1999, I
21 think this was just around the time you were
22 testifying at trial, and it appears that you were
23 interviewed after your evidence, and it says here:

24 "Outside court, Ferris said his lab,
25 which shut down in 1990, was a research



1 facility and was never intended as a
2 "full service" laboratory, where tests
3 are provided for clients.

4 "The only reason we did the
5 tests at all was because of immense
6 pressure from Joyce Milgaard," he said."

7 And would that be an accurate recording of what
8 you would have told them?

9 A I suspect that's probably a little unfair to Mrs.
10 Milgaard. As I said this morning, we were
11 primarily a research facility. It was our hope
12 that we would eventually become a full service
13 laboratory and although I don't want to
14 underemphasize the pressure that Mrs. Milgaard
15 placed upon me, it really was I think justified
16 pressure in light of the fact that we were at that
17 stage, I have to say, almost her only hope as far
18 as DNA was concerned. Maybe I should have been, I
19 should have said to her, you know, the chances are
20 not good, I probably did, but I may not have said
21 it strongly enough, but on the other hand, as a
22 result of my introduction to her and those tests
23 which failed, I think the review of the subsequent
24 evidence probably made the contact worthwhile.

25 MR. HODSON: Okay. Thank you, Dr. Ferris,



1 those are my questions. We'll maybe break here
2 and I can canvass with counsel.

3 COMMISSIONER MacCALLUM: Thanks.

4 *(Adjourned at 2:52 p.m.)*

5 *(Reconvened at 3:09 p.m.)*

6 BY MR. HODSON:

7 Q Just -- sorry, before Mr. Gibson starts, there's
8 just one document that I should have put to you
9 regarding -- I think I told you I didn't think
10 there was a second meeting with Eugene Williams.
11 If we go to 277709 and go to the next -- this is
12 Mr. Williams sending back. If you can go to the
13 next page, please, where they talk about meeting
14 on Tuesday, May 19th, so it does look like there
15 may have been a 1992 meeting?

16 A Yes.

17 Q At your offices?

18 A Yes. That may have been in the laboratory, I
19 don't know. I can't remember.

20 Q And this would be after the Supreme Court
21 reference and I think after Mr. Milgaard's
22 conviction was set aside and he was released from
23 prison and this may well have had to do with
24 further DNA or forensic work. Do you have any
25 recollection of that?



1 A I don't. I know that, from the context of the
2 letter, it looks as if he was principally
3 interested in talking to Mr. Kelly McNeill.

4 MR. HODSON: Okay, thank you. I just
5 wanted to bring that to your attention because I
6 think I may had led you to believe that there was
7 only one meeting.

8 **BY MR. GIBSON:**

9 Q Dr. Ferris, for the record, my name is Bruce
10 Gibson, we had a chance to say hello at the break.
11 I'll be asking you a few questions in relation to
12 some of the evidence that you've gone over with
13 Mr. Hodson and I'm going to try not to belabour
14 that very much.

15 First off, I would like to thank
16 you for the assistance that you rendered to the
17 RCMP in the 1990s in clarifying a lot of the
18 evidence in the scientific data when you were
19 contacted by Inspector Sawatsky.

20 One of the areas I do want to
21 touch on is the evidence with respect to the
22 retrieval of the sample from the snowbank, and I
23 know we've been over that evidence a good deal
24 today already, and again I don't want to belabour
25 that, but my understanding is that your evidence



1 was that it was questionable as to whether that
2 should have been used at the trial and your
3 concern again was with respect to the
4 contamination and continuity of that sample; is
5 that correct?

6 A Correct.

7 Q And I believe that your evidence was that if the
8 forensic scientist had gone out to the scene, he
9 likely would have drawn the conclusion that that
10 sample would not be the best sample to use because
11 of the observations one could make with respect to
12 the trampling of the snow and the porosity of the
13 snow and the blood that had seeped into that?

14 A Yes. I mean, clearly if the sample had been
15 collected at the very initial stages of the scene
16 examination, then its significance might have been
17 much greater.

18 Q And were you aware as to whether Staff Sergeant
19 Paynter actually attended the scene? There's no
20 evidence that he did.

21 A No, I'm not aware of that.

22 Q Okay. And obviously that would have been
23 something that would have been beneficial if he
24 would have had that opportunity, to attend the
25 scene and then make that determination on his own?



1 A Yes.

2 Q Now, as far as what sample may have been best to
3 use, I think you agreed that the vaginal aspirate
4 would have been a far better sample to be doing
5 the type of tests that Staff Sergeant Paynter
6 eventually did; is that correct?

7 A Yes, and clearly it would have been a better
8 sample, but it would have been better still to
9 have access to that and any other sample,
10 including the snow sample, and to have at least a
11 comparative examination of the samples.

12 Q And I suppose you may agree with this comment in
13 that a scientist doesn't always necessarily get to
14 choose what sample he gets to do his analysis on?

15 A Oh, no, that's correct, but in his report he will
16 often qualify his results based on what he
17 understands to be the integrity of the sample.

18 Q Okay. And we do know that the evidence that went
19 in at trial, it was very clear in that evidence
20 that that sample was found a number of days later,
21 Lieutenant Penkala who found the sample testified
22 at the trial, and so that was certainly not a
23 secret at the trial as to the continuity and the
24 location of that exhibit?

25 A That's correct.



1 Q Now, I'm going to try to speed over this area
2 rather rapidly because we have gone through this
3 evidence a fair bit, even before your attendance
4 here today and yesterday, Dr. Ferris. Staff
5 Sergeant Paynter's evidence in the trial in 1969
6 was that he used a hemostix test which he gave
7 evidence was a presumptive test that there could
8 be blood in the sample, and would you agree with
9 that?

10 A Yes.

11 Q And Staff Sergeant Paynter at this Inquiry gave
12 evidence that that was only a presumptive test and
13 that he would have wanted to have done a
14 hemochromogen test to confirm that blood was
15 present in that sample, but there wasn't enough of
16 the sample there for him to do that confirmation
17 test, and does that make sense to you, Doctor?

18 A Yes, it does, and in fact he would probably have
19 explained that even the hemochromogen test does
20 not confirm that it is human.

21 Q Yes. And the evidence at trial was slightly
22 different, he never referenced the hemochromogen
23 test, but -- and again I don't think that's
24 necessary to put that up, but for the assistance
25 of you, Mr. Commissioner, at 041925, at 945 Staff



1 Sergeant Paynter indicated that there was
2 insufficient colouring in the sample to confirm
3 positively if the blood was there, and you will
4 agree that that was the evidence at trial? I
5 think you actually addressed your mind to that
6 portion earlier with Mr. Hodson, you did go
7 through that evidence.

8 A Yes.

9 Q And there was I guess a rather stern warning from
10 the judge that there was no evidence that blood
11 had been identified in the frozen sample and there
12 was an exchange back and forth with Mr. Tallis and
13 Mr. Caldwell and Chief Justice Bence on that?

14 A Yes. In fact, I think the judge actually said
15 there was no evidence whatsoever of blood.

16 Q And I guess it was on that basis, because the
17 judge ruled that there was no evidence of blood,
18 that the identification was that the sample was
19 from an A blood type secretor and that Mr.
20 Milgaard was identified, at least at the trial
21 stage, as being an A blood type non-secretor, that
22 you were able to draw the conclusion that in all
23 likelihood the evidence at trial went more to
24 exculpating Mr. Milgaard than inculpating him?

25 A The forensic evidence, that's correct.



1 Q Yeah, that's what I mean, yes. Now another area
2 that was covered by Mr. Hodson was the address to
3 the jury by Mr. Caldwell, and again I'm not going
4 to go through that, but at the end of the day I
5 think you agreed that Mr. Caldwell's view that --
6 was that it, I guess that evidence didn't identify
7 Mr. Milgaard as the culprit and did not eliminate
8 him as the culprit either, it was really I guess a
9 wash if anything?

10 A Yes.

11 Q And it was your view that that was a fair comment?

12 A Umm --

13 Q At least that aspect of it?

14 A -- yes, underwritten by the fact that I felt that
15 it would have been more appropriate to say that
16 you could not draw any conclusions from that
17 sample.

18 Q Okay.

19 A I know the two conclusions are either it includes
20 him or it excludes him but, in fact, it's slightly
21 different to say that you could draw no
22 conclusions from that.

23 Remember, I presume Mr.
24 Caldwell's task was to show evidence that linked
25 David Milgaard with the murder, and by saying that



1 you could neither include nor exclude him made
2 that piece of evidence neutral when in fact the
3 piece of evidence meant nothing, which is slightly
4 different from being neutral.

