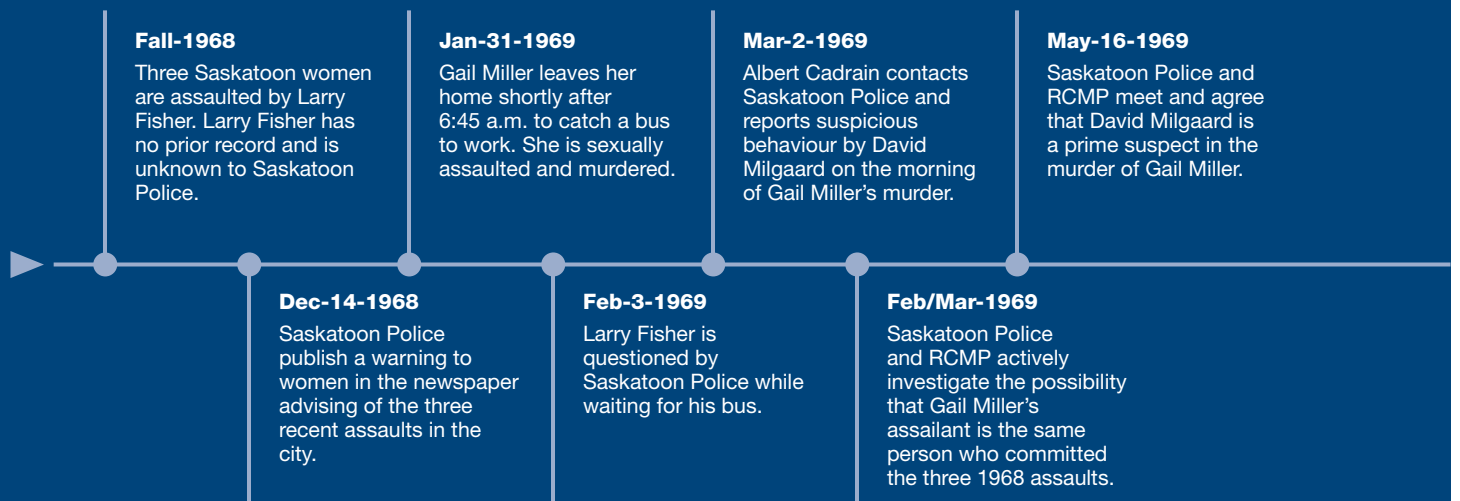


# Chapter 8

## Investigation into the Death of Gail Miller



## 1. Introduction

One of the fundamental issues facing the Commission was whether the police investigation caused or contributed to the wrongful conviction of David Milgaard.

As Bruce MacFarlane, Q.C. wrote in his paper entitled *Convicting The Innocent: A Triple Failure of the Justice System*,<sup>1</sup> “The police investigation is often at the heart of a wrongful conviction because the police gather the evidence, identify the prime suspect, build the evidentiary foundation for conviction, and then testify in support of the prosecution”.<sup>2</sup>

With that in mind, thoroughness in presentation of the evidence relating to the investigation seemed to us to be the only choice, notwithstanding the existence of previous reviews and reports by both Justice Canada and the RCMP which dealt with, *inter alia*, the investigation into the death of Gail Miller.

Thoroughness was also called for because previous reviews have been dismissed by the Milgaard group as whitewashes, biased, or limited in scope, so it was important that all the facts, to the extent possible, be laid before the public.

The Terms of Reference require the Commission to “inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller”.<sup>3</sup> The investigation was conducted primarily by the Saskatoon Police with some assistance from the RCMP. The Saskatoon Police also received assistance in locating and interviewing witnesses from police forces in Regina, Calgary and Fort Garry. As the legal responsibility for the investigation rested with the Saskatoon Police, their conduct was the primary focus of this aspect of the Commission’s mandate. The Commission also examined the conduct of witnesses, their interaction with investigators and the role witnesses played in the investigation.

The objective of this part of the Inquiry is to find out what happened in the original investigation. The mandate goes beyond the investigation and charging of David Milgaard, as the Commission was asked to inquire into “any and all aspects”<sup>4</sup> of the investigation into Gail Miller’s death. The Commission reviewed the entirety of the investigation into Miller’s death. An important part of this aspect of the Inquiry was to critically examine the investigative steps that gave rise to the evidence which resulted in the wrongful conviction of David Milgaard. Equally important, the Commission examined the investigative steps that were taken or could have been taken with respect to Larry Fisher.

In the years that followed Milgaard’s conviction, there were many public allegations of misconduct and deliberate wrongdoing on the part of the Saskatoon Police and the officers involved in the investigation. There have been widely publicized allegations that the police deliberately framed Milgaard and that they coerced, pressured and even tortured witnesses to lie to enable the police to make a case against a person they knew to be innocent. There have been public allegations that the police knew Milgaard was innocent and that Larry Fisher was Miller’s killer, but took deliberate steps as far back as 1969 to cover this up. There have also been allegations that the police had tunnel vision and focused their attention exclusively on Milgaard to the exclusion of other suspects.

Although the Saskatoon Police have acknowledged that they investigated a person they now know to be innocent, they have steadfastly maintained that Milgaard’s wrongful conviction was not due to any misconduct or deliberate wrongdoing on the part of any police officer.

The Commission reviewed the investigation in great detail so it could address the many allegations made against the police officers involved.

**2. Commission’s Evidentiary Base**

The Commission had the benefit of a significant historical record of the Gail Miller murder investigation. The entire police investigation file had been preserved and the original police file was provided to the Commission. The file included police investigation reports, witness statements, and correspondence.

The notebooks of officers involved in the Miller murder investigation were not retained on the investigation file, as officer’s notebooks included notes on many different cases and investigations. Although it was police policy for completed notebooks to be deposited with the service, this practice was not always followed in 1969 - 1970. Some officers kept their completed notebooks, including after retirement, while others turned theirs in. The notebooks were kept for a period of time and then destroyed. The first conviction review of the police files did not occur until 1989, 20 years after the initial investigation. By this time, many of the officers’ notebooks had been destroyed. A few officers had their original notebooks. They were obtained, and copies of these were received by the Commission.

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3 | Schedule ‘A’ to Order-in-Council 84/2004.  
4 | Schedule ‘A’ to Order-in-Council 84/2004.

The original RCMP investigation file from 1969 was destroyed in the 1970s as part of their regular file destruction policy. However, copies of three key reports were located in 1993 in historical records maintained by the office of the Attorney-General of Saskatchewan.

As part of Milgaard's efforts to reopen his investigation and set aside his wrongful conviction, the original police investigation was reviewed by a number of agencies, institutions and courts.

A number of police officers were interviewed by federal Justice officials as part of the two applications by Milgaard for a remedy under s. 690 of the *Criminal Code*. Some of the officers testified at the Supreme Court Reference in early 1992. Police officers were also interviewed by the RCMP as part of their 1993 investigation, and transcripts and notes of these interviews were provided to the Commission. Officers were examined for discovery in the civil proceeding commenced by Milgaard in 1993. These transcripts were provided to the Commission. As well, some police officers also testified at Fisher's trial in 1999 and these transcripts were evidence before the Commission.

The police investigation file contained notes of interviews and witness statements from the people who were interviewed by police in the original investigation. This group of people were referred to as "Event Witnesses" at the Inquiry and consisted of the key people who were questioned by police and may have witnessed an event or something that was relevant to the investigation.

Like police officers, most event witnesses retold their story as part of the reopening proceedings that commenced in 1988. Many of them were interviewed by Joyce Milgaard, her supporters and counsel, and again by federal Justice officials. Some gave evidence at the Supreme Court Reference. Most of the witnesses were interviewed by the RCMP in 1993, and some gave evidence at the Fisher trial. The Commission record included all of these previous transcripts and interview notes.

Over 100 officers participated in the Gail Miller murder investigation. Those involved in the original investigation have retired from active duty and many are deceased. The Commission heard evidence from 25 police officers who were involved in the original investigation, three RCMP officers, 20 Saskatoon Police officers and one officer from each of the Regina Police Service and the Fort Garry Police Service.

The Commission heard evidence from a number of witnesses who were involved in the original investigation as either witnesses to certain events or people who provided information to the police. All of the key witnesses at trial, other than Albert Cadrain and George Lapchuk who are deceased, were called to testify at the Inquiry. As with most witnesses before the Commission of Inquiry, these people had not only provided written statements and given evidence in 1969 and 1970, they had also recounted their stories in later years as part of the various reopening investigations.

As indicated in the Foreword to this report, this and subsequent chapters contain more detail than Chapters 3 and 4, and there are frequent references to source material. Documents referred to in the hearings are identified within the text by footnotes, using their six digit identifiers. Reference to the hearing transcripts are found in the footnotes preceded by the letter "T". Recourse to either the documents or the transcripts is not essential to an understanding of the text, unless so indicated. The source material has been included to permit verification of what is said in the text, should that be desired.

Chapters 3 and 4 of this report, the Overview of Facts and Executive Summary are intended to provide context for what follows and should be read in advance of subsequent chapters. Without that context, the reader might have difficulty at times in following the review of witness testimony and issues.

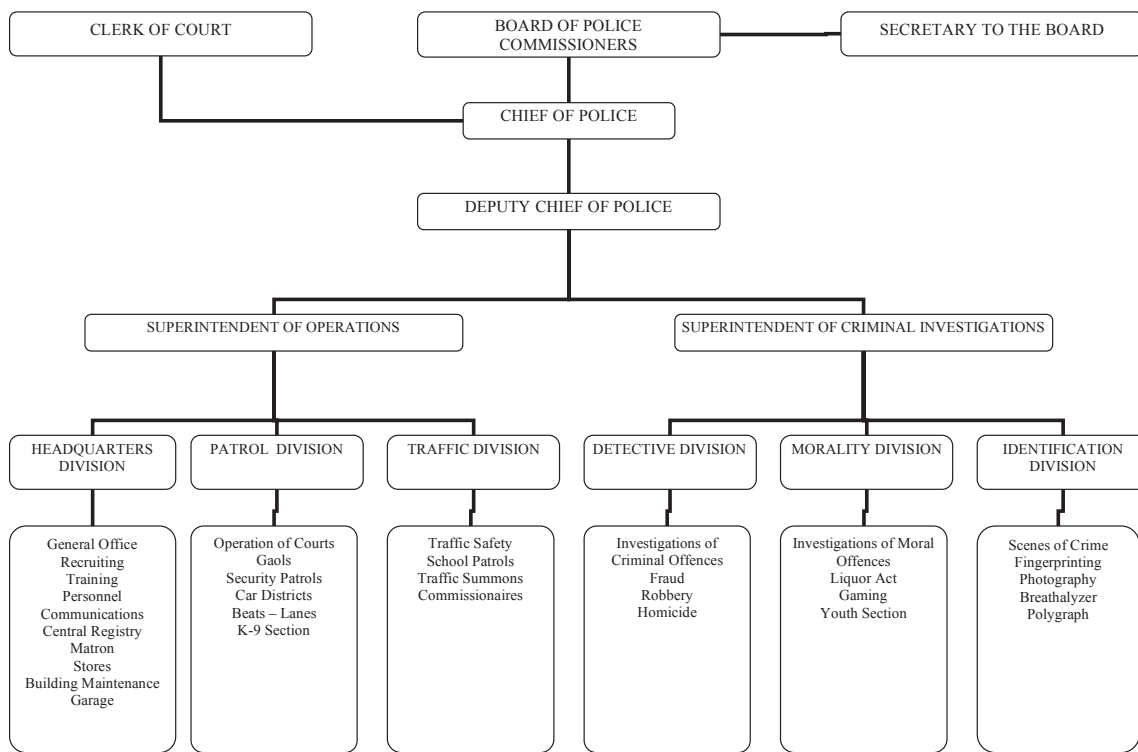
3. Investigating Police Agencies

(a) Saskatoon Police Service

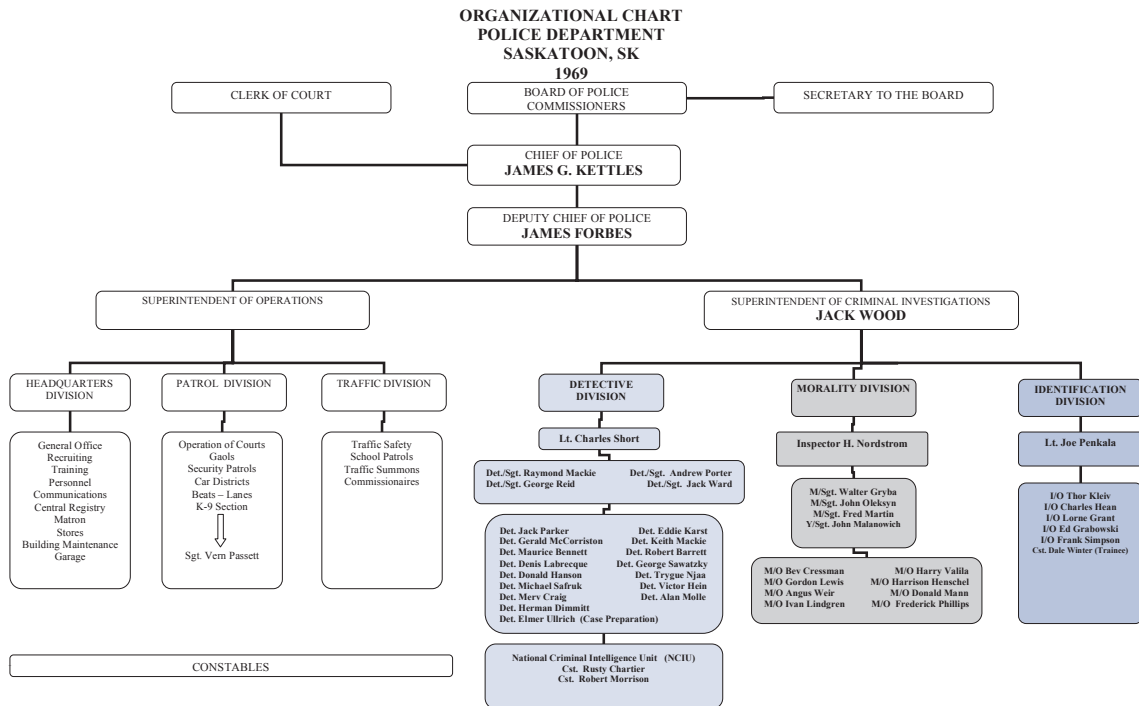
The investigation of the Gail Miller murder was done by the Saskatoon Police (a term which I will use to describe the organization variously described over the years as the Saskatoon Police Service, Saskatoon Police Force and the Saskatoon Police Department) assisted, in its initial stages, by the RCMP.

