Chapter 9
Investigation and Prosecution of David Milgaard

Jan-31-1969
David Milgaard, Ron Wilson and Nichol John arrive in Saskatoon at approximately 6:30 a.m. Gail Miller's body is discovered around 8:30 a.m.

Mar-2-1969
Albert Cadrain contacts Saskatoon Police to report suspicious behaviour by David Milgaard. Saskatoon Police subsequently interview David Milgaard, Wilson, John and Cadrain.

May-16-1969
Saskatoon Police and RCMP meet and agree that David Milgaard is a prime suspect in Gail Miller's murder.

May-23-1969
Inspector Roberts interviews Ron Wilson and Nichol John. Both provide statements to Saskatoon Police implicating David Milgaard.

May-30-1969
David Milgaard is arrested for the murder of Gail Miller.

Jan-31-1970
David Milgaard is found guilty of the murder of Gail Miller.

Jan-5-1971
David Milgaard's appeal is dismissed by the Saskatchewan Court of Appeal.

Nov-15-71
The Supreme Court of Canada denies David Milgaard's application for leave to appeal his conviction.

1. Introduction

In the last chapter we considered the investigation into the death of Gail Miller. That investigation came to be centered on David Milgaard and the result was his prosecution for murder. We now turn to that particular investigation and prosecution.

The investigation of David Milgaard as a suspect was prompted by the visit of Albert Cadrain on March 2, 1969 to the Saskatoon Police. There he told police that Milgaard, Wilson and John had been at his home on the morning of the murder around 9:00 a.m., that Milgaard was in an extremely nervous state and had blood on his trousers and shirt. Cadrain's house was a block and a half south of the murder scene.

We have reviewed the investigation in its entirety to see whether any steps taken by law enforcement agencies contributed to Milgaard's wrongful conviction. The conduct of the prosecution and trial have been examined in the same light.

The Supreme Court of Canada, in its 1992 review, was of the opinion that David Milgaard received a fair trial. It is now accepted that he was wrongfully convicted, but the two notions are not irreconcilable. He might have been tried fairly on the basis of what was known in 1992, but now is seen to have been wrongfully convicted in light of subsequent events. I do not see it as part of my mandate to either question or endorse the assessment of the Supreme Court of Canada in regard to the fairness of the trial. My task is to explain why he was wrongfully convicted and to inquire into the conduct of the trial. In doing so, I have before me not only the evidence heard by the Supreme Court of Canada but much more as well, touching upon many issues, of which the fairness of the trial is one.

At the Inquiry, the main thrust of the Milgaard counsel arguments, on the point of the trial shortcomings, turned on the presentation of the case by prosecutor T.D.R. Caldwell who, they said, put forward a theory of events which was patently impossible. Knowing it was, he acted improperly. I reject this argument, for reasons which follow.

There was, however, a major problem with the trial which involved the jury listening to inadmissible evidence. Although properly warned by the trial judge as to what they could take for proof of contents, laymen and lawyers alike have opined that members of the jury could not reasonably have ignored the highly incriminating parts of Nichol John's May 24, 1969 statement, which she failed to adopt on the stand. I lack the best evidence on that point, because the members of the jury are sworn to secrecy concerning their deliberations, but I am not without evidence. At the Inquiry, defence counsel Tallis described the s. 9 *Canada Evidence Act* proceedings at the trial as a major turning point, and another witness, Murray Brown, formerly of Saskatchewan Justice, who was present at the trial, and who must be regarded as a true trial expert, offered his opinion that the jury took into account inadmissible evidence.

From the Inquiry evidence, I agree with both witnesses. I find that the reason for the inadmissible evidence coming before the jury was a problematical law, s. 9 of the *Canada Evidence Act*, as well as errors in procedure at the trial relating to the application of s. 9.

Appendices relating to this chapter will consist of the trial transcript (Appendix D), the Appeal Judgment (Appendix E), the Crown opening address (Appendix F), the Crown closing address (Appendix G), the defence closing address (Appendix H), the jury charge (Appendix I), the May 24, 1969 statement of Nichol John (Appendix J) and finally, a paper on s. 9 of the *Canada Evidence Act* (Appendix K).

2. Events of January 31, 1969

The activities of David Milgaard, Nichol John and Ron Wilson on the morning of January 31, 1969, were the subject of intense investigation by police. The evidence they passed to the Crown became central to the prosecution and trial.

Our concern is whether the evidence was properly gathered, reasonably presented by the Crown, and handled appropriately at the trial.

If the police or the Crown used evidence which they knew, or should have known was untrue, that is of direct concern to this Inquiry.

On the other hand, if they used evidence which they reasonably believed to be true, and which only much later has been shown to be unreliable, the investigation and prosecution have not been discredited.

What actually happened on the morning of January 31, 1969 involving Milgaard, John and Wilson is not what matters to us so much as what the investigators and authorities reasonably believed had happened. This point cannot be over-emphasized, because in reviewing the evidence which emerged at the Inquiry, the urge to decide what Milgaard, Wilson and John really did is almost irresistible. Only they know, and the versions they have given over the years have at times lacked both credibility and consistency.

It is what the police, Crown and the jury heard from them that concerns us.

The police interviewed David Milgaard. The Crown did not and Milgaard did not testify at his trial.

The police, the Crown and the jury heard from Ron Wilson and Nichol John.

Defence counsel Calvin Tallis interviewed his own client, Milgaard, but what he heard from him did not come before the jury or the Crown. It is of interest to us on the adequacy of Tallis' defence, a subject treated elsewhere in this report. It is irrelevant to the propriety of the investigation and prosecution, but will be considered later in this chapter in section 14(b).

3. Key Officers

(a) Eddie Karst

Karst took the first statement from Albert Cadrain on March 2, 1969, and followed it up with interviews of other Cadrain family members. He travelled to Winnipeg to interview Milgaard for the first time on March 3, 1969. He followed this with the interviews of John and Wilson in March and April, 1969. In the critical period of May 21 – 24, 1969, Karst interviewed Wilson in Regina and brought him back to Saskatoon. Later he took the first statements from the motel re-enactment witnesses Craig Melnyk, George Lapchuk and Ute Frank.

Karst was granted standing before the Commission and was a regular attendee at the hearings.

(b) Raymond Mackie

Mackie served the Saskatoon Police from April of 1948 to April of 1978. He was the detective in charge of the Gail Miller murder investigation including the part focusing on Milgaard. Although not personally involved with Milgaard, he was with Wilson, John and Cadrain.

In late April of 1969, Mackie prepared a summary outlining various theories as to Milgaard's possible involvement in the offence.

He went to Regina on May 21 with Eddie Karst to interview Wilson and John, and drove John back from Regina to Saskatoon on May 22, 1969. He took her formal statement on May 24, 1969 after she had been interviewed by polygrapher Art Roberts.

(c) Joseph Penkala

Penkala was the lieutenant in charge of the Identification Division of the Saskatoon Police. He gathered evidence at the scene of the murder on January 31, 1969, attended the autopsy, submitted samples for analysis, and went back to the scene on February 4, 1969. Here he gathered frozen semen from the snow where Gail Miller's body was found. He was also part of the senior police team that met on May 16, 1969 and made the decision to have Wilson and John examined by polygraph.

(d) Art Roberts

In 1969, Roberts was a Calgary Police Service Inspector who was trained in polygraph and interrogation. Saskatoon Police enlisted him to do polygraph examinations of Ron Wilson and Nichol John. He interviewed both and did a polygraph exam of Wilson but not John.

He left no notes or records of the polygraph exam with Saskatoon Police. He died on July 6, 1997.

Roberts' role in the investigation was pivotal. Although Wilson had begun to incriminate Milgaard before he saw Roberts, the polygraph examination and interview produced even more incriminating evidence.

Before seeing Roberts, John's statements to the police had not been directly inculpatory of Milgaard's involvement. Pressed by Roberts, however, she remembered, for the first time, seeing Milgaard stab a girl.

4. Albert Cadrain

(a) Introduction

A key witness at the Milgaard trial was Albert Cadrain who died in 1995. Cadrain told the police and testified that he saw blood on Milgaard on the morning of the murder and noted other suspicious behaviour, so his evidence was critical. It has been alleged that he was pressured by authorities to provide false and incriminating information, and that he was suffering from mental illness which affected his credibility and which should have been apparent to the authorities. The Inquiry heard from police officers who dealt with him, several of his family members, a friend, the prosecutor and defence counsel.

A teenager in 1969, he lived about a block and a half south of the murder scene in a small house with his parents and siblings. In the basement of the same house lived Fisher and his wife Linda.

Milgaard and Cadrain were acquaintances, Milgaard having visited him in Saskatoon.

It is undisputed that Milgaard, Wilson and John drove to Saskatoon with the intention of inviting Cadrain to accompany them on their trip to Alberta. Upon arrival in Saskatoon they drove around the west central part of the city looking for him, finally finding his house sometime after daybreak on the morning of the murder. He left with them later in the morning, and they stopped at a garage for car repairs before leaving for Alberta in the afternoon. The four young people visited Edmonton, St. Albert, Calgary and Banff before returning to Regina, where they parted company. Cadrain worked in that area for a few weeks, was arrested for vagrancy in Regina, was interviewed by the police there, and then returned to his home in Saskatoon where he discussed Miller's murder with members of his family. He then went to Saskatoon Police to report his suspicions of Milgaard's involvement in the murder.

(b) Report to Saskatoon Police

Eddie Karst reported Cadrain's visit on March 2, 1969, incorrectly dating it 1968.[1] I accept the report as accurately recording Cadrain's statement. It is vital to assess the information the police received from Cadrain because it played a major role in the direction which the investigation was to take. For that reason the report is reproduced in full:

1 Docid 009233.

FORM #23
SUBJECT GAIL ...ER MURDER OCCURRED NUMBER 641 /68

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

273
104

NAME OF FIRM OR
PERSON CONCERNED ADDRESS

DIVISION ASSIGNED TO: Detectives TIME DATE March 7th /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
ADULTS
JUVENILES

FILED:

DATE:

On Sunday, March 2nd, at approx. noon, one Albert Henry CADRAIN, DOB August 19th, 1951, of 334 Ave. O South of this City attended at the Police Station and advised S/Sgt. BRADY and Lt. SHORT, that he felt he had information pertinent to the murder of Gail MILLER approx. one month ago in this City.

After interrogating this youth Lt. SHORT advised me to take a statemer from him with regards to this information which was done at approx. 12:1 PM, March 2nd, in which CADRAIN advised us of the following incidents which he felt were of a suspicious nature with regards to one David Edgar MILGAARD of Langenburg, Sask.

That on the morning of Jan. 31st, MILGAARD along with a few other pers Ronald WILSON of Regina, and Nicole? JOHN arrived at his home at appr 9:30 in the morning. CADRAIN states that the MILGAARD youth seemed extremely nervous and he noted that he also had blood on his trousers and shirt and consequently MILGAARD changed these garments while at his place on the morning of Jan. 31st. It should be noted that CADRAI referred to as "Shorty" did not pay particular interest to these inci at this time as he states he was not aware of the murder until arrivi back in Saskatoon approx. one month later.

He also states that while the three above mentioned persons were visit at his place on the morning of Jan. 31st, MILGAARD left his house alo and drove around the block several times which did not appear to be the normal thing for a person to do, and a short time later when havi the car repaired at the local garage at Ave. P and 22nd St. that he seemed very nervous and in a hurry, and also that while leaving the Ci he did not stay on the main highway and drove in an erratic and extre ly fast rate of speed, and also that MILGAARD appeared to be under some sort of influence of drugs etc.

It was also a point of interest that the MILGAARD youth and his assoc es appeared to be out of money at this time as they requested CADRAIN go with them as they were advised that he did have a little money in the bank which he could withdraw.

CADRAIN further relates the story of going on to Calgary on the after noon of Jan. 31st, arriving there in the early hours of the morning an then buying some drugs noted as "Weeds" and proceeding on to Edmonton and then on to a small town 8-10 miles north of Edmonton known as St. Albert, where some friends were visited and the evening spent in a m these further statements becoming rather vague at this time, CADRAIN's reasoning for this is that they were at this time well under the in- fluence of the "Weeds".

He further relates that they then returned to Calgary and then on to Banff, and approx. one week later after leaving Saskatoon they arrived in Regina, where he states himself and the girl, Nicole JOHN are dropped off at a local coffee and hippie house on Cornwall St. in Reg

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K. - 2.

FORM #23
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SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

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NAME OF FIRM OR
PERSON CONCERNED _____ ADDRESS _____

DIVISION ASSIGNED TO: _____ TIME _____ DATE _____ /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
_____ ADULTS
_____ JUVENILES

FILED: _____

DATE: _____

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and further stated that he had not seen any of these persons, the girl nor MILGAARD or WILSON since that date. He then advised that he was consequently arrested by the Regina Police Dept. on a Vag. charge and then worked for several days on a farm out of Regina and consequently returned to Saskatoon approx. a month after the murder arriving here by Bus. He further stated that although he had some mention made of t murder in Regina, he did not pay particular attention to it and only after he returned to Saskatoon and had conversation with his family did he become suspicious of the actions etc. with regards to MILGAARD and consequently was advised by his parents to attend at the Police Station and advises of same which he did.

Consequently on the afternoon of March 2nd, further inquiries were mad by myself and Lt. SHORT with regards to CADRAIN's stories and various parts of his conversation checked out with regards to MILGAARD's actio his nervousness with service Station attendents where the car was fixe two tow truck drivers which he had been in conversation with, also the fact that CADRAIN was in custody in Regina, etc. etc. and it was felt that CADRAIN's information warranted further investigation.

Lt. SHORT advised the Chief of this information, consequently this Dept. was in touch with Insp. RIDDELL of the RCMP Detachment Regina, and through those efforts it was revealed that MILGAARD was presently staying at a Motel in Winnipeg, Man. It was then decided that a membe of this Dept. should attend in Winnipeg and interview this suspected MILGAARD.

On the morning of March 3rd, I attended at the Von Street Boys Correct ional Institute in Winnipeg where David Edgar MILGAARD, 16 years of age, DOB July 17th;, 1952, home address Langenburg, Sask. was being held on a suspicion of murder charge having been detained there by a member of the Mounted Police, one Cst. Charles COPPANG of the CIS Sect that Division.

MILGAARD was transported to the Mounted Police Barracks where he was interviewed at length by myself and other members of the Mounted Polic along with S/Sgt. Stan EDMUNSON of Saskatoon who was attending in Winnipeg at the same time, and after a lengthy interrogation and state ments taken from this youth, it was decided that there were many poi for which his answers were too vague to be actually authentic.