5 **Q** Now you also went through Mr. Tallis' address to
6 the jury with Mr. Hodson, and I think you agreed
7 with his comments that the evidence was
8 exculpatory of Mr. Milgaard, that was certainly in
9 Mr. Tallis' submission to the jury; correct?

10 **A** Yes.

11 **Q** And I suppose you would agree with me, and I
12 believe you did make the comment, that it was
13 really fact-specific and it was up to the
14 individual counsel in this case to decide, I
15 suppose, whether that evidence was beneficial to
16 his client or harmful to his client. And
17 certainly, from what we have seen, it was
18 obviously a determination made by Mr. Tallis that
19 his best argument -- and, again, he'll get an
20 opportunity to give that evidence -- that that was
21 beneficial to his client because, clearly, he
22 never called any expert evidence on his own;
23 correct?

24 **A** Correct.

25 **Q** And I suppose it would be fair, then, that your



1 view of the evidence in reviewing it in 1969, in
2 that sense, would have been I suppose similar to
3 Mr. Tallis' in that you took the view that the
4 evidence as presented at trial was exculpatory of
5 David Milgaard?

6 A That's correct.

7 Q Just a couple of other points that I want to touch
8 on with you, Dr. Ferris. Now, back in 1969, would
9 you agree that there would have been no way to
10 differentiate between Larry Fisher and David
11 Milgaard if both had been identified as A blood
12 type secretors, there was no additional testing
13 that could have been done to their body fluids to
14 test those body fluids to make a differentiation
15 between those two individuals?

16 A Not on those serological typing tests. There were
17 some other tests becoming available but the
18 difficulty, in those days, was the reliability of
19 those tests in stains.

20 Q Yes. And now of course, if we are able to
21 identify a stain, it would be appropriate to do
22 DNA testing and, thank goodness, hopefully people
23 won't have to have these lengthy discussions about
24 secretor or non-secretor issues?

25 A Well most of the serological tests have been



1 abolished in laboratories.

2 **Q** Now if we can go back again to 1969, and we can
3 look at the testing that was undergone by Staff
4 Sergeant Paynter, and he took the sample and ran
5 tests on it and identified the sample as coming
6 from an A blood type secretor, and if he had found
7 further samples, would you agree with me, doctor,
8 that finding further samples wouldn't have given
9 him any other opportunity to run any more tests on
10 anything? If he had found further seminal fluid,
11 there's not really much more that one could do
12 once you've identified the blood type and whether
13 they are a secretor or a non-secretor?

14 **A** Yes. I've -- I don't think it's quite correct to
15 say that Mr. Paynter's conclusion was that this
16 sample of semen came from an A-type secretor. I
17 think what he said was that he typed the semen as
18 type A and, therefore, it was either from a type A
19 secretor or it was contaminated by blood from an A
20 -- type A secretor or from other blood.

21 **Q** So he -- that was --

22 **A** He may not have actually said it quite like that
23 but I think his evidence, if you read it, allows
24 for that interpretation.

25 **Q** And that's as definite as he could get in the



1 sense that what he drew a conclusion from, that
2 sample, was that he had found an A blood type
3 sample, and then the issue was if there is no
4 blood in it then that may be from a secretor, if
5 there is blood in it that still may be from a
6 secretor; is that fair?

7 A That's correct. And that's -- that was the issue,
8 then, that became available to Crown.

9 Q Okay. One other area I just want to touch on
10 briefly with you, Dr. Ferris, is you gave evidence
11 at the Larry Fisher trial with respect to your
12 review of the clothing items that were forwarded
13 on to you in 1988, and I believe your recollection
14 was that you likely examined the uniform and it
15 may have been put under a UV light; is that --

16 A Yes. I can't remember. I mean we should have
17 examined all of the items, I mean that would --

18 Q It would make sense that you would do that?

19 A That would be the normal, but I have no actual
20 memory of that garment. I have a very good memory
21 of the bra and the panties because I took the
22 samples from those, and I have some recollection
23 of the other samples, but for some reason I can't
24 remember the dress.

25 Q And if we could just put up from that transcript,



1 I think it's doc. number 314131, and if we could
2 put up 173 of that document, please. If I could
3 just call up that bottom portion, this is under
4 examination by Mr. Beresh on behalf of Larry
5 Fisher at that trial, and it says:

6 "Q With respect, I don't want to debate
7 this all morning, your notes don't tell
8 us whether or not the other items were
9 examined?

10 A I can tell you that they were
11 examined, but I can tell you that they
12 were not tested for DNA, and fabric
13 was not cut out of them.

14 Q They were tested using UV light,
15 correct?

16 A I can't even tell you that, but I
17 think they were."

18 And if we go to the next page, just to finish
19 that off:

20 "Q Okay. And certainly Mr. McNeill didn't
21 report to you; using UV light he found
22 an area on cloth which suggested bodily
23 fluid?

24 A Well, I was the one that used the UV
25 light, not him."



1 And, again, your notes don't confirm that there
2 was any stain identified, but does that help with
3 your recollection that it was likely that he
4 reviewed that item of clothing with sight and UV
5 light to try and identify if there was any
6 staining?

7 A Well, all I can say is that it is likely that I
8 did, but I don't recall it.

9 Q All right. And, again, it's likely -- well, I
10 guess it's obvious that you weren't able to
11 identify a stain that was later identified by Dr.
12 Barber; correct?

13 A Correct.

14 Q Okay. Thank you, doctor.

15 **BY MR. LORAN:**

16 Q Good afternoon, Mr. Ferris, I'm Pat Loran and I'm
17 here with the Saskatoon Police Service.

18 I just wanted to ask you about
19 something I heard near the end of your evidence.
20 Did I correctly hear you say that the sample of
21 cloth from the panties was destroyed after you had
22 completed your analysis in 1988?

23 A I -- that's my recollection.

24 Q Okay. Now you've indicated that surprising
25 advances in the scientific understanding and



1 technology associated with DNA testing have
2 occurred in the last 10 or 15 years, I think that
3 was your evidence, wasn't it?

4 A Yes.

5 Q If that sample were still around is it possible
6 that current techniques would permit the
7 extraction of a sample with some probative value
8 regarding DNA?

9 A Possibly, unless our manipulation of the sample
10 and our attempts to extract DNA had in fact
11 removed all of the DNA that was there.

12 Q Okay. Umm, are you able to say, at this time,
13 whether a technology which might not yet be
14 developed will come along which would have allowed
15 the extraction of a sample with probative value?

16 A I'm -- I simply can't look into the future.

17 Q When you destroyed the sample would it be fair to
18 say that you didn't consider yourself to be
19 destroying valuable evidence because the available
20 knowledge at the time led you to believe that the
21 sample had no probative value?

22 A Umm, it -- I was of -- I was under the impression,
23 at that time, that we had done all that could be
24 done to that particular sample.

25 Q And you thought it would be of no further value.



1 That was because of the scientific knowledge or
2 technology at the time; would that be correct?

3 A That was correct in part, but I think we also
4 might have modified the sample in such a way that
5 further testing might have been unreliable, and,
6 remember, there were still other parts of the
7 fabric and garments would still be available for
8 further testing.

9 Q Thank you. Those are all the questions I have.

10 **BY MR. PRINGLE:**

11 Q Dr. Ferris, you know me, I'm Alex Pringle, I
12 represent Justice Tallis.

13 Just a few questions for you,
14 Dr. Ferris. One of the, I'm sure you've run into
15 this as an expert witness who testifies in our
16 courts often, but one of the principles of
17 Canadian law is that the, you know, the expert's
18 opinion is -- it has to be supported by proof of
19 underlying material facts; is that correct?

20 A Yes.

21 Q And in this case the, any opinion that has been
22 provided in this case to reach any conclusion that
23 there was a match between the frozen semen and
24 David Milgaard's, any opinion, that has to be
25 based upon underlying evidence that is proven;



1 correct?

2 A Yes.

3 Q Okay. And you've already pointed -- you've
4 already observed the address by Justice Tallis
5 where he is basically saying that, in argument,
6 and very alertly pointing out to the jury in final
7 argument that there is no evidence that David's
8 blood was in his semen at the material time?

9 A Correct.

10 Q And the judge also said that there was no evidence
11 that, you know, that his blood would be in his
12 semen at the material time, and Crown's theory
13 that, you know, he was suffering from some illness
14 or injury that would cause blood to seep into his
15 semen, there was no evidence to that effect?

