Chapter 4
Executive Summary

1. Chronology

David Milgaard, Nichol John and Ronald Wilson set out from Regina to Saskatoon in the early morning hours of January 31, 1969 in Wilson's car, stopping once along the way to break into a grain elevator. The trio arrived in Saskatoon before 6:45 a.m. and drove around looking for the home of a friend, Albert (Shorty) Cadrain, whose house was located on Avenue O south of 20th Street. Sometime between 7:00 a.m. and 7:30 a.m. they stopped at the Trav-A-Leer Motel on the west central edge of Saskatoon. David Milgaard entered in his stocking feet, asking for a map. The Wilson car was next seen in an alley behind the Danchuk residence around 7:30 a.m. or 7:40 a.m. The Danchuk residence was between the Trav-A-Leer Motel and the crime scene, closer to the latter. Milgaard, John and Wilson had become stuck in the alley behind the Danchuks' car and waited there until well after daylight when a tow truck freed their car and took them to a garage. From there, they made their way to the Cadrain residence then to another garage, leaving Saskatoon in the afternoon with Albert Cadrain. Over the course of about a week, they traveled to Calgary, Edmonton, St. Albert, Banff and Regina, where they parted company.

Gail Miller was sexually assaulted[1] and murdered on January 31, 1969. Her body was found in a Saskatoon alley around 8:30 a.m. She was last seen around 6:45 a.m. in her rooming house, about one block away.

Within the previous four months, three other women had been sexually assaulted in Saskatoon, two within 12 blocks of the Miller crime scene.

As reported to police, another young woman, Victim 12, was sexually assaulted on January 31, 1969, about six blocks from the Miller crime scene. In the terminology of the day, it was an indecent assault.

Larry Fisher lived in the Cadrain house about two blocks south of the murder scene, also in the general area of two of the sexual assaults.

David Milgaard was in the area of the murder scene around the time of death.

He was questioned on March 2, 1969, released on March 3, arrested on May 30, 1969, and convicted of the murder of Gail Miller on January 31, 1970.

He served 23 years of a life sentence before being released on April 16, 1992.

On February 21, 1970, another sexual assault was committed in west Saskatoon.

In August and September of 1970, Fisher committed two sexual assaults in Fort Garry, Manitoba. By December 21, 1971, he had been convicted of these and the four Saskatoon sexual assaults noted above, except for the indecent assault and the Gail Miller rape and murder. Ten years later he was convicted of rape and attempted murder in Prince Albert, Saskatchewan for an offence committed in North Battleford.

In 1992, following a reference to the Supreme Court of Canada, the Minister of Justice set aside David Milgaard's conviction and ordered a new trial. The Province of Saskatchewan declined to prosecute, entering a stay.

In 1997, DNA from semen samples found on the clothing of Gail Miller was tested and matched that of Larry Fisher, but not David Milgaard.

Fisher was charged for the rape and murder of Gail Miller and was convicted on November 22, 1999. His appeal to the Saskatchewan Court of Appeal was dismissed on September 29, 2003, and his application for leave to appeal to the Supreme Court of Canada was dismissed on August 26, 2004.

On July 18, 1997, the Government of Saskatchewan apologized to David Milgaard for his wrongful conviction, and on September 9, 2004, acknowledged that he was factually innocent of the charge that he murdered Gail Miller, and that he was wrongfully convicted of a crime he did not commit.

2. Saskatoon Police Service

The investigation of the Gail Miller murder was done by the Saskatoon Police assisted, in its initial stages, by the RCMP with incidental help by the Regina Police and Calgary Police.

1 In 1969 and 1970 sexual assaults were particularized as, for example, rape and indecent assault. The modern usage in the *Criminal Code* employs a generic term, "sexual assault", and this usage will be applied here except when recording convictions where a specific crime will be identified.

In general, the Saskatoon Police investigation was thorough and followed acceptable procedures. There was, however, a critical failure to record the circumstances surrounding the questioning of John and Wilson by their agent, Roberts of the Calgary Police and, in John's case, by Mackie as well. Many years later, Saskatoon Police failed to follow up on a report that Fisher and not Milgaard might have been Gail Miller's killer.

3. RCMP Investigation

The RCMP gave full time assistance to the Saskatoon Police for three months from the day of the murder. Both forces devoted important resources to the investigation.

4. Scene Investigation

The scene investigation by Penkala and Kleiv and other officers was thorough and performed under trying circumstances, given the extreme cold.

5. Autopsy

The victim died from a stab wound which penetrated her lung. There were 11 other stab wounds on the upper body and her throat had been slashed several times.

Vaginal aspirate was drawn from the victim, found to contain non-motile spermatozoa, and discarded.

6. Canvass of Neighbourhood

There was a prompt and concerted effort by police, including an organized interview of persons living or found within the four to six block radius of the crime scene.

7. Questioning of Gail Miller's Friends and Others

The investigation initially focused on Gail Miller's friends, roommates and male acquaintances.

Some witnesses saw activity in the area of the crime scene at relevant times, while others saw nothing. In evaluating their evidence it is important for us, as it was for the jury, to remember that until around 7:30 a.m. it was dark, bitterly cold (-41 C), with ice fog which obscured visibility to a marked degree.

8. Forensics

Forensic evidence was collected from the victim and the crime scene. Although introduced at trial, serological evidence played little part in the conviction. DNA typing as a forensic tool was unavailable in 1970, but semen stained clothing was among the trial exhibits preserved. Twenty-seven years later, DNA was successfully extracted from these stains and typed in England. David Milgaard was excluded as the donor and consequently exonerated of the murder. A match with Fisher was found and served as the basis for his conviction as the killer of Gail Miller.

The RCMP analyst noted semen stains only on the panties of the victim in 1969 and a different analyst did the same in 1992, although they were present on the dress and the coat, as finally found in the United Kingdom's Forensic Services Laboratory in 1997, where DNA was successfully extracted and typed. The technology for doing this was not available prior to Milgaard's conviction.

9. Suspects and Theories

Saskatoon Police reasonably made no connection between an indecent assault which occurred at 7:07 a.m. at a spot eight minutes walking distance from where Gail Miller was killed.

Fisher, unknown to police at the time, had committed two rapes and an indecent assault in the fall of 1968 in the general area of the murder. Although a possible link between the murder and the 1968 rapes was considered, police had no suspect for either the rapes or the murder until Milgaard came to their attention on March 2, 1970, as being connected to the murder but not the rapes. Saskatoon Police attention thus reasonably became focused on him as the murderer, and investigation of the rapes was left in abeyance.

10. Albert Cadrain's Statement to Police

A key witness at the Milgaard trial was Cadrain who died in 1995.

On March 2, 1969, he gave a statement to Saskatoon Police implicating Milgaard in the murder of Gail Miller. The statement played a major role in the direction of the investigation. He reported that Milgaard arrived at his home (which was within two blocks of the crime scene) around 9:05 a.m. in the morning in a nervous state with blood on his trousers and shirt, which he changed for other garments at Cadrain's house.

No police pressure was exerted upon Cadrain to implicate Milgaard, but police vigorously challenged Cadrain upon the truth of his statement implicating Milgaard. Cadrain never recanted what he had told to the police about seeing blood on Milgaard.

Although Cadrain later suffered mental illness, it was not apparent when he gave his statement of March 2, 1969, to police nor to the prosecutor at the preliminary inquiry or trial of David Milgaard.

11. Ron Wilson Questioning

With Milgaard on the morning of January 31, 1969, were Wilson and John. Wilson was interviewed by police on March 3, 1969, and provided an alibi for Milgaard saying that he was with him at all relevant times except for a few minutes. Police suspected that Wilson had not given them the whole story and interviewed him again on May 21, 1969, at which time he began to implicate Milgaard in the murder. He was taken to Saskatoon for a polygraph examination and there he further implicated Milgaard. Following the polygraph session, Wilson gave a sworn statement to Saskatoon Police and, consistent with it, testified at trial for the Crown. Some 20 years later he was to recant parts of his incriminating statement against Milgaard, but he conceded at the Inquiry that he had not been intimidated by the police or by the prosecutor.

Police checked his veracity insofar as they could and acted reasonably in submitting his evidence to the prosecution. Caldwell, in turn, was justified in putting Wilson forward as a credible witness.

12. David Milgaard Questioning

Milgaard was interviewed on March 3, 1969, by Karst who found his answers to be too vague, calling for further inquiries. Although known to have been in the general area of the crime at relevant times, Milgaard was unable to account for the period of time which could have included the murder. This is not intended as a criticism of Milgaard, who had the right to remain silent. It is simply noted in connection with the reasonableness of police in continuing their investigation of him.

13. Nichol John Questioning

John gave an initial statement to police on March 11, 1969. At least one policeman, Karst, thought that she might be telling the truth when she said that Milgaard could not have committed the offense, but the consensus among investigators was that she had not told the whole truth and they resolved to have her, as well as Wilson, examined by a polygrapher in Saskatoon. This was done on May 23, 1969, although the polygraph test was not administered to her because she gave what polygrapher Roberts regarded as the truth to him orally. She was turned over to Saskatoon Police who took her statement the next day, May 24, 1969, under oath.