MILGAARD's body was checked with regards to the physical marks, altho old scratches etc. were noted on his hands and on the back of his neck It was nothing that could be connected with any recent struggle. It should also be noted at this time that during the day of March 3rd, I attended at Room #3 & #4 which was being used by MILGAARD at the Boule Motel in Winnipeg, the premises thoroughly searched, also his luggage clothing, etc. checked, however nothing was noted which would be of

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FORM #23 K. - 3.
SUBJECT OCCURRE NUMBER 641 /68

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

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NAME OF FIRM OR
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DIVISION ASSIGNED TO: TIME DATE /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
ADULTS
JUVENILES

FILED:

DATE:

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any assistance in this investigation, however it was noted that all h shirts, etc trousers, etc. had been dryecleaned and still had dryclean tags of Perths Drycleaning Business in Winnipeg where he stated all o his clothes had been drycleaned recently as they had become soiled, however as noted in and covered in the statement he does not know what happened to this particular clothing which he had changed at the CADRA residence on the morning of the murder, stating that he may have thro them in the suitcase or he may have thrown them out of the car or lef them in a Motel room or in fact stated he didn't know what had become of them.

Through investigation and statements taken from MILGAARD there were several points of interest noted.

1. That his arrival time in Saskatoon coicided with the time of the Murder.
2. He can be placed in the vicinity of the Murder due to his own admission
3. And we know he was travelling in the lane having been told from s by tow trucks which we have information and statements with rega t o.
4. Also that MILGAARD attended at the CADRAIN residence and also thr his own admission was in an excited condition and although he den this, CADRAIN statd that he had blood on his clothing, this cloth not to be found or located at this time.
5. Also that from Insp. RIDELL's conversation with the other youth involved, Ronald WILSON in Regina, stating that certainly MILGAA was excited giving the reason as his girl friend having ditched h for one of the other youths when in fact it is found through MILGAARD's statement that he was a little excited and in a hurry due to the fact that he was going to see his girl freind in St, Albert, Alta., this girl friend being Sharon WILLIAMS, he giving address as #54 Gillian Cres. St. Albert.
6. That we know these persons were under the effect of drugs throug their own admission,
7. Also that these persons were in financial trouble.
8. Also to be taken into consideration is the record and type of offences which MILGAARD has a record, this being covered in the statements taken from him.
9. There is also some indication from one of the Servise Station att ants that while the vehicle was being fixed at the Garage at Ave. and 22nd St. that MILGAARD made various attempts to clean the au out.
10. And one of the most important factors to be kept in mind is the element involved, as there is no accounting for the time which th arrived in the City, which is approx. 5:00 or 5:30 by their own testimony and statements and we cannot account for any of their actions until approx. 20 minutes to 8:00 when they were stuck in

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K. - 4.

FORM #23
SUBJECT _____ OCCURRE NUMBER 641 /68

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SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

NAME OF FIRM OR
PERSON CONCERNED _____ ADDRESS _____

DIVISION ASSIGNED TO: _____ TIME _____ DATE _____ /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
_____ADULTS
_____JUVENILES

FILED: _____

DATE: _____

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a lane in the 100 Blk. off of south of 22nd St. between Ave. T and U. This portion being covered by a further statement from Wally DANCHUK of 129 Ave. P South who had also observed these persons that morning.

Intensive interrogation and questioning of MILGAARD by myself and S/Sg EDMUNSON reveal that he does not account for this period of time and states he just doesn't remember other than probably driving around looking for his friend "Shorty's" residence. It was also noted that Insp. RIDDELL had the same results with regards to the time element wh questioning the WILSON youth in Regina.

I might also add that a peculiarity of MILGAARD noted was that upon my arrival in Winnipeg and the questioning of him on the early mornin of March 3rd, he did not appear nervous or in a tense condition as would be anticipated of a 16 year old youth being held on a suspicion of murder charge, being held several hours in anticipation of what mi be coming, he made no mention of obtaining legal aid, which is the usu custom when dealing with youths with a record of his type.

Also noted that MILGAARD has in fact received psychiatric treatment during the past years from the Psychiatric Centre in Yorkton, Sask. his doctor being at that time Dr. ANDRES. This portion being admitte by MILGAARD, however not checked out.

It was also noted that although MILGAARD's clothing has not been loca he states than when attending at the Trav-a-leer Motel in the early morning of Jan. 31st, in regards to obtaining a map for directions, he recalls his crotch being completely ripped out of his trousers. It was also noted that MILGAARD's reason for driving in the lanes while in this City on the morning in question his explanation for being in t lanes was that he was looking for his friend's residence and for St. Mary's Cathedral as he would be able to get directions from this, how ever it is felt that anyone being lost and not knowing directions wou hesitate to drive in the alleys to get bearings.

It was noted that Insp. RIDDELL checked out the WILSON vehicle which was located in Regina and found nothing that would indicate that it was involved in the Murder in the same, however it was also noted tha the suitcase mentioned nor the articles of clothing were located in same, nor has the girl been located or interviewed, Namely Nickole which may be of some value with regards to interrogation and further information with regards to this suspect MILGAARD.

My personal feelings after interrogating this youth and after being in conversation with Sgt. EDMUNSON is that he could be responsible for an offence of this type and there are many areas which I think should be cleared up further with regards to time element and discrep cies in statements made etc. which I believe should be done before this person should be eliminated as a suspect with regards to this f

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FORM #23
SUBJECT _____ OCCURRA NUMBER 641 /68

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

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NAME OF FIRM OR
PERSON CONCERNED _____ ADDRESS _____ 100

DIVISION ASSIGNED TO: _____ TIME _____ DATE _____ /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
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_____ JUVENILES

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DATE: _____

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Further detailed accounts of the conversation with MILGAARD with regs to his employment, type of person, type of answers received when questioning him and his general attitude are noted through the statem taken from him which is attached to this file.

After a further conversation with Insp. RIDDELL I was advised that th MILGAARD youth should be released at that time due to insufficient evidence obtained with with which to lay a charge, consequently on the evening of March 3, the suspect was released to the Boulevard Motel.

As a point of interest it is noted that the CADRAIN youth was again interrogated and a further statement taken however he stuck close to his original story . He insists the marks on MILGAARD's pants and shirt were blood and that MILGAARD stated at the htime that he had blood on his clothes, however when interrogating the suspect he denie any knowledge of this blood on his clothing.

E. KARST, Det.

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(c) Follow-up by Saskatoon Police

Saskatoon Police were sufficiently impressed by Cadrain's story that they sent Eddie Karst to Winnipeg to interview Milgaard and to have Wilson and John interviewed by other officers. From Karst's report, reproduced above, we see that he interviewed Milgaard in Winnipeg and found his answers "too vague".[2] For example, he did not know what he had done with the clothes he changed in Saskatoon; he could not account for his actions between 5:30 a.m. and 7:40 a.m. on the morning in question; and the fact that he was driving around alleys in Saskatoon when he was supposed to be looking for a church as a landmark was suspicious.

Gerald Cadrain was re-interviewed on March 5, 1969. He repeated his story to Raymond Mackie in the presence of McCorriston and Detective Donald Hanson of the Saskatoon Police, and Stanley Edmondson of the RCMP.

Saskatoon Police were later accused of causing Cadrain to say what they wanted to hear. On the contrary, the statements and reports demonstrate otherwise, namely that Cadrain continued to say what he had voluntarily said to begin with. Although Cadrain's later accounts became embellished and increasingly bizarre, he continued, with one exception, to repeat the essence of his first story, namely that he saw blood on Milgaard's clothes. The exception was in his interview with Paul Henderson,[3] where the latter wrote out a statement for him. The statement made no mention of the events which Albert reported to police, but rather concentrated on allegations of police mistreatment of Cadrain.

Karst denied the statement of Dennis Cadrain[4] in 1990, in which he said that the police questioned Albert Cadrain day after day for a month, as well as Albert's statement to Peter Carlyle-Gordge and the RCMP in 1993, that police worked him over in a little room and showed him pictures. I accept Karst's evidence.

The crucial part of Cadrain's statement to the police was that Milgaard entered his house with blood on his clothes which he had to change; that he was going to leave town and removed his brown coat which had acid stains, displaying the torn crotch of his pants which were blood stained, as was his shirt.

Cadrain was known to police and had in fact acted as an occasional informant, however no animosity was known to exist between he and Milgaard, and no motive existed, to my knowledge, for falsely incriminating Milgaard. The police, after extensively testing him, trusted Albert.

Karst had no concerns in 1969 about Cadrain's mental state, but he wanted to check everything he was told by Cadrain.

Karst had approximately 10 conversations with Cadrain, in which the latter maintained his story about seeing blood on Milgaard. Far from exerting pressure on Cadrain to implicate Milgaard, as later implied in media reports, Karst was concerned with the truth of Cadrain's statement, and after repeated testing he came to trust Cadrain.

At the Inquiry, David Asper agreed that police were right to test Cadrain's statement, to the potential benefit of Milgaard. They could not have acted improperly to change his evidence, because it did not change in its essentials.

2 Docid 009233.
3 Docid 000229.
4 Docid 002181.

Celine Cadrain was 20 in January of 1969. She was able to confirm for police that Milgaard, John and Wilson came to the house some time after 8:10 a.m. on the morning of the murder, and that when she came downstairs after about an hour she saw Milgaard wearing a pair of her father's pants.

She was able to confirm for us that Albert came to the family first with his suspicions of Milgaard's involvement in the murder, and then went to the police.

This fact became of great importance many years later when it was alleged that the police coerced evidence from Albert that he had seen blood on Milgaard. He had already reported this to his family before going voluntarily to the police.

(d) Albert Cadrain's Mental Health

One of the steps taken by the Milgaard group in their reopening effort was to interview Albert Cadrain. Having failed to obtain a retraction from him about him seeing blood on Milgaard, but learning of his mental illness, Joyce Milgaard and her advisors formed a strategy to attack Cadrain's mental condition at the time of trial, hoping to show that his evidence should be entirely discounted because he was mentally ill.

In fact, a few years post-conviction, Cadrain was hospitalized for mental illness and remained troubled by it for the rest of his life. Although what follows is not part of the investigation and prosecution of David Milgaard, it is necessary to examine what became of Cadrain after the conviction of Milgaard, as reflecting upon Cadrain's status as a witness at Milgaard's trial.

Peter Carlyle-Gordge had interviewed him, followed by Paul Henderson, then Eugene Williams, and finally by the RCMP in Project Flicker. His story became embellished over the years, but an examination of the trial evidence does not display anything he said as being patently unreliable. Evidence at the Inquiry demonstrated that he was rational in 1969 and 1970, or at least showed no signs of the schizophrenia he displayed in 1973.

He was treated in Saskatoon hospital and by May 30, 1973 was on the mend. Part of the report reads:

> He is asked again about hallucinations and delusions that he had 3 years ago. He blames this abnormal reaction to the abuse of drugs such as marijuana and LSD, as well a to a painful situation in which he told the police that a former friend of his had killed a woman. According to Albert apart from seeing the Virgin he also saw in the sky the picture of a killer smiling. He remembers that from then on he always was afraid that he was going to be killed for doing what he did.
>
> Albert is reluctant to give details about these events and he appears somehow upset when talking about this.[5]

In the opinion of the doctors, his psychosis could have related to his use of drugs. It is to be noted that in his interviews with medical personnel in Saskatoon in 1973, he did not admit to lying in his trial evidence, rather that he was suffering because of what he said about his friend.

The Inquiry heard evidence that for some years following his release from the hospital in Saskatoon, Cadrain functioned adequately, but by February of 1983 he was again delusional, as appears in a tape

5 Docid 325508 at 528.

and transcript of a conversation he had with journalist Peter Carlyle-Gordge on February 18, 1983.[6] His narrative of events around the time of the murder was given in dramatic, exaggerated tones, replete with references to the mafia, and grandiose references to his own role in events. He was highly critical of Milgaard, who he said used drugs of all kinds, and of whom John was very frightened. He repeated his story of Milgaard coming to his house with blood on his pants and snapping off the car aerial, as they left Saskatoon in a hurry. Asked if he thought Milgaard had done it, he said that he would stake his life on it.

As of February 1983, therefore, Cadrain was basically repeating his trial testimony, albeit in a rather demented manner, with numerous embellishments. He said that when Milgaard changed, his soiled clothes probably went into the garbage, something he repeated to Eugene Williams of Justice Canada on June 15, 1990. Williams' memorandum of June 16, 1990, is important. It says, in part, "Mr. Cadrain responded emphatically and affirmatively when I asked him whether he had told the truth when he was a witness at the trial."[7]

Cadrain's mental condition was an issue for the Inquiry, not only as it existed before and at trial, but as it continued through the years until his death because he was interviewed several times and those interviews came to the attention of Saskatchewan Justice and the police. If they had given reason for authorities to suspect that he was mentally ill at the time of trial, that would have been information relative to a possible reopening of the investigation into the death of Gail Miller.

The Commission had the benefit of the evidence of family members and acquaintances on the subject of Cadrain's mental condition.

His former wife, Barbara Cadrain, testified. She met Albert in 1973 and they separated in 1988. She related increasing problems between them, with Albert saying unbelievable things about the Milgaard case and slipping into chronic use of marijuana. Although his story changed in some ways, he did not vary in saying that he saw blood on Milgaard's pants.

In the last few years his behaviour was "really bad"[8] but nevertheless the TV interview[9] following Paul Henderson's May 1990 interview "blew her away".[10] To her, Albert appeared to be drunk. Celine Cadrain commented to us after seeing the interview, that Albert was nothing like that in 1969.

After listening to the tape,[11] Celine said that Albert had never gone so far as to talk about torture at the hands of police. In fact, he got along well with Eddie Karst and never expressed remorse or regret about his participation in this matter.

Barbara Cadrain, I find, was a credible witness. Her evidence that Albert remained steadfast, despite his increasing derangement, about the bloody pants is consistent with other evidence from people who knew him well, like his brother Dennis.

In her evidence, Cadrain's younger sister, Rita Gifford, testified that her brother, Albert, was a kind and generous person in whom she noted no signs of mental illness prior to 1969. Due account must be taken,

6 Docid 040654.
7 Docid 000836.
8 T2962.
9 Docid 002062.
10 T2964.
11 Docid 230134.

however, of Rita's age at the time. She was only 10. It is her belief that the stress of the court proceedings led to Albert's mental illness, about three years post-trial.

She said that her brother was not easily influenced although his generosity sometimes led him to be taken advantage of.

The witness impressed me as being honest and sincere. She was loyal to her brother Albert and described him as being honest – one who would not have gone to police with a story unless he thought he had to. I accept what she says about her brother's character. Whether he told the truth to the police is, of course, an open question, but the important thing for us is whether Albert carried enough signs of trustworthiness that the authorities could reasonably have confidence in what he said.

She did not notice anything mentally wrong with Albert, either before or after the trial, except that he became very tense and worried about what David might do if he got out of prison. Perhaps two years after the trial, however, Albert was relating visions.

Another person who knew Albert well in 1969 was Leonard Gorgchuk (Woytowich),[12] a credible witness who described Albert as "a great guy",[13] who showed no signs of mental illness. I accept this. With the exception of Dennis Cadrain, whose evidence I will review, all others noted no signs of mental illness in Albert prior to the trial, a fact which is important in assessing police reliance on Albert's testimony.