16 A Correct.

17 Q And to think otherwise would be what we could say,
18 in law, "speculation"?

19 A Correct.

20 Q It would just be speculative to reach such a
21 conclusion?

22 A Correct.

23 Q There was no evidentiary basis in this trial for
24 that opinion, for the opinion being based upon
25 that type of evidence?



1 A Correct.

2 Q And that's why you're saying that in the final
3 analysis, when you look at the evidence that was
4 called at this trial, the blood evidence was
5 exculpatory in favour of David Milgaard?

6 A Effectively, yes.

7 Q And so that really, when you look at the final
8 result here, the final, you know, the final
9 conclusion that can be drawn from the evidence is
10 that there was no evidence that the A antigens in
11 the frozen lump came from any other source than an
12 A secretor?

13 A That's correct.

14 Q And it would be speculation to conclude otherwise?

15 A That's correct.

16 Q And your position on analysing the evidence, then,
17 that David Milgaard could not be the source of
18 that frozen semen?

19 A Correct.

20 Q And that was what Justice Tallis was arguing in --
21 at the time of the trial in his closing address?

22 A That's correct.

23 Q Now if a defence lawyer is going to get that
24 result in the evidence would you not think, from a
25 tactical point of view -- and I just, I know you



1 are a scientist and a doctor, and the thinking of
2 doctors is different when it comes to the
3 adversarial system because doctors are more used
4 to a venue where you are getting at the truth in a
5 scientific inquiry -- but in a trial process, and
6 you are familiar enough with trials, don't you
7 think that in this trial, considering what
8 ultimately occurred, it was a wise decision by Mr.
9 Tallis not to seek a voir dire, to allow the
10 evidence in, and get that ultimate result with
11 respect to the evidence?

12 A I think that may well be correct, but I have one
13 concern. And, I mean, I'm not a trial lawyer,
14 although --

15 Q Right.

16 A -- I mean for 40 years I have been participating
17 in trials. If you stand back and look at this
18 case from the jury point of view you have evidence
19 being presented by the Crown which, much of which
20 is really bad news for David Milgaard; and then
21 you have serological evidence which is being
22 presented by the Crown, and although it does not
23 implicate David, the evidence from the Crown is
24 again and again and again that in fact it's
25 neutral.



1 Now Mr. Tallis correctly argued
2 that that was not correct, in fact it was more
3 than neutral, it was -- actually potentially
4 excluded him.

5 Q Correct.

6 A And the judge also argued that, and pointed out on
7 several occasions, that the jury could reasonably
8 interpret this evidence as excluding David
9 Milgaard, or words to that effect.

10 Q Right.

11 A And I think what I would have done is it would
12 have been, I think, a requirement by the defence
13 to counter the Crown case by calling their own
14 expert because they would be saying to the jury
15 "this is very important evidence and our expert is
16 telling you this is the correct way to interpret
17 this evidence. It may be the same interpretation
18 as the Crown, but I want you to understand that it
19 is actually defence evidence", and the only way
20 the jury will identify it as being of significance
21 to the defence is to hear it from the defence
22 through the mouth of a good, articulate, defence
23 expert.

24 Q Right. But the, at the end of the day the Crown
25 is saying at the end of the trial, you know, "at



1 worst this is neutral evidence"; right, that's
2 what Mr. Caldwell said at the end of the trial?

3 A Yes.

4 Q And Mr. Tallis correctly pointed out that there
5 was no evidence, there was no evidence that
6 supported a match, the Crown's theory with respect
7 to, you know, the fact that blood could get into
8 the semen through an injury or illness is, you
9 know, is simply speculation, and the only
10 conclusion that can be reached on that evidence is
11 that, you know, David Milgaard is a non-secretor,
12 and that the evidence that is there is a secretor.
13 You have what you want, you have the evidence that
14 you need, and there are always problems in calling
15 experts for the defence; aren't there?

16 A Oh --

17 Q Things can go sideways?

18 A Absolutely.

19 Q Like --

20 A On the other hand, you have got to make sure that
21 the jury, that they --

22 Q Well --

23 A -- that the tunnel vision that the jury may have
24 developed at the beginning of the trial is
25 including your arguments, and that sometimes



1 doesn't happen.

2 Q But here, in this case we had a judge intervene
3 right at the material time, and point out to the
4 jury the situation?

5 A Yes. And I mean I'm not, I'm not disagreeing with
6 you, I mean I agree entirely.

7 Q Yeah.

8 A I think the problem is that we know what happened,
9 and somehow or other the jury set this evidence
10 aside, and the question really is what allowed the
11 jury to set aside exculpatory evidence.

12 Q Yeah. And if Mr. Tallis had gone out and got an
13 expert the expert may have decided to test, test
14 David Milgaard's saliva, and found out that he is
15 a secretor, and that could have happened; right?

16 A But isn't that part of the problems associated
17 with adversarial systems. I mean that's hardly a
18 reason for not seeking an expert.

19 Q Well, you know --

20 A Maybe I'm being naive.

21 Q Well, you don't know whether he did seek an expert
22 or not, that's --

23 A No, all right, that's -- sorry.

24 Q But the judgement call as to whether to call an
25 expert, when the Crown 's expert comes down really



1 totally in your favour, as you've pointed out, is
2 a judgement call a defence lawyer makes, and that
3 in this case the serological evidence was
4 exculpatory, it was totally favourable to David
5 Milgaard as led in the Crown's case; is that not
6 what you were saying?

7 A Correct.

8 Q And so when you, as I said before, when you get
9 that result in the evidence is it fair to say that
10 the defence lawyer would not want to question the
11 integrity of the sample, it -- when you want to
12 get that evidence in, when you can get the type of
13 result that Justice Tallis ultimately obtained
14 with respect to the serological evidence?

15 A Yeah, I'm sure that's correct. I'm really not in
16 a position to make that sort of judgement call,
17 but I can understand it.

18 Q Yes. But I -- as far as trying, you know, as far
19 as a reason why the defence would want to try and
20 keep that evidence out, it's hard to come up with
21 a reason, isn't it, they would want that evidence
22 in?

23 A Yes, certainly. As that evidence stands, and in
24 view of the other evidence, you certainly would
25 want that evidence in.



1 Q Yeah. And, you know, like if for instance I had
2 -- if I was defending him and I did this trial, or
3 let's say Mr. Tallis had -- you were back
4 practicing forensic pathology back in 1969 and he
5 had gone and hired you and you had given an
6 opinion, I don't think -- I don't think you would
7 be called, because you would be saying that the
8 sample is contaminated, and he would never get to
9 the ultimate conclusion that the Crown's expert
10 got to in this particular case because you would
11 be questioning whether you should even consider
12 the ultimate results that were obtained?

13 A That may be correct.

14 Q Like, I think what would have happened if the
15 defence had retained you, you would have ended up
16 being an advisor, I don't think the defence would
17 have called you, because you would have brought
18 into question whether the exhibits should be
19 considered and the value of their evidence, you
20 would say that the samples, the frozen samples
21 should not even be considered because of their
22 contamination?

23 A Maybe --

24 Q It's right in your report.

25 A Maybe that's why I give evidence so little and I'm



1 consulted so often.

2 Q Right. So, you know, hiring a defence expert
3 witness here is complicated, isn't it, it's a
4 complicated decision as to whether you --
5 especially when you get such favourable evidence
6 coming out --

7 A Yeah.

8 Q -- in the Crown's case, as to whether you would
9 start calling expert evidence in the defence case?

10 A I would hate to think that the experts determined
11 how the evidence is presented. I mean these are
12 tactical issues that really are in the hands of
13 the lawyers.

14 Q Yeah. And you mentioned the fact that the jury
15 could have got tunnel vision here, but let's face
16 it, we don't know how the jury reached their
17 conclusion, reached their conclusion, but if they
18 did misunderstand the impact of that serological
19 evidence they may very well have misunderstood it
20 even if another expert was to testify; is that not
21 fair to say?

22 A Yes.

23 Q And, you know, I might say this; that it may have
24 been helpful -- and I'm sure you will agree with
25 me that if the judge at the end of the trial --



1 and of course Mr. Tallis would not know the judge
2 wouldn't do this when he is calling his
3 evidence -- but at the end of the trial, if the
4 judge in his final charge to the jury had
5 reiterated the fact that the Crown had not proven
6 that David's blood, through injury or illness,
7 could go into his semen, if the judge had
8 reiterated that, that might have been helpful; is
9 that not fair to say?

10 A Yes, although I presume -- I don't know what the
11 custom was in those days -- but presumably counsel
12 do have an opportunity to inform the judge of
13 issues that they think need further stressing.