John has never alleged that she was coerced to make her May 24, 1969, statement which put Milgaard at the scene of the murder, stabbing a woman. At both the preliminary inquiry and the trial she professed not to remember witnessing a stabbing. Her statement to police, however, was before the jury at the trial, for the purpose of testing the credibility of her trial testimony that she could not remember the most incriminating parts of her statement to police. The jury was cautioned that, because she did not adopt those incriminating parts of her statement, they could not be used for truth of content. Whether the jury obeyed their instructions cannot be known with certainty, but reliable evidence at the Inquiry invites the conclusion that they did not.

14. Questioning of Other Witnesses

A March 1969 interview of a girlfriend left police with reason to think Milgaard was a person of bad character, capable of having been involved in the murder.

Prior to May 5, 1969, Saskatoon Police visited Milgaard's parents to speak about their son as a murder suspect, and recorded his father stating that he was not surprised and suspected that something like this might happen. By May 16, 1969, Milgaard was regarded by police as the prime suspect arising from Cadrain's statement. He had to be either implicated further or eliminated, so police resolved to get the full story from Wilson and John. What they told police on May 23 and May 24 in Saskatoon provided enough evidence to charge Milgaard.

15. Motel Room Re-enactment

On the eve of trial, Sunday, January 18, 1969, Wilson reported to police that Melnyk and Lapchuk had told him that Milgaard re-enacted the killing of Gail Miller at the Park Lane Motel in Regina in early May of 1969. Police told Caldwell, who had them interview Melnyk and Lapchuk, and the two testified at trial. Caldwell immediately reported what he had heard to defence counsel Tallis. Confronted with this information by his lawyer, Milgaard could not deny that it happened, but said that he was stoned at the time and if he did anything it was a joke. Tallis could not therefore suggest to witnesses at the trial that it had not happened, but could only argue that Milgaard had acted in jest. The interpretation of the event was left with the jury to decide.

A girl who was present at the Park Lane Motel when the incident was said to have occurred, Frank, was interviewed by police, but was not called at the trial because of her highly emotional state. A second girl, Hall, could not be located.

16. Police Investigation Files Provided to Prosecutor T.D.R. Caldwell

In the practice of the day, Caldwell did not see the complete police file. He received some police reports, but not all, and reviewed 95 civilian statements at the request of defence counsel Tallis, looking for

evidence tending to show that the accused might be innocent. Caldwell's disclosure to Tallis met the standards of the day according to the Supreme Court of Canada. In the hindsight illuminated by much additional evidence heard at this Inquiry, Caldwell did not disclose some evidence from witnesses who told the police that they had seen nothing unusual in the neighborhood of the crime scene, although they were in a position to have seen activity, and he did not disclose evidence of certain sexual assaults in the area in 1968, as well as one indecent assault almost contemporaneous with the murder. Evidence of these assaults, had they been known to Tallis at the time, might have led him on lines of inquiry establishing a defence that the murder could have been committed by a third party, thus possibly raising a reasonable doubt of Milgaard's guilt. This non-disclosure was the product of an honest, if mistaken, belief by Caldwell that the evidence was not useful to the defence. By present standards, such evidence would have been disclosed as a matter of course under the *Stinchombe* standard, a fact which makes unnecessary any recommendation I might make on this subject.

17. Preliminary Inquiry

Although at the preliminary inquiry John recalled the events of the morning of the murder without reference to seeing a stabbing, there remained some evidence upon which a jury could convict and the accused was accordingly committed for trial. Prosecuting counsel prepared himself to challenge John at trial under s. 9(2) of the *Canada Evidence Act* about her May 24th statement should the need arise.

18. The Trial of David Milgaard

The premise of this Inquiry is that David Milgaard was wrongfully convicted. In its 1992 Reference, the Supreme Court of Canada was of the opinion that he received a fair trial. This opinion was based upon:

- evidence known at the time;
- argument presented at the Reference;
- deference to the findings of the jury relating to facts heard by the Supreme Court which were before the jury; and
- deference to the Court of Appeal judgment from which the Supreme Court had denied leave to appeal.

My first Term of Reference requires me to "inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Milgaard…". Many issues arise, including the fairness of the trial, and I neither question nor endorse the assessment of the Supreme Court of Canada in this regard.

When the Saskatchewan Court of Appeal heard argument about the trial judge's handling of the s. 9(2) *Canada Evidence Act* matter, it decided that although a procedural error had occurred in not holding a *voir dire* on the circumstances surrounding the giving of the Nichol John May 24, 1969, statement, the error did not compromise the safety of the conviction. I have accepted evidence given at the Inquiry that the defence of David Milgaard was prejudiced by this error. This argument was not made by Milgaard counsel at the 1992 Supreme Court Reference.

There are two problems arising from the error. In the first place, the jury might never have heard the most incriminatory parts of John's May 24, 1969 statement had Tallis been allowed to probe, in their absence, the circumstances under which the statement was given to police. The second problem is the inherent prejudice to an accused in s. 9 itself. That prejudice lies in the recitation of evidence which is inadmissible for truth of contents, unless adopted by the witness, but is admissible on the issue of credibility only.

The prejudice can be avoided only by the jury heeding the warning of the trial judge to ignore the evidence for truth of contents, unless adopted. I listened at the Inquiry to credible evidence that the distinction was lost on this jury. Without direct evidence on the point, I make no finding that the jury used the evidence for truth of contents, but there is a real possibility that they did.

I reject the argument that the Crown theory, put to the jury, was impossible and should have been seen as such by the prosecution. It was a plausible theory and was presented as nothing more. The jury was instructed that it was for them to find the facts. They could have disagreed with the Crown theory and still have returned a verdict of guilty.

Tallis argued at trial that the timing of events did not support the Crown's theory and he received a favorable charge on the time issue, the judge placing the window of opportunity between 6:45 a.m. and 7:10 a.m. even though he could have extended it to 7:30 a.m. based on the evidence. The judge's tone and manner in delivering his charge were favorable. His treatment of the motel re-enactment was appropriate. David Milgaard, according to trial witnesses, Melnyk and Lapchuk, had, at a motel party, acted out the stabbing of Gail Miller.

Caldwell was properly convinced of Cadrain's credibility, and acted accordingly in putting him forward as a Crown witness.

John, while denying that she had lied in giving statements to the police, said that she had no memory of telling police the most incriminating parts of her May 24th statement.

The trial judge's interventions during the hearing of evidence hurt the defence, especially during the cross-examination of John where he effectively destroyed the credibility of her *viva voce* evidence that she could not remember the incriminating parts of her statement. In the result, the jury was likely to conclude that the truth lay in her May 24th statement.

My conclusion with respect to the conduct of the trial by Crown and Defence is that neither counsel did anything to contribute to the wrongful conviction of David Milgaard. On the contrary, Caldwell offered evidence which he believed to be credible and relevant, and did so in a spirit of cooperation with defence counsel. For his part, Tallis offered a skilled, thorough, nuanced and ethical defence.

19. Preparation for Trial by Prosecutor

Caldwell's trial preparation was based upon the police summary provided to him. It was an amalgam of known facts, allegations drawn from witness statements and informed speculation.

20. Preparation for Trial by Tallis

Tallis first met with his client, David Milgaard, on August 4, 1969, and twice more in prison before trial. He also met him daily in private during the preliminary inquiry and trial.

Tallis became aware of the Cadrain, Wilson and John statements on August 4, 1969, as well as Milgaard's statements of March 3 and April 18, 1969.

He prepared an extensive legal brief and described at the Inquiry what I find to have been a thorough preparation for trial.

Tallis' advice to his client and his conduct of the defence were founded in ethical considerations. While operating on the basis of his client's assurance that he had not committed the crime of murder, he had

to take note of certain admissions by Milgaard which were incriminating and which were reflected in the evidence called by the Crown.

Tallis advised him not to take the stand on his own behalf and Milgaard and his parents accepted the advice. It was an informed decision, based on advice from a seasoned, ethical defence counsel who had taken all relevant factors into account.

Roberts, the Calgary Police polygrapher who had heard critical oral statements (later recorded by Mackie and Karst of the Saskatoon Police) from Wilson and John, made no record of the circumstances of the taking of these statements. He presented special problems for Tallis because he was uncooperative in a pre-trial interview. Tallis concluded that he would be of no help to the defence, and that it would have been a grave mistake to call him. Denied a *voir dire* on the circumstances surrounding the taking of the John statement, Tallis could not raise polygraph issues before the jury without risk of having them conclude that the witness had passed the test.

The case was not easy to defend. Milgaard's friends had implicated him without apparent motive. Wilson tried to be convincing at trial and there was no suggestion of police pressure on him. Cadrain displayed no signs of mental instability at the preliminary inquiry or at the trial. He had reported voluntarily to Saskatoon Police.