Organizational charts of the Saskatoon Police with responsible officers of the day are reproduced below.

**ORGANIZATIONAL CHART  
1969**



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In 1969 Chief James Kettles directed 203 police and 41 civilian personnel. The Detective Division assumed responsibility for the investigation of the death of Gail Miller under Lt. Charles Short, who reported to Jack Wood, Superintendent of Criminal Investigations. Two detectives were assigned responsibility for the investigation of major files. In this case they were Det./Sgt. Raymond Mackie and George Reid.

Some of the work was shared with the Morality Division, and the Identification Division played a major role. It was headed by Lt. Joseph Penkala.

Detective and Morality Divisions were located on separate floors in the police station, and there were no direct reporting lines between the two. Morality, consisting of one inspector, four sergeants and eight officers investigated 14 rapes in 1968, and eight in 1969, in addition to a larger volume of lesser sexual offences. Included in matters investigated in 1968 were two rapes and one attempted rape later attributed to Larry Fisher. Detectives investigated four murders in 1969 and one attempt, including the Gail Miller case. There were no murders in 1968.

Joseph Penkala served with the Saskatoon Police from 1954 to 1991. In 1969 he was an Identification Officer and rose to Chief of Police serving as such from January 1982 to September 1991.<sup>7</sup> In the early years of his service, training was mainly in-house but increased over time.

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Docid 325569.  
Docid 325553 and 325555 at 560.

Although the Identification Section did fingerprinting and fingerprint Identification, the members lacked sophisticated equipment and relied, for most forensic testing, upon the RCMP's Crime Detection Laboratory.

The Gail Miller attack involved both rape and murder, and as such would have attracted the attention of both Morality and Detective Divisions. Because Fisher had in the previous months committed rapes in Saskatoon and was later found to have committed the Gail Miller rape and murder, the suggestion has been made that not enough attention was paid to a possible connection between the 1968 rapes and Gail Miller's murder. The Detective Division led the investigation into the Miller rape and murder and, it is argued, Morality was not making the connection, as it should have, between the 1968 rapes and that of Gail Miller.

Penkala, however, stated that the level of cooperation between divisions in 1969 was always excellent. As between Morality and the Detective Division he was not aware of difficulties. All officers viewed a serious case as a challenge and were anxious to help.

**(i) Organization of Investigation**

One aspect of the investigation which needed our attention was how well coordinated was the effort. The evidence demonstrated that an immediate and concerted effort was made involving the Identification, Detective, Morality, and Patrol Divisions. A prompt and extensive canvass of the neighborhood was taken while Identification officers attended to the scene. Detective and Morality officers conducted interviews of friends and acquaintances of the victim, known offenders and others. A tracking dog was used.

The possible connection between the 1968 rapes and that of Gail Miller was quickly recognized and investigated to the extent possible, given the fact that Fisher was unknown to police and there were no other suspects for the rapes.

According to Penkala, a morning meeting was held involving the Chief, the Deputy Chief, heads of divisions and detective sergeants, if required, to exchange information. This is important evidence. But, he says, the activity and dedication generated by the Miller investigation would have made the morning meetings secondary.

The day-to-day direction of the murder investigation came from Detectives Raymond Mackie and Charles Short. Officers in the field prepared investigation reports, sometimes including a witness statement. The reports would be read by a designated detective (Detective Sergeant Jack Ward in 1969) who would co-ordinate follow-up investigation. Mackie and Short would be involved as well.

The Commission heard a great deal of evidence from police officers and witnesses relating to the extensive investigative efforts conducted before Milgaard came to the attention of police on March 2, 1969, as will appear from a later review of the evidence.

At this point, the work done by a single officer will serve to illustrate what was typical.

George Reid testified at the Inquiry. He served the Saskatoon Police from 1951 to 1987. He did 26 reports<sup>8</sup> and took 14 witness statements. With Det. Jack Parker he was first on the scene of the murder.<sup>9</sup>

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8 Docid 326597.  
9 Docid 006258.

I am satisfied that there was coordinated attention given to the Miller murder case as between Morality and Detectives (see the evidence of former Superintendent Jack Wood<sup>10</sup>).

The Saskatoon Police enjoyed a good reputation in 1969 and its members were seen as credible.

Most of the officers involved in the investigation had been trained on the job, unlike the situation today where police officers receive extensive training before active duty, including following courses in relation to young witnesses and accused persons. Milgaard and the main witnesses Ron Wilson, Nichol John and Albert Cadrain all fell into that category, and their handling by police became an issue and will be extensively commented upon later.

**(ii) Resources Devoted to the Investigation**

All officers of the Detective Division (a lieutenant, four detective sergeants and 16 detectives) worked to varying degrees on the murder investigation. They were assisted by the Identification Division Officers, and many from the Morality Division. The Patrol and Traffic Divisions gave assistance as well. More than 100 officers from various departments<sup>11</sup> checked or investigated 208 persons, 38 of them after Milgaard became known.

**(iii) Record Keeping Practices**

The first records created were the officers' notebooks containing details of investigative steps taken. They were supposed to turn them in to their departments to be kept for a defined time period and then destroyed. Some officers, however, kept them after their retirement. Given the passage of time, not many notebooks were available for the Commission to review.

Notes taken by officers were then expanded into written reports, as close as possible to the events recorded. Witness statements were sometimes attached but occasionally stood alone.

Ideally, an investigation report would relate the circumstances under which a statement was taken. This was not always done, regrettably, inviting questions as to the propriety of procedures used in taking the statement. The investigation of the Gail Miller murder featured two significant omissions of this kind: one by a police officer seconded from the Calgary Police who took initial statements from Wilson and John, and another by Raymond Mackie of the Saskatoon Police who took Nichol John's written statement. This issue will receive detailed attention in further sections of the report.

**(b) RCMP**

As it does today, the RCMP provided policing for municipalities in Saskatchewan which lacked their own forces. They had many trained and experienced investigators and their assistance was often called upon by Saskatoon Police for work beyond the municipal boundaries of the city, as well as for help in major cases. In February of 1969, James Kettles of the Saskatoon Police contacted Inspector J.A.B. Riddell of the RCMP for assistance. Officers Stanley Edmondson and Edwin Rasmussen were assigned to help on a full-time basis, with the Saskatoon Police maintaining control.

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T11245-T11427.  
Docid 326548.



After an initial meeting of representative officers on February 21, 1969, the RCMP noted that “at this time, the Saskatoon Police had no real suspects in mind as investigation to date had failed to turn up any leads of a promising nature”.<sup>12</sup>

The RCMP’s role in the Miller murder investigation was explained by Edwin Rasmussen who served that force from 1957 to 1977.

RCMP reports went to the Attorney General, with whom they contracted to supply policing services in the province. However, Saskatoon Police and the RCMP did not exchange reports although the work each was doing on the Miller murder investigation was known by all.

The Rasmussen report of May 7, 1969,<sup>13</sup> included in this report as Appendix B, reviews the “full-time assistance”<sup>14</sup> given to the Saskatoon Police by himself and Edmondson.

The exchange of written reports between police forces working on the same case will be the subject of a recommendation in this report. It is a question of achieving co-ordinated effort. I have been assured by both RCMP and Saskatoon Police witnesses that verbal exchanges between them ensured that important information was well known to both forces. The question achieved particular significance in this case because the connection between the rapist active in Saskatoon in the fall of 1968 and the murderer of Gail Miller was not made definitively during the murder investigation, although it was considered.

In his report, Rasmussen recorded that it was believed that the rapes which occurred in the area in the fall of 1968 were connected to the murder but goes on to note that “[A]ttempts to uncover further information in this respect have been to no avail”.<sup>15</sup> This report was not copied to the Saskatoon Police who were criticized by the Milgaard group as not having made the connection. I accept from the evidence of its officers that they thought of it but could find no evidence in support.

I find that both the Saskatoon Police and the RCMP devoted important resources to the Miller murder investigation.

**4. Initial Investigation**

**(a) Death of Gail Miller**

Gail Miller was raped and murdered in the early morning hours of Friday, January 31, 1969. Her body was found around 8:30 a.m. in the north/south lane between Avenue N and Avenue O south in the 200 block, halfway between her house and 20th Street where the buses ran.

The morning of the murder was very cold. Ice fog was present and the Commission obtained Environment Canada records showing the temperature to have been -41.1 degrees Celsius with a southerly wind at 13 km/hr.<sup>16</sup>

Gail Miller’s movements from the time she left the rooming house, at 130 Avenue O South, are unknown.

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12	Docid 065399.
13	Docid 250597.
14	Docid 250597.
15	Docid 250597.
16	Docid 078601.

The Commission heard from former roommates of Gail Miller, Adeline Hall (Nyczai) and Linda Brecej (Markwart) whose evidence I accept.

From their evidence, I find that Gail Miller was last seen on January 31, 1969, around 6:45 a.m. standing at a window overlooking Avenue O, dressed in her nurse's uniform. One roommate heard footsteps hurrying downstairs shortly after seeing Gail Miller.

The practice of roomers using the bus was to catch it at Avenue O and 20th Street, a few minutes walk from the rooming house, but there was also a bus stop at Avenue N and 20th Street involving a walk of one extra block.

There was no direct evidence before me, nor indeed before the jury as to where Gail Miller went after being seen by Nyczai. The likelihood, from the evidence available, was that she would have exited the front door, and walked south on Avenue O to the 20th Street bus stop. It is possible, however, that she caught a ride, or walked east on 21st Street to Avenue N and then south to the bus stop, or walked south in the alley between Avenues O and N. If she walked, the exact route she took would make very little difference in the timing of events, as the jury might reasonably have concluded. Given the bitter cold one would think that Gail Miller chose the route which offered her the best protection from the biting wind.

Alerted to the presence of a body in the lane, personnel from the nearby funeral home found it lying with clothing in disarray, in trampled snow stained with blood. The body was dressed in a ¾ length black cloth coat but no hat. There was a watch on the left wrist. The right shoe was missing and a stocking and undergarments were around the right ankle. Underclothing was blood stained. The white uniform dress was pulled down to the waist and the right shoulder strap of the brassiere was broken.

### **(b) Crime Scene and Neighbourhood Investigation**

#### **(i) Scene Investigation**

It is my finding that the scene was appropriately preserved, examined, and recorded. No issue has been raised as to these subjects, so only a brief discussion is needed here. Readers wanting more detail should access the referenced documents.

The first officers responding to the call which came at 8:40 a.m. were Detectives George Reid and Jack Parker. They were followed by Identification Officers Thor Kleiv and Joseph Penkala.<sup>17</sup> At the Inquiry, Parker had little independent recall but did remember finding a sweater and a boot pushed into the snow. The sweater was inside out as if taken off the victim. He also recalled following a garbage truck in the alley and finding a handbag in a garbage can.<sup>18</sup>

Kleiv provided reliable evidence at the Inquiry and a useful report<sup>19</sup> and scene photographs. One showing the body at the scene is graphic, demonstrating the great disarray of the blood stained clothing and the gloveless hands clutching snow. The scene bespeaks great violence with much trampling of the snow. Police concluded that the victim was killed following a struggle at the spot where she was found, but the scene did not tell them whether the attack was random or was made by someone known to Gail Miller. More than 30 officers were mobilized to investigate on the day of the murder.

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17

Docid 006255.

18

Docid 180089 and 105048.

19

Docid 006241.

Joseph Penkala made notes<sup>20</sup> and filed a report dated February 1, 1969,<sup>21</sup> detailing his observations at the scene.

The face of the victim was distorted, cheeks sunken and lips protruding indicating a hand hold to cover her cries. In Penkala's opinion, the 10 foot diameter circle of trampled snow, the blood and all circumstances told him that the crime was committed at that site. A bloody knife blade was found in the snow under the body.

There was nothing to indicate that the body had been dragged to where it was found.