Gorgchuk remembers Albert as a quiet, gentle person, simple of speech and down to earth. Asked if he was aware of Albert being mentally ill in 1968/69 he emphatically replied "not at all".[14] I regard this as important because it comes from a close friend. If he did not detect signs of mental illness, why should the police? Albert was no doubt stressed somewhat, as his brother Dennis testified, by the grilling he received from the police, and while his mental state after the trial is of interest, it is not directly relevant to the integrity of the investigation and conviction.

Gerard Chartier told us that he knew the Cadrain family well and noted no signs of mental illness in Albert in 1969.

Alone amongst the Cadrain siblings who testified before us, Dennis Cadrain had concerns about Albert's mental health at the time of trial.

Dennis impressed me as a sincere witness. He had protected Albert's interests for many years, and had great compassion for him. The only weak point of his evidence related to the timing of the visible onset of Albert's mental illness. He testified that he noted signs of Albert being delusional before trial. But even if he is correct about the time, there is no evidence that what he saw was ever communicated to the police, or that either the police or prosecution were put on notice before the end of Milgaard's trial that Albert Cadrain might be unreliable by reason of mental illness.

Dennis told us that his brother could not tolerate stress. There seems little doubt that Albert, a teenager at the time, was repeatedly questioned by police, not only as to the accuracy of what he saw, but also as to his own possible involvement in the murder; that he responded poorly to stress and that he might have experienced visions about two months after giving his statement to the police; that the preparation

12 T2471-T2513; T3893-T3938.
13 T2473.
14 T2975.

for court and testifying was an ordeal; and that by 1973, three years post-trial he was diagnosed as schizophrenic.

My impression of Dennis' testimony is that his suspicions of Albert's mental illness in 1969 were formed well after the murder, sometime between the trial and 1973, when Albert was put into treatment. Notwithstanding his observations then, however, he continued to believe that Albert's testimony was correct until 1990, when he spoke to Paul Henderson and later to Neil Boyd and Kim Rossmo.

Having listened to police witnesses, notably Eddie Karst and Rusty Chartier, there is no evidence that they should have had concerns about Albert's mental state prior to the conviction of Milgaard.

The weight of the evidence indicates that Albert was not overtly mentally ill at the time he gave his statement of March 2, 1969 to police; that he was progressively and adversely affected by the stress of police questioning and having to testify at the preliminary inquiry and trial; that he was a simple person (as described by the trial judge); that he suffered a mental breakdown about three years following the trial; that following treatment in 1973 he enjoyed a period of stability until after his move to B.C.; that he relapsed into mental illness from then until his death, a period which included Henderson's effort to have him recant.

(e) Conclusion

Cadrain's information given to the police, and his testimony at trial, were critical in the conviction of David Milgaard. His mental illness, however, was not apparent to investigators or prosecutors prior to his conviction, even if it existed before then. I find that the authorities were justified in relying upon his information, and that his evidence was handled appropriately throughout.

Police had offered a reward for relevant information pertinent to the murder investigation, and after conviction Albert Cadrain applied.

During the reopening effort, the Milgaard group suggested that the offer of a reward induced Cadrain to provide false information. The evidence, on the contrary, supports a finding that Cadrain gave his report to the police on March 2, 1969 before he knew anything about a reward.

City Solicitor, J.B.J. Nutting, wrote to the Mayor on May 19, 1971, reporting that three claims for the reward had been made.

> After studying the applications and certain interviews with the agent of the Attorney General T.D.R. Caldwell, Esq., the person responsible for the prosecution and conviction of Milgaard, it appears that the applicant Albert Cadrain of 334 Avenue O South on March 2nd, 1969, attended at the City Police Station and voluntarily offered information which gave the Police the first concrete lead in connection with Milgaard's involvement in the crime of murder and which lead (sic) to search and capture of Milgaard. Cadrain also gave material evidence in the case against Milgaard. In the opinion of Mr. Caldwell, which is shared by the writer, the information given by Cadrain was of such paramount significance that, without it, the case could still conceivably be under investigation. Cadrain's information was first in time and focused all Police activities thereafter in the search for and arrest of Milgaard.[15]

15 Docid 002290.

Inquiry evidence supports that assessment. But it is important to realize that the police did not pursue Milgaard solely on the basis of what Cadrain told them he saw. They were led to John and Wilson as well and to the trail of activity by the three which demonstrated to them that Milgaard had the time and opportunity to commit the crime. Closer to the date of the preliminary, their case became much stronger with incriminating statements from Wilson and John. What they heard from Wilson, in fact, corroborated Cadrain's story.

5. Ron Wilson

(a) Introduction

Given Cadrain's statement about Milgaard, the persons with whom Milgaard found himself on the morning of January 31, 1969 also were of interest to police. One of these was Wilson. When first questioned on March 3, 1969, he gave police a statement which amounted to an alibi for Milgaard, something he did not change when questioned again on March 18, 1969. On May 21, however, he began to implicate Milgaard, and finally, after submitting to a polygraph test administered by Art Roberts of the Calgary Police, on May 23, 1969, he made a sworn statement which not only put Milgaard near the scene of the crime with opportunity to commit it, but also related admissions made by Milgaard that he had stabbed Gail Miller. Wilson confirmed his statements to police at preliminary and trial, but recanted the most incriminating parts of them 20 years later. His recantation was advanced as a ground for relief in the s. 690 applications. He testified at the Supreme Court of Canada in 1992 where he was not found to be credible. The truth of his recantation or of his trial testimony was, however, not the subject of comment by the Court.

Wilson was thus a central figure in the investigation and prosecution of Milgaard for the murder of Gail Miller, as indeed he was in the reopening effort which featured the recantation obtained from him through the efforts of Paul Henderson of Centurion Ministries. As we shall see, the strategy behind the recantation was to suggest to Wilson that he had been coerced by police into lying in his statements to Art Roberts, Saskatoon Police, and in Court. The long and intensive campaign by the Milgaard group to demonstrate police misconduct had its foundation in Wilson's recantation, so a review of his evidence through the years is necessary.

(b) Wilson Background

Kenneth Walters was a Regina City policeman from 1957 to 1985. He worked with both the RCMP and the Saskatoon City Police Department on the Milgaard investigation. In 1969 and 1970, he was in the Youth Crime Section. He knew Wilson as a minor criminal and sometime informant, involved with drugs and on the fringes of the Apollo motorcycle gang. Walters testified at the Inquiry that depending upon the degree of his personal involvement in the matter, Wilson could be forthcoming or he would hold back in which case several interviews would be needed to get a story from him.

As with his peers, he liked to impress and enjoyed the status earned by brushes with the law. At the same time he cultivated police contact. He was not intimidated by them. In fact, he was a cocky youth. I accept Walters' evidence and conclude that Wilson was streetwise, bold and duplicitous. Walters could get to the bottom of things with him, but it was not always easy. He could offer no reason for Wilson having turned on Milgaard except to say that friendships amongst these young people were fleeting.

Walters was a good witness. He was sure of things he recalled and readily admitted no memory of some things he had forgotten.

(c) Initial Statement – March 3, 1969

Prompted by Cadrain's report on March 2, 1969, Kenneth Walters and J.A.B. Riddell interviewed Wilson on March 3, 1969[16] in Regina. Walters thought that Wilson was being straightforward.

According to Wilson, the first stop after arriving in Saskatoon and driving around in search of Cadrain's house was when they became stuck behind Danchuks. He left out the stop at the motel around 7:00 a.m. He told the RCMP that Milgaard was not out of his sight for more than a minute or two except at Cadrain's house when Milgaard left to drive the car around the block at which time the transmission line broke. This was well after daylight. The account, essentially, amounts to an alibi for Milgaard because the investigators knew that Gail Miller was killed before 8:30 a.m. and before daybreak. Wilson said that it was daylight or around 8:00 a.m. or 9:00 a.m. when they finally got out of the alley.

(d) May 21 – 24, 1969 Questioning

On May 21, 1969, Walters attended an interview of Wilson in Regina conducted by Eddie Karst with Raymond Mackie and Dan Dike present.[17] He thought that his presence was a comfort to Wilson.

The conversation was apparently taped but no tape was available to the Inquiry. From the report of Karst we read that Wilson admitted being in Saskatoon with Milgaard and John in the early morning of January 31, 1969 and that Milgaard left the car when they became stuck around 6:45 a.m. while looking for the Cadrain residence. He appeared to be "puffing and running, slightly out of breath when he returned to the vehicle, and he admitted that he had since thought that this was the time that Milgaard was probably involved in a murder."[18] Karst brought Wilson back to Saskatoon.

I find, therefore, that Wilson had seriously implicated Milgaard before he met Roberts for the polygraph test.

Walters did not keep his notebooks[19] but he recalls Wilson as being cooperative and also that he was well treated by police as reported to the RCMP in 1993,[20] as was John. I accept this.

The turning point in the investigation occurred during May 21 to 24, 1969 with the questioning of Wilson and John by Saskatoon Police, and Roberts of the Calgary Police.

En route from Regina to Saskatoon, says Karst in his report, Wilson told him that he and Milgaard had discussed purse snatching and rolling someone to get money. Karst had little memory of this, but confirmed that his report would be accurate. As well, he and Wilson stopped in Aylesbury where Wilson said Milgaard had broken into an elevator. The agent confirmed a break-in the night of January 30 and that a flashlight was missing. Wilson said he had seen Milgaard return to the car with a flashlight and that it was now at his home in Regina.

All of this, particularly the fact that Wilson had told the truth about the elevator, was important to Karst and led him to expect that Wilson would continue to be forthcoming. Witnesses seldom give the whole truth at first, he said.

16 Docid 009275, 250597 at 601.
17 Docid 009264.
18 Docid 009264.
19 Docid 035206.
20 Docid 035206.

Karst acknowledged the five pieces of incriminating evidence Wilson had given on May 21st:

1. The stuck car – 6:45 a.m.;
2. Milgaard leaving the car;
3. Returned puffing – might be involved in a murder;
4. The discussion of crimes to raise money;
5. The elevator break-in.

He drove Wilson around the area of Avenues P to N, and 22nd Street. Wilson found it to be familiar, as being the location where he had seen the girl walking. He did not drive him to the scene, however, in order to avoid prompting him, because he was interested in what the witness knew himself.

Wilson was held overnight as a sleeper at the police station. He was then taken to a hotel where he stayed on the 22nd and 23rd. He was again driven around on the 22nd by Charles Short and John Oleksyn, and identified an area around 22nd Street and Avenues M or N as the place where their car might have been pushed out by two men. What concerned them more than the exact location was Wilson's report of Milgaard leaving the car, to return puffing and running after 15 minutes. That would allow time for commission of the crime.

Eddie Karst thought that leaving the Cadrain residence for 10 minutes would permit Milgaard to dispose of the toque and wallet. In his view, Wilson had given them enough information by the evening of the 22nd of May to charge Milgaard, but he still had reservations about Wilson's credibility. Senior officers wanted Wilson tested by the polygrapher. I accept Karst's evidence that on May 22nd, neither he nor anyone in his presence told Wilson what to say or told him that he was a suspect, nor did they threaten him. Any suggestion by Wilson to the contrary is a product of much later invention, to support his retraction given to Paul Henderson.

Karst delivered Wilson to Art Roberts, the polygrapher, on May 23rd and picked him up later that day. Roberts advised him that Wilson was now prepared to give a statement.[21]

Wilson did not hesitate to make the statement. I find that Karst and senior officers acted reasonably in checking Wilson's veracity insofar as they could. As with Cadrain, they persisted with questioning Wilson, not, as alleged, to coerce a statement, but rather to make sure that they had the whole story.

Having the witness swear his statement before a Justice of the Peace was done in serious cases, in an effort to impress the witness of the need to be truthful.

Wilson's statement repeated many things which he had already told Karst, but included new information that:

- he had picked out a knife from samples shown to him;
- the young lady of whom they asked directions wore a dark coat;
- they had become stuck while attempting a u-turn;
- Milgaard stated, upon returning to the car, "I got her" or "I fixed her";
- he had seen blood on Milgaard's pants;
- John found a white or cream colored compact in the glove compartment and Milgaard threw it out the window;
- John would scream at times;

21 Docid 006701.

- Milgaard told him in Calgary that he "hit" or "did" a girl, grabbed her purse which he put in a trash can, jabbed the girl with a knife but thought she would be alright. When he told this to John she said that she already knew.[22]

Karst said he had not told Wilson about the purse being found in a trash can and had no idea of whether any other officer had. In fact the finding was reported in the newspaper shortly after the murder, but that factor influenced Karst nevertheless as did John's reported knowledge of the murder, and of course the results of the polygraph test. As a result, Karst no longer had concerns about what Wilson was telling him.

Karst's report[23] included everything that Wilson had told him from May 21 – 24, as well as what he had told Roberts.

Roberts' testimony at the Supreme Court of Canada on February, 1992[24] is important evidence for our purposes because Roberts is deceased, and he took incriminating evidence from Wilson that the latter had not offered before. Roberts told the Supreme Court of Canada that during the test, Wilson told him certain things which Karst now says he only divulged to him after the Roberts interview – things like hitting or killing the girl, and John being upset when he, Wilson, returned to the car.

So for Karst, the polygraph exam had the effect of filling out the story.

The judges of the Supreme Court were not critical of Roberts for showing John the victim's bloody clothes in an effort to jog her memory.[25] Nor did they criticize bringing Wilson into the discussion to help John's memory.

I find from Karst's evidence that he might not have chosen to interview the two together, but he was not even aware that Roberts had, and so his belief in the reliability of the statement Wilson gave him was not affected. Wilson added to his statement on May 24[26] saying that he and David left the car for help, going in opposite directions. Upon his return he found Nichol John hysterical. She told him of the stabbing and when David returned she moved away from him. Karst thought it possible that this added information resulted from Wilson and John meeting the day before.

Police continued their inquiries even after getting the Wilson and John statements. In his May 25, 1969 report[27] Karst says they should be looking for the discarded compact. As well, police advertised in the Saskatoon StarPhoenix for information about the two persons said to have pushed the Wilson car. As a means of checking Wilson's story, Mackie got the flashlight from him when he returned him to Regina.

They checked at the Wilson home about a toque, and called at the Aylesbury elevator to show the agent the knife and the toque. They called the Miller family members at Delisle, and Laura about the compact. Plainly, they were seeking corroboration of Wilson's and John's stories. Why would they bother to do this if they had already and improperly extracted the evidence they wanted to hear from Wilson and John?

Karst remained dubious about Wilson's credibility throughout March, April and May, up to the time of the polygraph. I understand him to say that what Wilson had told him before the polygraph was enough to lay charges, if what he said could be believed. The polygraph session settled the credibility issue for the

22 Docid 006701.
23 Docid 009264.
24 Docid 043300.
25 Docid 043300.
26 Docid 006701 at 705 and 065360.
27 Docid 009264 at 268.

police, so they charged Milgaard, relying, of course, on John's statement. Karst had no doubts about her honesty, or of Cadrain's.

I am satisfied that Saskatoon Police acted in good faith in charging Milgaard, based upon what they saw as reasonable and probable grounds.