John's evidence was pivotal, leaving the impression with the jury that she was trying to protect her friend Milgaard.

A major challenge for Tallis lay in the fact that Karst, a well respected, experienced, and forthright officer, gave important evidence for the Crown, mostly relating to Cadrain and his statement implicating Milgaard.

Tallis was well prepared to meet the serological evidence and was able to present it as being exculpatory.

Milgaard never complained to Tallis of pressure from the Saskatoon Police or of them trying to frame him.

Informed on the eve of trial about the motel re-enactment evidence, Tallis caused inquiries to be made in Regina about Melnyk and Lapchuk. He informed his client, who said that he could not recall the incident but could not deny that it happened. If it did, he said, he was stoned and joking.

In view of what his client and Frank, another witness, told Tallis, he felt that he could not suggest to witnesses that the re-enactment had not happened. His view was that Frank would not be of help as a witness.

Tallis' handling of Wilson at trial was thorough and sensitive to the many difficulties presented. Wilson's Inquiry evidence differed markedly in many respects from what he said at the preliminary inquiry and trial. He was not credible at the Inquiry. According to Tallis, the evidence of Lapchuk and Melnyk about the motel re-enactment was damaging, but had not nearly the impact of John's evidence at trial. I accept that the s. 9 *Canada Evidence Act* proceeding was instrumental in Milgaard's conviction.

David Milgaard undoubtedly re-enacted the stabbing of Gail Miller, as reported by Melnyk and Lapchuk at trial. Whether he did it as a joke was something for the jury to decide. Although they were not of good character, the Crown put forth Melnyk and Lapchuk in good faith as credible witnesses.

By most accounts available to the authorities, both before and after conviction, Milgaard was a young person of unsavory character – a fact which would give reasonable cause for suspicion. Both the police

and the prosecution would be entitled to think that what the re-enactment witnesses described was a confession to murder by David Milgaard.

I find no fault in Tallis' preparation for the preliminary inquiry and trial or in the conduct thereof. His client, David Milgaard, received an able defence.

21. Secretor Issues

Evidence relating to semen samples found frozen in the snow near the victim's body was put in by the Crown as part of the circumstances. The evidence was essentially exculpatory because the blood antigens found in the semen could only have been those of a secretor and Milgaard was thought to be a non-secretor, although the Crown left open for the jury the possibility that the accused could have been the donor through contamination with his whole blood. This conjecture was effectively discounted during the trial by lack of evidence in support, so the jury was left with exculpatory evidence as argued by the defence.

DNA typing was not available to analysts in 1969.

22. Wrongful Conviction of David Milgaard

But for the questioning of John and Wilson by polygrapher Roberts, David Milgaard would not have been charged and tried for the crime of murder.

The Government of Saskatchewan has acknowledged that David Milgaard is factually innocent of the charge that he murdered Gail Miller, and that he was wrongfully convicted of a crime he did not commit. The Commission, therefore, has accepted that the term "wrongfully convicted" as used in the Terms of Reference means that David Milgaard was found guilty of a crime which he did not commit. That crime was murder.

In her statement of May 24, 1969, John said that she saw Milgaard stab a woman. In view of the acknowledgment made by the Government of Saskatchewan and adopted by the Commission as its working premise, that cannot be true. How then did she come to say it? I do not find that she deliberately lied, and I do not find that Roberts induced her to lie, although both must be acknowledged as possibilities. We know, however, that Roberts interrogated her in the belief that Milgaard was the killer, and that he showed her the victim's bloody garment, asking what if this had been your sister? The tactic produced the desired result, by his own account in testimony before the Supreme Court of Canada. That Court, in view of what was known in 1992, was entitled to think that Roberts might have gotten the truth. I, on the other hand, must conclude that he somehow pressured John into telling him what he thought to be the truth.

Although the details of the pressure exerted are unknown, there can be no doubt that the Roberts interrogation of John led to a sworn statement which provided the basis for charging David Milgaard with murder. That it also led to his conviction is less certain, but it was a factor according to the evidence which I will review.

23. Conclusions on the Investigation and Prosecution

The investigation by Saskatoon Police and the RCMP as well as the prosecution was conducted in compliance with the standards of the day, and in good faith. There was, however, a critical failure to record circumstances surrounding the taking of Wilson and John's statements by Roberts of the

Calgary Police, and Mackie of the Saskatoon Police. Tunnel vision, negligence and misconduct have been alleged, but not shown.

Disclosure met the standards of the day, due account being taken of the prosecutor's discretion in deciding what evidence tended to show the accused's innocence. Arguably, some evidence which might have been useful to the defence was not disclosed, but the prosecutor exercised his discretion in good faith.

The trial was conducted competently and fairly by both prosecutor and defence counsel.

An error in procedure in applying s. 9(2) of the *Canada Evidence Act* made by the trial judge was deemed by the Court of Appeal as not having affected the verdict. Inquiry evidence leads to the conclusion that the defence was prejudiced by not only this error, but by excessive intervention by the trial judge when witnesses were testifying.

The patience of a trial judge is sorely tested in the court room and its occasional loss is understandable. This case, however, is a reminder to all of us who preside over trials that displays of impatience can have profound consequences.

24. Larry Fisher Chronology of Events

Sexual assaults, later attributed to Fisher, were committed in Saskatoon in the fall of 1968. He committed a further rape in 1970, in Saskatoon, after David Milgaard was convicted for the murder of Gail Miller.

Some policemen during the Miller murder investigation thought that the perpetrator of the 1968 sexual assaults might also be the murderer of Gail Miller, but the rapist was unknown to them and they finally settled on David Milgaard as the prime murder suspect. They put aside the rape files which remained unsolved, until Fisher was apprehended in Winnipeg for rape there and stated that he wanted to clear up matters from Saskatoon. Two Saskatoon officers went to Winnipeg in October of 1970 to take statements and one of them, Karst, had worked on the Miller murder investigation. He testified that he drew no connection between the rapist, Fisher, and the murderer of Gail Miller. He reported to his superiors in Saskatoon. Informations charging Fisher with the Saskatoon sexual assaults were drawn, and about a year later, in 1971, Fisher, having pled guilty to the Winnipeg rapes, came to Regina and pled guilty to the Saskatoon offences. He received concurrent jail sentences to the ones imposed by the Manitoba court for his offences there.

More than 20 years later, when Joyce Milgaard and her supporters tried to have the case reopened, Fisher became the focus of their attention, and some of the Saskatoon rape files could not be found. Thus arose the allegation by the Milgaard group of a cover-up – that Saskatoon Police and Justice officials in Saskatchewan concealed Fisher's conviction in Regina for the Saskatoon rapes so as to avoid the embarrassment of having convicted the wrong man for Gail Miller's murder.

I am satisfied from the evidence of Karst of the Saskatoon Police, Greenberg (Fisher's then defence lawyer), and witnesses then with Saskatchewan Justice such as Caldwell, Kujawa and MacKay, that no connection between the Fisher rapes and the Miller murder was drawn by police or Justice officials, which should have caused them to reopen the murder case. No Saskatoon rape files were concealed or destroyed by police or Crown officials for the purpose of concealing them lest the connection be made between those crimes and the Miller murder.

25. Caldwell's Letters to the National Parole Board

In 1972 and again in 1974, Caldwell wrote to the National Parole Board urging Milgaard's continued incarceration because of the seriousness of the crime. His letters related to Milgaard's possible parole, and not to the reopening efforts of the Milgaard group, which began only in 1980. The letters did not delay the reopening, because Caldwell was cooperative with investigators, despite being pilloried by the Milgaard group through the press. But accusations of bias against Caldwell have led investigators up many a blind alley. This Inquiry has invested much time, effort, and money on what have proven to be baseless accusations of misconduct by him. One recommendation which I would make for the better administration of justice in this province, would be that prosecutors desist from unsolicited contact with the Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts. They should avoid leaving the impression that they are heavily invested in a case on a personal level.

26. Linda Fisher's Visit to Saskatoon City Police

The third arm of the Terms of Reference directs me to seek to determine whether the investigation into Gail Miller's death should have been reopened earlier based upon information which came to the attention of the police or the Crown. The Commission interpreted "reopening" as meaning the reopening of the investigation into Gail Miller's death, which occurred in July of 1997 after DNA testing in the United Kingdom. Although the Linda Fisher report to police in 1980 predated by many years any possible recourse to DNA typing, it might have led to Fisher as a serious suspect in 1980 had it been followed up. The report was received, filed, referred, and possibly evaluated on a cursory basis within the Saskatoon Police, but it went no further. It should have.