Because the arms were out of the uniform but in the coat, it was obvious that at some point, the coat had been removed, then put back on. One can only speculate at the sequence of events, he remarked.

After removal of the body, Penkala went over the packed snow, finding the knife blade and some blood seepage under the surface. There was around 10" of snow under the body and the knife blade was midway in this depth.

The officers found paring knives for sale in a store which matched the blade and bought a pair for demonstration purposes. They were maroon handled. A maroon handle fitting the broken blade was later found nearby in the Hounjet yard.

A small hunting knife was later discovered on a nearby fence, under snow, but both the defence and the prosecution viewed it as having no connection to the murder.

I am satisfied that an acceptable system of exhibit handling was in place to maintain continuity.<sup>22</sup> Penkala returned to the scene on February 4, 1969,<sup>23</sup> finding some frozen lumps of semen in snow which he had piled up in his first search. The lumps contained pubic hair, and thinking that they might consist of ejaculate, Penkala had Pathologist Dr. Harry Emson examine them for the presence of semen, which Emson identified. Penkala then sent the frozen lumps to the RCMP lab for analysis along with samples of Gail Miller's head and pubic hair and other items of clothing.<sup>24</sup> Brown fibres were found on the victim's badge pin and these were sent for analysis as well. Police suspected that they might have come from contact with the attacker, but no matching garment was found.

No fingerprints were found on the knife blade, but the lab reported that Miller's blood type O was present. The donor of the semen found in the snow lumps was group A and a probable secretor.

There was packed snow in the traveled areas of the lane, but if a car had been present that morning, it left no distinguishing tracks. A police dog was used, and the handler, Vern Passet, recalled at the Inquiry that a scent was tracked from Gail Miller's body to a location on Avenue N across the street from the east/west alley behind the funeral home.

A sweater buried in the snow was found nearby as were a lipstick and a boot.<sup>25</sup>

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20	Docid 325062, 071025 and 324807.
21	Docid 106130.
22	Docid 025591.
23	Docid 325062 at 068 and 106199.
24	Docid 009276.
25	Docid 105048.

**(ii) Neighborhood Investigation**

Police made a large number of inquiries of people living in the area of the crime scene or of those who regularly traveled to work or caught buses nearby at relevant times. They did not fail to record reports from people who had not seen anything unusual that morning bearing in mind that the opportunity to see was limited because of darkness and fog.

The possibility of a random attacker led the police on a widespread investigation.

On the day of the murder, officers contacted 27 dry cleaning establishments to check whether anybody had brought in bloody clothes and to ask them to contact police if such items arrived. They followed up all leads but no suspects were traced by these means.

Immediate steps were taken to contact taxicab companies. Forty-six taxicab drivers, 13 of whom were on duty at the time of the murder, were contacted and interviewed for information on fares around the time of the murder.

All guests at the Salvation Army hostel were checked as well as workers at a construction site at the end of the north-south alley between Avenues N and O. A methodical door-to-door canvass of homes within a four block radius of the crime scene was undertaken and surveillance of the back alleys in the area of the murder was set up, and patrols were made on the chance that the perpetrator might return to the scene.

Police attended Gail Miller's funeral, took photographs, and noted car license plate numbers as well as checking flower shops for the names of people who had sent flowers to the funeral. Police also approached Gail Miller's friends, acquaintances and roommates for evidence of any of them having a reason to attack her.

A summary of persons checked and investigated by Saskatoon Police, RCMP, and Regina Police<sup>26</sup> prepared by Commission staff reveals that:

- A total of 208 people were checked or investigated as suspects in connection with Gail Miller's murder;
- 17 people were checked or investigated for the first time on January 31, 1969;
- In February 1969, 147 people were checked or investigated for the first time;
- In March 1969, 30 people were checked or investigated for the first time;
- 38 people were checked or investigated after March 2, 1969 – the day the Saskatoon Police Department received information regarding David Milgaard.

These numbers reveal a prompt and concerted effort by police. The numbers also show that police did not slacken their efforts to check for other suspects after Milgaard came to their attention.

A short review of evidence given by former policemen at the Inquiry gives a flavor of the work that was done. In general, given the lapse of time, the memories of policemen involved had faded, and more of their activities can be learned from documents they authored than from their testimony at the Inquiry.

Amongst the latter were former Detective Jack Parker who worked in Morality in 1968 and 1969. He was with George Reid at the murder scene and remained involved for about a week, checking bus stops and doing interviews.

David Wilton served with the Saskatoon Police from 1965 to 1997. He was sent to check an alley on the day of the murder. His report of February 15, 1969,<sup>27</sup> says that Sid Sargent told him that he saw a woman in a nurse's cape at the bus stop at Avenue N and 20th around 7:00 a.m. or 7:05 a.m. At the Inquiry, Sargent said that the woman he saw was Gail Miller. The police thus had information which supported the belief that Gail Miller had walked down Avenue N to 20th Street to take her bus. That was one of the theories suggested by the Crown in explaining the circumstances at trial. That same evidence, as discussed elsewhere, would invite comparison with other evidence to the effect that David Milgaard at about the same time was at the Trav-A-Leer Motel.

Raymond Mackie served the Saskatoon Police from 1948 to 1978 and was a detective sergeant in 1969.<sup>28</sup> He has not stayed in touch with police matters since retirement.

He was not a cooperative witness, claiming no memory of most things, even when prompted by documents.<sup>29</sup>

He was the senior detective sergeant in 1969, and the file was assigned to him and George Reid. The two of them coordinated the work with one or the other reporting.

Amongst his other duties, he did checks through the Red Cross on blood types.<sup>30</sup> If added to the list of 208 suspects checked and investigated, this would mean 361 persons were checked.

Maurice Bennett served from 1954 to 1986 with the Saskatoon Police.<sup>31</sup> A detective at the time of the murder, he did a house-to-house check on 20th Street. His report is dated January 31, 1969.<sup>32</sup> He took Victim 12's statement<sup>33</sup> which is on the Milgaard file because she did not complain of her assault until she heard of the murder. He showed photos to Victim 12. The annotation "Ind. Assault Not Connected" is not his writing, he thinks. It is easy to conclude, however, that someone considered it in connection with the Miller file and decided that the two were unconnected. Bennett and Victor Hein did a door-to-door canvass between Avenues H & W on 20th Street.<sup>34</sup>

The Inquiry heard from witnesses who found items and turned them over to police. Helen Gerse lived next door to the Cadrain house on Avenue O South and some time after the murder, while shoveling snow, she turned up a blue toque which she said was full of blood. She put this in her backyard and the police came for it on April 5, 1969.

The Inquiry also heard from two witnesses who were children at the time – Giles Beauchamp and Norman Remenda. They found a wallet containing Gail Miller's identification in the snow not far from the Cadrain residence on Avenue O, south of 20th Street.<sup>35</sup>

Police had no eye witnesses initially but were able to find a few witnesses who had made significant observations.

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27	Docid 106547.
28	Docid 325555 at 558.
29	For instance, documents such as those described in Docid 325863.
30	Docid 106637 and 106716.
31	Docid 325555.
32	Docid 106110.
33	Docid 006404.
34	Docid 106254.
35	Docid 106653.

Henry Diewold was the caretaker of St. Mary's Church, located in the 200 block of Avenue O South, across the street from the alley which led to the crime scene. He told police that at about 7:00 a.m. on the morning of January 31, while on his way to open the church, he noted a car with lights on facing west in a lane at the rear of the Westwood Funeral Chapel. This told police that a vehicle was in the back alley very near the spot where Gail Miller's body was found at the relevant time.

Upon his return 10 minutes later from the church to the rectory, the vehicle was still there and he noted a person walking in front of the headlights then back towards the driver's side.

On February 5, 1969, police interviewed Marie Indyk who said that while at the north-west corner of 20th Street and Avenue O she saw a woman walking west on 20th Street on the north side. The look on the woman's face frightened Indyk when she stopped in front of her. She then turned and walked north on Avenue O towards 21st Street. The woman was 25 to 30 years of age, and wore a black cloth coat and black collar.

Murray Duffus, who lived on the corner of 20th Street and Avenue O, told police that on the morning of the murder he was trying to start his car between 6:40 and 6:55 a.m. in a location which afforded him a full view of the east side of the 200 block of Avenue O south. He neither heard nor saw any unusual activity.

On the opposite end of the alley, and across the street at 226 Avenue N South lived Margaret Merriman. She told police that she was looking out her front window which faced the entrance to the alley behind the funeral home, waiting for a taxi which had been called for 6:55 a.m. She did not see or hear anything. This witness was not disclosed to the defence, a subject which will be discussed in a later section of the report.

Mary Gallucci told police that she boarded a bus every day on the corner of Avenue O and 20th Street. On Thursday morning, the day before the murder, a girl got on the bus. She was young, had dark hair, wore a white dress and stockings, dark cloth coat and a white scarf. She wore no hat. Gallucci had seen the girl before on the same bus.

That same day, Gallucci also saw a construction worker wearing blue jeans and a hard hat, possibly yellow, and he had come from Avenue O south of 20th Street and was a regular on that bus at the same time. She could not identify him.

Looking back, it is easy to surmise that Gallucci saw Gail Miller and Larry Fisher. At the time, however, Fisher was unknown to the police except through a routine canvass of passengers at the bus stop at which time he told them that he had been there on Friday morning and took the bus to work.

Another bus passenger, Simon Doell, told them that he often caught the bus on 20th Street and that when Gail Miller got on the same bus, she was always on the corner of Avenue N and 20th Street, directly across from the funeral home. Here is more evidence causing police to think Miller had come down Avenue N, or perhaps down the alley, as opposed to walking out her front door and straight down Avenue O.

Initial investigation left police with no direct evidence of Gail Miller's movements after leaving her home. They had no eye witness to her attack and no suspect.

**(c) Autopsy**

The Gail Miller autopsy was conducted by pathologist Dr. Harry Emson on January 31, 1969. He introduced a number of photos of her body, in respect of which a publication ban was given. The photographs are not essential to this Report and will not be published in it.

Emson had, by that time, been qualified in pathology for about 11 years and was still practicing his profession in Saskatoon when he gave evidence to the inquiry. His autopsy report is Appendix C.<sup>36</sup>

Although not called as an expert witness to give an opinion, Emson's expertise in pathology drew many questions from counsel at the Inquiry. He explained that his objective, then and now, in a medical legal investigation was to learn who the victim was and how, where, and when she came to her death.

Emson said that a collaborative approach with the police was necessary and he recalls officers Joseph Penkala and Thor Kleiv being present at the autopsy, which was performed around seven hours after death. He found the cause of death to have been a stab wound in the right chest causing bleeding into the chest cavity. A contributing factor was the cold, from which the victim would have died within 15 minutes lying unconscious, as she was, in the snow.

A photograph of the body shows distortion of the face. At the time, Emson did not attribute a cause, but said at the Inquiry that it might have resulted from someone grabbing the face.

Emson testified that it was his responsibility during an autopsy to remove the clothing and hand it to police who would bag it. In cross-examination, it appeared that this was in fact not done because there is a photograph of the gurney carrying the victim's body under which one sees clothing piled on the floor. Although this demonstrates a lapse in procedure, it appears not to have affected this case although subjecting garments to external contamination might be a serious lapse in other cases.

The throat bore slash wounds, from left to right, two of which, says the pathologist, penetrated the subcutaneous tissue and might have been inflicted near or after death. There were four stab wounds over the collar bone, three below the left breast, four on the back, and one on the right side, the latter penetrating the lung and causing death. Emson examined slides of lung tissue from this stab wound and discovered fibers which, being microscopic in section, could not be retrieved. The presumption arising is that the knife passed through a garment into the body.

Emson did not check the clothing for stab wounds because, he says, it was not his responsibility.

He believed that the slash wounds on Miller's body were likely caused by a right-handed individual but he could not ascribe handedness to the stab wounds. He suggested that more than one knife might have been used to inflict the wounds.

A small amount of reddish fluid was aspirated from the vagina and found to contain non-motile spermatozoa indicative of recent intercourse. Emson said that sperm motility is lost quite quickly in a living person, but more slowly in a dead body. He noted the absence of pelvic injury, but indicated that this did not mean Miller had consensual sexual intercourse because penile sexual intercourse does not usually cause injury in a woman of child bearing age.

Emson told the Inquiry that he presumed that the vaginal aspirate was discarded after examination and said that in 1969, there was no protocol for saving bodily fluids, the decision being taken on a case by case basis. He concedes that although DNA testing was unavailable at the time, a lab could have tested for blood antigens, but he simply cannot remember whether saving the aspirate was considered and rejected or was not even considered. He said it was up to the police. In answer to cross-examination by Calvin Tallis at David Milgaard's trial, Emson said that the failure to save the aspirate was presumably a police decision.<sup>37</sup> Before the Inquiry, however, he acknowledged some responsibility by conceding that discarding the sample would not have been inadvertent, but rather a collaborative decision with police. Today he is inclined to save everything.

Joseph Penkala testified that the police never received the vaginal aspirate; that Emson just looked at it, found sperm, and discarded the sample. For reasons which he could not explain, Penkala went back to the scene on February 4, 1969, and found and saved some semen samples found in the snow. I conclude that he was not satisfied with Emson's decision to discard the vaginal aspirate. It appears to me, having listened to Emson and the two Identification officers Penkala and Kleiv, who were present at the autopsy, that the police simply deferred to Emson in the matter of samples taken from the body.