Karst says, and I accept, that Wilson did not object to going to Saskatoon. As we know, he implicated Milgaard in the murder before he was interviewed by Roberts. Here he was challenged and gave more information, adding even more after seeing Roberts. He recanted some of it to Henderson: ie: Blood on Milgaard's pants; seeing a knife; Nichol being hysterical; the compact being thrown out and David having said in Calgary that he "got" or "hit" a girl in Saskatoon.

In his statement to Henderson, he said that this information was "planted in my mind by police."[28] I do not accept that, one reason being that there is simply no doubt, as I have found elsewhere, that Milgaard threw a compact out of the car. Wilson told Roberts that he had and then recanted the statement to Henderson. But he was recanting something which was true, meaning that his recantation, at least in this particular case, was false.

What is clear from the events is that Wilson, having implicated Milgaard on May 21st and 22nd by adding details to his story of March 3rd, implicated him still more to Roberts. Then, as we know, he referred George Lapchuk and Craig Melnyk to the police shortly before the trial. Was he coerced into doing this, as well? The answer is no. Tallis regarded Wilson as treacherous – the type of person who tended to add to his evidence upon repeated questioning, rather than retract it. Beyond bringing to his attention the March 3 exculpatory statement which he had given to police, Tallis was constrained in further questioning by reason of the fact that Milgaard had told him certain incriminating things which appeared in Wilson's statement. As well, he feared that if pressed too far Wilson might say that he made his March 3 statement with a view to protecting his friend Milgaard.

In relating the events of January 31, 1969, he appears, in the view of experienced criminal trial counsel at the Inquiry, to have expressed himself in terms calculated to be convincing. Since then, he has vacillated and is not worthy of belief, except on some particulars corroborated by other evidence.

(e) Inquiry Evidence

Ron Wilson testified before the Inquiry. A self-described young criminal in 1969, he says that he was a heavy user of, and dealer in marijuana, LSD and heroin in the 1970s when he was a member of a biker gang, the Apollos. Beginning in the 1980s, he began to rehabilitate himself, he married and reduced his drug intake. He says now that he has been free of drugs for 20 years, and that he operates his own business. Such a background would justify a reluctance to believe him in 1970, and his testimony before various tribunals since then and before this Commission, I regret to say, was marked by contradictions. But, as with an unsavory witness in a criminal trial, one does not disbelieve him out of hand, but rather exercises great caution in accepting uncorroborated testimony.

Wilson says that he met Milgaard in 1968 and knew him as an energetic, non-violent person. Wilson, at the time, was already dealing in drugs and had had brushes with the police, so despite his youth he was not unfamiliar with being questioned. He had in fact been incarcerated by that time. This point is of some

28 Docid 017096.

importance in evaluating how easily he might have been influenced under questioning, in view of the allegation about police misconduct in questioning John and Wilson.

In fact, all three, Wilson, John, and Milgaard were young, but by no means naive or innocent. Wilson knew John as a party lover and user of LSD and marijuana. Wilson says that he used, in his words, acid, speed, dope, mescaline, and MDA, and said that David Milgaard fit the same general description.

Although Wilson met Albert Cadrain for the first time only on January 31, 1969, Melnyk and Lapchuk were close friends before that, and remained so until Wilson recanted to Henderson in 1990. Milgaard was convicted on the evidence of these friends who displayed, so far as I am aware, no reason for turning on him.

Wilson's evidence is that he and Milgaard decided to make a drug-buying trip to Calgary or Edmonton from Regina, and that they invited John along simply because they needed her money. That is probably true. Also supported by other evidence is his statement that he and Milgaard stole a battery in Regina and spilled acid on their clothes in the process. He says that Milgaard wore striped pants and a brown suede jacket. Reference has already been made to his brown suede jacket which came into the hands of Wilson's mother. She destroyed it, with the permission of police.

Wilson said that on the drive from Regina to Saskatoon, they stopped twice, breaking into an elevator at Aylesbury and getting stuck in Craik. From the elevator Milgaard stole a bone-handled hunting knife with about a 6" blade.

He also testified that he, Milgaard, and John were stoned on acid when they left Regina, and that they smoked marijuana along the way. Given their lifestyle, this is entirely possible, although there is a lack of supporting evidence. Reliable witnesses who saw them after about 7:00 a.m. did not observe impairment, although some people said they were very tired.

On the trip, said Wilson, there was discussion of raising money by break and enter or robbery. I accept that. There is similar evidence given at other times by John and Milgaard and being against their interest, it is likely true.

I also accept on the totality of the evidence Wilson's statement that upon arriving in Saskatoon they looked for a church as a landmark to locate the Cadrain house, stopped a woman on the street to ask directions, became stuck at a T-intersection a few blocks from where they saw the woman, and that he and Milgaard got out momentarily to look for help. He said that two men pushed them out but these men have never been located.

A crucial question was whether the group also got stuck near the funeral home as he told police, and as he testified at trial and in his pretrial statement of May 23, 1969. His statements were no doubt material to Milgaard's conviction and have been characterized since as being not only unbelievable but impossible on the assumption that Wilson related being stuck on 20th Street, a busy thoroughfare. Nobody noticed the car there where it would have been blocking traffic. But even with the Inquiry witnesses, there is no reliable evidence of where Wilson's car was stuck. It could have been on 22nd Street where there was a boulevard such as he described in his evidence. As well, we have heard evidence from the dog handler, as noted above, that he saw signs of a car being stuck just across Avenue N at the entrance to the alley across from the funeral home, so police might reasonably have relied on Wilson's evidence on this point.

Wilson says that both he and Milgaard changed pants at Cadrain's. That is corroborated by other witnesses.

He testified that Milgaard did not tell him that he had stabbed or poked a girl with a knife, nor did he, Wilson, report this to John. This conforms with his recantation to Henderson, which contradicted what he told police and what he said at trial.

March 3, 1969 was his first contact with the police, while in jail from February 25th to May 9th in Regina.

He claims to have been stoned 90 per cent of the time between his release and the Milgaard trial.

There is a conflict in Wilson's evidence as to his drug use on January 31, 1969. At the Inquiry, he testified that he used drugs extensively that day, both on the trip from Regina to Saskatoon, and thereafter.

When the matter was raised at trial, however, by the judge,[29] then again on behalf of the jury,[30] Wilson testified that neither he nor Milgaard nor John used drugs from Regina to Saskatoon or on the morning of the murder. In the charge to the jury, there is no mention of drug use as a significant factor, possibly because of Wilson's testimony.

In other respects, his Inquiry evidence followed the tenor of his recanted evidence. In particular, he says that while the car was stuck, he and Milgaard were apart for only the length of time it would take to cover a block. And, surprisingly, he now says that the incident with the cosmetic bag did not happen, although the other three people in the car, including Milgaard, said that it did.

Wilson was shown his March 3, 1969 statement[31] at the Inquiry and basically adopted it. In it he did not tell police about the bone-handled hunting knife because, he says, he did not want to be charged with break and enter. Similarly he did not disclose drug use on the trip.

He was unaware, he said, that statements of John and Milgaard were similar to his. He was re-interviewed[32] but told police nothing new.

Wilson recalls voluntarily giving blood and saliva samples, and he agreed to a police request for a polygraph as he rode with them from Regina to Saskatoon. He was becoming increasingly more cooperative, stopping at the elevator in Aylesbury that they had broken into. This was on May the 21st.

We know from other evidence that the police suspected that Wilson had not given them the full story in his first interview and they were taking him to Saskatoon to test their thesis. His increasing cooperativeness would have given them more reason to suspect Milgaard.

He recounted to the Inquiry the ride around Saskatoon, being shown where Miller was killed, and then being taken to the motel where they had asked for directions. Wilson was not critical of police up to this point, but became so when he spoke of the lie-detector test administered by Roberts.

Wilson described two long sessions with Roberts in which Roberts kept coming back to the same questions. For example, after being asked several times if Milgaard had killed Gail Miller and replying in the negative, he finally changed his answer to yes, and the question was not asked again.

Roberts testified at the Supreme Court that his standard interviewing technique was to re-ask when the answers were at first shown to be false on the polygraph.

29 Docid 005172 at 306.
30 Docid 005172 at 313.
31 Docid 006689.
32 Docid 106640.

It is difficult to understand why Wilson, Milgaard's friend, would trifle with the latter's life by incriminating him for no better reason than to find out if Roberts would stop asking the same question. However, this essentially was his explanation, the same one he offered for saying at first that he saw no blood on Milgaard's pants and then saying that he did.

I note Karst's report of May 25, 1969,[33] recording the May 21, 1969 interview of Wilson in which the writer observes that Wilson was now saying that Milgaard had returned to the car running and puffing, and that he had since thought that Milgaard was likely involved in the murder. At the Inquiry, Wilson explained that he only concluded that after Roberts suggested it to him during the polygraph test. But Karst's report shows that Wilson came to that view on May 21st, prior to the polygraph.

Roberts showed him pictures of Gail Miller's body and her clothes. He says the pictures shocked him, but he did not say that caused him to lie. In fact, one is hard pressed to think why such things would provoke a lie as to who was responsible unless it was Wilson, and he said that he was unconcerned for his own sake.

He testified that in a break between the polygraph sessions he spoke with John and told her that they should just give police what they wanted and "sink"[34] Milgaard. His explanation? – "I figured we'd get the hell out of there."[35] Again, an unbelievably trivial reason for implicating a friend in murder. I do not believe Wilson.

Roberts' testimony at the Supreme Court of Canada[36] is useful because otherwise we would be left with no sworn version of the polygraph test other than the highly dubious one given by Wilson.

At the Supreme Court of Canada, Roberts testified that the procedure he followed was:

1. Get information from investigators – in this case that Milgaard was a suspect, and that the investigators believed that John and Wilson knew more than they were saying;
2. Tell the suspect that he need not take the test, and then ask general questions to assess him or her;
3. Ask the subject to lie about an obvious matter, in order to obtain the profile of a false indication;
4. Ask the subject if he understands the questions, and give him a chance to read them;
5. If deception is found, a re-interview is done in an effort to get an admission. This can lengthen the procedure, as happened in Wilson's case;
6. Go to the scene beforehand to familiarize one's self;
7. Hand the subject back to referring detective.

Wilson testified that Roberts told him that he got a deceptive response on answers touching his knowledge of the event and of the suspect, but not to a question asking if he (Wilson) did it.

Wilson told us that he believed he told Roberts that he wanted to make a statement, and so he was turned over to Karst or Short.

In describing the Roberts' interview, Wilson said he told him that Milgaard killed her, and "hit a girl", but it wasn't true; that he said it only to get out of there. He added that Roberts "basically started to

33 Docid 106669.
34 T5526.
35 T5526.
36 Docid 043300-043316 inclusive.

put everything together … that they wanted in my head."[37] "Deep inside I didn't think he'd done it, but I figured this is what they wanted so this is what they are gonna get."[38] Wilson told us that he did not appreciate the consequences at the time, but finally admitted that he realized that it might lead to his friend Milgaard's conviction for murder.

At trial Wilson added incriminating material to his testimony beyond what he had told Roberts on May 23rd. This belies the statement that he told Roberts what he wanted only "to get out of there".[39] If that were so, why would he later add things to the story?

Wilson told us that he did not know that John had given a statement to Roberts, nor could he recall Roberts, John, and himself discussing matters, although Roberts testified at the Supreme Court that they had done so for about three-quarters of an hour. Such a discussion could give an opportunity for collusion, but there is no evidence of it.[40]

At the Supreme Court, Wilson suggested and still suggests, that he was brainwashed, misled, and manipulated by Roberts, a charge the latter denied at the Supreme Court Reference. On the contrary, Roberts said, he handled Wilson and John with kid-gloves, knowing how serious the matter was.

There is no question, I think, that Roberts confronted Wilson with what he regarded as deceptive answers. He might well, as Wilson says, have pressed him with remarks like "Do you know what happened". But, without more, I cannot characterize Roberts's questioning as brainwashing or manipulation, or an attempt to mislead. My lack of confidence in Wilson's credibility does not translate into an approval of Roberts's methods, of which we know little.

Wilson's statement of May 23, 1969[41] was sworn before a Justice of the Peace at 3:30 p.m., a step taken by police to lend further assurance of authenticity and reliability.

Karst reported that on the same day, Wilson picked out a knife from a group of five similar to the one he had seen Milgaard handling on the trip from Regina to Saskatoon.[42] Wilson told us that he picked this out because the officers kept going back to it.

He did admit that he understood the consequences to Milgaard of what he did at the line-up.

Contrary to what he told police, Wilson now says that Milgaard did not call the woman they stopped for directions a "stupid bitch". He has no explanation for having told police that. The point might be a small one, but it again raises the question of why he would gratuitously cast his friend in a bad light. More importantly, why tell the police that he and Milgaard were away from the car for fifteen minutes, time enough for the commission of an assault, when it was untrue, and when he appreciated the consequences of what he was saying?

In making an assessment of Wilson's reliability, the police and the prosecutor would certainly have been on the lookout for motive to lie. What motive did Wilson, or Milgaard's other friends have? None, that I have heard. He testified that the police did not tell him to lie. That he in fact did is a conclusion to

37 T5582 and T5583.
38 T5583.
39 T5526.
40 Docid 043300 at 344.
41 Docid 002242.
42 Docid 106669.

be drawn from subsequent events, not one which flowed from the facts known to authorities in 1969 and 1970.

He acknowledged a typed version of his May 23, 1969 statement.[43] He said that the part about seeing blood on David's pants was a lie, and that he knew it was when he said it. In the next breath, however, he said that before signing the statement, he heard that Cadrain had said so, and so it must have been true. So here we have Wilson saying in effect that he deliberately lied, but also that he thought he was being truthful.

Also a deliberate lie, he said, was his statement that John found a compact which Milgaard threw out. But how could this be a lie? He was sitting in the car with Milgaard, John, and Cadrain, and all three of them said that it happened.

If he intended to lie, he went into some detail about it, describing the compact as white or cream colored with a floral design. He could not tell us at the Inquiry how he came up with this, but the police must have gained some assurance of the accuracy of his story from the detail in it.

Asked to explain his reason for saying that in the Calgary Bus Depot David told him he had "done" or "hit" a girl in Saskatoon, he said that the purpose was to remove suspicion from himself. He was concerned about being held accountable for murder.

One of the dubious reasons he gave for implicating Milgaard was that he simply did not care. He just wanted to go home because a couple of days without drugs was starting to hurt. But he was not too anxious, it seems, to stay over to May 24th to make a supplementary statement, although the police might have detained him. The evidence is unclear.

In it, he added that he, as well as Milgaard, left the car. He was gone for 15 minutes, and upon his return he found John hysterical. She told him that Milgaard had taken a girl down the lane, pulled out a knife and stabbed her a few times. When Milgaard returned to the car, she shrugged away from him. Now he says that none of this is true.

He could not explain the various points of agreement between his statement and that of John – points which included the stabbing. If he had not conspired with John to give false, very similar statements, the police had every right to conclude that both were being truthful. Milgaard counsel takes the points of similarity as evidence that there was a conspiracy between him, John, and the police to implicate Milgaard, but again I must say that there is no evidence of this.