14 Q And if counsel felt it was clear at that point
15 they wouldn't bother. Okay, well thank you very
16 much, doctor.

17 **BY MS. KNOX:**

18 Q Dr. Ferris, I just introduced myself to you during
19 the break. As you know, my name is Catherine
20 Knox, and I am counsel for the prosecutor, T.D.R.
21 Caldwell, and I do have some questions for you.
22 But contrary to your opinion, I hope I won't make
23 you feel like, as you suggested, that I was going
24 to tear you apart.

25 But, doctor, I was interested in



1 a couple of comments that you have made in the
2 course of your evidence today, and I'll paraphrase
3 a bit because my note-taking is a little bit off,
4 but at one point in response to questions from Mr.
5 Hodson, Commission Counsel, you indicated to him
6 -- and I think I've got your words right -- "I
7 suppose I have an inherent distrust of trial by
8 press"?

9 A Yes.

10 Q And I take it that's a sentiment or a belief or a
11 philosophy that you have developed over the some
12 40 years that you have indicated you have been
13 involved in scientific work and have had some
14 involvement with courts and court process and
15 criminal proceedings?

16 A Yes.

17 Q Now, sir, you've also testified today that it was
18 only a couple of weeks ago that you came into
19 possession of significant documentation from the
20 perspective of my client, being his opening
21 address to the jury, his closing address, Mr.
22 Tallis' closing address to the jury, and the
23 judge's charge to the jury?

24 A Yes.

25 Q And I guess my question is how is it that a man of



1 your experience and a man of your discrimination
2 -- and I'll use that word -- with respect to being
3 able to know that trial by press is not a good
4 thing; how come you did not follow a first-step
5 prudent practice of making sure that you had
6 possession of the full documentary record with
7 respect to these issues in this trial, if not all
8 of the issues in the trial, before you made the
9 statements you made that, for many years now, have
10 called into question the competence and at some
11 levels have called into question the ethics of
12 people like T.D.R. Caldwell, who you had never
13 met?

14 A Well, first of all, I am never aware of how much
15 evidence is available, --

16 Q Uh-huh.

17 A -- I am only aware of the evidence that is
18 supplied to me, and when I asked originally for
19 all of the evidence that was relevant to the
20 forensic issues in this case I had to assume that
21 that had been provided to me. So I based my
22 opinion on that evidence, and I listed all of
23 those documents, and I presume it would have been
24 available to any of the parties interested that
25 the documents that you've just referred to were



1 not included in that list, and I presume if it had
2 been important, those could then have been
3 provided to me. They were first provided to me
4 within the last couple of weeks, which is over 20
5 years after that opinion.

6 Q Doctor, you write that those documentations were
7 available and they could have been provided to
8 you, and anybody looking at your report, be it a
9 lawyer or another scientist, could tell from
10 looking at it that there would be some limitations
11 on the material that you had, and working within
12 professional circles and professional communities
13 that response makes sense, but you are aware that
14 what happened with your report is your report went
15 out into the public media?

16 A Yes. But is it not correct that the transcripts
17 of those addresses were not in fact prepared some
18 -- until some five years after I wrote my report?

19 Q I don't believe that to be the case. I could be
20 wrong on that. Maybe Commission Counsel could
21 assist me?

22 MR. HODSON: It's my understanding that
23 certainly with respect to Mr. Tallis' closing
24 address, it was not available until towards the
25 end of 1992 when it was prepared from shorthand



1 taken at the time. Mr. Caldwell's opening
2 address was, his notes were obtained by Mr.
3 Carlyle-Gordge in 1983, being a copy of his
4 draft. I believe his opening address was in the
5 transcript that may have been provided to
6 Dr. Ferris, may not have, I'm not sure, and
7 certainly the charge to the jury would have been
8 available as part of the transcript. The 1992
9 reference I think was limited to Mr. Tallis'
10 address which would not have been available. The
11 other ones were to my understanding.

12 A Certainly I did not see them.

13 BY MS. KNOX:

14 Q You did not see them, but you were aware, based on
15 what Commission Counsel just advised us, that as
16 of about 1983, given that some of the notes were
17 given to Mr. Carlyle-Gordge, in 1983 they were in
18 the possession of parties acting on behalf of the
19 Milgaards and the transcripts were in their
20 possession certainly from early 1980, so well
21 before you became engaged they had possession of
22 these materials?

23 A Yes, but I would not have been aware of that
24 unless someone told me.

25 Q But, sir, as a person who by that time had been



1 practicing in the system for about 20 years, and
2 I'm not sure I've got the exact numbers, I'm
3 borrowing from your term of about 40 years'
4 involvement, but having practiced in the system
5 for about 20 years by the time you were asked for
6 this review, you would have known the protocol for
7 the conduct of a trial, a jury trial in
8 particular, that there would be a documentary
9 record, there would be remarks made to the jury.
10 I'm sure you in your capacity as an expert perhaps
11 on occasion have been consulted by Crowns or
12 defence lawyers about how to incorporate the
13 evidence that you can offer into a jury address?
14 A That's correct, but I have to tell you that over
15 reviewing multiple transcripts of evidence in
16 multiple cases, to receive a copy of the charge to
17 the juries by either defence or Crown or even the
18 judge is not very common. Usually I'm dealing
19 specifically with the evidence of the experts as
20 it is presented and not how it is reinterpreted.
21 Now, clearly in this case it was important.
22 Q Dr. Ferris, I suggest to you that it was far more
23 than important, it was critical, you stood in
24 front of the TV camera at one point in time as we
25 saw today and you criticized the competence of



1 Mr. Tallis about what he should have done at a
2 trial only to find out that in fact he did the
3 very thing that you said in a public forum on
4 national TV that he should have done, didn't you?

5 A Yes.

6 Q Sir, with respect to other issues that were put
7 into the paper such as the article that was
8 referred to you today where one of the captions in
9 it indicated that your report proved innocence,
10 you indicated you hadn't seen that newspaper
11 article before, but you were aware, were you not,
12 how your report was being taken, and I mean no
13 disrespect by this term, but the spin that was
14 being put on it by advocates for Mr. Milgaard and
15 the consequent criticism and harm that was doing
16 to the reputations of professionals who had worked
17 on this case?

18 A No, I was not aware of that. How would I have
19 been aware of that?

20 Q How could you not have been aware of it?

21 A First of all, I was not aware of it because I was
22 living and working full time in Vancouver, well
23 away from all of these press reports, and unless I
24 had received direct communication from either Mr.
25 Wolch's office or Mrs. Milgaard, I would not have



1 searched the press in order to see this. I mean,
2 I was a full-time forensic pathologist dealing
3 with other critical issues and this was one case,
4 admittedly a very serious one, but the only time
5 that I gave much thought to the case after writing
6 that original opinion was whenever I was asked
7 specifically about it, and you are right, that
8 information had changed and the availability of
9 information had changed, but at no time was I made
10 aware of that additional information or given an
11 opportunity to consider it. If I had sought it,
12 you are correct, it might well have affected what
13 I said, and I'm sorry if in not seeking that I
14 have said the wrong things and offended people.
15 That certainly was never my intention.

16 Q Sir, did you not agree when you were contacted by
17 Mr. Asper to co-operate in the publication of some
18 materials from your report? Mr. Hodson showed you
19 a letter where you were advised that your name was
20 being given to reporters and presumably by
21 implication permission had been given to them to
22 contact you. Did you not react to that and say
23 hold on a minute, I only commented or I only
24 reviewed one aspect of this case, I'm in no
25 position to be commenting on the big picture?



1 A No, because the context of my opinion was clearly
2 defined within the opinion.

3 Q Sir, in the news clip that we saw where you spoke
4 on, one of the TV clips that Mr. Hodson showed
5 you, you commented on more than the forensic
6 evidence, you commented on the other evidence, and
7 I've lost my place in the notes, but you commented
8 on the frailties of eye witness testimony, you
9 commented on different aspects of the Crown case,
10 but what I hear from your evidence today, you had
11 no knowledge of it except that which was being fed
12 to you by advocates for Mr. Milgaard?

13 A Correct.

14 Q And as a scientist you saw, or obviously you
15 didn't see that as a bar to preventing you from
16 passing your opinion when you are being consulted
17 as an expert on areas of evidence that you hadn't
18 a clue about in terms of his reliability,
19 credibility, except for third-hand information
20 from advocates for the accused?

21 A Well, what I was stating in those comments was
22 what my understanding was. I don't think I stated
23 that this was factual evidence.