In hindsight, discarding the vaginal aspirate was unfortunate because it might eventually have provided material for DNA typing, something that was not possible at the time. Then, it had value only for serological testing, and the evidence is that such testing could not have yielded conclusive results.

Asked to comment on blood typing, Emson explained that the four main blood types – A, B, AB, and O – are defined by antigens (proteins). Types A, B, and AB antigens are expressed on the surface of red blood cells and, in the case of secretors, in other bodily fluids such as sperm or saliva.

Because the presence of numerous non-motile spermatozoa was noted, Emson approximated that the sperm might have been deposited within 12 hours of the start of the autopsy (2:30 p.m.) because sperm begins to disintegrate after about 12 hours. In this case, however, that process could have been slowed by the cold. Intercourse might have occurred post-mortem.

I observe that the police were left with several possibilities arising from the condition of the body and the clothing. For example, because the victim was fatally stabbed only after her uniform had been pulled down to her waist and her coat had been put back on (the victim was stabbed through her coat but not her dress), she might have been partially stripped, raped, and then allowed to put her coat on before being stabbed either by the rapist or by somebody else, or she could have been partially stripped, had her throat slashed by one assailant who allowed her to put her coat back on only to be stabbed by a second assailant and then raped post-mortem by him. These examples are given simply as possibilities which might explain the two-stage attack presented by the physical evidence. Neither the police nor the prosecutor could explain it and left it up to the jury to sort out.

The physical evidence relating to the stabbing of Gail Miller presented the police with a question that has never been answered – how was it that Miller had been stabbed through her coat but not the top of her uniform dress. That circumstance pointed to a two stage attack for reasons which could never be explained. Detective Eddie Karst testified that many theories were put forward and it is a curious feature of this matter that after all these years, no one can say for sure just what happened to account for it. In neither the Milgaard nor the Fisher trial did the Crown suggest that there was more than one attacker.



Emson said that the victim might have been able to stumble, possibly, but not to run after the stabbing. She would have been essentially immobilized, not only from the stab wounds, but from the high degree of thermal shock, and shock from the sexual assault.

He agreed with the possibility<sup>38</sup> that the attack might have taken place elsewhere, with the body being dumped where it was found because he said it was difficult to imagine, as a common sense proposition, a sexual assault taking place outside at -40 C. At least one other witness, as we shall see, disagreed and as a matter of common sense, I see nothing impossible or even improbable about the sexual assault having been done outside by an assailant capable of such a frenzied attack assuming, of course, that he had just emerged from a warm environment.

### **5. Physical Evidence and Forensics**

During the investigation, both physical evidence (such as items of clothing) and biological evidence (such as blood samples) were collected. Such samples were introduced in court and may therefore be described, in general, as forensic evidence.

The investigation into the death of Gail Miller and the subsequent trial of David Milgaard were much concerned with both physical and biological evidence, especially the latter and specifically serology, being the identification and analysis of bodily fluids. A hair and fibre analysis played some part in the investigation, but most importantly it concerned blood, semen, and saliva.

In 1969 and 1970, the science of serology, including blood typing, could lead to the exclusion of a suspected donor of a biological substance, but not to his positive identification. It had value as an investigative tool because of its ability to reduce the pool of potential suspects by reference to their serological profile. DNA typing, which was not available then, can be used not only to exclude but to identify to a near certainty, a donor of a bodily substance. When it became available, it led to the conviction of Fisher and the exoneration of David Milgaard, a subject to which we return in Chapter 18 of this Report.

Physical items gathered by the Saskatoon Police during the investigation became important in the Milgaard trial, and in the reopening of the investigation years later. This evidence consisted primarily of the victim's clothing and personal belongings. Penkala and Kleiv gathered important evidence at the scene, and the senior officer, Penkala, directed further testing and analysis. He was present at the autopsy conducted by Emson, where further biological samples were collected.

All testing of forensic samples used at trial was done at the RCMP Laboratory.

#### **(a) The Physical Evidence**

Most of the significant physical evidence was gathered on or shortly after January 31, 1969, from the vicinity of the crime scene. Notable amongst these were items found on the victim or thought to be hers:

- a blood stained and perforated coat;
- blood stained pink panties, girdle, white mesh stockings, half slip and brassiere;
- blood stained white uniform dress;
- boots, one located on the body and the other buried in snow around the corner of the alley where the body was found;

- a red and black sweater found in the same location; and
- the victim's gloves found near to where the body was located.

A knife blade was found buried in the snow beneath the body, and its matching maroon handle was later located in a nearby backyard. The victim's purse and contents were found in a garbage can in an alley within a half a block from the scene. A blue toque, apparently blood stained, was later found in the backyard of a house adjacent to the Cadrain's, which was within two blocks of the crime scene, and the victim's wallet and identification were later found near that home.

Penkala returned to the crime scene on February 4, 1969, and reported that, "[t]he snow was searched and during the search, two frozen lumps about one inch in diameter, yellowish in color, with hair frozen into the lumps, were found and retained in a frozen state in the Identification Section Exhibit Room refrigerator".<sup>39</sup>

The snow referred to is that piled up by Penkala on the day of the murder from where the body had lain.

A small bone handled knife was later found at the scene resting under snow on the stringer of a fence. It was preserved and considered by both prosecution and defence to have played no role in the crime, and so was not introduced into evidence. It later became of interest only because Joyce Milgaard suggested many years later that it might have been the murder weapon used by Fisher, but was deliberately discarded by the police. This matter will be discussed in a further section of the report.

### **(b) Samples Collected at Autopsy**

Vaginal aspirate was withdrawn, as described, for the purpose of determining whether sexual intercourse had recently taken place. The presence of non-motile spermatozoa suggested that it had within the previous 12 hours. However, Emson explained at the Inquiry that the extreme cold might have slowed the degradation of the spermatozoa, thus impacting the time estimate.

The sample was discarded, probably by Emson, to whom Penkala would have deferred. This was a mistake. Coming from the body of the victim, the sample would potentially have been of far greater use than the frozen lumps of unknown substance which Penkala collected four days afterwards from snow where the victim's body was found. These samples were tested and found to contain human semen and A antigens which could be linked to the victim, or to her attacker only by inference.

Evidence at the Inquiry showed that vaginal smears were being retained in other rape cases, including one being considered by investigators in the context of the Gail Miller murder.

### **(c) Analysis by the RCMP Crime Detection Laboratory**

As mentioned, the Saskatoon Police did not have laboratory facilities of their own and relied upon the RCMP. On February 7, 1969, Joseph Penkala sent a number of items to them for testing:

- Black coat with perforations in the back to be checked for seminal stains (particularly in the coat tail region) and to determine consistency of cuts with knife blade submitted. Also to determine manner in which button was ripped off of coat;
- Pink panties to be checked for seminal stains and presence of menstrual blood. Also to determine nature of rip or cut;

- White uniform dress to be checked for seminal stains and to determine manner in which zipper and seams had come apart. Also to determine nature of fibre located at back of name badge;
- Girdle and stockings to determine presence of seminal fluid and menstrual blood;
- Half-slip to determine presence of seminal fluid;
- Broken knife blade to determine presence of human blood and to group same;
- Two vials of the victim's blood to determine blood type, alcohol content and presence of drugs;
- Two plastic vials of unknown substance to determine presence of spermatozoa and human origin. Also to examine nature of hair located in sample and determine similarity to hair samples of victim also submitted.<sup>40</sup>

Testing was conducted by Staff Sgt. Bruce Paynter. Paynter served the RCMP from 1955 to 1990 working as a serologist in the Regina Crime Detection Lab. Already an experienced officer and technician in 1969, he performed many tests on exhibits submitted to him in the Miller case.

Happily for us, he preserved his original notes, a fact which greatly assisted his recall of events.<sup>41</sup> The request for testing was more detailed than usual, and so Paynter's role was confined to testing certain kinds of exhibits involving sperm and blood.

He responded to Penkala's request for testing on March 12, 1969,<sup>42</sup> concluding that:

- The vials of blood (Ms. Miller's) contained type O blood.
- Type O blood was located on the knife blade.
- Human seminal fluid was located on the pink panties.
- Human seminal fluid, highly probably from a secretor of Group A was found in one of the vials of substance.
- No seminal fluid was found on the coat, girdle and stockings, half-slip, brassiere or white dress.

**(d) The Secretor Finding**

In his Inquiry evidence, Paynter explained that because some people (known as secretors) secrete blood antigens into other bodily fluids, including semen, a sample of semen can be found, for example, to have been donated by a person of blood type A who was a secretor. But a significant percentage of the population falls into this category, so a match cannot be achieved to identify a particular donor. Conversely a potential donor could be excluded if he was found to be a non-secretor, or, if a secretor, his blood type was something other than A.

To put the matter in perspective, about 40 per cent of the population have blood type A and about 80 per cent are secretors, so in the result, about 32 per cent of the population would be secretors of Group "A". That would be the pool of potential suspects as donors of the semen found in the snow.

In the context of our case, type A antigens were found in the semen from the snow, so they must have come from a secretor of blood type A. Blood and saliva samples from Milgaard were tested for blood grouping and secretor status.<sup>43</sup> Blood group A was reported conclusively.<sup>44</sup> No A or B antigens were found in the saliva sample, so Paynter reported simply that. Paynter explained that he did not mean to

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40	Docid 084974.
41	Docid 082386 and 082377.
42	Docid 105542.
43	Docid 009259 and 256195.
44	Docid 324690.

indicate by that report that Milgaard was a non-secretor because antigens from a secretor can be absent in saliva for other reasons. Further testing would have been needed to establish his secretor status conclusively. For the purposes of the Milgaard trial, however, Milgaard was thought to be a non-secretor.

Edwin Rasmussen went too far, says Paynter, in reading the conclusion expressed in his report of April 23, 1969, paragraph 26 when he said:

Milgaard was found to be of group 'A' however, is not a secretor and has also been eliminated as a possible suspect.<sup>45</sup>

Twenty-two years later, a further saliva sample from David Milgaard was tested showing him to be a group A secretor.<sup>46</sup> Had this fact been known at trial, he could not have been excluded as the donor of the semen found in the snow.

As a consequence of Paynter's findings, Saskatoon Police focused their investigation on potential suspects who were type A secretors.<sup>47</sup> Ron Wilson, Milgaard's companion on the trip, was known to have been blood type B<sup>48</sup> and so was excluded for that reason.

In his testimony before the Inquiry, Bruce Paynter said that the discarded vaginal aspirate could have been tested at the time for antigens, and being found in the victim, would have been of much more significance than the samples from the snow. Paynter stands by the accuracy of his work and I accept it as such.

The remaining requests in Joseph Penkala's February 7, 1969, correspondence were passed on to other RCMP technicians. The toxicology results were negative. The tuft of brown fibre found on the back of Gail Miller's name badge could not be identified. The cuts on the back of her coat were consistent with the knife blade, the dress seams and zipper had been damaged by force, the button missing from the coat had been removed by force, but the opening in the crotch area of the panties was due to normal wear and tear. Significantly, the seven hairs removed from one of the vials containing the frozen substance found in the snow by Penkala were pubic and were consistent with hair samples taken from the victim.<sup>49</sup>

#### **(e) Human Semen Found in the Snow**

Certain individuals who later reviewed the details of the forensic investigation noted that the frozen lumps of substance found by Penkala on February 4, 1969, were described at the time as "yellowish"<sup>50</sup> or "pale yellowish"<sup>51</sup> in colour. This observation led at least two experts, who had been retained by the Milgaard group, to opine that the substance found by Penkala was likely dog urine. The repercussions of this suggestion are covered later in the Report. Suffice it to say at this point that a review of Paynter's original examination notes would have confirmed that the semen from the vial was human. Paynter explained at the Inquiry that human origin was confirmed by way of a standard protein test, as well as a microscopic examination of the morphology of the spermatozoa.

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45	Docid 250597.
46	Docid 019279.
47	Docid 106637, 250597.
48	Docid 106666.
49	Docid 105544.
50	Docid 106199.
51	Docid 041925.

**(f) The Glove Stain**

The victim's gloves were found at the scene but never submitted to a lab for testing until 1997. RCMP analyst Anne-Elizabeth Charland examined the gloves and found a small stain of mixed biological origin.

As Charland reported to the Inquiry, the substance on the glove was not confirmed to be blood. Charland explained that the major (most significant) portion was consistent with Gail Miller's DNA profile, and one could therefore conclude that it was likely Gail Miller's biological material. Charland also identified a component of male origin with limited information. She could not say what particular biological material the stain consisted of i.e. blood or skin or semen, and there was insufficient information to match it with a donor. She reported that she could not exclude Larry Fisher as the donor but certainly could not identify him either.

In the absence of evidence on the point, I assume that the gloves found in the snow were thought to have been of no forensic value and so were not tested in 1969. One counsel at the Inquiry suggested that this was an investigative oversight but I do not agree. DNA typing was not available at the time and even if it had been, larger biological samples were available on other garments, and from the victim's body. Serological interest centered on the vaginal aspirate to the extent of identifying spermatozoa, but mainly on the frozen semen samples from the snow.

Even if type A blood had been identified on the gloves, it would have only left open the possibility of Milgaard as the donor, Fisher being unknown to the police at the time. A forensic case for either the prosecution or the defence would not have been advanced.