27. Bruce Lafreniere Report to Shellbrook RCMP

It is possible that a report came to the RCMP detachment in Shellbrook, Saskatchewan in the mid-1980s concerning information to link Larry Fisher to the Miller murder. There is no documentary record of the report and the RCMP officer to whom it was supposedly made cannot remember it. The same person who claimed to have made the report to the Shellbrook RCMP, Lafreniere, used an alias, Sidney Wilson, in 1990 when he again reported to Wolch's office by telephone. This time, the report received immediate attention by authorities who were by this time engaged in the first s. 690 application.

28. Initial Steps Taken by the Milgaard Group to Reopen

The Inquiry's business, under the third Term of Reference, is to decide whether or not, on the basis of information received by the police and the Department of Justice ("Saskatchewan Justice"), the case should have been reopened earlier.

Convictions which have survived the judicial process do not attract the continued interest of police or prosecution. That will not change. Both are fully occupied with ongoing cases but stand ready and willing to act on information which comes to them relative to the safety of a conviction. What is needed are policies for doing so.

The Milgaard group requested information from Saskatoon Police in 1981 but were told that any release of information by them would need to be authorized by the Attorney General. The police obliged them to the extent of contacting witnesses but the latter did not want their whereabouts known. Joyce Milgaard's then lawyer, Young, was terminated by her before he could approach the Attorney General for permission.

Joyce Milgaard was aggressive in her efforts to get information, and in the process alienated witnesses and caused problems for her lawyers. Her efforts in 1981 and 1982 towards the reopening of her son's case produced no information that should have caused the authorities to take action.

Joyce Milgaard did not publicly question the conviction during the first 10 years, interesting herself instead on getting parole for her son. Because he would not accept prison life, he escaped in 1974 and again in 1980. She then despaired of parole, offered a reward, and began to reinvestigate the crime with no new evidence, but with a belief in her son's innocence.

Proceeding from that belief, she concluded that witnesses who had implicated him at trial had lied and that the police had twisted the facts to put him in prison.

She failed to capitalize on work done for her by her first two lawyers, and agents operating on her behalf. She was mistrustful of, and antagonistic towards the police, interpreting their confidence in the verdict as opposition to her efforts.

Joyce Milgaard contacted Wilson and John directly, without success. She instructed her counsel not to have the police contact them.

Joyce Milgaard and her counsel saw Tallis' file on March 11, 1981, and copied some of it. Her counsel was given access to the Crown file by Caldwell, who also granted an interview to another of her agents. One of her agents, Carlyle-Gordge, contacted Cadrain family members, learning that Fisher, a convicted rapist, lived in Cadrain's basement at the time of Miller's death. Efforts were made to contact Linda Fisher, but Larry Fisher was not a serious suspect for them and they did not persist.

Saskatchewan Justice would have co-operated with Joyce Milgaard in the 1980s had they been approached properly. They would have allowed unrestricted access to the prosecutor's file, and would have helped to get police files if even a marginal basis for it were shown. Her counsel did not approach Saskatchewan Justice for the purpose.

To the end of 1983, nothing had come to the attention of the police or Saskatchewan Justice which should have caused them to reopen the investigation into Gail Miller's death, except for Linda Fisher's 1980 statement to Saskatoon Police.

29. Preparation of First Application Under s. 690 (1986-1988)

Joyce Milgaard's reopening efforts stalled for a period, resuming in late 1985 with the engagement of the Wolch firm. Wolch turned the matter over to his articling student Asper to research, while retaining responsibility for the file.

Asper's involvement on the file featured quick conclusions that:

- the trial was flawed;
- David Milgaard was innocent; and
- there was official wrongdoing.

The latter belief persisted right up to the time of this Inquiry, when he finally adopted a more moderate stance (his "overall view" was that tunnel vision took over).

The Milgaard group resolved to carry on a media campaign in conjunction with the application, and as well promised Justice Canada that there would be a family presentation in conjunction with the official one, but it was never produced, causing delay in the processing of the main application.

The group did not contact either Tallis or Saskatchewan Justice, suspecting both.

Two grounds were submitted in support of the first application. The first was an expert report by Ferris relating to serological evidence, and the second was an affidavit by Hall, a witness present at the motel re-enactment. The Ferris report and the Hall affidavit were submitted in support of the 1988 application. The Ferris report did not take into account the nature of the defence put forward by Tallis at trial. The Hall affidavit was prepared on the basis of a telephone conversation between Asper and Hall in which Hall neglected to mention highly incriminating utterances of David Milgaard which she later reported to the Justice Canada investigator. As a result, the two grounds stated in the application were discounted by Justice Canada rather early in the evaluation process.

Concurrent with the start of the Justice Canada investigation of the first s. 690 application, the Milgaard group conducted a media campaign to publicize their cause and launched a parallel investigation. Joyce Milgaard, later assisted by Centurion Ministries, a United States based firm advocating for the wrongfully convicted, conducted interviews which were designed to produce ideas of wrongdoing in witnesses' minds, to justify recantation. The tactics used were transparent and, as they admit, were used in the belief that David Milgaard was innocent, and that the ends justified the means.

The only valuable piece of information passed along by the Milgaard group to Justice Canada, and indirectly to the Province was, I find, the Sidney Wilson tip in 1990, and that came spontaneously to Wolch. Once Fisher's identity was known to Williams and Pearson, they followed up at once.

The Milgaard application was advanced by instalment. From the start, Wolch had urged holding back information and releasing it from time to time to keep Justice Canada's interest up. For Justice Canada, however, this only caused delays. As well, it was a strategy of the Milgaard group to feed material to the media in preference to Justice Canada.

The s. 690 application of December 28, 1988, was incomplete and consideration of it was delayed for some five months.

Information produced as a result of the first s. 690 application came to Saskatchewan either from Justice Canada or through the media, but it caused them to think that the application would be rejected, not that the case merited reopening. Saskatchewan Justice officials did not believe the Wilson recantation secured by Henderson of Centurion Ministries.

30. Ferris Report

At the request of Joyce Milgaard and Wolch in 1987, Ferris agreed to examine garments of the victim from amongst the trial exhibits, for the purpose of extracting and typing DNA. He was able to extract some DNA from the panties but could not type it. He read part of the trial transcript and concluded that the forensic evidence at trial could be taken to exclude David Milgaard as the perpetrator of the murder. Ferris assumed that Milgaard was a non-secretor of blood antigens, and was unaware that Tallis had presented the forensic evidence as exculpatory on that account.

The Milgaard group interpreted his report as proving Milgaard's innocence, something Ferris said at the Inquiry was wrong. His report was submitted by the Milgaards in support of their first application on

December 28, 1988, as one of two grounds. Justice Canada investigators took professional advice on the subject of the report and discounted it.

The report received wide publicity and, of course, came to the attention of Saskatchewan Justice and the police but, under the circumstances, it was not information which should have caused them to reopen the investigation earlier.

A gloss was added to Ferris' opinion when the Milgaard group engaged another forensic pathologist, Markesteyn, to comment. He gave an opinion that the sample thought to be human semen might have been dog urine. This opinion was seized upon by the Milgaard group and widely publicized for its value in suggesting that a gross error had been made by the people who gathered and analyzed the forensic evidence. The group did this at the cost of undermining Ferris' opinion, which was only arguable on the basis that he was talking about human semen. Another pathologist, Merry, took up the dog urine speculation with the result that Justice Canada investigators, who knew that the substance was human semen and who realized that the Ferris report did not demonstrate Milgaard's innocence, became more convinced than ever that one of the two main grounds of the Milgaard application was worthless.

The second main ground, the Hall affidavit, was similarly discounted when Williams interviewed Hall. Williams was ready to conclude his report in January of 1990 when he asked Milgaard counsel if they had any more evidence to produce. The reply was that if what they had given him was insufficient they would look for more, provided they were funded to do so.

In the two years preceding the submission of the first s. 690 application, Wolch and Asper had discovered no new evidence beyond the Ferris report and the Hall affidavit, both of which were later discounted by Williams, although he did not say so. After filing the application, they became very frustrated with the process, expecting Justice Canada to be proactive in finding evidence to support their stated grounds, as well as to investigate further.

31. Communications Between David Milgaard and the Federal Minister

David Milgaard wrote directly to the federal Minister of Justice expressing his wish for a reopening of his case. He received a reply setting out the documentary requirements. Milgaard apparently did not tell Asper about the letter, and the Minister was not provided with the appropriate documentation upon filing of the application.

In addition to this difficulty, Justice Canada and the Minister's office were led to expect a family presentation, which was to be part of the overall application. It was never sent to Justice Canada, with the result that needless delays were incurred.

The evidence was that Milgaard was in a precarious mental state and needed something to occupy his time in prison, so the family presentation idea was a sort of make work project for him. His mother and counsel did not share bad news with him, with the result that he continued to believe that the Ferris report had exonerated him and he was very bitter at the lack of progress.

32. Federal Justice Review and Investigation of the First Application

The first s. 690 application was filed on December 28, 1988. Milgaard counsel had not asked Justice Canada what supporting materials were needed and the Minister's office had to ask for them in February of 1989. That year saw federal investigators working on the application as filed, once the materials had

been provided, while the Milgaard group conducted an energetic media campaign and David Milgaard busied himself with the family presentation.