24 Q Dr. Ferris, in fairness, when you appear in front
25 of a TV camera and you are identified as a doctor,



1 a forensic pathologist, do you not consider that
2 the impression that goes with your credentials and
3 your qualifications is one that will cause the
4 public to perhaps give more weight to what's
5 coming from you than if those words came out of
6 Joyce Milgaard or David Asper or others?

7 A I suppose it might, but it's not something that I
8 actually think usually about. I don't think I
9 have that influence.

10 Q Based on the way the media used your report in
11 this case, have you had reason to think that maybe
12 you do have that kind of influence by virtue of
13 your professional expertise?

14 A I might do in some cases, but, you know, it's not
15 very often that what I say either in court or out
16 of court ever gets reported.

17 Q Doctor, if we could bring up document 153446,
18 please, this is a transcript of what I believe is
19 the Pamela Wallin tape that Mr. Hodson had played
20 for you this afternoon, and if I could skip to
21 page 159448, please, I draw your attention to this
22 paragraph which is a response that you give to the
23 reporter, and the reporter says, Dr. Ferris -- and
24 in the previous paragraph:

25 "Dr. Ferris was approached by Milgaard's



1 family to examine the court transcripts
2 and evidence presented at the trial. He
3 believes the semen sample discovered in
4 the snow bank four days after the murder
5 did not match Milgaard's, and that
6 the --"

7 And I can't read what's, I think it's perhaps a
8 word like unreliable,

9 "-- the forensic evidence as presented."

10 But you see the context that the reporter framed
11 the question, she said you examined the court
12 transcripts and the evidence presented. There's
13 no limitation that you examined the forensic
14 evidence and the court transcripts to do with
15 forensic evidence only is there?

16 A Not except at the end of the paragraph.

17 Q And, sir, your response is:

18 "There is almost no element of the
19 entire case which does not raise some
20 questions, and the validity of the semen
21 itself ..."

22 You talk about the semen, that's an area of
23 concern. There's a -- there's some -- there's
24 some other areas quoted by you, one being the
25 temperature the morning that this happened,



1 that's an area of concern. A second question
2 that again I can't pick out, and I didn't make a
3 note of it, and then you go on to say:

4 "The reliability of many of the
5 witnesses. I think there are many areas
6 that certainly would give rise for
7 concern."

8 But you see, whether you intended to or not, that
9 the response you gave here was a very broad-based
10 judgment by you on the merits of the entirety of
11 the Crown case?

12 A Well, with the exception of the last sentence
13 which talks about the issue, or other issues that
14 give rise for concern such as the reliability of
15 witnesses. All of the others are within the
16 context of the original opinion that I wrote.

17 Q The reliability of many of the witnesses would be
18 within the parameters --

19 A That's what I say, with the exception of that, and
20 that was additional information that I had been
21 provided.

22 Q But you didn't caveat by saying that you hadn't
23 looked at it, that you were relying on information
24 that was given to you by others?

25 A Well, I think, as you are probably well aware,



1 interviews with the press are not quite the
2 writing of medical legal opinions.

3 Q Exactly, sir, that's the point isn't it, what goes
4 out in the press you don't control once you start
5 talking to them do you?

6 A Exactly.

7 Q But the consequences for people in the system who
8 you talk about can be quite profound can't they?

9 A You don't have to tell me that.

10 Q Sir, when you were provided with the copies of the
11 jury address a couple of weeks ago by Mr. Hodson,
12 I understand you took the opportunity to review
13 them?

14 A Yes, I did.

15 Q Do you recall that there were a number of times
16 during the course of the opening address, the
17 summations and the charge by the judge where the
18 jury was cautioned that whatever was said to them
19 by Mr. Tallis, Mr. Caldwell or even the judge with
20 respect to the evidence and the facts was not
21 matters that they need be guided by, that they
22 were the judges of the facts and only they could
23 be the judges of the facts?

24 A Correct, and I have to tell you that when I spoke
25 to Mr. Hodson, having reviewed this material, I



1 pointed out to him that all of the areas of my
2 concern relating to that whole issue of the
3 presentation of the evidence in fact were
4 addressed in those addresses to the jury.

5 Q So if you had had those addresses to the jury in
6 1998, Mr. Caldwell and Mr. Tallis and others might
7 not have been subjected to the criticisms, some of
8 them quite unfair that they've been subjected over
9 the course of years by people using your report,
10 as the basis to found those criticisms?

11 A Well, I have to say that this is the first time
12 that I've heard that they were subjected to that,
13 and if I'm responsible for that, please give them
14 my sincerest apologies.

15 Q My client would appreciate that, sir. Thank you.

16 BY MS. McLEAN:

17 Q Good afternoon, sir. I'm Joanne McLean, I'm
18 counsel for Joyce Milgaard as you know.

19 I want to go back to something
20 that you said this morning to Mr. Hodson just --
21 I'm not entirely sure I understood your answer.
22 It was dealing with Dr. Emson and the fact that he
23 had discarded the vaginal samples taken from Miss
24 Miller's body at autopsy after determining that
25 there was in fact sperm present in the sample. Do



1 you remember those questions?

2 A Yes.

3 Q And if I understand your answer, you said that you
4 understood or you could have some understanding
5 about why he would have thrown them out; correct?

6 A Yes.

7 Q And I think your answer was that he thought he
8 would have enough other evidence or something?

9 A Well, what -- again, he's really the only person
10 that can answer these questions and I can only
11 tell you what I would have done under similar
12 circumstances, but if I had been handling those
13 samples, I would probably have looked at them for
14 the presence of sperm and I believe he did that
15 and saw sperm. Under the microscope he probably
16 also saw some red blood cells which he identified
17 as evidence of blood and that is fair enough, and
18 depending on the information that would be
19 available to me at that time, if I had been given
20 to understand that other samples were available
21 for testing, then it might have been possible to
22 discard them. Clearly I don't think I would have
23 discarded them, but I can perhaps understand how
24 he might have been misled into thinking they were
25 no longer of any significance.



1 Q Okay, that's precisely my question, what other
2 samples or what other evidence are you suggesting
3 that he might have been led to believe existed?

4 A Well, there would be first of all the clothing.

5 Q Yes.

6 A Which may well have had obvious stains in it at
7 that time and which Dr. Emson would have seen. He
8 may possibly have been told about the collection
9 of seminal samples from the scene, I don't know
10 whether that occurred later or not.

11 Q It's my understanding it was later, sir.

12 A Okay. I don't know exactly what samples he did
13 collect. He may even have collected additional
14 samples which got, that he had intended to keep
15 but which got destroyed in error. I don't know.
16 I mean, often we do swabs, we do smears and we do
17 washings and that would result in perhaps as many
18 as half a dozen samples, and it's possible that
19 you give instructions that say some of these
20 samples should be destroyed and then by mistake
21 all of them get destroyed, that could have
22 happened. I just don't know.

23 Q Okay. So you are really suggesting some form of
24 error rather than thinking that there was an
25 additional source of material; am I correct?



1 A Well, I was simply offering that as one possible
2 reason, but I don't know.

3 Q Okay. Now, you told us in response to somebody's
4 questions today that you have -- you have some
5 problems with an adversarial system, or have some
6 concerns with an adversarial system, and I want to
7 ask you about your interviews with the Department
8 of Justice officials after your report in 1988.
9 Did you have some concerns with the manner in
10 which Mr. Eugene Williams dealt with you?

11 A At the time I did, but this may -- I mean, as you
12 know, sometimes there can be personality issues
13 that can rise that it's hard to put your finger
14 on.

15 Q Yeah.

16 A But I don't think Mr. Williams particularly liked
17 me and I didn't particularly like him, and that
18 may be entirely unfair because when I read his
19 report, it's actually a pretty objective report.

20 Q Could we go to the report, please, because I want
21 to ask you about that. I hope the number is
22 002483. Is it? Hey, I'm impressed. The report
23 starts off with, that he's there to discuss the
24 contents of your September 13th, 1988 report.
25 Now, in the first place he's there some 16 or 18



1 months after you had filed it. Did that strike
2 you as odd, that it took from September of '88
3 until June of '90 to speak to you about your
4 report?

5 A Well, I mean, that was out of my control. I
6 think -- I believe there was a significant delay
7 between the initial approach by Mr. Wolch or Mr.
8 Asper and --

9 MS. COX: Mr. Commissioner, the report was
10 completed perhaps in September of '88, but it
11 actually wasn't filed with the application until
12 December of 1988.