On May 29, 1969, Raymond Mackie reported[44] that he took Wilson back to Regina on May 24, 1969 and got from him a flashlight, which was said to have come from the elevator break-in. Wilson professed not to recall this. One can understand why, having previously denied in his Inquiry evidence that Milgaard took a flashlight. The theft of the flashlight is not important in itself, but the fact that Wilson would bother to deny it tells me that his first instinct is to lie. Wilson's record[45] as of June 20, 1969, reveals him to have been an active thief through 1968, and he would have been regarded as an unsavory witness at trial.

He has no memory of talking to police or prosecutors at the preliminary, but prior to trial he recalls the prosecutor coming to his hotel room to ask him if he was sure about the length of time he and David

43 Docid 065360.
44 Docid 106676.
45 Docid 009304 and 009310.

were separated. Caldwell told us that he might have done this – not an improper act, if it happened. The question of timing was covered in cross-examination by Tallis.

Commission Counsel led Wilson through his preliminary[46] and trial[47] testimony touching upon various subjects. It was markedly different in some respects from what he told the Inquiry:

1. Drug use

   At trial he did not admit to the heavy use of which he so now freely speaks. In fact he now says that Milgaard, John and himself were all stoned on the day of the murder, but this was not before the jury.

2. Knives

   At the preliminary and trial Wilson said that Milgaard had a paring knife with a reddish brown handle. He now says that this was untrue. Milgaard had a bone-handled hunting knife.

3. Lady in the Street
   The trial heard him say that they stopped a lady on a side street near a residential area and that Milgaard called her "a stupid bitch". He now denies that the comment was made.

4. Time Away from the Car

   At trial he said that he had walked perhaps five blocks before returning to the car. He now says that this is untrue, but that he did leave the car for a short time.

   He told us that at trial he did not believe that Milgaard had killed Gail Miller, but he was afraid that he would not be believed if he changed his story, and that he would be in trouble with the Saskatoon police. He hoped, in any event, that Milgaard would be found not guilty. I regard this as nonsense, but whatever I think of his credibility today cannot alter his trial evidence which left the jury with a reason to find that Milgaard was away from the car for about 15 minutes, time enough for Wilson to walk five blocks or four for sure. Wilson said he waited five or six minutes in the car before Milgaard returned, telling Wilson that "I fixed her or something to that effect".

   Tallis was certainly alive to the time issue because he challenged Wilson on the difference between his preliminary and trial testimony, but Wilson insisted that they were apart for 15 minutes.

5. Blood
   Wilson tells us that at the preliminary he testified to seeing blood on Milgaard's pants, knowing that it was false, but just sticking to his statement of May 23/24th. Tallis challenged his testimony, but again at trial he reported seeing a small amount of blood on the pants.

6. Compact

   Wilson now says that this incident never happened, but everyone else in the car, Milgaard included, has said that it did, and Wilson himself said so at the preliminary and at trial.

46 Docid 007595.
47 Docid 005172.

7. The Bus Depot Admission

   At the preliminary and at trial Wilson testified that Milgaard said "he hit a girl, or got a girl in Saskatoon"; that he put her purse in the trash can and that he thought she would be okay." He explained to us that this evidence was not true and that he said this to corroborate his statement and to keep himself out of trouble as a suspect. He added the words "he thought she'd be O.K." to comfort himself and to help Milgaard.[48] There was simply no reason for him to falsely implicate Milgaard in the first place, so why would he say anything by way of mitigation?

Wilson applied for the reward on the advice of Lapchuk and Melnyk who, he said, told him that he was one of the main witnesses. He was quick to add, however, that the reward played no part in his evidence, and was not discussed with Caldwell or the police before the trial.

Wilson's evidence is unreliable today. It might have been so at the trial as well, but his testimony there did not reveal misconduct by police or internal conflicts in evidence as between the preliminary and the trial. True, he had held things back before May 22nd and 23rd, but the police did not regard that as unusual behavior in a young person trying to protect himself and his friends, and the jury, in my view, would not have acted unreasonably in believing him.

Wilson told Joyce Milgaard in 1981 that David Milgaard should not have been put in jail, but rather in a home, because there was something mentally wrong with him. Asked to explain himself, he said that if Milgaard had been sent to a home it would have been some place other than jail. I conclude from this that in the early part of 1981, Wilson still believed in Milgaard's involvement in Gail Miller's death. If he thought Milgaard was innocent, why would he consider that a mental home, as he implied, would be preferable to jail? Perhaps, as he said, he was just "totally confused".[49]

In her conversation with him in 1981, Joyce Milgaard repeatedly put suggestions to him of police pressure or promises of reward but he denied any such thing. He told her that he was "pissed off"[50] when Milgaard was sent to jail instead of being committed, which would have given him time to "straighten out his head".[51]

These exchanges[52] are important. They reveal Wilson's state of mind some 11 years after the trial – namely that Milgaard was involved in Gail Miller's death – perhaps not criminally liable, for reasons of mental incapacity, but involved.

He told Joyce Milgaard[53] that he did not know if David Milgaard did it, but was capable of it. He now tells us that long before 1981, he thought Milgaard was innocent. But he did not tell Joyce Milgaard that and he cannot explain why.

He told Joyce Milgaard on April 15, 1981[54] "I was pressured a bit, but I wasn't pressured to the point where I'd convict your son".[55] In fact, he suggested to her that the police had found blood and hair

48 T5582-T5584.
49 Docid 177468 at 471.
50 Docid 022904.
51 Docid 022904.
52 Docid 022904 at 918.
53 Docid 022904 at 927.
54 Docid 177468.
55 Docid 177468 at 471.

samples in the back seat of his car matching Miller's.[56] Whatever he thinks of the truth of that statement now, why would he tell her such a thing if he knew he had lied at trial?

He told us that he never did believe in the motel incident but when he spoke to Joyce Milgaard, she described it to him and he remarked that "he was probably stoned".[57]

Wilson said that he was treated well by the police, and that Roberts had instructed him to tell the truth. Neither Karst nor Short mistreated or threatened him or put words in his mouth. He said as much to Joyce Milgaard in 1981 when she asked him how police had treated him and he told her as well that police had not offered him a lighter sentence. But in cross-examination at the Inquiry, Wilson continued in his uncritical manner to agree with almost every thing put to him, e.g.:

- he tried to tell police the truth at first but they would not accept it;
- his damning statements at his preliminary and trial were never really challenged;
- the police never scrutinized the plausibility of his story, nor did Department of Justice officials when they got involved;
- that Rossmo and Boyd were the only non-partisan ones who examined him;
- that he had it much easier when he falsely accused Milgaard, than when he tried to recant because nobody in authority wanted to believe him;
- that the police were fixated on Milgaard;

In my view, these suggestions were either demonstrably false by reference to the evidence or were beyond the knowledge of the witness.

Wilson admitted that he was at least partially convinced of Milgaard's guilt at trial, tried to convey that he, himself, was truthful and minimized his drug use in an effort to appear credible.

He told the Inquiry that in driving around the Pleasant Hill district with police, he did not identify a specific area where they were stuck. He did not pick out a funeral home, saying only that the U-turn was made in the area of an all-night café, but he could not say where it was. His supplemental statement of May 24th added nothing regarding location.

He confirmed that they had been stuck and that Milgaard and he separated – as Milgaard himself told his lawyer had happened, so that did not come from the police, any more than the conversation about rolling someone.

By reference to Karst's report[58] of May 25, 1969, Wilson said that he possibly told Karst and the other officers on May 21st that he and Milgaard left the car, which was stuck, around 6:45 a.m.; that Milgaard returned, puffing and running; that he and Milgaard on the way to Saskatoon had discussed break and enters and rolling someone. It is obvious, even without hearing from Karst and the other police officers, that Wilson began implicating Milgaard two days before he gave the rest of his story to Roberts in Saskatoon. The report indicates an attempt to trace the route the three had taken[59] perhaps down 22nd Street where he recognized the Texaco, to the Trav-A-Leer Motel, then Danchuks. The report does not disclose an attempt to lead Wilson to the crime scene.

56 Docid 177468.
57 Docid 177468 at 474.
58 Docid 009264.
59 Docid 031006.

He told police he was unsure where the girl was stopped or where they were stalled except that it was at a T intersection with no traffic.

Wilson admitted to us that the report is accurate in terms of what he told Karst, including that Milgaard had made the "stupid bitch" comment, and that he had returned puffing and running after about 15 minutes. He also told police of Milgaard's admission "I fixed her, etc.", of David having blood on his pants and of John screaming and being very nervous.

Generally, he concedes that he told Karst the things recorded in the statement.

It has been argued that Wilson testified as he did at trial because he was young and frightened of a perjury charge for what he told the police on May 23 and 24, 1969.

The evidence demonstrates, however, that he was street-wise, a member of a motorcycle gang and no naïve teenager, as his record shows.

Today, he owns his own business, and has been involved in the construction and tire business for 25 years. This is a man with the inner resources to pull back from a life of crime and addiction. Despite the obvious toll that drugs have exacted on his health, he impressed me as too intelligent and sophisticated a person to be sincerely advancing the kind of evidence he provided to this Inquiry.

He admitted that by the time he was 18, he knew his rights, including the right to refuse giving statements to the police. He admitted that there was no animosity between him and Milgaard, and he could not say why he told the police, for example, that Milgaard had broken into the Aylesbury elevator; or might have gotten a knife from a hotel; or called the woman a "stupid bitch"; or had talked with him about break-and-enters or rolling someone.

It was suggested to him that the words he chose in the statement to describe the separation, the compact, Milgaard's admissions of stabbing, and his conversation with John about it were subtle and calculated to make them believable. He told police "I am sure Milgaard killed that nurse"[60] even though the police had not asked for his opinion. Again, there is no question that Wilson left police with a plausible and damning account of Milgaard's involvement in the crime. He now says it was a lie, but can explain his motivation no better than to say he was scared and paranoid and did it "to protect my own ass".[61] The fact is that he was never arrested for murder, or cautioned that he might be charged, and knew that he need not go with police on May 22nd to Saskatoon.

Wilson was not in an enviable position at the time of the preliminary inquiry. He was a member of a motorcycle gang, the Apollos, and was in prison. Even talking to the police, and worse still, testifying for the Crown, would spoil his reputation amongst his peers. Still, he made quite a determined effort to implicate Milgaard in murder. He said that Milgaard told him that he had poked a girl a few times with his knife but that he thought she would be okay, instead of putting the matter more bluntly (for example "I stabbed her to death") as a person out to get Milgaard might be expected to say. He had his chance at trial to blame drug use for his previous actions because he was questioned about it by the judge, but he denied being under the influence of drugs at the time of the event. Asked why he simply did not admit at trial that he had lied to the police in his statements, he had no answer.

60 Docid 065360.
61 T7406.

Wilson told us that his May 23, 1969 statement was partly true – the break-in; getting stuck; he and David separating.[62]

He admitted that when Caldwell questioned him before the trial about the time of separation he did not tell him what to say. He was also reminded about the distinction to be made between the time he and Milgaard were separated, and their respective times away from the car. In his May 23rd statement he said that they were separated for 15 minutes, at the preliminary he told Caldwell he was away for five to 10 minutes, and he told Tallis that it was about five minutes. Nobody asked him how long Milgaard was away from the car before he came back. But he was asked at trial, and said it was five to six minutes. So if one adds that to the 10 minutes or so he said at the preliminary you have a separation in the neighborhood of 15 minutes. Caldwell, he admitted, had not asked him to stretch the time.

Wilson agreed with counsel at the Inquiry that he was not intimidated by police or by the prosecutor.

As for the Roberts' interview, Wilson admitted that prior to seeing John midway through it, he had had no meeting with her in Saskatoon, or on the way from Regina. As a result, there had been no chance to discuss statements. By the time he saw her, he had already given his first statement[63] which incriminated Milgaard. Even if they agreed to "give them what they want" that could not have influenced something he had already said. For example, before talking to John he had already said (on May 23rd) that John found the compact and Milgaard threw it out.

Wilson finally conceded that the compact incident possibly happened, given that John told the police it did and Milgaard told his lawyer about it.

Wilson was an important figure in the investigation and trial of David Milgaard, at first providing the police with exculpatory information consistent with what they were hearing from Milgaard and John, but eventually implicating Milgaard.

The most damaging account by Wilson followed his meeting with polygrapher Roberts. After that, authorities relied, in the investigation and trial, upon Wilson's post-polygraph version of events. Roberts left no notes so our only evidence of his session with Wilson can be seen in his Supreme Court of Canada testimony. There is no evidence that he coerced Wilson, but there is no doubt that he extracted additional incriminating evidence from him which is inconsistent with Milgaard's innocence. Although cooperative with Saskatoon Police the day before, Wilson was even more responsive with Roberts. This is not to suggest that Roberts or anyone else knew that the information he got was untrue.

6. Nichol John

(a) Introduction

John, arguably the most critical witness in the investigation and prosecution of David Milgaard, lives in British Columbia. She was only 16 on January 31, 1969, an impressionable young girl from a troubled home, leading an aimless life featuring frequent drug use, and the companionship of young street level criminals.

62 Docid 065360
63 Docid 124983 at 5035.

In general, she was not a more useful witness at the Inquiry than she proved to be in 1970 at the Milgaard trial when she professed not to recall anything concerning the killing of Gail Miller, notwithstanding her statement to police on 24th of May, 1969.

After listening to her and reviewing previous testimony and tapes of interviews, it is reasonable to conclude, as others have, that she witnessed a traumatic event on the 31st of January, 1969. I find that her professed loss of memory at trial could have been the result of trauma, or fear, or both – that is it might or might not have been genuine, in whole or in part – and that her present inability to recall, although perhaps due in part to psychological trauma is, in some particulars, deliberate. In her view, she has been put through a 36 year ordeal through no fault of her own, and she simply wishes to be left alone.

I will refer to evidence which supports a finding that between the time that she gave her May 24, 1969 statement and the time of the Preliminary Inquiry in August of 1969 she resolved not to cooperate with the prosecutor by repeating the story which she gave to police, parts of which are inconsistent with Milgaard's innocence. As matters turned out, it might not have made a difference to the jury. They heard her story anyway, in the course of a Section 9 *Canada Evidence Act* hearing at the trial. As with Wilson, her place in the conviction of David Milgaard was so pivotal that a detailed treatment of her evidence over the years is called for.

As John was led through the record of her many statements and court appearances, she remembered some, but not others. In no case did she deny that a particular interview happened, just that she could not remember. My impression was that she had little interest in remembering them. She declined, for example, to be interviewed by commission counsel prior to her appearance, or to read materials in advance, or to be represented by counsel. She was a reluctant witness.

Testifying in court might seem a small thing to the casual observer, but it can be a stressful, trying experience, especially for young people as John was in 1969 and 1970 when the preliminary and trial took place. What followed for her as an adult, from 1981 to the conclusion of her testimony at this Inquiry, was no easier.

She has been interviewed by the Milgaard group, by agents of the Federal Department of Justice, both medical and legal, by the RCMP, and she has submitted to two sessions of hypnosis. She also testified before the Supreme Court of Canada. John's reluctance as a witness before this Inquiry and her fervent wish to be left alone, were unfortunate for us, but understandable. Our objective with her was to identify anything she said in later years which might be inconsistent with the facts as police and prosecutors believed them to be in 1969 and 1970.