The federal investigator assigned to the first Milgaard application was Williams. Although he reported to Justice Canada and not to provincial authorities officially, he necessarily had contact with Saskatoon Police, Saskatchewan Justice, and the RCMP in the course of his investigation. The information he gathered went to the federal Minister of Justice and influenced the course of the Supreme Court Reference, resulting in its opinion which was relied upon by Saskatchewan on the issue of reopening.

As 1989 wore on, relations between Milgaard counsel and Williams worsened, and the Milgaard group resolved to rely on the media.

Williams, in fact, was working in a methodical way and keeping to himself the fruits of his investigation, as policy required. He did not consider himself entitled to express his opinion to applicant's counsel because his job was to advise the Minister who made the decisions.

The test to be applied by the Minister in considering the first s. 690 application was not well understood by applicant's counsel, who thought that what was needed was evidence tending to show innocence. From Williams' evidence, one concludes that the test applied by the Minister at that time required the applicant to produce new information, or evidence that a reasonable basis existed to conclude that a miscarriage of justice had likely occurred. "Miscarriage of justice" is an expression which would include conviction in the face of innocence or probable innocence, but was not restricted to that.

Williams explained that his job was to collect information, not to argue with the applicant, so he took the applicant's statement of grounds as his only concern at the pre-screening stage. When that hurdle was passed, he became more proactive but not, I find, in looking for grounds beyond those stated in the application. He effectively answered the charge of procrastination made by the Milgaard group against Justice Canada. The application took as long as it did to process because the group advanced grounds incrementally.

Williams explained that the applicant was responsible for presenting the grounds because the Minister would be in no position to know the details. These needed to be explained by the applicant before the Minister could decide if the reasons given warranted a remedy. The applicant put up two grounds supported by a report and an affidavit, expecting a far-ranging investigation by the Minister to follow. Instead, the Minister investigated the report and the affidavit, found them both wanting, and asked for more. Fisher as murder suspect was raised, but Pearson, assigned to investigate him, could find no hard evidence linking him to the murder. The Minister refused the application.

The Milgaards persisted with Fisher for the second application which was allowed for public policy reasons. The similar fact evidence relating to Fisher's crimes was emphasized in the second application, but, I find, was not persuasive in ordering the Reference. Before the Supreme Court of Canada, that same evidence was looked at as something new which, had it been known to the defence, might have been put to the jury as a defence and could have affected their verdict. A new trial was recommended.

Williams was assigned to the second application as well, and a limited investigation followed. Additional information on Fisher rape victims was provided, but not all witnesses were interviewed because Justice Canada was considering a reference to a Court of Appeal for advice to the Minister.

There was no lack of diligence on Williams' part in investigating the grounds advanced. He had to delay completion of his report more than once because new grounds were advanced requiring the interview of additional witnesses.

Williams became the scapegoat for the dissatisfaction of the Milgaard group relating to the s. 690 applications. Lack of progress was blamed on him, whereas it stemmed from an incomplete application followed by the incremental disclosure of grounds for relief. The group resorted to the media, it is said, because the group had nowhere else to turn. I reject that contention. The media campaign was not borne out of frustration with Williams, but rather was a separate venture entered into by the Milgaard group concurrently with the filing of the application.

Williams' interview of John convinced him that her May 24, 1969, statement had not resulted from police pressure, and that she still remembered some things from that morning which confirmed the trial evidence. She told him that she had not lied in her statement, and that she would have told the truth to Mackie who took her statement, even though she could not remember some things.

There was nothing oppressive or improper in Williams' questioning of witnesses, although because he had to probe for the truth he tested them with some persistence. It is appropriate to observe, however, that Williams went about his work in strict compliance with the policy of the Minister as he then knew it, which was to respond only to grounds raised by the applicant. The whole course of his investigation leaves the impression that while he had an open mind, he also was determined not to stray from the strict lines of inquiry which he felt were dictated by the application itself.

Williams enlisted the help of Pearson of the RCMP on February 28, 1990 to investigate the Fisher matters, which had been advanced as an added ground for relief under the s. 690 application.

Pearson's work was professional, thorough and skillful, and drew praise from even members of the Milgaard group.

Pearson was looking for evidence that showed Fisher as the killer. As such he needed material that would support a criminal charge. To be admissible in court as an identifier, Fisher's rapes as similar fact evidence needed to have probative value which exceeded their prejudicial effect, and similar fact evidence is highly prejudicial. So the standard is high.

But similar fact evidence can also be used by the defence to raise a reasonable doubt that someone other than the accused was the perpetrator, and a lower standard applies.

Williams and Pearson were not looking for a defence for Milgaard of reasonable doubt through similar fact evidence, which would have met a modest standard of similarity, but rather evidence which could show that Fisher was the killer, and if that was to be done by similar fact, the similarity needed to be striking. Arguably, both Williams and the Minister of Justice, to whom he submitted the first application, applied an unnecessarily high standard. After the second application was submitted to the Supreme Court of Canada, that Court said that a new trial was justified by new evidence which, if presented to Milgaard jury's, might have affected the verdict. Why would not the same evidence have called for a remedy on the first application, which was dismissed? Similar fact evidence in both cases was the same. The answer is not clear, however the early emphasis by the applicant had been on Fisher as killer and Milgaard, consequently, being innocent. The emphasis gradually shifted to similar fact evidence which might have affected the jury in finding a reasonable doubt, but for the purposes of the first application, the Minister was not persuaded.

Williams and Pearson had to contend with unwanted publicity, repeated requests for a speedy conclusion to the investigation, and new allegations, the investigation of which delayed preparation of the report to the Minister.

Tallis was criticized for not calling a defence at trial, but after speaking to him, Williams concluded that had David Milgaard taken the stand, the Crown's case would have been strengthened.

Williams was the subject of severe criticism by the Milgaard group for his conduct of the investigation. He regarded the criticism as a strategy to bring so much pressure that the easiest way to deal with it would be to grant the application. He did not let it guide his activities.

By September 21, 1990, the s. 690 investigation was finished, and federal officials met with Milgaard counsel to hear their perspectives of the case and examine the Fisher situation.

The Williams investigation was expert, thorough and principled. The investigator assigned to help him, Pearson, was a senior, highly qualified officer. Despite his best efforts, he could not find an evidentiary link between Fisher and the Miller murder, although he suspected Fisher.

Joyce Milgaard, assisted by Henderson of Centurion Ministries had conducted a parallel investigation featuring interviews of witnesses and a publicity campaign. Joyce Milgaard was urged to co-operate with investigators instead of making her own inquiries, but she did not comply.

Pearson enjoyed full co-operation from the Saskatoon Police. Although his main focus was on finding evidence which inculpated Fisher, he did not pass over evidence which involved Milgaard.

Williams discounted the Ferris report, as well as the opinions of Drs. Markesteyn and Merry which it spawned in 1990. But at the time he did not consider that it was his position to explain to the applicant why the reports were not accepted. Once the application was ready to go to the Minister, however, he met with Wolch and Asper on October 1, 1990, and a full discussion of the issues took place.

The Milgaard group enlisted a Member of Parliament to their cause. He raised the Fisher matter in Parliament, to the detriment of Pearson's investigation. The latter was trying to get Fisher's confidence and have him submit to a polygraph. However, when Fisher became publicly known as a suspect in the Miller murder, his life in prison was in danger. Allowing somebody else to do one's time is a cardinal offence in the penitentiary. Fisher became unapproachable.

Public criticism of Justice Canada investigators by the Milgaard group drew the fury of the Minister. Joyce Milgaard said that she feared Minister Campbell would get so mad she would turn down the application.

33. Engagement of William McIntyre

Federal Minister Kim Campbell engaged retired Supreme Court Justice William McIntyre to advise her in 1990.

His advice is particularly relevant to us because Saskatchewan Justice relied upon it as justification for not reopening the investigation into the death of Gail Miller. The Milgaard group was denied access to McIntyre's report to the Minister, as being privileged. It has also been withheld from us as being constitutionally protected.

The furor caused by its non-release stemmed from the Minister justifying her opinion by reference to it. She was entitled to take legal advice and equally entitled to rely upon it. But referring to her reliance on it

without producing it to explain her reasons caused public suspicion and resentment, especially amongst the members of the Milgaard group.

Justice Canada officials, however, communicated the substance, if not the report itself, to Saskatchewan officials who relied upon it in not reopening the investigation.

34. Criticism in the Media

The media campaign conducted by the Milgaard group gained early support from journalist Lett of the Winnipeg Free Press. Asper courted a wider audience in the eastern press, and was a member of television panels highly critical of Justice Canada's handling of the application. He was joined in this effort by Joyce Milgaard who told us that she realized that they were taking a calculated risk in publicly criticizing Justice Canada and the Minister while their application was under review. There can be no doubt from the evidence of police and both federal and provincial Crown officials that they came to mistrust anything emanating from the Milgaard group .