13 BY MS. McLEAN:

14 Q Yeah, that's fine, that's why I'm saying 16 to 18
15 months instead of closer to two years.

16 The question I guess really is
17 would it have been preferable for you and do you
18 think it would have been easier for you to discuss
19 your report if you had done so a little closer in
20 time to the time that you had prepared the report
21 or did it make no difference to you?

22 A I don't think it really made any difference.

23 Q Okay. And Mr. Williams sets out the general
24 discussion that you had with him. If we could
25 move on to page 2. On this, this part here in the



1 centre, he's recorded you saying that you were
2 asked to review the trial evidence, not, you know,
3 as we've heard, not the addresses, just the
4 evidence at the trial, and that you made your
5 opinion on four assumptions; correct?

6 A Yes.

7 Q So you had the assumption that the semen was
8 human, it had the A antigen, it was not
9 contaminated by blood, David Milgaard was an A
10 non-secretor and there was no evidence that David
11 Milgaard bled, and that was because you were asked
12 to review the trial evidence on the basis of the
13 facts established at the trial and you put
14 yourself in the position of a juror hearing the
15 evidence; correct?

16 A Essentially correct, yes.

17 Q And Mr. Williams has set that out accurately;
18 right?

19 A Yes.

20 Q And then taking only those facts into account, you
21 reached the conclusion that the evidence could be
22 reasonably considered to exclude David from being
23 the perpetrator of the murder?

24 A Yes.

25 Q And that you were of the belief, and you discussed



1 this with Mr. Pringle, but you were of the belief
2 that the evidence should not have been admitted at
3 trial?

4 A Yes.

5 Q So your assumption or your, the assumption that
6 you proceeded on was that having been admitted, it
7 would have to be not contaminated because if it
8 was contaminated, it shouldn't have been admitted;
9 right?

10 A Well, yes, having been admitted, then one could
11 raise the argument of contamination.

12 Q Yes. And your view was that if contaminated, it
13 should not have been admitted?

14 A Yes, but that presupposes that it was not
15 admitted. In fact, once it is admitted, then the
16 issue of contamination becomes an argument.

17 Q Okay. If we can go to the last page of this.
18 Mr. Williams, just before setting out his
19 conclusion, he says:

20 "I then asked Dr. Ferris to take into
21 account the contamination ... and
22 indicate whether the evidence excluded
23 David Milgaard. Dr. Ferris then stated
24 that the ... evidence did not link David
25 Milgaard to the offence, however, you



1 could not say it (the serological
2 evidence) excluded him. (Underlining
3 added)"

4 So that's Mr. Williams' emphasis there; correct?

5 A Correct.

6 Q And I think you told us earlier that the secretor
7 status was key to Mr. Williams?

8 A It seemed to be at the time that I spoke to him.

9 Q Okay. And then we go on to the conclusion where
10 he uses the quote that has, he calls it the often
11 quoted paragraph, and I presume that's from
12 submissions made by Mr. Wolch and Mr. Asper, where
13 you state that you have no reasonable doubt that
14 the blood evidence presented at the trial failed
15 to link David Milgaard with the offence and that
16 opinion has not changed in any way, sir, has it?

17 A No, it hasn't.

18 Q Same in 1969, 1988, 1990, 2006, that evidence did
19 not link David Milgaard with the offence?

20 A The emphasis today, given what we know about David
21 Milgaard's secretor status, puts that evidence, if
22 it was admissible, back into the neutral position.
23 In other words, at this stage, given that we know
24 that David Milgaard is a secretor and is A
25 positive, then you can no longer say anything



1 other than that this piece of evidence neither
2 includes or excludes him, whereas I believe at the
3 time that I wrote my original opinion, based on
4 the assumption that David was a non-secretor, that
5 it could be used, as Mr. Tallis had intended it to
6 be used, to exclude him.

7 Q And that's why I stopped reading where I did here,
8 the evidence failed to link David Milgaard with
9 the offence, that part has always been true;
10 right?

11 A Correct.

12 Q The part that has changed as a result of the
13 secretor status is that it could be reasonably
14 considered to exclude him from being the
15 perpetrator of the murder?

16 A Correct.

17 Q And that:

18 "Dr. Ferris --"

19 According to Mr. Emson,

20 "-- provided a re-interpretation on the
21 evidence on what we now know to be a
22 fallacy."

23 And then his statement, Mr. Williams' statement:

24 "Very little, if any weight can be given
25 to a conclusion that blindly ignored the



1 obvious contamination of the samples
2 that were collected. The conclusion is
3 also wrong because an essential fact
4 upon which it is based, namely, David
5 Milgaard's status as a non-secretor, has
6 not been established."

7 Does that strike you, sir, as an objective
8 rendering of your report, your interview with Mr.
9 Williams?

10 A I think that's what Mr. Williams was saying when
11 he left my office and it certainly was not what I
12 had hoped he would understand.

13 Q Do you consider it to be an objective assessment?

14 A Well, it's his assessment.

15 Q Yeah.

16 A It would not have been mine.

17 Q Okay. Do you think overall that we may be better
18 served in the criminal justice system by having
19 cases investigated by people who are removed from
20 the Department of Justice that has the
21 responsibility for determining whether or not a
22 case should be reviewed?

23 A If you mean reviewed prior to trial or reviewed
24 after trial?

25 Q After trial.



1 A That's a -- quite seriously, that is a difficult
2 question, because part of the problem is the issue
3 of objectivity. Objectivity is, in part, in the
4 eye of the beholder, but you can take the most
5 potentially biased and bigoted individual and get
6 a very objective, carefully thought out argument.

7 Q Uh-huh.

8 A And you can take someone who is apparently
9 entirely objective and entirely independent and
10 they can just go into an investigation, quickly
11 form a bias and look for issues that support that
12 bias, so I really don't think there is a hard and
13 fast rule. The only guiding, guidance might be is
14 the public perception and I doubt if the public
15 perception in Canada, or in any other jurisdiction
16 that I've worked in, is that senior, if you like,
17 bureaucrats working within a department, a
18 government department necessarily have a
19 particular bias and I would have not expected Mr.
20 Williams to have a bias. It's possible that he
21 may have had an instruction about which I know
22 nothing, but I'm sure Mr. Williams himself did not
23 go into this case with a bias unless he was
24 instructed to do so.

25 Q Okay. You entered this case in 1988 as a result



1 of some pressure from my client?

2 A Yes.

3 Q She's the one that made the initial telephone
4 contact to you?

5 A Yes.

6 Q And in that conversation you had with Mrs.
7 Milgaard she was asking for DNA testing primarily;
8 am I right?

9 A Yes.

10 Q And did you -- do you recall discussing financial
11 matters with her?

12 A Not really. I think there was an understanding
13 that there would be no charge.

14 Q More specifically, she told you that she had no
15 money to pay for this and she was desperate?

16 A I'm sure that's correct.

17 Q And you agreed to do this without any charge?

18 A Correct.

19 Q Why?

20 A Perhaps because I was interested, but also it
21 did -- if we had got a positive result or a
22 conclusion, it would have helped us in terms of
23 justifying our research laboratory, it would have
24 been another example of one of the issues that we
25 were specifically researching, but I was also well



1 aware of the fact that the likelihood of getting
2 anything that would be immediately helpful was not
3 great.

4 Q Mrs. Milgaard takes the position that, "I was
5 desperate and he helped me." Will you accept that
6 or were you hoping to get some research material?

7 A I suspect that initially we were hoping to get
8 some material. Not research material, but
9 material that would help justify the research lab.

10 Q Sorry.

11 A But when it came round to reviewing the transcript
12 evidence and the other evidence, there was no
13 objective at that stage other than just personal
14 interest.

15 Q You said earlier this morning, or yesterday
16 perhaps, that you were impressed when David was
17 willing to offer samples for DNA testing?

18 A Yes.

19 Q Can you expand on that?

20 A Well their knowledge of DNA from the press at that
21 stage must have been that DNA was going to be able
22 to prove David's innocence, if he was innocent,
23 and they probably would have had no other
24 knowledge other than that; and if that was the
25 case they also knew that if David was guilty --



1 and David would be the only person who would know
2 that -- that it was going to prove he was guilty.

3 Q And at that time, in 1988, the only type of DNA
4 testing that was out there, so to speak, that the
5 public would be aware of would be the RFLP
6 testing, which was known as genetic
7 fingerprinting?

8 A That's correct.

9 Q And that is the one that effectively, at that
10 time, said that there is one person in the world
11 that could leave that genetic print?

12 A Yes.

13 Q And that's kind of where we are now with the
14 development of the PCR, that you can effectively
15 say that as well?