**(g) Forensic Considerations in Connection with the "Rapist Theory"**

As mentioned, police investigating the Gail Miller murder thought for a time that the murderer might also have been the rapist operating in the general vicinity in the fall of 1968. In furtherance of this theory, they sent some clothing and vaginal smears from rape victims to the RCMP laboratory for examination.<sup>52</sup> They were interested to see whether the donor of the semen in the rape cases might have shared a serological profile (A secretor) with the donor of the semen found in the snow near Gail Miller's body.

They found that the first victim's attacker was a type A secretor, consistent with the donor of the frozen semen samples in the Miller case. But the matter seems to have gone no further than that because, I might conclude, police attention had shifted away from the rapist as murderer theory to David Milgaard as murderer. It could be argued that police abandoned too soon the evidence that demonstrated that a type A secretor had raped both the first victim and Gail Miller. As we have noted earlier, however, the result of Paynter's analysis of the frozen semen in the snow led police to look for type A secretors. They assumed that the donor of the semen in the snow had raped Gail Miller, and so there was an obvious possibility that he had also raped Fisher Victim 1 in 1968 because a type A secretor had deposited semen in each case. But that did not lead them to a suspect, because the same serological profile would fit 32 per cent of the male population. They had no suspects for the rapes in 1968, and none for the murder until Milgaard came to their attention, after which police attention understandably became focused on him. Only in hindsight can it be said that the possible connection between the 1968 rapes and the murder of Gail Miller should have continued to hold police attention.

**(h) Failure to Detect Semen Stains**

Paynter was directed to look for semen stains on certain items of Gail Miller's clothing. He found some on the panties but not elsewhere, although they were present on the dress and the coat. These stains were missed again in 1992 by Patricia Alain of the RCMP lab, and finally found in the United Kingdom in 1997. Paynter employed ordinary light and manual inspection in his examination. In 1997, as reported by Michael Barber,<sup>53</sup> an acid phosphatase test was used to detect semen on the panties, the uniform and the coat. Paynter said that this test was not in use in 1969 by the RCMP, who began to employ it around 1973. I find that with the tools at his disposal, he met the standard expected of him.

Alain went over the garments again in 1992 and failed to find semen stains on the dress. She testified that her lab was not equipped for applying the acid phosphatase test to the entire garment. Her findings, or the lack of them, had implications for the DNA testing which will be discussed elsewhere, but it is only Paynter's tests which concern us in connection with the trial. Had he found all the semen stains which were there on the garments in 1969, samples would have been available for DNA typing earlier than they were, but such testing was not available until long after the trial and appeal.

At the time of trial, the only testing of relevance on the sperm samples would have been for the presence of antigens possibly revealing the blood type of a secretor who would be one of the 32 per cent of the male population – evidence which could not identify a perpetrator.

**6. Suspects and Theories**

**(a) Friends and Acquaintances of Gail Miller**

Police questioning of potential suspects began on the day of the murder and continued unabated until, and even after, David Milgaard became known to them on March 2, 1969. It has been said that they focused too quickly on Milgaard to the exclusion of other suspects, so the thoroughness of their investigation from the time of the murder is in issue.

In tandem with their search for evidence relating to a random attacker, police investigated people known to Gail Miller, her friends, acquaintances, co-workers and family members. They were looking for any information suggesting a motive.

Previous boyfriends were of interest and two of them, Les Spence and Dennis Elliott, had been referred to them by Gail Miller's roommates. Spence had been a long-term boyfriend and Elliott was a recent acquaintance who had driven her home from a party, which started the night before her murder and ended after midnight.

The RCMP located Spence in Perdue, a town west of Saskatoon, on the day of the murder. He told them that he had been at home the night before. His parents verified that, and said that he had not gotten up until 11:30 a.m. on January 31, 1969.

He was again interviewed on February 1, 1969, this time by Saskatoon Police, telling them, as he had told the RCMP, that he had last seen Gail Miller on Saturday, January 25, 1969. Police had information that Spence was jealous and quick tempered, and that Gail Miller was trying to break off their relationship, so they did not eliminate him but rather interviewed him again on February 3, 1969. One RCMP and three Saskatoon Police officers were involved. They found him co-operative. They looked into his driving record

and had his blood tested. It was type A. Around February 8, 1969, police finally eliminated Spence as a suspect.

The last person known to have been in the company of Gail Miller was Dennis Elliott, who drove her home from a party in Saskatoon the night before her murder.

Elliott learned of her death at around 6:00 p.m. on January 31, 1969. He went to 130 Avenue O South and spoke to the police, providing a written statement telling them that he had his roommates pick Miller up the evening before, to bring her to the party. He was in her company from about 9:45 p.m. until around 1:15 a.m., when he drove her home because she had to work in the morning. They talked for about 15 minutes in the car in front of her home, and then he walked her into the house at around 2:00 a.m.

On February 1, 1969, Elliott remembered something relevant and called police to say that when he took Gail Miller home at around 2:00 a.m., he noticed a male person sitting alone in a car across the street, and he appeared angry. He described the car as a 1963 Pontiac Parisienne, and police recognized that Spence did not own such a car. The police interviewed roommates and people who had been at the party and received statements, which were consistent with what they had been told by Elliott.

On February 2, 1969, police searched Gail Miller's room at 130 Avenue O South, and the house at 1308 Temperance Street where the party had been held, including Elliott's room.

Spence was eliminated as a suspect on February 8, 1969, but Elliott, and others who were at the party on January 31, 1969 with Gail Miller were re-questioned. On February 6, 1969, Elliott told them that the person he saw in the car across the street from Gail Miller's apartment was about 5'10" tall, 160 lbs with dark hair.

In later years, Elliott gave different times about the arrival in front of Gail Miller's house, and about when she went into the house. At the Inquiry, he said that he drove her home at about 1:30 a.m. and that she stayed in his car for about half to three quarters of an hour. He would have gone to bed at approximately 4:30 a.m. at his own residence.

In 1996, Elliott provided a sample of his blood for DNA testing, and the result confirmed that the semen on Gail Miller's clothing could not have come from him.

Documentation and testimony before the Inquiry clearly indicated that in 1969, police thoroughly investigated and properly eliminated both Spence and Elliott as suspects in the murder of Gail Miller.

RCMP and Saskatoon Police officers attended Gail Miller's funeral at Laura, Saskatchewan at 2:00 p.m. on February 4, 1969. No suspects could be identified.

Extensive questioning of Gail Miller's family members, and friends and acquaintances continued through March 1969, and revealed no enemies. On the contrary, she was extremely well liked.

Documents introduced at the Inquiry demonstrate the extent of police interviews:

- Between February 1, 1969 and March 12, 1969 five family members were contacted, some more than once. Police also searched Gail Miller's room, checked phone records and obtained names of persons who had sent flowers to the funeral.
- Between January 31, 1969 and February 8, 1969, 12 people living at or connected with 130 Avenue O South were approached, neither motive nor suspect for her murder appeared.

- Between January 31, 1969 and March 20, 1969, six female friends of Gail Miller were asked about her social life.
- Between February 8, 1969 and March 26, 1969, eight men who had been associated with Gail Miller were questioned.
- Co-workers, including 29 men were interviewed. No leads resulted.

Police concluded that the perpetrator of the murder was likely unknown to Gail Miller, as expressed by Cpl. Edwin Rasmussen in his May 7, 1969, RCMP report where he stated, “after extensive investigation it is felt that the person responsible was unknown to Miller in view of statements of immediate friends, family and acquaintances”.<sup>54</sup>

**(b) Perpetrator of Previous Sexual Assaults**

Within the three months prior to the Miller murder, there had been two rapes and one indecent assault in Saskatoon which prompted a warning to be published in the paper<sup>55</sup> by police on December 14, 1968:



When Gail Miller was raped and murdered, police wondered whether there was a connection with the previous sex crimes. A single perpetrator could have been responsible. There were similarities between the previous rapes and the attack on Miller but there was no suspect. Fisher was unknown to police.

**(i) Review of Previous Sexual Assaults and Investigation Prior to Gail Miller Murder**

The three attacks that prompted the Saskatoon Police to warn women about talking to strangers or walking in dark areas occurred on October 21, 1968, November 13, 1968, and November 29, 1968. Larry Fisher, as perpetrator of these crimes, did not become known to police until later in 1970, well after the conviction of David Milgaard for the murder of Gail Miller, but before his appeal proceedings were concluded.

There were similarities in the attacks, which may be seen from the following brief description.

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On October 21, 1968, Fisher raped a 22 year old woman, FV1, in a lane between Avenues G and H in west Saskatoon near 19th Street. He grabbed her from behind, held a knife to her, verbally threatened to use it, and ordered her to take off her clothes and lie down on her coat. He held her blouse over her mouth and face and raped her. She could see that he had long hair but could not see his face. He left the scene and she ran to report the crime. She described her attacker to the police as “quite young about 18 years old, he had dark hair hanging down over his face, short at the back was about 5’2” - 4” tall, quite small not very heavy, wore dark coloured clothing, trousers and sweater, no hat or glasses”.<sup>56</sup> She was examined at the hospital and nine items of clothing and articles from the scene were collected. A tracking dog was used for about an hour and 45 minutes.

Fisher raped another young woman, FV2, on November 13, 1968, after grabbing her on 18th Street between Avenues E and F. He put his hand over her mouth and held a knife against her throat dragging her into an alley. He ordered her to take off her clothes, put her coat on the ground and forced her to lie on it. After raping her he told her to sit up and turn her head, he picked up her coat, dress and bra and ran north towards 18th Street. She ran for help and police responded and took her statement. She described her attacker as a young person, 18 to 25 years of age, of medium build, dark hair hanging over his forehead, thin face, harsh voice, wearing a white hard hat, work clothes and boots and smelling of oil and gas. Like Fisher Victim 1, Fisher Victim 2 was also examined at the hospital and a vaginal smear was taken.

Both Fisher Victim 1 and Fisher Victim 2 had been attacked in the dark and in the evening.

On November 29, 1968, another young woman, FV3, was attacked by Fisher, this time in the University area of east Saskatoon. As she walked home in the dark around 9:30 p.m. she was followed by a man who grabbed her near an alley, put his hand or arm across her mouth and told her not to make a sound because he had a knife. In the alley he forced her to the ground, threatened her with the knife saying it would not be the first time he had used it. He started to undress her but the attack was cut short by the lights of an approaching vehicle. Fisher ran away and the occupants of the car assisted her. She described her attacker to police as “about 20 years old 5’6”, rather long dark hair ear length with side burns circling up at the ends. Medium build, wearing a dark waist length jacket, soft material.”<sup>57</sup> She noted that he was quite strong for his size. She was taken to the police station and shown a photo line-up.

Incomplete police records for the above crimes do not reveal all of the investigative steps taken, but we know that they had no clear suspects for the crimes, although they considered them to be connected to each other as appears from the warning to women published in the Saskatoon StarPhoenix mentioned above. The police also saw in their circumstances a possible connection to the Miller murder, as we have seen. All that was lacking was knowledge of Fisher as the rapist.

I am satisfied that the two rapes and the indecent assault were the subject of serious investigation. It appeared from surviving records and testimony that police interviewed all three victims and took statements.

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**(ii) Single Perpetrator Theory and Gail Miller Murder Investigation**

The nearly contemporaneous rapes and attempted rape in Saskatoon gave rise to what I will refer to as the single perpetrator theory, linking those sexual offences to the murder and rape of Gail Miller. The 1968 rapes were still fresh in the minds of police, having warned the public about them on December 14, 1968. As well, the murder gave rise to many reports from women regarding indecent assaults and suspicious behaviour, which they thought might be linked to the murder.

Fisher Victim 2 was interviewed by Sgt. Raymond Mackie on the day after the Miller murder and shown a photo line-up from which she could not identify her attacker. Fisher Victim 1 was also interviewed for the same purpose. In her case, the photo line-up contained pictures of two men who lived in Gail Miller's rooming house, obviously with a view to identifying her attacker as the 1968 rapist.

A report left by Detective Victor Hein reveals that as early as February 2, 1969, police were looking for a suspect wearing work clothing and a hard hat, who fit the descriptions given by the rape victims, and this in connection with the murder investigation.

The possible connection was publicly noticed in articles appearing on February 3 and February 4, 1969, in the Saskatoon StarPhoenix and the Regina Leader-Post respectively.

Joseph Penkala also thought there might be a connection. On February 5, 1969, he wrote to the RCMP Crime Index Section, enclosing a general summary of the facts regarding the Gail Miller murder. His letter indicated that the information was being submitted to the Crime Index Section for possible offender identification by method of operation. Penkala provided the following information:

Our Department has two unsolved cases, dating back into October and November of 1968, which involve complaints of rape. In both these cases, the victim was attacked from behind while walking in the late evening, forced into a lane and, under threat with a knife, made to undress and submit to intercourse. The victims were always threatened and forbidden to see the attacker who, after the attack, carried away some of the victim's clothing. In these cases, the attacker allowed the victims to replace some of the clothing, usually the outer garment or coat.<sup>58</sup>

Penkala agreed at the Inquiry that he believed there was a connection between the rapes and the Gail Miller murder. By February 6, 1969, police were asking citizens to come forward with information they might have about the murder, and acknowledged that victims of indecent assault who had not pressed charges were now coming forward. Police diligently followed up on such information.