Her present recall of events in 1969 and 1970 is small. She vaguely recalls leaving Regina for Saskatoon on the 31st of January, 1969 with Wilson and Milgaard. She recalls being stuck in an alley with a building on the left and one on the end of the alley. This evidence, coupled with other recollections over the years, is not inconsistent with a finding that the car became stuck in the east-west alley facing west towards St. Mary's church at a point near the back of the funeral home and within half a block of the intersection with the north-south alley where Gail Miller's body was found.

John continued that she recalled nothing from the point of being stuck until she walked up the front steps of the Cadrain house. She did not even recall giving evidence at the Milgaard Preliminary or Trial, something she could not explain, nor have others been able to, except for the suggestion of trauma induced suppression of memory.

(b) Nichol John Background

Regina City Constable Kenneth Walters knew John and testified at the Inquiry. Her home life was difficult, and she spent most of her time on the street. She was introverted and sullen. Basically honest and forthright, she was in bad company. She informed on her peers as well, but sometimes the information was not readily provided.

Walters had no concerns about Eddie Karst's treatment of John or Wilson. Coming from a policeman who clearly had the interests of these young people at heart, I think that is significant evidence of a lack of intimidation on Karst's part.

Walters said that he prepared no reports because he was not acting as an investigator but rather a resource person for the other forces. He was there to reassure Wilson and John. Speaking of taking statements, he acknowledged a feature of the practice of the time which is unfortunate by current standards. Police would talk to the subject before taking the formal statement, but what they talked about was not recorded. This left a door open for abuse, I observe. In this case we have no idea what was said to key witnesses before their statements were recorded in writing. Only exceptionally were statements taped. This failure to embrace technology which, even then was readily available, invites speculation that police had something to hide.

Walters told us that he was involved in the case from March 2, 1969, and would have said something if he had questions about the reliability of John and Wilson. I accept that. The fact that the RCMP and Saskatoon Police bothered to use him as a resource person to deal with the young persons speaks well for their approach. Surely they would not do this if they intended to intimidate the witnesses.

(c) Initial Statements – March 11, 1969

Nichol John's first statement to police on March 11, 1969[64] was far less incriminating than that of May 24, 1969. The former put her, Milgaard and Wilson in Saskatoon in the general area of the murder between 6:30 a.m. and 7:30 a.m.; at a motel to get a map; stuck in an alley from which they were pulled by a tow truck; at Albert Cadrain's house where she saw David Milgaard changing his clothes but where she did not see "any blood on anybody's clothing";[65] at a gas station to get the car fixed; at Rosetown where they bought some food and a small knife; at Calgary, then Edmonton and St. Albert, then back to Calgary, at Banff and then back to Regina over a period of five or six days. Most significantly, she said that all during the morning they were in Saskatoon, she was sure that "David or Ron never left me for more than one or two minutes".[66]

(d) March 18 and April 14, 1969 Questioning

Like Wilson, John began implicating Milgaard to some degree even before being interviewed by Roberts on May 23, 1969.

Charles Short reported that on March 18, 1969 he and Karst met with John and Cadrain in Regina and John told them that she believed Cadrain was telling the truth.[67] She thought Milgaard was dangerous, and he had forced intercourse upon her. This was probably a factor in what the police thought of

64 Docid 002124.
65 Docid 002124.
66 Docid 002124.
67 Docid 106640.

Milgaard. But it is not the case, as has been suggested, that the police planted a bull's eye on Milgaard – witness Karst's report of April 18, 1969 where he observes that there are many unanswered questions, and that "if one is to believe the girl, NICHOL JOHN, and it appears that she is very convincing with her story, then there is no way in which MILGAARD can be connected with this crime."[68] Obviously, Karst was prepared to see both sides.

The Saskatoon Police did not regard John's March 11, 1969 statement as being the whole truth, and in mid-May they resolved to have her and Wilson examined by Roberts, the polygraph operator from Calgary. The result of this interview was a verbal statement to Roberts on May 23, 1969 that she saw David Milgaard stab Gail Miller. Roberts turned her over to the Saskatoon Police. Mackie, of that force, took a written statement from her on May 24, 1969 (see Appendix J). This statement, which gave rise to the s. 9 examination at trial, was the most incriminating piece of evidence David Milgaard faced in the entire case. Some of it got into evidence at trial through the s. 9 procedure, but the most incriminating parts did not, at least officially, because she said that she could not remember them having occurred, and she could not remember having told Raymond Mackie about them. Nevertheless, as mentioned earlier, the incriminating parts were read to the jury, although they were cautioned not to use those parts as evidence because she had not adopted them in the stand.

(e) May 21 and 24, 1969 Questioning

Roberts tested Wilson on the polygraph, but not John, being satisfied that she had told him the truth during the course of their conversation.

Milgaard counsel alleged that Roberts was party to an effort by the police to coerce Wilson and John into saying what they wanted to hear. Because Roberts is dead, his testimony before the Supreme Court becomes very important. There, he said that he spoke to John for one-half to three-quarters of an hour without her remembering much, until he showed her a plastic bag containing Gail Miller's blood stained clothing.

I said, "What if this had been your sister?", and she burst out, she said, "My God, I do remember. I do remember. I saw him fighting with her down the lane. I saw him stab her". I said, "Well, now you remember", and she said, "Yes". I said, "Was there some reason that you didn't want to tell me before?" She said, "I couldn't tell you before. I didn't remember until I saw the dress".[69]

She then told him that she thought she got out of the car and ran, but must have got back in because she was there when Wilson came back. Roberts said that he felt that she had made an admission and so brought Wilson into the discussion. The three of them talked and Wilson said "Well, I didn't see that. I guess I was away from the car."[70]

As mentioned, Roberts did not test John, but rather "would have" presented her to a Saskatoon police officer and related what she had told him. This would be highly significant evidence for the Saskatoon Police. As we shall see, there was no documentary record kept of John's May 23 interview and May 24 statement by either Roberts or the police, a fact which gave rise to much suspicion by the Milgaard group that the police had something to hide. If they did, nobody has been able to prove it either at trial or since,

68 Docid 106661.
69 Docid 043300 at 341.
70 Docid 043300 at 342.

but the failure to record the circumstances surrounding the events of May 23 and 24, 1969 are of great concern to the Commission.

Roberts testified that showing a witness an item of evidence and asking if they had seen it is normal practice.[71] That, of course, is not quite what he did here. He showed the dress to John for its shock value, (What if this had been your sister?) and it worked. It appears, therefore, that Roberts was acting as more than a mere polygraph technician. He was an interrogator. If he got an admission which he thought was true, he did not use the polygraph. If he did not (as in Wilson's case), he used it and then confronted the witness with the "fail" result as an aid in getting the truth.

After interviewing Wilson and John on May 23, 1969, Roberts returned to Calgary.

Raymond Mackie took John's written statement the next day. There is no evidence that either Roberts or he used coercion. Roberts, before the Supreme Court of Canada, and Mackie before us, both denied it. Both, it must be acknowledged, would have had an interest in so doing. Had John been coerced by Mackie (which she denies), she could have told the prosecutor or the court at the preliminary inquiry, or the court at the trial, instead of saying she could not remember. And to this day she persists in saying that she cannot remember, whereas had she been coerced by police, it would lift a great weight of criticism from her shoulders to say so. At the same time, of course, saying so would attract criticism for not revealing something which might have assisted Milgaard's defence.

(f) Trial Evidence

(i) Adopted Evidence

At trial John was in the process of basically repeating her preliminary evidence, leaving out the most incriminating parts of her May 24 statement to police, but was stopped by the prosecutor who sought, and was given, the chance to cross-examine her on her May 24 statement. He did so in the presence of the jury. The most incriminating parts of her statement were put to her line by line. She testified that she could not remember the events, nor having related them to Mackie.

Although cautioned not to accept out of court statements by a witness as evidence unless confirmed by the witness in the stand, I doubt on the basis of witnesses I heard, that in the circumstances of this case the jury was able to disregard what they had just heard, namely that she had seen Milgaard stabbing a woman. Of interest in this connection are two articles which appeared in the Saskatoon StarPhoenix on January 22, 1970 and January 25, 1992:

71 Docid 043300 at 372.

Witness quoted at trial as saying she saw Milgaard stabbing woman

JAN 22 1970

"All I recall is of him stabbing her with a knife," was part of a statement signed before police by Nichol John, and read in court today by Crown prosecutor T. D. R. Caldwell.

Miss John, 17, of Regina, is testifying in the Queen's Bench jury trial of David Edgar Milgaard, 17, of Regina, who is on trial for the stabbing death last Jan. 31 of Gail Miller, 20, of Saskatoon.

Miss John was examined Wednesday but Mr. Caldwell then asked Mr. Justice A. H. Bence to have her declared a hostile witness, allowing him to cross-examine her.

Before court began this morning, Judge Bence ruled in favor of the Crown prosecutor and also allowed him to examine her on an 11-page statement she had made to police and later signed.

It was in that statement that she was quoted as saying she saw Milgaard stabbing a woman with a knife.

Asked today whether she could recall making such a statement to police, she said she could not.

She said she did not recall saying in the statement, "The next time I remember seeing Dave was on the right side of the car with a girl we had spoken to. He was making a grab for her purse.

"Dave reached into one of his pockets and pulled out a knife . . . I can't remember which pocket. I don't know if Dave had a hold of this girl or not. All I recall is of him stabbing her with a knife."

Asked whether she made this statement, the witness said "I don't know."

When she said she did not know, Mr. Caldwell said, "I am telling you, Miss John, that this is something you would never forget."

At this point, the witness started to sob and said, "I don't know, I can't remember if I was on the trip or whether I did it."

Reading more from the statement, Mr. Caldwell asked, "Do you remember saying, 'I recall running down the street — the next thing I knew I was back in the car . . . I don't know how I got back in the car. I seemed to remember Dave putting the purse in a garbage can . . . I remember two garbage cans side by side.'?"

Mr. Caldwell also asked her about the statement, "I don't remember Ron (Wilson, who had travelled with Miss John and Milgaard from Regina to Saskatoon that Jan. 31) coming back. I remember Dave (Milgaard) coming back and I moved over to the driver's side because I didn't want to be near him."

Miss John said she remembered this part of the statement.

She also remembered saying in the statement, "I remember seeing a knife . . . it was a kitchen knife and had a maroon handle."

This portion of the statement referred to her observations on the trip from Regina to Saskatoon.

When the Crown prosecutor pressed for an answer again on whether the witness saw Dave reach into his pocket and pull out a knife, Miss John again started to sob loudly.

At this point, Mr. Justice Bence ordered her to stop crying. He said, "You have shown that you are able to stop crying, so stop crying now."

She stopped.

She again said she did not remember seeing Dave stabbing the girl with a knife.

Mr. Justice Bence asked her if she was crying when Ronald Wilson returned to the car. To this she replied, "I don't know."

"Were you hysterical?"

"I don't know."

"Did you see any stains on his pants?"

"I don't know."

Mr. Justice Bence, at this point, made a charge to the jury concerning the statement.

He said, "In respect to the statement that this witness admits giving, the only evidence that can be considered against the accused are the portions of the statement which the witness has accepted under oath in the witness box. Any statement that she has not admitted to being the truth, is not evidence against the accused."

Mr. Justice Bence added that the contents of this statement should not be taken as evidence, but only served to test credibility of the witness.

Miss John was also asked whether she remembered telling Detective Sgt. Raymond Mackie in a statement signed on May 24, that "After we got to Saskatoon we drove around for about 10 to 15 minutes, and then we talked to this girl . . . Ron was driving the car at this time . . . he drove to the curb where Dave talked to this girl . . . Dave was on the outside side of the passenger seat.

"Dave asked the girl for directions for either down town or Pleasant Hill — he offered to give her a ride to wherever she was going . . . but she did not accept a ride . . . Dave closed the window."

Miss Nichol said she remembered part of this statement, but said she didn't remember telling the police that Dave said "Stupid bitch."

Judge Bence said "Surely you would remember somebody saying something like 'stupid bitch' . . ." Miss John gave a negative reply.

(Earlier trial report on Page 4).

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STAR PHOENIX JAN 25 1992

A4 Local Saturday, January 25, 1992 Saskatoon, Saskatchewan The StarPhoenix

Was damning testimony considered?

ANALYSIS
By Dave Yanko
of The StarPhoenix

Although she provided only little meaningful testimony at David Milgaard's 1970 trial, Nichol John may have contributed more to his conviction than anyone else, including Ron Wilson.

Wilson and John, who both testified at Milgaard's Supreme Court review this week, were Milgaard's Regina companions who travelled with him to Saskatoon to visit Milgaard's friend Albert "Shorty" Cadrain.

They arrived in Saskatoon on the Jan. 31, 1969, morning that Saskatoon nursing assistant Gail Miller was murdered.

Where Wilson told the original trial he saw Milgaard with a knife and saw blood on his pants after Miller's murder would have taken place, John told the court she recalled nothing of the time period during which the death occurred.

But that's not what she told police investigators. She told them she saw Milgaard stab a woman.

In an unusual turn of events at the murder trial, Crown prosecutor Bobs Caldwell successfully applied to the court to have John — his witness — deemed a hostile, or adverse witness. That allowed Caldwell to cross-examine John.

Caldwell referred to the statements John made to police, read them aloud before the jury, and asked her whether she recalled making them. Here's how some of the questioning went, according to transcripts of the original trial:

Caldwell: "Did you tell (police officer) Mackie this": 'I don't know if Dave had a hold of this girl or not at this time. All I recall . . . is seeing him stabbing her with the knife'?"

John: "I don't remember."

Because John refused to adopt the most damning statements she gave police, they were not evidence upon which the jury could deliberate.

Judges are frequently asked to "disabuse" themselves of inadmissible information arising out of special court hearings aimed at determining admissibility of evidence. But one must wonder whether jurors, everyday people with presumably little legal training, can be expected to forget hearing that John told police "the knife was in his right hand."

In his charge to the jury, Justice A.H. Bence stressed: "Those things (John) did not accept must be completely disregarded." While no one but Milgaard's jurors can know whether they were able to disregard John's dramatic police statements, some people believe that's not likely.

And even if it's assumed jurors could not disregard the unadopted statements, it's unknown to what degree they served to condemn Milgaard.

The credibility of a witnesses is best left to jurors, who are expected to use common sense in sizing up a witness. In fact, appelate courts are averse to overturning convictions made by jurors for just that reason.

Perhaps John's "I don't remembers" rang false to anyone watching her body language, and hearing her tone of voice. Perhaps jurors believed she was lying when she said she couldn't remember, in order to protect her friend and sometime lover, Milgaard.

We'll never know.

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The first article appeared during the course of the trial, and the second some 22 years later during the Milgaard effort to reopen the case. This effort involved a great deal of biased and unreliable reporting. In contrast, the first article quoted above is factual and the second expressed a layman's point of view which was later to be confirmed by legally expert witnesses at the Inquiry, Brown and Tallis.