16 A Yes. I think the statistics have become more
17 realistic, but yes, that's correct.

18 Q Okay. But back at that time, if David is offering
19 DNA testing, offering his blood for DNA testing
20 and his mother is pushing to have it done and it's
21 going to be done, that's a real risk to be taking
22 if he is, in fact, guilty; --

23 A Correct.

24 Q -- is it not? And that's what impressed you about
25 it, that he may very well not be guilty if he is



1 willing to take that kind of a risk?

2 A Yes.

3 Q You have had some other, some involvement with
4 some other cases of what are now acknowledged to
5 be wrongful convictions, have you?

6 A Yes, I have.

7 Q What cases in Canada have you been involved with
8 that fit into that category?

9 A Umm, the *Ronald Dalton* case from Gander; Clayton
10 Johnston from Halifax; umm, umm, Louise Reynolds
11 from Kingston, although that did not actually
12 proceed right through to trial; umm, Guy Paul
13 Morin, Ontario; umm, and I suppose this case.

14 Q And what about outside of Canada, in any other
15 jurisdictions?

16 A Umm, I have been involved in the Chamberlain
17 Commission of Inquiry from Australia, sometimes
18 known as the *dingo baby* case; I have been involved
19 in, recently, in a case from Britain, the *Queen*
20 *versus Pauca*.

21 COMMISSIONER MacCALLUM: Who?

22 MR. HARDY: *R versus Pauca*, P-A-U-C-A.

23 COMMISSIONER MacCALLUM: U-C-A?

24 A It was in the Court of Appeal in London in
25 November and I believe is now written up in one of



1 the law reports.

2 Umm, I'm -- I have been involved
3 in a number of cases of alleged miscarriage of
4 justice where it has been proven that the case, in
5 fact, was correctly tried and prosecuted, both in
6 Britain and currently in Australia, and I have
7 been before the Court of Appeal in New Zealand on
8 a similar case.

9 BY MS. McLEAN:

10 Q So going to the ones where they are, they fit into
11 the wrongful conviction category, you have had
12 access to transcripts and police reports and
13 various things involved in those cases; haven't
14 you?

15 A Yes.

16 Q And, not restricting it just to pathology, do you
17 notice any kind of commonality amongst the cases?

18 A Well each case has its own special
19 characteristics, but there are some features that,
20 to a greater or lesser extent, seem to keep
21 repeating themselves.

22 Q And, from a systemic point of view, this
23 Commission is interested in the types of systemic
24 problems that cause wrongful convictions and
25 recommendations that can be made to avoid them, so



1 with that in mind, could you give us an idea of
2 some of the things that you say keep repeating
3 themselves?

4 A I would say that they do, and they vary, and I --
5 with due respect to Mr. Caldwell, and it probably
6 does not apply in this case --

7 Q If I could just, I don't want you to address this
8 case in particular, --

9 A No, I just --

10 Q -- or any. It's systemic.

11 A I have to say that from time to time Crown or the
12 prosecution services may not be as critical of the
13 evidence that they are about to present,
14 particularly the technical scientific evidence, as
15 they might be, and I'm well aware of some cases
16 where scientific experts have been put in court
17 without any prior consultation with the
18 prosecutor. Now, clearly, that doesn't apply
19 here.

20 There are other cases where the
21 defence simply failed to research their case at
22 all, maybe for as simple reasons for financing and
23 inadequate Legal Aid support, and I know of cases
24 where that is clearly the case.

25 Then the reliability of expert



1 witnesses. There have been problems over the
2 years, fortunately they are being dealt with
3 internationally, but there are problems with
4 regard to the reliability of expert testimony,
5 even pathology expert testimony, and it's very
6 hard to deal with this. I think the forensic
7 scientists have dealt with this issue much better
8 than forensic pathologists have.

9 The Association of Crime
10 Laboratory Directors in the United States has
11 established an international network for crime
12 laboratory standards throughout the World, and
13 almost all major accredited crime laboratories are
14 sort of covered by this mushroom of standard
15 laboratory testing with test results being sent
16 all over the world, and they are required to test
17 unknown samples and then compare results.

18 Forensic pathologists are slowly
19 moving in that direction. The Home Office in
20 Britain has established a Standard Code of
21 Practice for forensic pathologists throughout
22 Britain, and it is produced and published by the
23 Home Office and the Royal College of Pathologists;
24 in Ontario the, there is a Code of Practice
25 dealing with some particular types of case



1 investigation for pathologists; in the United
2 States the North American Association of Medical
3 Examiners has recently produced a document, umm, a
4 Code of Practice and Quality Assurance; and I have
5 been responsible for writing a Code of Practice
6 For Forensic Pathology and Colonial Pathology in
7 New Zealand, and it's currently working its way
8 through the system and is being reviewed by some
9 of my colleagues, but even there there are
10 problems in that some people feel that the
11 standards that have -- that I have drawn up in New
12 Zealand are too high, that, you know, "this is not
13 the way we've done things over the years and why
14 should we change". Medical people are very slow
15 at adapting.

16 But all I'm saying is that this
17 is not the way it used to be, it is improving, and
18 it's improving significantly.

19 And I suppose the final question
20 really is how the jury view the evidence, and
21 that's often out of the control of everybody, but
22 the one thing that is common in many of the
23 miscarriages is that there is some quirk or issue
24 about the defendant that has made the jury dislike
25 them, they are either presented as being unusual,



1 or odd, or even the, clearly their behaviour in
2 Court is inappropriate. And I think one very good
3 example of that was the *Chamberlain* case in
4 Australia where Lindy Chamberlain, in Court and in
5 the witness box, became a very unattractive
6 individual.

7 Q So it may not have anything to do with the actual
8 evidence led, it may just be a, at least in her
9 case, maybe a demeanour issue?

10 A Well, there were major evidence issues there as
11 well, about the reliability, in fact many in
12 parallel with this case.

13 Q Yes.

14 A But the point is that many of these issues are out
15 of the control of the trial judge and the lawyers,
16 but in terms of the presentation of the scientific
17 evidence I'm very much in favour of having this
18 sort of evidence tested, you know. I believe, you
19 know, issues such as the reliability of evidence
20 and the acceptability of evidence needs to be
21 tested more through the voir dire system and then
22 the judge can truly make a decision, before the
23 jury hear the evidence, as to whether or not it's
24 safe to let that evidence go before the jury, and
25 can also, if he decides that it is appropriate,



1 prepare himself in such a way that he can control
2 how that evidence is heard in Court and ultimately
3 plan how he is going to address the jury and
4 advise them on its validity.

5 Q And, also, to control how it's, how it's dealt
6 with after it's presented so that it's not
7 misconstrued by either party to the trial;
8 correct?

9 A Yes. I mean as Mr. Caldwell's counsel pointed
10 out, you know, all of these issues in the *Milgaard*
11 case were in fact dealt with by counsel and the
12 judge, and therefore you may have to recognize
13 that the issue that I have been dealing with may
14 well have been simply set aside by the jury.

15 Q Uh-huh?

16 A And although it could have been interpreted as
17 excluding David, if they choose -- chose to set
18 that evidence aside, then there is other evidence
19 that really gave them little choice with regard to
20 their verdict.

21 Q And what do you mean there?

22 A Well, the evidence of the witnesses that has later
23 been shown to be unreliable was pretty damning.

24 Q And you are referring, there, to the witnesses
25 Nichol John, Ron Wilson, Albert Cadrain?



1 A Yes. I have to again say that I am not, I've
2 never read the transcripts of their evidence, but
3 I've heard it discussed and I've heard it
4 discussed amongst the lawyers.

5 Q Finally, sir, do you have any familiarity with the
6 Criminal Cases Review Commission set up in the
7 United Kingdom?

8 A Yes, I'm aware of some of the people involved in
9 that.

10 Q And --

11 COMMISSIONER MacCALLUM: Criminal justice
12 review commission, is it?

13 MS. McLEAN: It's the Criminal Cases Review
14 Commission.

15 COMMISSIONER MacCALLUM: Okay.

16 BY MS. McLEAN:

17 Q Have they got around to setting one up in New
18 Zealand yet?

19 A No. It's on the agenda to be discussed by the new
20 government but I suspect that's as far as it will
21 go. There are various claims that there may be as
22 many as 40 cases in New Zealand that could be
23 submitted to such a commission, I simply have no
24 idea.

25 Q Okay. And you understand that the way the



1 commission works is that there are -- well,
2 actually, maybe it's better if you tell us what
3 your understanding is of how it works.