35. Federal Minister's Decision of February 28, 1991

The first Milgaard s. 690 application was rejected by the federal Minister of Justice, Kim Campbell, who found that there was no body of new evidence or information capable of demonstrating that a miscarriage of justice had likely occurred. Saskatchewan relied upon this information, and saw no need to reopen the case.

Minister Campbell did not refer to the John statement of May 24, 1969, in her letter rejecting the first application. Although the most incriminating parts were not in evidence at trial, John had neither recanted nor repeated them. I see no reason preventing the Minister from having taken that statement into account, but if she did, it would not be in the category of information coming to the attention of police or Saskatchewan Justice which should have caused them to reopen sooner. The reverse would be true.

36. Milgaard Reaction and Media Coverage; Response by Saskatchewan Justice

The Milgaard group reacted with outrage, saying that they had done all the work, that Justice Canada had failed in its duty by not doing a full investigation, and that officials were not impartial. They added personal attacks on Minister Campbell, which diminished the credibility of their critique and reflected badly on the administration of justice.

37. Second s. 690 Application

The second s. 690 application was filed August 14, 1991, accompanied by a publicity campaign organized by the Milgaard group. It was designed to bring maximum pressure upon the Minister. McCloskey of Centurion Ministries alleged that Milgaard was framed, and that the Saskatoon Police covered up Fisher's tracks.

Discussions began in August of 1991 between federal and provincial officials as to what could be done to air the matter publicly. On November 28, 1991, the Minister ordered the matter to the Supreme Court.

On a substantive basis, Saskatchewan Justice had confidence in the federal Minister's rejection of the first application, and doubted the strength of the second. For them, the media campaign had proven to be counter-productive. Genuine complaints or suspicions were trivialized by false accusations. Provincial officials no longer believed anything Joyce Milgaard said.

Some of the Saskatoon Police files relating to Fisher's rapes in that city were missing from police records. The Milgaard group seized upon this as evidence that somebody had tampered with the system to cover up the rapes lest a connection be made between them and Gail Miller's murder. They alleged that the files had gone missing after the McCloskey accusations of cover-up on August 16, 1991. In fact, they had been missing long before, probably lost in a move of records to a new police building. A Saskatoon Police Commission investigation was undertaken, and concluded that the files had probably been lost or destroyed through inadvertence.

Joyce Milgaard confronted the federal Minister of Justice in public on May 14, 1990, while the first application was still being investigated. The Minister refused comment. Following rejection of the first application, she approached Prime Minister Brian Mulroney in public on September 6, 1991, within a month after filing of the second application. He expressed an interest in the case and promised to do what he could.

38. Federal Justice Consultation with William McIntyre

Justice Canada again consulted with McIntyre for advice in late 1991.

Saskatchewan Justice received information which they relied upon to the effect that McIntyre was of the opinion that the second s. 690 application revealed "still no reasonable basis" to conclude that a miscarriage of justice may have occurred.

39. Decision to Refer to the Supreme Court of Canada

In November 1991, the Minister decided to refer the matter to the Supreme Court, perceiving widespread concern as to whether there had been a miscarriage of justice in the conviction of David Milgaard. It was in the public interest that the matter be inquired into.

In compliance with the wishes of the Milgaard group, the hearing was set at the earliest possible time, mid-January 1992. The Supreme Court set guidelines for its consideration of the question of whether the continued conviction of David Milgaard would constitute a miscarriage of justice.

Proof of innocence, either on the criminal or civil standard, would have sufficed for a remedy, but it was not shown at the hearings. Being able to raise a reasonable doubt in 1992 would not suffice, but if there was credible new evidence, not available at trial, which could have affected the verdict, a court should look at it, and that is what led to the recommendation for a new trial.

The Supreme Court's opinion demonstrated that, in their view, a miscarriage of justice had not occurred, but would if the conviction were allowed to stand (the "continued conviction").

The Supreme Court hearings followed an adversarial model, with Saskatchewan Justice being instructed to support the conviction. The documentary case was put together by Justice Canada with the approval of both Milgaard counsel and Saskatchewan Justice. Notwithstanding the adversarial role assigned to them, Saskatchewan Justice counsel were free to take any action dictated by the evidence, and would have told federal officials at once had they seen any need for a new trial.

All parties undertook to provide full disclosure before the hearings.

At the Reference, Milgaard counsel argued that incriminating evidence against their client had been produced by "highly coercive and improper police tactics". Some evidence was heard in support of this

position, but the Supreme Court said that they had been presented with no credible evidence of police misconduct.

Police and prosecutorial misconduct was, therefore, a live issue at the Supreme Court hearings but the case for it was not made. The assertion that Milgaard counsel were not permitted to call evidence of police misconduct before the Supreme Court was refuted by Brown and Fainstein, counsel at the Reference and witnesses before the Inquiry. In fact, testimony was heard at the Reference from Roberts and Karst, and the Mackie Summary was presented, all relating to allegations of misconduct. None was proven. The opinion given by the Supreme Court represented the view of five dispassionate, learned judges with everything before them but the DNA evidence. At the conclusion of hearings, they were left with at least an equal possibility that David Milgaard was the culprit. They recommended a new trial for him, but expressed no opinion that Fisher should be charged.

The Milgaard group welcomed the Supreme Court's recommendation for a new trial, to the extent that it would afford David Milgaard a chance for a not guilty verdict. But they wanted more – a declaration of innocence which would give them a chance at compensation.

Saskatchewan Justice ordered a stay on the basis that a new trial would not be in the public interest given the lapse in time. Saskatchewan Justice correctly foresaw a "public relations war" in furtherance of a compensation claim by the Milgaard group.

Sensational accusations of official wrongdoing (the Breckenridge allegations) were widely disseminated as were baseless comments about non-disclosure, incompetence and dishonesty on the part of the Saskatchewan Crown relating to the trial. Saskatchewan officials, far from regarding such information as calling for a reopening, believed the allegations to be false and motivated solely by a desire for compensation.

40. Efforts to Conduct DNA Testing

After the Supreme Court hearings in 1992, both Saskatchewan Justice and Justice Canada remained interested in testing the victim's clothing for the purpose of extracting and typing DNA.

Semen staining was thought to be the most relevant for the purpose, and the only known remaining sample of the kind was microscopic. Technology was then available to test such a sample on an exclusionary only basis, but it would consume the entire sample and might not yield a result given the size, age and quality of the stain. A decision was therefore taken to await the further development of analytical options for testing.

Unknown to the parties, other semen staining was present on some of the victim's garments, but had been missed both by the Milgaard expert and the RCMP lab.

Had the larger stains been known in 1992, technology then available could have excluded David Milgaard as the donor of the semen on the victim's dress and, within the limits of discrimination for the type of test then available, could have identified a match with Fisher.

The larger semen stains were found only in 1997 in the Forensic Science Services Lab in the United Kingdom using a mapping technique which the RCMP lab in Ottawa was not equipped to employ in 1992.

In January of 1995, prompted by a request from David Milgaard through his counsel, Justice Canada revisited the issue of testing the small known sample and found that viable methods were now available. There followed a two year course of negotiation which culminated in the successful 1997 DNA typing in the United Kingdom. Justice Canada favoured the use of the most discriminating test available, while Milgaard counsel urged the use of a test which could exclude their client, but if it did not, would not identify him as the donor of the semen. This position derived from advocacy, not science, which dictated the use of the best and most discriminating test available. Eventually science won out and yielded the favourable result for Milgaard in 1997 in the Forensic Science Services lab in the U.K.

The successful DNA typing conducted in 1997 demonstrated that David Milgaard could not have been the donor of the semen on the victim's clothing which was tested by the laboratory, and to a very high degree of probability, it could not have been deposited by anybody except Larry Fisher.

No DNA based information came to the attention of Saskatchewan Justice or the police between 1992 and 1997 which should have caused them to reopen. The situation could have been otherwise had not semen stained material on the victim's panties been wasted in the Ferris lab and other staining missed by the RCMP analyst. These materials, if tested by the methods available in 1992, might have caused authorities to reopen the case earlier.

41. Michael Breckenridge's Allegations

Allegations of official misconduct by Breckenridge came to Wolch on March 21, 1992, when the Supreme Court hearings were still ongoing, but were not introduced into those hearings.

Some investigation was done by the Milgaard group into Breckenridge – not enough to demonstrate his whereabouts at relevant times, but sufficient to cast doubt upon his credibility. No action was taken for about six months, but then the allegations were published as proof of official wrongdoing. A protracted and costly inquiry was conducted by the RCMP, who reported to Alberta Justice. The finding was that there was no substance to the allegations. The ambit of the inquiry reached beyond the targets of the Breckenridge allegations and amounted to a virtual reinvestigation of the death of Gail Miller. No wrongdoing on the part of police or prosecution was found. No cover-up of evidence was found.