We will never know the importance placed upon her May 24, 1969 statement by the jury, but I must be alive to the strong possibility that weight was given to it where none should have been. Section 649 of the *Criminal Code* makes it an offence for a juror to disclose any information relating to the proceedings of the jury when it was absent from the court room, which was not subsequently disclosed in open court. It will be a recommendation of this Commission that the section be amended to permit academic research into the question of whether jurors understand and follow the orthodox warning not to take out of court statements for truth of contents unless adopted. Such a study is needed, we believe, as a prelude to possible amendment of s. 9 of the *Canada Evidence Act*.

The Commission has studied s. 9 of the *Canada Evidence Act* as well as the procedure adopted by the trial judge in applying it to John's purported loss of memory. The implications go to the weakness of the jury system itself. (See Appendix K) The trial judge's warnings to the jury about the use of the evidence bring to mind the homely analogy of shutting the barn door after the horse has bolted. He did what he could, but he was dealing with a law which carries great prejudice for the accused when the case falls to be decided by a jury. Ordinary people are not inclined to ignore sworn declarations of the sort involved here, even when instructed by a judge to do so.

The problem is further compounded by the fact that in returning a verdict, a jury gives no reasons for its decision, in contrast to a judge sitting alone. Had the Milgaard trial been tried by judge alone he would have stated his reasons for finding the accused guilty, and if these had included reference to John's unadopted and highly incriminatory out of court statement, the Court of Appeal could have acted to address the problem. But here, the Court of Appeal could only assume that the jury followed instructions. That assumption, I think, must have been made as well by the Supreme Court of Canada in its Reference when it said that the accused received a fair trial. Two things should be done, as will be suggested in the recommendation section of this report. The first is a relaxation of s. 649 of the *Criminal Code* to permit jury research. To what extent do juries follow instructions from the bench?

The second is a study of national scope of s. 9 of the *Canada Evidence Act*. Is the prejudice presented to the accused justified by the public interest in dealing with adverse witnesses in the ways permitted by s. 9?

However much John's testimony counted for in the trial, there was other evidence which might reasonably have led to a conviction. She remains, however, a figure of central importance within our Terms of Reference because what she told the police undoubtedly was central to the investigation and prosecution, if not the conviction. As well, she has been the subject of interest throughout the long process leading to the reopening of the investigation. No amount of effort, as we shall see in reviewing her testimony, has succeeded in reviving her memory of the events of the 31st of January, 1969, if indeed she has forgotten, or had any memory to begin with. But the incriminatory statement which she gave to police on May 24, 1969 was there for federal investigators to see during the s. 690 applications, not to mention the Minister of Justice who decided the applications. If this statement was a factor in the rejection of the first s. 690 application, the Minister did not say so. Justice Canada, however, wanted advice from the Supreme Court on what use could be made of the statement for the purposes of the second application. But the statement of course was in the knowledge of both police and Saskatchewan Crown officials who,

in considering the possible reopening of the case, were not restricted by evidentiary rules which applied to the jury at trial.

At trial, faced with her statement of May 24th, she remembered seeing David in the car on the way to Saskatoon from Regina with a maroon handled kitchen knife. She remembered driving around in Saskatoon, talking to a girl in the area in which she had been driven around by Mackie. She remembered Milgaard talking to the girl and asking for directions to Pleasant Hill, and offering to give her a ride which she refused. She remembered driving away for about half a block and becoming stuck at the entrance to an alley behind the funeral home. She had apparently been told by the police that it was a funeral home. It is not advertised as such at the back entrance which faces the alley. She remembered Wilson and Milgaard getting out and unsuccessfully pushing the car, whereupon Milgaard went back in the direction of where they had spoken to the girl, and Wilson went the other way past the funeral home. She next remembered sitting in the car alone and Milgaard returning to sit in the front seat beside her, at which point she moved over toward the driver's side because she did not want to be near him. She remembered leaving for Calgary and finding a cosmetic bag in the glove compartment when they were between Saskatoon and Rosetown. She opened it and found a compact, two lipsticks and an eyeshadow. She asked whose it was, whereupon Milgaard grabbed it and threw it out the window.

Having adopted these portions of her May 24th statement, they were before the jury for truth of contents.

However, she failed to adopt certain other parts of the statement, saying that she could neither remember the events nor remember telling Mackie about them. These were that after talking to the girl Milgaard closed the door and said "the stupid bitch"; seeing Milgaard in the alley on the right hand side of the car holding the girl they had spoken to a minute before, grabbing her purse, reaching into one of his pockets and pulling out a knife, stabbing the girl with it, and then taking her around the corner of the alley; running away from the scene herself but then being back in the car; seeing Milgaard putting a purse into a garbage can; and finally, seeing two garbage cans.

The parts of the statement of May 24th which she could not recall, noted above, were put to her in the presence of the jury by Prosecutor Caldwell. The jury was instructed to ignore anything she had not adopted, but she did adopt some things which were incriminating in a general sense. These had Milgaard, on the morning of the murder, in possession of a knife which resembled the murder weapon; speaking to a girl in the vicinity of the murder scene; walking in the alley in the vicinity of the murder scene; returning to the car where she did not want to be near him; later throwing out of the car window a compact which she had found in the glove compartment.

John was cross-examined quite thoroughly by Calvin Tallis at trial. She admitted her drug use, which she had not disclosed to the Saskatoon Police except to one person at the Cavalier Motel and to Mackie.

At trial, she said that on May 23rd and 24th, 1969, the police first took her to the cells, then to the matron's room where her statement was taken. It appears that defence counsel was alive to the possibility of inappropriate treatment of this witness, and covered the subject in his cross-examination.

(ii) s. 9(2) Procedure[72]

Caldwell prepared for the preliminary and trial armed with John's May 24, 1969 statement to the police in which she said that she saw David Milgaard stabbing Gail Miller. When he interviewed her, however,

72 See Appendix K for Memorandum of Law on s. 9(2) of the *Canada Evidence Act*.

she demonstrated reluctance to talk about this part of her statement, and she failed to repeat it at the preliminary inquiry. In preparation for trial, therefore, Caldwell and a colleague decided what they would do about it if she again refused on the stand to adopt the most incriminating parts of her statement. They decided to question her under s. 9 of the *Canada Evidence Act*, specifically s. 9(2) which allows counsel to apply to the Court to cross-examine his own witness on a previous written statement. His preparation was not wasted because when she was put on the stand and asked to relate the circumstances of the morning, she professed no memory of critical events. Caldwell then made his application and was granted permission to put her statement to her. Thus unfolded a court room drama that probably contributed materially to Milgaard's conviction. That is the background, briefly, and I will now move to a more detailed account of what happened in court, drawn from Tallis' Inquiry evidence, and from the trial transcript itself.

Asked for his assessment of John as a witness, Tallis told us that she created the impression in the judge's mind that she was holding back to protect her friend, causing him to wonder if anyone from the defence side had exerted pressure on her, so Tallis tried to establish that neither he nor any member of the Milgaard family had talked to John.

Although unknown to Tallis, John's waiting room declaration to other witnesses at the preliminary inquiry showed her intention to say nothing, and that is what she did.

In Tallis' opinion, leaving the jury the impression that she was holding back was worse for the defence than had she adopted her statement in the stand. I accept that, and as matters turned out, the defence was dealt a double blow. Not only did she appear to hold back rather than not remember, her incriminating statement was put to her line by line in the presence of the jury.

Tallis could find no reason for her May 24th statement in view of what his client had told him. He considered jealousy, reward money, and pressure by Roberts, but had no evidence in support. She had given an earlier statement on March 11, 1969[73] to police, significantly omitting mention of the stolen battery, the break and enter, the discussion about purse snatching, stopping a woman for directions, getting stuck and Milgaard and Wilson leaving the car, or Milgaard throwing out a compact. These things happened and she added other things which Milgaard admitted to his lawyer such as the elevator break-in and Milgaard having a knife.

The most incriminating parts of her statement with which Milgaard disagreed were pointless to challenge because the statement was not in evidence, and she did not adopt those parts.

Further points of agreement between what his client told him and her statement of May 24th concerned Milgaard taking the car for a drive at Cadrain's, and later throwing out a cosmetic case.

John, at trial, repeated basically what she had said at the preliminary inquiry. She remembered Milgaard and Wilson leaving the car in opposite directions and then remembers Milgaard getting back in the car.[74] They drove away but she could not remember how they became "unstuck". These things were incriminating but beyond challenge in view of what Tallis knew from his own client.

The judge intervened to tell her that surely she must know how they became unstuck. Tallis says that at this stage the judge was already skeptical of her professed lack of memory. I accept that and the transcript indicates as much. Wilson had already testified that she was hysterical when he re-entered the

73 Docid 006329.
74 Docid 003049.

car, so the judge might have suspected that she saw something but was not telling all she knew. As the transcript shows, Justice Bence's skepticism and impatience with John increased to the point where I am sure that he destroyed her credibility in the eyes of the jury as to her professed lack of memory. She had no memory loss about the rest of the trip. Why this?

When John professed no memory of events after being stuck in the alley and before arriving at the Danchuks, Caldwell started his s. 9(2) application.[75] With the jury and the witness out, he explained s. 9(2) of the *Canada Evidence Act* to the Court. Tallis said that he knew that the recently enacted s.s. (2) allowed the prosecutor to cross-examine his own client on a prior inconsistent statement, use the inconsistency to show adversity, and cross-examine his witness at large. That is what Caldwell told the judge, submitting that in the absence of the jury he be granted leave to cross-examine on the statement. Tallis agreed that the jury should be out.

But the judge declined to hold a *voir dire*, observing that s. 9(2) of the cross-examination was not for the purpose of determining adversity, but merely stated that it could be considered, should the question of adversity arise.[76] He decided that the trial testimony of the witness was inconsistent with her statement and he noted that he would be giving special instructions to the jury "in considering any such statement and such instructions will of course depend on the evidence of the witness respecting such statement".[77] By that I understand him to mean that he would instruct (as he did) the jury to use only those parts of the statement for truth of contents as had been adopted by the witness on the stand.

The witness was recalled and examined by the Crown about giving a statement to J.A.B. Riddell. She acknowledged that she had.

She then agreed that she gave a further statement to Raymond Mackie in Saskatoon. She read it over and signed it on May 24, 1969. The court asked a few questions about the circumstances of taking the statement.

She was shown the statement and acknowledged her signatures on each of eleven pages. She was asked to read it over silently. She agreed that she had made the statement. She was asked to re-read the third, fourth and fifth pages. She did, but when asked if they were true, answered that she did not know, prompting the judge to say, "What do you mean you don't know? You signed them."[78]

The witness answered that she did not remember saying that.[79] The judge pointed out that she had signed each page which contained a detailed description of what had happened and asked if that refreshed her memory. She said, "No it doesn't; I don't remember saying that."[80]

At this point, Caldwell ended his cross-examination and asked for a ruling on adversity.

The Court asked further questions pointing out to her that she remembered giving the statement and signing each page, why then, could she not remember what she said?

75	Docid 003049 at 126.
76	Docid 003049 at 134 and 140.
77	Docid 003049 at 003142
78	Docid 007049 at 003151.
79	Docid 003049 at 151.
80	Docid 003049 at 003151.

Her answer was, "I don't know".[81] She denied discussing the statement with people other than the police or Caldwell, at which point the judge declared her to be adverse, meaning hostile, without inviting Tallis to cross-examine her. He would have been reluctant to do so anyway in the presence of the jury.

One can understand Chief Justice Bence's decision on the adversity point. It seemed obvious to him that the witness was holding back. And to Caldwell, who had the report of John's declaration outside the preliminary inquiry room, the reason for holding back must have seemed evident – fear of Milgaard. He asked, and was given permission, to cross-examine under s. 9(1) of the *Canada Evidence Act*. With her statement in front of her, she was taken through it, and she admitted everything except:

- Milgaard using the expression "stupid bitch" about the girl they had stopped for directions. The judge intervened, expressing his surprise.[82]
- Milgaard holding the same girl in the alley while grabbing for her purse.
  (The judge intervened once more, this time displaying increased impatience:
  Q. "Well, if you did see the accused grab the purse it's something you would have remembered isn't it? Isn't it? Witness?
  A. I don't know.
  Q. Take a drink of water and stop crying."[83])
- Milgaard pulling a knife from his pocket in his right hand and stabbing her,[84] then taking her around the corner of the alley.
- Running down the street (John).
- Milgaard putting a purse into a garbage can.

She then recovered her memory and recalled Milgaard getting back in the car and moving away from him because she did not want to be near him.

Caldwell took her back to page one of the statement and she remembered telling Mackie that on the way from Regina to Saskatoon "shortly after David got back into the car I saw a knife he had…This knife was a kitchen knife used to peel potatoes and things like that. It had a maroon handle".[85]

I pause to observe that even though John claimed not to remember the most incriminating parts of her statement, she did adopt the bulk of it which put the accused near the place where the body was found, having shortly before been in possession of a knife which matched the description of the murder weapon.

The judge was clearly out of patience. He said to her:

> Excuse me a minute, just a minute - It's very easy for you to stop crying because you've done it several times when you were asked a question with which you would agree – so would you please stop crying.[86]

81 Docid 003049 at 003152.
82 Docid 003049 at 156.
83 Docid 003049 at 158.
84 Docid 003049 at 159 and following.
85 Docid 003049 at 163.
86 Docid 003049 at 003164 and 164.

Caldwell then asked her if she did not know whether she saw Milgaard grab her purse, pull out a knife, stab the girl, take her around the corner of the alley or whether she herself ran. The witness replied that she did not.[87] Caldwell said he was finished, but the judge was not and carried on with the cross-examination.[88]

The witness then retired and the judge instructed the jury not to take any part of her statement as proof of contents unless she had admitted it.[89] Tallis asked that the instruction be amplified and, although the judge was not easy to persuade, he complied, not, however, referring to her evidence in terms of what parts she had adopted and of what parts she disclaimed memory.

In view of the great importance of the testimony, I see this as having posed two problems:

- The jury might not have remembered exactly what she adopted.
- The jury heard the most incriminating parts put to her and then reviewed by Crown counsel. She disclaimed memory of them, but had no difficulty remembering everything else in her eleven page statement.

Could the jury be reasonably expected to ignore the essence of her statement? And even if they did, what remained, as noted, was to some degree incriminating.

Tallis was, as usual, thorough in cross-examination. He canvassed the circumstances of her interview with Roberts which resulted in the statement given to Mackie on May 24th. He spent much time on her use of hallucinatory drugs; asked her about being driven around the area of the crime by the police and about being housed in cells. On this point she told him that she was in a cell for only about two minutes on the 23rd. She complained and was moved to the matron's room.

Tallis said that in his personal assessment, the John evidence was a devastating turning point at the trial. Wilson's credibility was probably enhanced, whereas it could have been undermined if Caldwell had not been allowed to use John's May 24th statement to cross-examine her.