4 A Well, in essence, they bring in a series of
5 experts who are appropriate to the particular case
6 involved, and they will review it independently
7 and submit reports, and I think they go through
8 the Commission to the Home Office and presumably,
9 ultimately, will go through the Crown prosecution
10 service and maybe finally to the Attorney General.
11 I'm not sure of how the ultimate process is.

12 Q Okay. The Criminal Cases Review Commission will
13 actually have applications made to it as opposed
14 to a Home Office, you understand that, --

15 A Yes I do.

16 Q -- as opposed to the old system? And that the
17 investigation is done by the staff, the employees
18 or the retainers of the people at the Criminal
19 Cases Review Commission, as opposed to an
20 applicant having to hire an expert; do you
21 understand that?

22 A Yes I do.

23 Q And that that would certainly be something that
24 would assist claimants of wrongful conviction from
25 a financial standpoint?



1 A Umm, absolutely. But you must also remember that,
2 for example with regard to forensic pathology, any
3 forensic pathologist that is advising the review
4 commission will also be, already, a Home Office
5 pathologist.

6 Q And is that a problem?

7 A No, it's not a problem, but it relies upon the
8 integrity of that pathologist and a recognition,
9 by him or her that they are independent of any
10 agency, even though they are retained by the Home
11 Office.

12 Q And in cases where the expert is a non-pathologist
13 do you have any awareness of where those experts
14 come from?

15 A It will depend. They may be privately retained.
16 There are a number of forensic scientists within
17 Britain, and the Forensic Science Service itself
18 is now an arm's length agency of the Home Office,
19 they are no longer Home Office laboratories --

20 Q Uh-huh?

21 A -- and there are other large, private forensic
22 laboratory services that are available. But most
23 forensic experts, regardless of their specialty,
24 see themselves as independent even though they may
25 be receiving their salary from one side or the



1 other or from government.

2 Q And when you were doing your report for the
3 Milgaards and looking at the DNA and looking at
4 the case in general terms, you had some real
5 concerns about the location of the body versus the
6 location of the crime scene, correct?

7 A Umm, yes. But, again, I have never been given
8 access to all of the information that I would like
9 with regard to the crime scene.

10 Q Yes, but you had some concerns?

11 A Yes.

12 Q You had some concerns about a rape taking place at
13 minus 40 degree weather, --

14 A Yes.

15 Q -- notwithstanding that apparently it happened;
16 you expressed in your report some concerns about a
17 complicated scene having to do with what must have
18 happened to Gail Miller to result in her having
19 stab wounds to her body, stab holes in her coat,
20 and yet nothing on the dress?

21 A Yeah.

22 Q That was an issue that --

23 A Yes.

24 Q Okay. And it's not really what you were
25 specifically retained to look at, it's just



1 something that caused you some kind of concern
2 there?

3 A That's right. And they were included in my report
4 simply to identify issues that Mr. Wolch might
5 wish to follow up with other people if
6 appropriate.

7 Q And do you understand that the composition of the
8 Criminal Cases Review Commission, in addition to
9 hiring experts and funding the same, would also
10 have investigators there that will go and speak to
11 witnesses, interview witnesses, review the
12 evidence from the trial, review the theories
13 offered at trial and the theories consistent with
14 guilt and with innocence, and render their
15 recommendations to the Court of Appeal based on a
16 full investigation that they have done?

17 A Yes.

18 Q And do you think that would be a good idea,
19 generally, to have in a criminal justice system
20 that does make mistakes?

21 A Umm, I think it could be, but there may be an
22 intermediate or an interim phase that needs to be
23 considered.

24 Q Uh-huh?

25 A And again, I'm not a lawyer, but within our system



1 it is very unusual in any appeal court process, in
2 other words where the case is subject to further
3 review by a higher court, --

4 Q Yes?

5 A -- for the scientific evidence to be looked at
6 unless there is clear evidence of new evidence.
7 Simple criticism of scientific evidence alone is
8 usually not grounds for appeal. Appeal is made
9 purely on the basis of the legal issues, as I
10 understand it, and yet in two of the appeal Court
11 cases that I have been involved in in the last two
12 years I have actually been called to address the
13 issue of reinterpretation of the medical and
14 pathological evidence that was presented in Court.
15 It was presented as so-called new evidence, but to
16 some extent that was a term that was really an
17 excuse for an opportunity to review the case, and
18 it may be that we should make the process of
19 complete case review a little bit easier and more
20 acceptable to the appeal court system.

21 Q Or to -- or as an intermediate step where you
22 don't require what could be an insurmountable
23 hurdle of coming up with fresh evidence before you
24 can have a case looked at again?

25 A Yes. Remember that the Criminal Case Review



1 Commission is designed to review cases that have
2 already gone through all of the system and have
3 essentially failed.

4 Q Yes.

5 A And what I am suggesting to you is that maybe the
6 system itself can adopt some of those principles
7 in the step to the appeal court.

8 Q How would you address the floodgates argument that
9 I would anticipate coming there, like wouldn't,
10 wouldn't you have the courts swamped with people
11 who have a pending appeal and then want to have
12 their appeal re-looked at and --

13 A Well, again, isn't there a general principle that
14 there have to be reasonable grounds?

15 Q Yeah, but some -- who's going to be, who's going
16 to be making the assessment of the reasonable
17 grounds?

18 A Well you'll have to, again, rely on the integrity
19 of the scientists, the pathologists, and the
20 lawyers.

21 Q Okay. Overall, sir, are there any, any other
22 recommendations or insights you can offer, based
23 on your involvement in this case or your general
24 knowledge of wrongful conviction cases?

25 A I don't think so. I think there are many issues



1 that can be dealt with on an individual case
2 basis.

3 Q Thank you, sir, and thank you for your
4 involvement.

5 COMMISSIONER MacCALLUM: I just have, if
6 there is no further cross-examination, I have a
7 question for the doctor.

8 Doctor, the objection is often
9 heard that juries are not suitable vehicles for
10 finding of facts in cases where complicated
11 scientific evidence must be understood. I will
12 leave that question aside, I'm not going to
13 trouble you with it. But to bring the matter
14 closer to home, in a jury trial it is the
15 responsibility of the judge to make sure, as far
16 as he can, that the jury understands.

17 Now I don't often get the
18 chance to ask somebody with 40 years experience,
19 being a scientist, what his perception is, but
20 I'm going to ask you, and don't be shy about
21 replying, please. What do you think, in general,
22 about the performance of judges in adequately
23 explaining forensic scientists/science to jurors?

24 A Umm, I have to say that generally I think judges
25 do it extremely well.



1 Umm, I -- I have to say that I'm
2 not quite sure what would happen if the issue
3 relating to expert testimony gets to where it is
4 in some parts of United States where, in fact, the
5 judge effectively acts as the gatekeeper for the
6 admissibility of all scientific testimony and
7 there are very specific criteria for the admission
8 of that evidence. I think that requires a level
9 of understanding not just of the import of the
10 evidence, but even the scientific process, which
11 even the scientists often don't agree on.

12 COMMISSIONER MacCALLUM: Well I believe I'm
13 familiar with the subject, I believe it arose in
14 the United States District Court, and I can't
15 remember the name of the case but it received a
16 lot of attention, and it was concerned mainly
17 with so-called experts chiefly in the soft
18 sciences, and it -- the burden of it was that
19 judges should not just take qualifications of an
20 expert and allow them to express an opinion
21 simply because they have had a lot of training in
22 their field, which might be not a worthy field of
23 expertise at all. I think there's -- that that,
24 that question has been addressed well enough. We
25 don't have enough of it in this country, in my



1 opinion, but is that what you are referring to?

2 A Yes it is.

3 COMMISSIONER MacCALLUM: Yeah, okay, thank
4 you.

5 MR. HODSON: With that, I think that is
6 all.

7 If I could pass on my thanks to
8 you, Dr. Ferris, for your cooperation not only in
9 your discussions with me, but changing your
10 travel arrangements to be here in person to give
11 your evidence, which is far better than by
12 telephone. So thank you very much for
13 accommodating us.

14 A Thank you.

15 COMMISSIONER MacCALLUM: And thank you, Dr.
16 Ferris, and you are excused.

17 A Okay.

18 (Adjourned at 4:40 p.m.)

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2 We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,
3 Official Queen's Bench Court Reporters for the Province of
4 Saskatchewan, hereby certify that the foregoing pages
5 contain a true and correct transcription of our shorthand
6 notes taken herein to the best of our knowledge, skill,
7 and ability.

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13 Karen Hinz, CSR

14 Official Queen's Bench Court Reporter

15
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