On May 7, 1969, Edwin Rasmussen reported that the local police department had reports of two rapes and one suspected rape in the fall of 1968. Rasmussen noted the similar *modus operandi*. He also observed that sperm samples from the Miller crime scene had been analyzed as originating from a group A secretor and suggested that exhibits obtained in the Saskatoon rapes be analyzed to reveal a possible link with the Miller murderer.<sup>59</sup>

Exhibits from two victims were sent to the lab and, in one case, type A agglutinogens were found on blue panties and a plaid jacket.<sup>60</sup>

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58 Docid 009299.  
59 Docid 250597.  
60 Docid 324672.

Both the RCMP and the Saskatoon Police were quite aware of the possible link between the murder and the rapes. To this day, the Milgaard group says that it was not only a possible link, it was an obvious link and not to have followed up on it indicates, at the very least, tunnel vision on the part of the police.

In assessing the reasonableness of the police investigation, one must be conscious of the powerful influence of hindsight. Police actions in 1969 must be judged on the basis of what the police knew in 1969. There had been three fairly recent sexual assaults in the city, probably committed by the same man.

Although the rapes bore some similarity to the rape of Gail Miller, the similarities did not bear a signature. That is to say, the circumstances were common to many stranger rapes. And the rape of Gail Miller was far more violent than the others. Police had no suspect for the rapes, and none for the murder (although they identified over 160 persons of interest) when Albert Cadrain made his report on March 2, 1969, implicating David Milgaard in the murder. From that point on, police concentrated on either eliminating Milgaard or gathering enough evidence to charge him. To say that this course of action demonstrated tunnel vision is to ignore the circumstances prevailing at the time.

Other people's blood was being tested, as one sees from Raymond Mackie's report<sup>61</sup> dated April 9, 1969, and other leads followed,<sup>62</sup> so it would be wrong to conclude that once the police heard about Milgaard they abandoned other lines of inquiry.

News of the murder prompted a number of people to come forward with reports of indecent assaults or suspicious activity by men. One of the first persons to contact the police was Victim 12. She was indecently assaulted about six blocks from the Miller crime scene at 7:07 a.m. on the morning of January 31, 1969. She was able to describe her attacker as about 5'6" tall, heavily built with dark hair and no hat. She could not, however, identify him from a photo line-up. Victim 12's report was not made in support of a prosecution for her own attack, but rather because she thought it might be connected to the murder. Therefore, it was placed on the Miller murder file, but neither the police nor the prosecutor thought it connected to the murder because it was contemporaneous, and about six blocks away and was only an indecent assault as compared to the rape and murder.

Another such report came from Victim 10. She made a complaint on January 31, 1969, relating to an indecent assault three weeks before on Avenue Q between 22nd and 23rd Streets by a 15 or 16 year old male, about 5'6" tall, with a slim build.

The Victim 11 complaint came on February 2, 1969. It was another indecent assault about two weeks before the murder, halted by a third party. This time the attacker was described as of dark complexion between 5'2" and 5'6" with a stocky build, perhaps in his mid thirties.

On February 3, 1969, police learned of a man following Victim 13 in the 1900 block of 20th Street. He was about 5'9" tall, wore dark clothing and was bare headed. Victim 13 was unable to pick out the man in a photo line-up.

Police received the Kreke complaint on February 20, 1969. It involved the offer of a ride while she waited at a bus stop around 6:50 a.m. on February 18, 1969. She declined, but the car came back. This time the man was described as 30 years old, with black hair, wearing work clothes. The police did extensive follow up on one Hartmut Schlueter but Kreke could not identify him. Surveillance was conducted for two

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weeks, his residence was searched and he was interviewed. Police thought Schlueter might be a suspect for the Miller murder.

Supt. Jack Wood of the Saskatoon Police wrote to the Toronto Police on February 19, 1969, for information on a suspect he had read about in the Royal Canadian Mounted Police Gazette. The article had been brought to his attention “because of the similarity of rape offences here that has now, we believe, led up to a murder”.

There is no doubt that the possible connection between the rapes and the murder was receiving full attention from the Saskatoon Police, and from the RCMP who were assisting them both prior to Milgaard becoming a suspect and after.

To follow up the suggestion made by RCMP Staff Sgt. Bruce Paynter that a blood and saliva sample be taken from Fisher Victim 1, Morality Officer Bev Cressman visited Fisher Victim 1 and obtained her agreement to provide the samples. Fisher Victim 1 was transported to the police station. While there, she was shown a group of 19 photographs, described as snapshots of various people picked at random from the Morality Office drawer. David Milgaard’s photograph was included. Saskatoon Police obviously questioned whether Milgaard was responsible for the previous rapes as well as the murder of Gail Miller. Cressman got the photograph of Milgaard from Mackie, so there was evidently communication between the homicide and morality sections of the Saskatoon Police. An investigation report prepared by Cressman dated April 15, 1969, related the following information:

Amongst these photos was included one of one David MILGAARDE [sic] (this last photo was obtained from D/Sgt. R. Mackie). [Fisher Victim 1] looked at these photos which were all placed on the desk at one time, and immediately picked out the photo of David Milgarde and one other male person whos [sic] identity at this time is not known to me. She stated that she had definitely seen both these persons around before somewhere however couldn’t remember where or when. She could not identify any of these persons as the one who may have raped her.<sup>63</sup>

Cressman’s investigation report also reveals that Fisher Victim 1 was questioned again about a possible suspect by the name of Vince. He reported the following:

Information had been received from an informant that there was a man who appeared at the Bus Depot on several occasions when Fisher Victim 1 worked at this location and it was believed by Fisher Victim 1 that this was the person who had raped her, and was the same one who was responsible for the Murder of Gail Miller. Fisher Victim 1 was questioned regarding this information on a previous occassion however denied any knowledge of same. It was suggested by the informant that Fisher Victim 1 was afraid to come forth with this information to the Police.<sup>64</sup>

Cressman questioned Fisher Victim 1 and determined that a man by the name of Vince used to frequent the bus depot when Fisher Victim 1 worked there. However, she knew very little about this person and had not seen him since she quit work at the bus depot. Cressman asked Fisher Victim 1 to contact him should she remember where she might have seen the two persons she picked out from the photographs she was shown.

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Paynter reported on his examination of samples obtained from Fisher Victim 1 that she had blood group "O" whereas there was evidence of blood group "A" antigens on her clothing. These could not have come from her but rather from a blood type A secretor so that whoever deposited the A antigens in the snow at the Miller murder scene might have raped Fisher Victim 1. Thirty-two per cent of the male population were A secretors.

On February 27, 1969, Penkala was alerting investigators to be on the lookout for items noted on the rape files, which were either missing or could show identification of the attacker. As well, on March 18, 1969, Penkala submitted exhibits connected to the Fisher Victim 1 and Fisher Victim 2 rapes to the RCMP lab for comparison to the physical evidence on the Miller file. Obviously, the similarities between the rapes and the Miller murder were still under active consideration by the end of March 1969.

The exhibits gathered by police in connection with Gail Miller's death were delivered to the Crime Detection Laboratory for testing on February 7, 1969. On March 12, 1969, Paynter, who was in charge of the Serology Section of the Crime Detection Laboratory, reported his findings. Paynter confirmed that frozen lumps found at the crime scene contained human semen and that they also contained A antigens, suggesting that the donor of the semen and the likely perpetrator of the Miller murder was blood type A and a secretor.

J.A.B. Riddell of the RCMP reported on March 20, 1969:

10. Between 21 Oct and 29 Nov 68, two rapes and one attempted rape were committed in the same area where this girl was murdered. To date the person responsible has not been identified. In each case the attacker forced the girls down an alley at knife point where he forced them to undress before committing the offence. In the attempted rape, the attacker was scared off by the approach of car headlights. One of the victims claims that she can still identify her attacker while the other two are only able to give a brief description of him. **In view of the similar methods used in committing these offences, there is a good possibility that they were all committed by the same individual and this fact is not being overlooked during this investigation.**<sup>65</sup>

[emphasis added]

The single perpetrator theory that occupied the attention of both the Saskatoon Police and the RCMP was summarized by Edwin Rasmussen of the RCMP in his May 7, 1969 report:

18. Our Crime Detection Laboratory at Regina advised that seminal fluid found at the scene was very probably from a secretor of Group "A". The Lab. defined a 'secretor' as a person who secretes their "AB" blood grouping substance and other body fluids. Copy of Lab. report attached.

19. It is mentioned that during the late fall of 1968 the local police department had reports of two rapes and one attempted rape. These investigations were conducted by City Police with negative results. Persons involved were as follows:

- a) Fisher Victim 1. The offence took place at approximately 8 PM of 31 Oct 68 in a lane of the 400 block between Avenues G and H.

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- b) Fisher Victim 2. This offence occurred at approximately 8 PM 13 Nov. 68 in a lane of the 500 block of Ave E South.
- c) Fisher Victim 3. This offence reportedly took place at approximately 10 PM, 29 Nov. 68 in the south lane, 1300 block Temperance St.

In these three instances the M.O. was similar in that the male approached his victim from the rear, covered their mouth with his hand and pointed a knife into their back, forcing them down the lane. The descriptions of the assailant given by all three were very similar and it appeared that the same person was involved. The assailant would force his victim to undress at knife point and always managed to stay in the shadows or behind them in order that his identity would not be detected. He would then have the victim lie on her coat at which time intercourse would take place. In the Fisher Victim 3 case, the assailant was scared away as a result of lights of a vehicle approaching down the lane.

20. As none of the exhibits obtained in any of the above cases had been analyzed by our Laboratory, it was suggested that this be done in order to establish whether or not the person responsible in these incidents was the same one responsible for the MILLER murder. Accordingly, on 20 March 69 exhibits obtained from Fisher Victim 2 and Fisher Victim 1 were transported to the C.D.L., Regina for serological examination. These included two smears on microscope slides, one pair of blue panties and one plaid jacket. Results of this examination indicated agglutinogens of Type "A" were found on the blue panties and plaid jacket. No attempt could be made to determine the agglutinogens on the slides as they did not provide enough sample for the test. It is not known if Fisher Victim 1 is a Group "A" secretor however, an attempt is being made by the Saskatoon City Police to obtain further samples such as saliva for further examination. Statements originally obtained from these girls by the Saskatoon City Police are attached.

21. **As a result of the foregoing, it is felt there is a strong possibility the three rapes and the murder are directly connected.** In view of this, extensive interrogation was conducted with Fisher Victim 2 with negative results. She, however, did indicate and named a person who was later interrogated and submitted to a blood test which indicated he was a member of the "O" Group. These three girls have been interviewed at length to no avail. All stated that they have not seen a person as described in their statement nor have they any idea who may have been responsible.<sup>66</sup>  
[emphasis added]

After Milgaard came to their attention, police included him in the list of possible suspects for the rapes as well as the murder. One rape victim, Fisher Victim 1, looked at a photo line-up containing Milgaard's picture and said that she had seen him but could not identify him as her rapist.

In his report of May 7, 1969, Rasmussen noted:

32. As it was believed that the rapes which occurred in this area in the late fall of 1968 are definitely connected to this offence and were committed by the same person, local individuals who have been interrogated have fitted the descriptions as given by Fisher Victim 2, Fisher Victim 1 and Fisher Victim 3. Attempts to uncover further information in this respect have been to no avail. Searches, etc. have been conducted in an effort to recover

clothing lost by the victims, also without result. After extensive investigation it is felt that the person responsible was unknown to MILLER in view of statements of immediate friends, family and acquaintances.<sup>67</sup>

Jack Wood, Joseph Penkala and Charles Short of the Saskatoon Police, and Stanley Edmondson and J.A.B. Riddell of the RCMP, met on May 16, 1969, to review the murder investigation and decide on a further course of action. As Riddell reported, "After a great deal of discussion it was agreed that David MILGAARD could be considered as the prime suspect in this case and that further efforts should be made to eliminate or implicate him in this offence".<sup>68</sup>

As of mid-May, therefore, the focus of the investigation became David Milgaard as murderer. The single perpetrator theory had received extensive attention, but there was no suspect for the rapes. The common features between the 1968 rapes and the Miller murder had been noted, as had the fact that both the Fisher Victim 1 rapist and the probable killer of Gail Miller were A secretors. On the other hand, Cadrain had implicated Milgaard, who was known to be in the area at the time of the murder. There were many unanswered questions about him and his traveling companions.

In his testimony before the Inquiry, Penkala discussed both the significant similarities and differences in the rapes and the Gail Miller attack. Two of the rape complainants had been made to lie on their coats and this appeared to have happened to Gail Miller as well, as suggested by the arrangement of her clothing. While a knife was used in all attacks, the use of a knife was very common in such crimes. The most dramatic difference was the level of violence. The fact that David Milgaard was not believed to have committed the FV1 and FV2 rapes was not reason enough to eliminate him as a suspect in the Gail Miller murder. In fact, as of mid-May, 1969, he was the only suspect. Wood was not convinced, but Penkala and Short persuaded him that a closer look was needed. Was it a coincidence, for example, that Milgaard and his friends were at or near the scene at relevant times?