Nothing produced by the Milgaard group's campaign to show official misconduct or cover-up was convincing and it was not information which should have caused Saskatchewan Justice or police to reopen sooner than they did.

The propagation of the Breckenridge allegations and other charges of official wrongdoing by the Milgaard group were known to be incorrect by public officials, the subjects of such allegations. The result was a complete loss of credibility for the Milgaard group.

The RCMP investigation (Flicker) was lengthy, sophisticated, costly, and comprehensive. No fewer than 68 allegations of conduct amounting to obstruction of justice were leveled by Joyce Milgaard, and each one of them was investigated and dismissed.

At the conclusion of the RCMP investigation in 1993, investigators simply did not know what had happened at the murder scene. They had no evidence to doubt the results at trial, on appeal, and at the Supreme Court. John, Wilson and Milgaard could have helped, but did not. The barrage of complaints and false accusations reaching investigators served only to trivialize the applicant's cause, and tended to reinforce investigator's belief in Milgaard's guilt.

Information coming to the attention of RCMP investigators showed a pattern of evidence incriminating Milgaard rather than tending to show his innocence, and therefore was not something which would prompt the Crown to reopen the case.

Throughout the course of Flicker, investigators were suspicious of Fisher but lacked reasonable and probable grounds to charge him.

Investigators found no evidence of public pressure on the police in 1969 to solve the murder, nor did they find evidence that pressure influenced police actions.

Investigators reported "There is no new evidence which would exonerate David Milgaard, or that would implicate any other person, including Larry Fisher". That was as of August 15, 1994, three years before DNA typing in England. The first part of the investigators report was correct in that there was no new evidence which would exonerate David Milgaard, but the second part that there was no evidence which would implicate any other person including Fisher was inaccurate in its choice of the verb "implicate". Investigators had reason to suspect him, but not enough reason to charge him. David Milgaard's status remained as it was after the opinion of the Supreme Court.

The release of the Alberta Justice and RCMP Flicker reports in 1994 and 1995 gave Saskatchewan no cause to reopen the investigation.

42. Public Disclosure of RCMP Report and Reaction of Milgaard Group

Without reading the report of the RCMP, Joyce Milgaard described it as a whitewash. David Milgaard and his counsel were reportedly of the same view.

I agree with the Alberta Justice conclusion that there was no credible evidence to support any allegation that:

- Saskatoon Police or any member;
- TDR Caldwell;
- Serge Kujawa;
- any member of Saskatchewan Justice including Attorney General Romanow; or
- anyone involved in the prosecution or investigation

attempted to obstruct justice, in any way or were involved in any criminal wrongdoing. Nothing I have heard at this Inquiry calls for a different finding.

The release of the 1997 report of the Forensic Science Services Laboratory in the United Kingdom caused a sensation. It reported that semen staining was found on the panties and on the dress. The same DNA STR profile was in samples from both garments. This profile was compared to knowns from Gail Miller, Milgaard and Fisher.

The analyst concluded that the semen could not have originated from Milgaard, and that Fisher could not be excluded as the source. His report stated that "based on data from the UK Caucasian population the STR profile obtained from both the semen stains and from Larry Fisher's blood sample is estimated to occur at a frequency of approximately 1 in 400 million men".

Counsel for Caldwell and Kujawa made a public statement July 21. In it he:

- admitted Milgaard was wrongfully convicted;

- apologized for the failings of the system;
- denied wrongdoing on their part in the prosecution; and
- expressed the opinion that the trial was free of improprieties.

The DNA results caused Saskatchewan to reopen the investigation into the death of Gail Miller, and to apologize and promise compensation to David Milgaard, leaving the door open to a public inquiry.

The Saskatoon Police were reluctant to accept the results, and so the RCMP was asked to carry the investigation of Fisher.

43. Systemic Issues and Recommendations

(a) Forensic Evidence

Retention of biological samples suitable for DNA profiling should be mandatory in all cases of forensic investigation of sudden death. Quality control standards must be set and maintained for the taking and analysis of body tissue and fluid samples. Such standards are difficult to maintain when autopsies are performed in various hospital settings. I recommend that dedicated medical examiners' facilities be established in both Regina and Saskatoon where all autopsies deemed necessary in cases of sudden death would be performed by qualified forensic pathologists in the service of the Province. Samples not currently testable should be retained on the chance that scientific advances might make them useful.

(b) Inter-Force Exchange of Information

When one force is assisting another, written reports should be exchanged. I recommend the mandatory sharing of the police continuation reports between all forces assisting in a case. The reports should become part of the major case management file, and should be directed to the file manager.

Because the RCMP is frequently called upon to assist municipal police forces in the province in the investigation of major crimes, every municipal force should enter into a written agreement with the RCMP under the Saskatchewan Police Commission policy manual, describing the terms, conditions and responsibilities of inter-agency relationships.

(c) Major Investigations

Allegations of misconduct by the Saskatoon Police in the investigation of the Miller murder have not been demonstrated at this Inquiry. I find that officers did not suffer from tunnel vision, nor were they incompetent. Investigations of major crimes have grown more sophisticated over time, and as a matter of policy, guidelines are in place to seek to ensure that all municipal forces operate under a common policy framework.

Officers are better trained today than they were in 1969. There is an increased awareness amongst them of wrongful convictions.

All forces use major case management, with a team reporting to a file manager. The entire case management file is delivered to the Crown. Any lack of investigative sophistication in the Milgaard case has been overtaken by events, and no recommendation relating to the management of major cases is required.

(d) Recording of Interviews

It is easy to say in hindsight that Roberts should have left a full record and a report to Saskatoon Police about the circumstances relating to his questioning of John and Wilson, and the same applies to Mackie in recording the circumstances of his taking of the formal statement from John the next day. But, in fact, it does not require hindsight to realize that both officers should have recognized the sensitivity of the crucial evidence they were taking, and the vulnerability of the young witnesses.

Presently, statements are recorded in audio, video, or both and to the extent practicable, that should continue. Utterances outside the setting of formal statement taking will continue to be made, and, if relevant, should not be inadmissible merely for the lack of a video or audio recording. It is a matter of weight for the trial court. Nevertheless, recording of interviews is very desirable, leading to more care in their taking, providing protection to the officer involved against false claims of intimidation, and most importantly, offering some assurance of fairness at trial for the benefit of both the accused and the witnesses.

Young witnesses and young accused should be handled with great care. An extra person should be present when taking a statement from a young person, and video or audio recording is needed.

Polygraph exams are routinely taped and have been for years. No further recommendation is needed.

(e) Prosecutorial Matters

(i) Disclosure

Both the practice of disclosure, and the underlying substantive law and regulatory regime to make possible full answer and defense, have been extensively improved since 1969. Indeed, present day standards of disclosure have not been criticized by the parties.

(ii) Trial Evidence

Section 9 of the *Canada Evidence Act* was intended as a codification of the common law exception to the rule against impeachment of one's own witness. The section, as first drafted, proved to be a conundrum in the matter of proof of hostility so subsection 2 was added, allowing the use of previous inconsistent statements in writing, or reduced to writing, to be used to prove hostility.

The application of subsection 2 in the Milgaard case contributed to his conviction, and might do the same in other cases unless it can be shown that juries understand and heed the orthodox warning that they are not to use out of court statements for proof of contents unless adopted by the witness at trial.

The application of s. 9 of the *Canada Evidence Act* poses significant prejudice to an accused. Whether that prejudice is exceeded by the public interest behind its enactment is debatable. Any further study, however, would be hampered by the lack of a factual basis for deciding whether or not juries understand and accept the orthodox warning. Amendments to the *Criminal Code* should be sought to permit jurors who have met this issue in their deliberations to be questioned about it.

(f) Post-Conviction Matters

(i) Follow-up on Reports

The Saskatoon Police failed to investigate Linda Fisher's complaint of August 1980 relating to her husband Larry as the possible killer of Gail Miller.

The complaint was properly taken and recorded, but the officer to whom it was referred took no further action. It was within his discretion to act or not. That he did not act is perhaps attributable to the fact that the complainant reported to the police station around 4:00 a.m., had been drinking and was making her report some 10 years after the event, and her description of the missing knife did not match the murder weapon. The Commission was not able to discover why follow-up was not done in this case but to help to prevent a recurrence of the problem in other cases, mandatory channels of reference should be put in place.

Complaints concerning the safety of a conviction which come to the attention of the police should be referred to the office of the Director of Public Prosecutions in the Saskatchewan Department of Justice. The police agency receiving the complaint can note that it appears to be frivolous, if that is the case, but no police force should have to bear the heavy consequences of an incorrect evaluation, as this one was.

(ii) Prosecutors and the National Parole Board

In the belief that he was acting in the public interest and that his input on decided cases was sought by the National Parole Board, Caldwell supplied them with details of the Miller murder and of David Milgaard, stating his view that Milgaard should not receive parole.

These actions did not have a direct bearing on the reopening of the case but they earned him the enmity of the Milgaard group who perceived that he was biased and vindictive. This led to much public criticism of Caldwell and, by extension, of Saskatchewan Justice.

For the better administration of Justice in this province, I recommend that prosecutors desist from unsolicited contact with the Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts. They should avoid leaving the impression that they are heavily invested in a case on a personal level.

(iii) Retention of Trial Exhibits, Police Files and Notebooks

Caldwell retained the Milgaard trial exhibits with the unforeseen result that DNA typing was possible in 1997.

Although retention poses a significant storage problem, I would recommend that in all homicide cases, all trial exhibits capable of yielding forensic samples be preserved in their original form for a minimum of 10 years. Convicted persons should be given notice after 10 years of the impending destruction of exhibits relating to their trials, allowing applications for extensions.

In all indictable offence cases, documentary exhibits should be scanned and placed in permanent electronic storage, unless a court orders otherwise.

All police and prosecution files covering trials of indictable offences should be retained in their original form for a year, then scanned and entered in a database where a permanent secure electronic record can be kept. The costs of scanning would in some measure be offset by the reduced cost of storage.

Officers' notebooks, now regarded as the property of the police service, can be important in claims of wrongful conviction. Present policy requires their preservation so no recommendations are needed.

(iv) Victim Services

Some of Larry Fisher's rape victims were not informed of his guilty pleas, leading to accusations from the Milgaard group that the police wanted to conceal them.

Every victim of crime whose case goes through the court system should be informed of its disposition.

(g) Review of Criminal Convictions

(i) The Milgaard Case

The Milgaard group chose to bring an application for mercy to the federal Minister of Justice under what is now s. 696.1 of the *Criminal Code*. It was brought 19 years after conviction, advanced by installment, leading to investigative delays and was accompanied by a media campaign which hampered the work of investigators. The Minister rejected the first application with reasons which the Milgaard group found to be unsatisfactory. A major complaint by them, and others, was the Minister's stated reliance upon advice received from an outside source, without disclosing the advice.

Notwithstanding the shortcomings of the application, it met the threshold for further inquiry by Justice Canada and would have done so, as well, under the model used by the United Kingdom's Criminal Cases Review Commission (CCRC)[2], the difference being that under that model, the application might have succeeded. With its proactive methods, the CCRC would have found the Linda Fisher report and acted on the s. 9 *Canada Evidence Act* problem, realizing that the Court of Appeal was wrong to hold that the lack of a *voir dire* made no difference to the outcome. They might have heard from Tallis, as we did, that had he been able to cross-examine on circumstances in the absence of the jury, he might have succeeded at keeping the out of court statement from the jury. As well, investigators might have recognized that the similar act evidence of unsolved rapes might have offered a possible defence at the original trial.

(h) Compensation and Factual Innocence

Decisions relating to compensation for wrongful conviction should continue to be dealt with by the Executive, but compensation should not be limited to those cases of wrongful conviction where factual innocence has been found. It is too difficult to prove. Wrongful conviction resulting from investigative, prosecutorial or judicial misconduct should be open to claims for compensation.

(i) Section 690 Applications

To the extent that information gathered during the course of the s. 690 applications in this case reached the police and Saskatchewan Justice, those applications were both relevant and within our competence to consider. We concerned ourselves with the quality of information generated by federal investigators while refraining from any criticism as to the manner in which they conducted their affairs.

We have not inquired into the reasons for actions or advice between federal officials, although some information in that regard has found its way into the public domain.

2 See Chapter 6.

Minister Campbell justified her decision to refuse the first application, at least in part, by reference to advice she received from outside counsel, not specifying what the advice was. This was her prerogative, but with the greatest respect, had she simply given her reasons, perhaps based more or less on advice received, without trying to justify them by reference to its author, there could be no cause for complaint.

As it was, the applicant asks how he can be assured of fair treatment when the decision maker relied upon unspecified reasons which she refused to divulge. The question has merit.

No substantial criticism of the ministerial decision is intended, only the expression of it. Reasons for a decision should stand on their own merits, and not be justified by unspecified advice. If a commission independent of government was formed for the purpose of dealing with claims of wrongful conviction, instead of Justice Canada investigating under s. 696.1, it might take advice and refuse to disclose it as a matter of privilege, but solicitor-client privilege is something that can be waived, whereas Justice Canada has successfully argued in Court that its constitutional prerogatives preclude production of such advice to provincial commissions.

Parliament has addressed some of the deficiencies in the old s. 690 proceedings:

- the test to be used by the minister is set out in s. 696.3(3);
- the application process is regularized;
- powers of investigators are added so that the speed of the process is no longer dependant upon cooperation of witnesses; and
- the considerations taken into account by the minister in applying the test are set out in s. 696.4.

The Milgaard experience has convinced Justice Canada of the need to share information with the applicant, protecting confidentiality where needed.

Even with the improvements noted, the s. 696.1 process has an inherent lack of transparency on the investigative side. There is a climate of secrecy and parochialism in Justice Canada which is ill suited to the investigation of claims of wrongful conviction which necessarily involve aspects of both provincial and federal jurisdiction.

Any findings of misconduct made by a federal minister under s. 696.1, touching upon the actions of police or prosecution, directly affect the administration of justice in the province which, therefore, has an interest in the public's perception of how the s. 696.1 process proceeds.

The s. 696.1 process will remain vulnerable to attack because it remains reactive in nature and assumes an inquisitorial role only on the basis of grounds advanced by the applicant. Most applicants are without resources which would enable them to put forward their best case.

An apprehension of bias attaches to federal investigators operating under the Ministry of Justice. Members of the public and applicants alike tend to view them as prosecutors, or at least in sympathy with the prosecution side.

There is as well resentment that one elected person, the Minister of Justice, can decide the fate of an applicant relying, perhaps, on a single advisor. The minister is subject to political pressure.

These are all valid concerns in my view, and even though some of them do not bear objective scrutiny, public perception of what is fair must be respected.

(j) The CCRC Model

In the United Kingdom (except for Scotland), claims of wrongful conviction are reviewed by an independent body, the Criminal Cases Review Commission (CCRC). The creation of such an agency has been recommended in Canada but so far has been rejected, as I understand it, on the basis that a further level of bureaucracy is not needed to replace Justice Canada acting under s. 696.1, especially one which might be seen as a further level of appeal. In support of the status quo, it is argued that legislative changes in 2002 have resulted in an increase in remedies granted by the minister in finding a reasonable basis to conclude that miscarriages of justice have likely occurred.

Under the CCRC model, an independent agency in Canada would serve as a gatekeeper to the Court of Appeal. It would make no findings itself, except determining cases where there was a real possibility that the conviction would not be upheld by an appeal court.

Quite apart from the performance of investigators under the present s. 696.1 regime, and of the response of Ministers of Justice acting upon their recommendations, the present system lacks transparency and suffers from a perception of bias. Evidence at the Inquiry describing the CCRC revealed a pro-active agency of wide profile-defence, prosecution and policing being represented, where the applicant is not required to do his own investigating, the CCRC being responsible for looking at the case as a whole. It does not concern itself with guilt or innocence, just whether there is a real possibility that the conviction is unsafe, something the Court of Appeal must decide. If they find that it is unsafe, they must quash the conviction.

The CCRC's concern is whether a person is rightly or wrongfully convicted, considered on an objective, evidential basis. Wrongful conviction can mean that someone has been convicted of an offence which he did not commit (he is innocent in the absolute sense), or it can mean that a person was convicted in a flawed trial or because significant, relevant, new evidence has come to light which might have affected the verdict of a jury.

The term miscarriage of justice is used loosely, and its meaning is not debated.

The CCRC does not reassess matters which a jury has considered.

The real possibility test has to be applied in finding new evidence or a new factor which could have caused the trier of fact to act differently.

Legislation requires that the Court of Appeal find the verdict to be unsafe as a condition of ordering a new trial. A finding that it might be unsafe does not suffice.

Applicants are encouraged to send what they have, but it is the CCRC's responsibility to get what it needs.

The CCRC's scope of inquiry is not defined by the grounds advanced. It is pro-active, but not there to substitute its opinion for that of the jury. Rather, it looks for something new and evaluates its impact.

The success rate for applications is rather low in terms of those who receive a remedy, and even a relatively high volume of cases can be handled quickly on the basis of documents.

The majority of cases receiving a remedy feature no misconduct or deliberate wrongdoing.

On balance, I think that claims of wrongful conviction presently investigated under s. 696.1 of the *Criminal Code* should be heard instead by an independent review agency established along the lines of the English CCRC.

44. Public Inquiries into Claims of Wrongful Conviction

The English experience has shown a reduction in requests for public inquires since the establishment of the CCRC. It is greatly hoped that the experience would be repeated here, should an independent agency take over the s. 696.1 task from Justice Canada. Public inquiries will continue to be desirable, or even necessary in some situations, but they are very expensive exercises, and if significant public expenditure can be avoided by the establishment of a truly independent, transparent and effective investigative agency, it should be done.