The position is perhaps best put in Penkala's own words from the Inquiry transcript where he was challenged about his focus on Milgaard as the prime suspect:

Q Which, as it turned out, was a pretty significant role that you played as we now look back 36 years and see what happened as a result of that decision that Milgaard was the chap to look at; right?

A Of course, but you have to remember that all those things were subjected to the verification by a Crown prosecutor, later subjected to a Court that convicted and appeals denied.

Q Sorry, you are being very defensive, Mr. Penkala.

A Of course I'm defensive.

Q All right.

A You are suggesting that we somehow had the option to pursue this thing in a different light. We had absolutely nothing else. This was staring at us and was glaring at us and I agreed with you that those rapes, there were similarities, I agreed with you

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on that, but we didn't have anybody to connect with the rapes and obviously David Milgaard wasn't responsible for the rapes.<sup>69</sup>

Edwin Rasmussen told the Inquiry that the theory of a connection between the rapes and the Miller murder arose from information provided by the city police to the RCMP. I accept that, and it is abundantly clear that both Saskatoon Police and the RCMP had a single perpetrator theory under active consideration.

While the failure of the RCMP to copy their reports to Saskatoon Police played no part in the subsequent police investigation, one wonders whether it had an impact on the prosecution. The RCMP reports discussing the connection between the rapes and the Miller murder were not discovered until after the Supreme Court of Canada concluded its hearings into the Reference Case regarding David Milgaard. Unfortunately, the reports were never in the possession of the Saskatoon Police and, therefore, were not available to T.D.R. Caldwell, or to David Milgaard's defence counsel. Had the Rasmussen and Riddell reports been copied to Saskatoon Police, they might have gotten to Caldwell and hence to Tallis if, in Caldwell's discretion, they constituted information tending to show that Milgaard was innocent. By the standards of the day, this was not likely, but events have shown just how relevant this evidence was.

### **(iii) Conclusions**

Every police force assisting in an investigation should send copies of its investigative reports to the lead agency.

I find from the evidence that the police simply put the rapes aside for the time being when, in late May, the evidence against Milgaard gelled. They prioritized the murder and did nothing for the time being on the rapes. Milgaard was convicted on January 31, 1970, and when Fisher surfaced as the rapist in October of 1970, it seemingly did not occur to police or to the Crown that Fisher might also have been the murderer of Gail Miller.

Police have been severely criticized by the Milgaards for not making the connection between the rapist and the murderer. But the evidence shows that they did recognize the possible connection and acted on it to the extent of having analysis done and victims interviewed. While there was a belief that the crimes were committed by the same person, they could not discover a suspect for the rapes.

As to whether this was reasonable, we should ask what alternatives there were. Counsel for Joyce Milgaard suggested that the Saskatoon Police could not and should not have ignored the similarities between the rapes and the murder. From what police knew of Milgaard's whereabouts in the fall of 1968, he was not a good suspect for the rapes. If the police believed that the rapist and the murderer were one and the same person, it follows that Milgaard should have been excluded as a suspect for the Miller murder.

That reasoning depends upon a continued belief that the rapist and murderer were one and the same based upon similar methods of operation. As Penkala testified, because no suspect for the rapes could be found, and because there was evidence implicating Milgaard and his friends in the murder, the Saskatoon Police decided to take whatever steps they could to test the truth of what the group was saying, and either exclude its members or obtain more evidence against them, without necessarily



ignoring the common perpetrator theory. I accept that at the time, the Saskatoon Police had no other alternative.

**(c) Person at Bus Stop**

In their canvass of the neighborhood in the days following the murder, police interviewed people who might have taken the bus with Gail Miller at either Avenue N or Avenue O and 20th Street. One of them was Larry Fisher, spoken to as a potential witness at the Avenue O and 20th Street bus stop. It appeared police had no reason to be suspicious of him, although in hindsight, he and Miller probably rode on the same bus at times.

On the day of the murder, police learned that the bus driver for the first bus on the Pleasant Hill route normally had a male passenger wearing a hard hat, about 20 years old, who got on at Avenue O and 20th Street. This passenger was not on the bus that morning.

The Inquiry heard reliable evidence that, on the day in question, buses would have stopped at Avenue O and 20th Street at 6:19 a.m., 6:34 a.m., 6:49 a.m., 7:04 a.m. and 7:15 a.m. Police interviewed the driver of the 6:49 a.m. bus, John Husulak, but not the driver of the 7:04 a.m. bus, nor that of the 6:34 a.m. bus. Gail Miller could have caught any one of these buses to arrive at City Hospital in time for her morning shift.

Just how close the police came to Fisher may be seen from their reports. On January 31, 1969, Constable Karpo Gabruch and Vern Passet called at the transit office to obtain the name of the operator of the first bus on the Pleasant Hill route. Determining that the operator was John Husulak, Gabruch and Passet then interviewed him at his home. Gabruch's investigation report indicated as follows:

HUSULAK stated that around Ave. O and 20th St. he would ordinarily have a male passenger at Ave. O and 20th St. who appeared to be a construction worker wearing red hard hat and approx. 20 years old, however this morning the gentleman was not around.<sup>70</sup>

In the early morning hours of Saturday, February 1, 1969, police stationed themselves at the corners of Avenue O and 20th Street and Avenue N and 20th Street, to make observations and to speak to people in the area. Cst. Jack Bakker's investigation report dated February 1, 1969, shows that police spoke with approximately 15 people in the area prior to 8:00 a.m. Police spoke with people taking the bus, driving vehicles or leaving their residences, and also with a milk truck driver, asking whether anyone had seen or heard anything unusual on the morning of January 31, 1969.

On the morning of Monday, February 3, 1969, police officers again positioned themselves in the area of the murder scene to conduct checks and observations. Police records show that Detectives Gerald McCorrison and Jack Parker proceeded to the area of the murder scene, as did Detectives George Reid and Raymond Mackie. McCorrison's February 5, 1969, investigation report outlines the checks conducted that morning:

On the morning of Feb. 3rd. Det. Parker and myself reported for work at 5:45 A.M. and proceeded to the area of the scene of this murder. The following checks and observations were carried out.

...

6:17 A.M. checked at Ave. O and 20th Street one Tony Humen of 216 Ave. O. South. Humen was identified by transit driver John Husulak of 217 Ave. V. North as the person he had referred to as the person who usually wears a red or orange hard hat and who he believed had not caught this bus on Jan. 31st. Humen at this time was wearing a red ski cap and stated he never wears a hard hat. On Feb. 4th. Det. Parker and myself again questioned Tony Humen who advised that approx. 6:30 P.M. Jan. 30th. 1969 he had noted a 1963 Pontiac Sedan White/blue the operator being alone, the window of his car was down. He had been going west on 20th. Street and when Humen and his sister, Natalie, 17 Yrs. caught the bus, this car followed this bus east on 20th. Street to the vicinity of Adilmans Ltd. Humen's sister, Natalie advised him she had seen this same auto at approx. 7:05 A.M. Jan. 31st. as she was catching the bus at Ave. O. and 20th. Street. His car window was down and he seemed to be acting in a somewhat suspicious manner. Tony is employed at the Robin Hood Flour Mills. Both he and his sister will be home during evening hours.

Further checks conducted on the morning of Feb. 3rd. 1969 are as follows:

...

6:49 A.M. checked in 300 Blk. Ave. O. South, Larry FISHER, 334 Ave. O. South. Works at Masonry Contractors at the Education Bldg U. of Sask. Wearing yellow hard hat. Stated last Friday he caught bus at 6:30 A.M. at Ave. O. and 20th. Street. He states there was no one else around at that time and he had no information to offer.

6:52 A.M. Checked again with the operator of a transit bus John Husulak who stated the man with the red ski cap, Tony Humen, was definitely the person he had in mind and realized he had been mistaken regarding his having worn a hard hat.<sup>71</sup>

An investigation report prepared by Reid shows that John Husulak was also interviewed by Reid and Mackie on the morning of February 3, 1969. Mackie's report reads as follows:

On Feb. 3/69 Det/Sgt. Mackie and writer started work at 6:30 a.m. and drove to vicinity of 200 blk. Ave. N and O.

At approx. 6:50 I interviewed transit bus driver John HUSOLUK who resides at 217 H South and was driving a transit bus at the time on 20th St. regarding a construction worker wearing a red hat. Mr. Husoluk states the person got on the bus just the past trip and made mistake as the person was wearing a red ski cap and not a red hat. This person according to the bus driver was checked out by Det. McCorrison this date.<sup>72</sup>

Both McCorrison and Parker took notes as they worked on February 3, 1969, and fortunately their notebooks were available to the Inquiry. While the notes they made conform with the investigation reports that were prepared, they do provide some additional context. Notes made by Parker read as follows:

6:17 Checked bus stop O & 20th St. Tony Humen 216 O S Bus oper John Husulak ident this person as one with red hard hat. Catches bus each morning (red ski cap).

...

6:49 Checked Larry Fisher 334 O S (yellow hard hat) works at Education Bldg Masonry Cont. Caught bus on Jan 31/69 at 6:30 a.m. never heard or saw anything unusual.

6:52 Inter. Bus oper Husulak further stated Humen was the person he had in mind.<sup>73</sup>

McCorriston's notes for the same morning read as follows:

6:17 a.m. Checked 2 postmen and Tony Humen of 216 Ave. O. So. Humen was identified as man who usually catches bus at this location wearing hard hat. Human was wearing red peaked cap. Humen stated no info.

...

6:49 a.m. Checked in 300 Blk O. So. Larry Fisher – 334 – O – So. Works Masonry Constructors Ed. Bldg. – U of S – wearing yellow hard hat States last Fri he caught bus at 6:30 a.m. at O & 20th No one else around. Had no info to offer.

6:52 a.m. Checked again with operator of #2 bus #156. John Husulak and he advises the man with red ski cap – Tony Humen was the person he had referred to as wearing Hard Hat. Humen stated he never wears hard hat. Husulak states he must have been mistaken about this.<sup>74</sup>

McCorriston, Parker, Reid and Mackie appear to have been following up on the information received from Husulak, provided to Gabruch on January 31, 1969, that he would ordinarily have a male passenger at Avenue O and 20th Street who appeared to be a construction worker wearing a red hard hat who did not ride the bus on the morning of January 31, 1969.

Police notes indicate that Husulak was spoken to by police three times on the morning of February 3, 1969. Parker and McCorriston spoke to him, and a male passenger, Anthony Humen, at 6:17 a.m. on Monday, February 3, 1969. McCorriston and Parker boarded the bus and Husulak identified Humen as the male passenger with the red hard hat that he had mentioned earlier to Gabruch. Humen was not wearing a red hard hat but he was wearing a red ski cap. Just a short time later, at 6:49 a.m., McCorriston and Parker interviewed Larry Fisher at the bus stop. It was noted that he worked for a construction company, that he was wearing a yellow hard hat, and that he lived at 334 Avenue O South. At approximately 6:50 a.m., Reid and Mackie interviewed Husulak. Husulak told them that he had been mistaken, as the male person he mentioned earlier had gotten on the bus on the last trip and was wearing a red ski cap, not a red hard hat. Husulak also said that the person he had in mind, namely Humen, had been checked out by McCorriston. Very shortly after this interview, at 6:52 a.m., McCorriston and Parker spoke with Husulak again. Husulak said that the man with the red ski cap, Humen, was the person he had referred to earlier as wearing a hard hat. Husulak told police that Humen was the person he had in mind.

McCorriston is deceased. Parker, Reid and Mackie all provided evidence at the Inquiry, as did Humen and Husulak. Neither Reid nor Mackie had any recollection of talking to Husulak or conducting inquiries at the bus stop used by Miller. Parker indicated that he had no independent recollection of police activities on the morning of February 3, 1969, but he was able to answer questions asked by Commission counsel with the assistance of his police notes.

Parker indicated that he and McCorriston would have been interviewing people with a view to learning whether they saw or heard anything of relevance to their investigation. They presumed that Miller caught the bus at Avenue O and 20th Street. While he had no recollection of checking Fisher on the morning of February 3, 1969, he confirmed that he would have been checking Fisher as a witness and not as a

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suspect. It did not seem noteworthy to him that Fisher caught the bus at 6:30 a.m. on January 31, 1969, but was catching a later bus at approximately 6:49 a.m. on February 3, 1969. Parker also indicated that there was no particular reason why he noted that Fisher was wearing a yellow hard hat, other than for descriptive purposes. He did not recall that at any time in the Miller investigation there was any particular significance placed on persons wearing a hard hat. Nothing in his encounter with Larry Fisher caused Parker to consider him a suspect in the murder of Gail Miller, and he took no further steps to follow up on Fisher at the time.

Parker confirmed that his police notes suggest that he interviewed Husulak at 6:17 a.m. and then again at 6:52 a.m. He also agreed that it appeared that Mackie and Reid would have spoken to Husulak just minutes prior at approximately 6:50 a.m. He thought the interview with Husulak was likely conducted on the bus. While he had no independent recollection, he agreed that police records indicate that at the time Fisher got on the bus on the morning of February 3, 1969, four officers would have spoken with Husulak and two would have talked to Fisher.

At the time of the murder, Anthony Humen resided at 216 Avenue O South and he regularly caught the bus at Avenue O and 20th Street at approximately 6:00 a.m. He testified at the Inquiry that he knew Gail Miller and recalled that she wore a nurse's uniform. On one occasion, on the bus, she had introduced herself to him. Humen also knew who Fisher was. Fisher took the same bus on occasion. An acquaintance of Humen's had pointed out Fisher to him when they were at the Albany Hotel. At the Inquiry, Humen testified that Fisher wore a yellow hard hat with a red toque underneath. Humen recalled that the first time he was questioned by police, the officers came on to the bus and asked about a person who wore a green parka and a red toque. An old lady on the bus pointed police in his direction. Police wanted to interview him but he told them that he could not be late for work. Police then interviewed him while driving him to his employment at the Robin Hood Mill. Humen recalled that this happened on two occasions. He thought that in total he was interviewed three or four times by the Saskatoon Police. He said that police followed him and he felt that he was a suspect. He was scared that police thought he might have some involvement in the murder. On one occasion police questioned him as he was coming home from his girlfriend's place at approximately 2:00 a.m. They also questioned him about a knife that his sister had thrown into the garbage can behind their residence. He recalled police asking him about the red hat that he was wearing. He did not recall being asked whether he wore a construction hat. Humen told the Inquiry he never did wear a hard hat. He wore a red cap that kept his head and ears warm. He also testified that "they just asked me about the murder, you know, and they asked me if I did it, you know, and I said no".<sup>75</sup>

Husulak was employed with the Saskatoon Transit Commission from 1947 to 1985. In January 1969 he was driving the Pleasant Hill bus route. This route began at 20th Street and Ottawa Avenue at 6:15 a.m. Husulak testified at the Inquiry that he would have picked up passengers at Avenue O and 20th Street at approximately 6:19 a.m. and then again a half hour later at 6:49 a.m. Husulak was questioned about the information he provided to police on January 31, 1969, indicating that a male passenger at Avenue O and 20th Street, who appeared to be a construction worker wearing a red hard hat, and who ordinarily would have taken the bus, was not around on the morning of January 31, 1969. Husulak recalled that the police spoke to him at his house that evening. He vaguely recalled a conversation about a construction worker and a red hard hat. He confirmed that he would have given police at the time his best recollection. He also recalled that a few days later two police officers got on his bus at Avenue P and rode it down to Avenue O. The officers identified themselves but he does not recall that they spoke to him further.

Husulak was later interviewed by Sgt. Rick Pearson of the RCMP in 1991 in connection with David Milgaard's s. 690 application. Husulak confirmed that the statement taken by Pearson, dated January 16, 1991, accurately reflects the information that he provided at that time. His statement reads in part as follows:

All I can remember from the time that girl was murdered was a couple of city detectives got on the bus at Avenue "P" and rode the bus east to the stop on Avenue "O" and 20th. The detectives got off at the Avenue "O" stop. They were talking to a guy that I think was waiting for the bus. I don't know who they were talking to, it must have been a man, but I don't remember.

During the investigation the detectives had asked me who got on my bus. I told them what I could and remember telling them about a guy who usually caught the bus who wore a construction hard hat. I can't remember anything about this guy, like a description, clothing or color of hard hat. I don't know if he caught the bus the morning of the murder or not. I do remember the hard hat wearing guy was kind of a regular, but I do not know if he caught the bus at the same time each time. There were several buses on Route #2. I don't remember the names of the other bus drivers who were with me on Route #2 in those days. I don't remember anyone dressed like a nurse using the bus stops on Avenue "O" or "N" during those days. I do not know Larry Fisher.<sup>76</sup>

A second bus driver was interviewed by police. An investigation report prepared by Hein indicates that on February 10, 1969, while on the Pleasant Hill bus, he spoke to the driver, Porter Beeson. Hein's investigation report reads as follows:

Mr. BEESON stated on Friday, Jan. 31/69, while operating the same transit bus, in westerly direction on 20th St., he picked up a fare at Avenue N and 20th St. at approx. 7:30 a.m. Mr. BEESON stated that he has been on this run for some time and gets to know his regular clients. The man he picked up at this location has not been seen prior to or since the murder of Gail MILLER, by Mr. BEESON.

He stated the man came running across 20th St. from the north in the 200 block Avenue N So. and just barely caught the bus. Mr. BEESON stated that he did not see the man immediately as it was foggy that morning. Further, the man asked for change and paid his fare, not purchasing any tickets. He was described as follows: Approx. 25 to 27 years of age, 5'8" to 5'9" in height, 160 to 165 lbs, square full forehead, with a flatter face but not gaunt, average size eyes, perhaps a little on the small side, dark brown hair, wavy on top, of average length and recently cut. Wearing a composition construction type boot, not leather but rather the insulated water proof type, with a yellowish coloured bottom and a light brown upper. White khaki trousers worn over top of the boots not tucked in like most construction workers, no hat, not carrying a hard hat or lunch pail. Jacket was what appeared to be genuine leather, a tanned brown color, with no collar but rather a knitted neckline, and design down the side of the front in a creamed color letter. Mr. PORTER believes this man was not wearing any mitts or gloves. Mr. BEESON stated that he was certain that the man had no blood on his clothing and that he could not tell whether he was excited or not, but that he had been running to catch the bus.

As the time coincides with the person leaving the area of the murder scene, it was felt that this should be checked out as it could very well be the person responsible.<sup>77</sup>

There is no indication in police records to suggest that the information provided by operator Beeson was investigated further. Beeson was not contacted again by police.

Another source of information for police was Mary Gallucci who was interviewed by Det. Maurice Bennett on February 6, 1969. Gallucci resided on 20th Street and took the bus in the mornings from Avenue O and 20th Street. Bennett's February 6, 1969, investigation report reads as follows:

Also interviewed was a Mary Gallucci of 1410 20th Street West who stated that she takes the bus at Ave. O and 20th Street every day She stated that on Thursday morning, Jan 31st., [sic] she recalls a girl get on the bus at the above with her. She describes this girl as follows. Younger girl, dark hair, wearing white dress and stockings, Dark coat, believed cloth and could be brown, no hat and believes to have had a white scarf. She has seen her on the same bus before but does not think seen on Wed. There was also a young man get on the bus with them who was a construction worker wearing blue jeans and hard hat, possibly yellow. This man comes from Ave. O South and 20th Street. He has been getting on the bus at the same time since that day. She does not think that she could identify.<sup>78</sup>

Gallucci testified at the Inquiry that she took the bus at Avenue O and 20th Street around 6:45 a.m. She remembered "a small, slight girl, dark-haired"<sup>79</sup> at the stop sometimes wearing white stockings, white uniform and a cloth coat. At times a construction worker with a yellow hard hat would take the bus as well.

She recalled that police spoke to her twice. A February 7, 1969, report prepared by Maurice Bennett and Victor Hein regarding their door-to-door canvass of individuals living in the area refers to Gallucci and states:

Mary GALLUCCI catches bus every morning at O & 20th St. at 6:50 A.M. On Thursday Jan 30 a pretty girl – white stockings and uniform dark coat maybe brown – dark hair no hat, maybe a scarf caught bus – seen her before, never since. Come from north on Ave. O. A young const. worker comes from south on Ave. O. caught same bus – still does.<sup>80</sup>

Gallucci told the Inquiry that she was contacted by Joyce Milgaard years later but declined to speak to her. She said that she thought the right man must have been in jail. She was also contacted by the RCMP in 1993 and then again in 1998 in connection with the Fisher prosecution. She confirmed to the RCMP what she told police in 1969. Gallucci was called to testify at Fisher's preliminary hearing and at his trial.

It may be seen, therefore, that police did a great deal in searching for witnesses at the bus stop. Could they have done more?

At the time he was interviewed on February 3, 1969, Larry Fisher gave his address to police as 334 Avenue O South. This alone would not have been of any significance to police at this time. Only later, when Albert Cadrain, who also lived at 334 Avenue O South, went to speak to police in March 1969,

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77	Docid 106513.
78	Docid 106234.
79	T373.
80	Docid 106254.

might Fisher's address have raised some suspicion. However, Fisher then had no criminal record. Any focus that might have been put on Fisher by Gallucci and Husulak was lost when Husulak confirmed with police that the male passenger he had in mind and who did not appear on the morning of January 31, 1969, was Anthony Humen.

It has been argued that Fisher escaped detection in February 1969 because of sloppy police work. I find that he escaped detection because he appeared to be just another passenger on a bus that Gail Miller used. Nothing in their interview of him gave police reason to suspect him.

**(d) Victim 12**

In 1992, the Supreme Court of Canada heard Victim 12 testify that she had been indecently assaulted by Fisher on the morning of January 31, 1969, just after 7:00 a.m. This raised questions about what police knew about Fisher at the time of Gail Miller's murder and whether adequate disclosure was made to the defence.

Although the Victim 12 incident has been mentioned previously, it is worth repeating it in relation to the investigation into the death of Gail Miller because it has been the source of allegations over the years that the police ignored something which should have led them to Fisher as the killer.

Victim 12 contacted Saskatoon Police on January 31, 1969, after learning of Gail Miller's murder, reporting that she had been indecently assaulted in the general area, about seven blocks from the murder scene.

Det. Maurice Bennett took her statement in which she said that at 7:07 a.m. on the morning of January 31, 1969, she was indecently assaulted by a male in the 200 block of Avenue H South while walking to her bus. She said a man grabbed her and ran his hands up and down her legs, then fled. She described her attacker as "not young or old. Wearing dark jacket  $\frac{3}{4}$  or  $\frac{1}{2}$  length possibly a dark brown suede and could have a fur collar. 5'5" or 5'6" tall. Heavy build. Seemed dark comp. Dark hair with no hat. Did not speak".<sup>81</sup>

She could not identify her attacker from a photo line-up. Bennett's report was placed on the Miller murder file because Victim 12 would not have complained to police had she not heard of the murder.

Victim 12 was interviewed again as part of the murder investigation, this time by Inspector J.A.B. Riddell of the RCMP, but she was unable to provide further information to that already given to Saskatoon Police.

We know from other evidence that the Victim 12 report contained a handwritten note that read "Ind. assault Not connected"<sup>82</sup> and was left on the Miller murder file. It was passed along to prosecutor T.D.R. Caldwell who did not disclose it to defence counsel Calvin Tallis. The indecent assault was very different in degree from the Miller rape and murder, and occurred about the same time, about seven blocks away. The indecent assault was also very different in degree from the two rapes and indecent assault which happened in the fall of 1968, of which Caldwell was unaware.

At the Supreme Court Reference in 1992, counsel for Saskatchewan, Murray Brown, discounted Victim 12's identification of Fisher as her attacker because it was made 22 years after the event on the basis of a photograph she saw in the newspaper. And because the murder and the indecent assault

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occurred contemporaneously, Brown believed that Fisher would have an alibi for the murder if he was the one who indecently assaulted Victim 12. Fisher has never admitted to the indecent assault.

Insofar as the integrity of the investigation is concerned, I conclude that police dealt with the Victim 12 complaint appropriately.

### **(e) Sexual Offenders**

The nature of the attack upon Gail Miller was such that persons with a history of sexual offences were of primary interest.

Saskatoon Police and RCMP compiled a list of 139 sexual offenders as potential suspects for Gail Miller's murder. Many were checked and eliminated. A large number of people submitted to blood tests. Some had blood types other than group A and were eliminated on that account because of the fact that the donor of the frozen semen found in the snow under the body was identified as a group A secretor. With the possible connection between the perpetrator of the 1968 rapes and the killer of Gail Miller, the police were also interested in contacting offenders with type A blood who matched the descriptions provided by the rape victims. Also of interest were offenders who had used a knife in the course of their attacks. A list of suspects prepared by the police for submission to the Red Cross contained more than 200 names. Police investigated over 160 potential suspects before Milgaard was identified on March 2, 1969. I find that their efforts were reasonable, appropriate and extensive.

### **7. Summary of Findings**

- Both RCMP and Saskatoon Police devoted important resources to the Miller murder investigation.
- The scene was appropriately examined, preserved and recorded.
- An acceptable system of exhibit handling was in place to maintain continuity of articles seized.
- Vaginal aspirate from the victim was collected at autopsy, found to contain semen and discarded. The victim's clothing was removed and left temporarily on the floor of the autopsy suite, exposing it to contamination. Both actions represented lapses in acceptable procedure.
- Staff Sergeant Bruce Paynter's testing of the biological samples submitted to him by Saskatoon Police was accurate. His search of the garments for semen stains met the expected standard of the day, given the tools available to him.
- Saskatoon Police thoroughly investigated and properly eliminated the victim's boyfriend,; and a male person who had driven her home in the early morning of her murder.
- The two rapes and indecent assault in Saskatoon in the fall of 1968 were seriously investigated by Saskatoon Police. Although a possible connection to the Miller murder was later considered, police had no suspects for the rapes. Milgaard became a suspect for the murder on March 2, 1969, but not for the rapes, so police interest in a connection between the crimes gradually diminished.
- The possible connection between the rapes and murder received full attention from both Saskatoon Police and the RCMP even after Milgaard became a suspect for the murder. However, the subject never reached the prosecutor in disclosure, perhaps because RCMP continuation



reports dealing with it were not copied to Saskatoon Police. Every police force assisting in an investigation should send copies of its investigation reports to the lead agency.

- Fisher escaped detection in February of 1969 because nothing in the police interview of him gave reason for suspicion.
- Police dealt appropriately with the Victim 12 complaint.