Tallis, I gather from his evidence, was clearly placed at a disadvantage by the highly skeptical trial judge, whose repeated interventions demonstrated that he thought this witness was holding back; that someone had gotten to her; and that she had a selective memory, forgetting only that which was damaging to her friend. In his typically restrained manner, Tallis said that the Chief Justice's manner was that of a stern father.

But what he found most dramatic were Bence's stern admonitions to John when she was weeping. I accept that, but would add that on the face of the record I think that the trial judge destroyed the witness's credibility on the point of whether she genuinely could not remember. Able and experienced counsel represented both Crown and defence. There was no need for the trial judge to join in the fray.

Tallis agreed that the result of the judge discrediting the witness on her testimony was to invite the jury to conclude that the truth lay in her statement of May 24th. This view was to be echoed by Brown of Saskatchewan Justice.

87 Docid 003049 at 165.
88 Docid 003049 at 166.
89 Docid 003049 at 168, 169.

As matters unfolded, Tallis said that he had to be very cautious in his cross-examination. If the witness came across as very cooperative, it would aggravate an already bad situation where she seemed to be holding back to protect the accused. Even if she recanted it might be viewed skeptically. He avoided mention of the word "polygrapher".

He refrained, as well, from reference to her March 11th statement. To do so would open up a line of questioning to the prosecutor about holding back to help a friend.

Tallis saw real problems for the defence in her evidence:

- She left the impression that she was holding back and only pretending not to remember the most incriminating parts of her statement;
- Her repeated statements of having no memory were taken as untruthful, leading to the conclusion that the truth lay in the unadopted parts of her statement.

At the Inquiry John said, as she has said all through the years since the preliminary inquiry, that she simply could not remember giving the most incriminating parts of her statement to Mackie. She was on the stand for a long time but added nothing to the evidentiary record. She steadfastly denied that she had lied in giving statements to the police, but on the other hand she purports to have no memory of telling Mackie the most incriminating parts of her May 24th statement. I am in no position to assess, on the basis of her evidence, whether what she told him was true. That it was not, is a conclusion to be derived from acceptance of Milgaard's innocence.

We were unable to assess the circumstances of John's May 24th statement to Mackie because the polygraph operator Roberts is deceased and kept no notes, and secondly because former detective Mackie was a disappointing witness at the Inquiry. He had the potential to clear up much of the uncertainty surrounding the John statement which he took on May 24th but he claimed no memory of the circumstances. One might attribute this to his age and the considerable lapse of time since the event, but there is an added factor. As will be discussed at a later stage of the report dealing with the reopening, some of the police officers who testified have, in my view, become so hardened by criticism leveled at them over the years by the Milgaard supporters that they have grown contemptuous of the source of the criticism and are unwilling to be bothered cooperating any further.

(iii) Hypnosis and Psychiatric Testing

John submitted to hypnosis twice during the reopening effort. Reference to these occasions is made in this chapter to determine whether these sessions inform the original investigation or trial at all. The hypnosis sessions were arranged by the Federal Department of Justice in an effort to revive her memory and in connection with a Section 690 application by Milgaard.

The Commission received a videotape of the first session with Dr. Lee Pulos of Vancouver.[90] The conduct of this session was criticized by Dr. Campbell Perry later[91] and John does not believe she was hypnotized.

Nevertheless, I noted that toward the end of the session she suddenly became highly emotional, crying out to someone not to do it to her, saying he killed her, sobbing and crying.

90 Docid 054558.
91 Docid 031179.

The horror and pleading in her voice was stark and unless she was a superb actress, any reasonable person present, or anyone viewing the tape could conclude that she had seen someone being attacked (or believed that she had). Eugene Williams might have thought that. In his memo of October 24, 1991 to the Assistant Deputy Attorney General,[92] Williams concluded from Pulos that John had seen Milgaard stab Miller repeatedly, but that the memory was locked in her subconscious and he recommended therapy to free the memory.

Given the highly suggestive nature of Pulos' prompting throughout the session, it is not surprising that Williams remarked that her "sub-conscious indications are not evidence".[93]

In a further memo,[94] November 2, 1991, Williams sets out his concerns about John's fragmented memory of the events and recommended that she be assessed for post-traumatic stress disorder and that the Minister could then decide what weight to give to her 1969 statement which could not be received into evidence at trial.

Accordingly, she was assessed by Dr. Russel Fleming who reported to Williams on November 18, 1991.[95] He attempted to find out if John suffered from "an emotional or psychiatric disorder that might have affected her memory of certain events on an occasion more than 20 years ago, more specifically in the early morning hours of January 31, 1969".[96]

John could not remember the session with Fleming, but of more interest to us is what his report said and how Williams took it.

Fleming, in commenting on John's May 24, 1969 statement and her preliminary and trial evidence, observed that John did not, in court, attempt to alter her statements, but rather displayed a complete blockage of memory in regard to crucial parts of it. He remarked particularly on the insensitive treatment by the trial judge, saying that the possibility of a genuine loss of memory did not seem to occur to anyone. I have already noted that on my reading of the transcript, the intense, extensive, impatient interventions by Chief Justice Bence could seriously have affected the jury's assessment of John's credibility. In fact, the jury might well have concluded that John had no memory loss, and that she was simply holding back what she said on May 24th. It would be a very easy inference for the jurors to make that what she said on May 24th, therefore, was the truth.

Fleming reviewed alternative explanations for John's inability to recall, and chose as the most plausible that she "has repressed the memory of certain events for psychological reasons".[97] He explained why, and I am impressed by the force of his arguments. Williams, I am sure, would have been impressed.

John met with Dr. Martin Orne in Philadelphia on January 10, 1992, and the interview was video taped.[98] John appeared at ease in contrast to her session with Pulos. Orne took time to explain the technique of hypnotism and then went into the procedure.

The video tape was played at the Inquiry. During the session of hypnosis John engaged in small talk with the avuncular Orne and was persuaded to relax and to think back to her childhood. She recalled meeting

92 Docid 004424.
93 Docid 004424.
94 Docid 002764.
95 Docid 031224.
96 Docid 031224.
97 Docid 031224.
98 Docid 054556.

Milgaard in the park and remembered finding the cosmetic bag which she described in detail, in the glove box, looking in it and then David grabbing it and throwing it out the window. This would seem to be a reliable memory because Milgaard himself told his lawyer that he had done it.[99]

She spoke of flashbacks, one being of her getting out of the car, coming around the corner and seeing a man kneeling over someone who was face down, explaining "that's not real".[100] The man clad in a short corduroy jacket with a tan fur collar was stabbing a woman. She saw a church and felt herself running to get away. She recalled, with some detail what she was wearing, a purple jacket with a hood; knee length with white fur around the bottom and a big zipper in the front.

As the session ended, she behaved exactly like a person awakening from a sound sleep.

At the Inquiry, she remembered something of Orne but the tape did not assist her in recalling events. To the extent that later hypnosis helped to explain her purported loss of memory at trial, this evidence is relevant, but it cannot be taken as corroborative of anything she said at trial or to the police.

(g) Inquiry Evidence

At the Inquiry, John was shown Caldwell's statement[101] which has her saying before the preliminary words to the effect that "I saw it all. I don't know why he didn't kill me too – I'm not going to say nothing."[102] She could not recall having said this.

Although Caldwell did not regard the statement as admissible evidence, it provided a reason for her purported loss of memory. John says that she told the truth at both the preliminary and the trial under oath, and was not coerced or persuaded to do otherwise.

Portions of her evidence at the preliminary inquiry were read to her concerning knives; purse snatching; seeing a girl on the street; Milgaard and Wilson getting out of the car after getting stuck behind the funeral home. None of it refreshed her memory. She now recalls being in the car but not the part about Wilson and Milgaard getting back in. However, she says that she had a more detailed memory at the preliminary than she has today.

She has no memory of the Milgaard trial. Many parts of her testimony were put to her but did not refresh her memory.

She said that at the time she took drugs, including LSD, hash, and THC, perhaps twice a week, and she has sometimes had hallucinations. Given the lifestyle of these three young people, one wonders if any of them had a clear memory of what happened on the morning of January 31, 1969, particularly since they had been up driving all night.

John admitted giving the May 24, 1969 statement to Raymond Mackie at the police station. She says that she told him what to write and he did, but admitted in cross-examination that parts of the statement did not sound like something she would say.

She testified at the Inquiry that she would have been truthful in her statement to police and to the courts. That, I suppose, amounts to no more than saying that she was a truthful person at the time and cannot

99 See the evidence of Tallis (T23623-T25099).
100 T4582.
101 Docid 008818.
102 T4136.

recall any decision to lie. She told us that all she knows now is that she has a gut feeling that something happened,[103] and she told the RCMP that she probably saw the murder of Gail Miller.[104]

I found John to be a composed and alert witness who displayed no apparent reason for her lack of memory. She had no memory of the Eugene Williams interview, November 7, 1989,[105] but she says she would have answered truthfully. When he showed her her May 24, 1969 statement,[106] she said that there were very few things that she could recall, but that the statement would have been her best recollection, and she did not lie. The best evidence Williams had from her, therefore, incriminated Milgaard, but of course, it was a statement made 20 years before which she could not remember except for a few insignificant things. Her memory today is spotty.

Beyond being there, she had little memory of testifying before the Supreme Court of Canada. She accepted the accuracy of the transcript and said that she would have been truthful. At the Supreme Court she was able to recall being stuck at the approach to an alley, which she identified by a church at the end. Her conversation with hypnotist Orne was similar to her testimony in the Supreme Court of Canada, in that she spoke of being in an alley in a car with a church straight ahead; seeing garbage cans and hearing bells, and seeing a garage with big doors.[107]

In 1993, a year after being in the Supreme Court of Canada, John was interviewed by two RCMP officers, Cpl. Jim Templeton and Cst. John Dyck,[108] for more than two and a half hours. She told them, among other things, that she would not have allowed the police to coerce her.

She told the RCMP that the murder took place and that she was there, and she saw something.

She recalled no manipulation or physical or mental abuse.

Reminded of her statement outside the courtroom at the preliminary, “I don’t know why he didn’t kill me too, I was right there and saw it all, but I’m not saying nothing”, she said that although she could not remember it, it would have been something she would have said.[109]

She had no explanation why she remembered so little at the Inquiry as opposed to the RCMP interview in 1993. She agreed that possibly she was trying to forget. Unlike Wilson, John has never recanted or admitted to lying. She has displayed a progressive loss of memory, and a progressive sense of alienation for the case.

Of interest are the statements of John’s parents[110] taken by the RCMP in 1993, and that of John’s friend, Barbara Berard[111] taken in 1969. Apart from their description of an importunate Paul Henderson, which is of interest in evaluating his methods, Mary John[112] told the officers that her daughter Nichol had described

103	T4921-T4930.
104	T4854.
105	Docid 125206.
106	Docid 125195.
107	Docid 302469.
108	Docid 037972 and 022289.
109	Docid 022289 at 350.
110	Docid 064788.
111	Docid 023036.
112	Docid 064788 at 802 and following.

witnessing the stabbing of Gail Miller by a man. "… she was just one scared girl".[113] Later in the interview she recounted that her daughter at that time, in 1993, was still expressing fear of David Milgaard.[114]

The Berard statement was also taken by the RCMP in 1993. They were interested in what Berard had told Kenneth Walters and another policeman in Regina on May 29, 1969 to the effect that her friend Nichol John was disturbed about something, and started to make statements about what happened in Saskatoon but never completed them. But to the RCMP she related that John had in fact talked about the murder to her, at her parent's home in Regina, saying that she was afraid that David Milgaard would kill her if she ever said anything about them going to do a break-in, with David going to check out the house and coming back to the vehicle full of blood. "All…..all she said was he got back in the car full of blood and he said I killed her".[115]

These matters have more relevance to the reopening effort than they do to the events concerned with the investigation, but they are mentioned here because they shed some light upon what John said and did not say in 1969 about the murder. The reader is again reminded that the truth of what John is said to have reported to her parents and to Berard is not in issue, but rather the fact that what she said came to the attention of police and Crown officials, and was of interest to police both during the investigation and the reopening.

Barbara Berard, a person with a credibility problem arising from her drug history, testified at the Inquiry and told us that John was very upset upon her return from her trip, and told her that Milgaard had followed some girl in an alley and had blood on him when he returned. This discussion, she said, was before March 11, 1969. I note that she had not said as much to Saskatoon Police on May 22, 1969[116] when she told Raymond Mackie only that John was upset and would start to tell what happened but would not finish. Even that, however, would reasonably pique Mackie's interest, and cause him to make further efforts to get the full story from John.

Given John's highly incriminatory statement to police of May 24, 1969 which led to Milgaard being charged with murder, she was closely cross-examined at the Inquiry by Milgaard counsel, who sought to demonstrate that because what she says she saw could not be true, she must have been coerced by the police into saying it.

Challenged by counsel on the differences between her March 11th and May 24th statements, she said that the first one was general and the second was very detailed. Counsel would not accept this, however, saying that the difference was fundamental. Besides the issue of the stabbing, he suggested to her that the discussion about purse snatching, which she mentioned in her May 24th statement, became the Crown theory as the reason for the attack on Gail Miller. And the throwing out of the cosmetic bag by Milgaard was, said counsel, damning evidence told for the first time on May 24, 1969, after urging by police.

There is no doubt that there was great contrast between her May 24th statement and what she had told police in earlier interviews on March 11th and April 14th, when she said that Wilson and Milgaard were not apart from her long enough to have done the crime.

113 Docid 064788 at 805.
114 Docid 064788 at 816.
115 Docid 023036 at 039.
116 Docid 106676.

In the Supreme Court of Canada, Eddie Karst testified that he thought she was holding back on April 14th and therefore brought her to Saskatoon. But the Milgaard position is clear. Something happened between May 21st and May 24, 1969 which caused John to give her damning statement of May 24th. Mackie told the Fisher trial[117] that he did not tape the May 24th statement probably because the room had poor acoustics. Mackie told us that he did not tape any statements unless he was directed to do so. Whatever the reason, we are left to speculate on what caused the dramatic shift in John's evidence. Art Roberts gave an explanation, long after the fact, to the Supreme Court of Canada in 1992 to the effect that showing John the victim's bloody garments revived her memory. A finding of coercion by Roberts or Mackie cannot be made for lack of evidence. The result they achieved, however, namely the John statement of May 24, 1969 is incompatible with a premise of this Inquiry – Milgaard's factual innocence. One must infer that Roberts, convinced of Milgaard's guilt, persuaded John to give him a statement which supported his belief.

In Roberts' testimony before the Supreme Court of Canada it appeared that he was told that John and Wilson were thought to have helpful information, but thus far had given unhelpful statements. Roberts is dead, so we are denied the evidence of a crucial witness, but something can be learned from his testimony at the Supreme Court.[118]

One of the judges there asked why he had shown John the Miller dress. Roberts replied "I felt she didn't appreciate the seriousness of the case",[119] and he did not believe that she could not remember. From information received from the Saskatoon Police, he believed that both Wilson and John would try to lie. Showing a blood stained dress to a witness might be termed a shock tactic, but I do not see how it might affect the integrity of the response it provoked. Justice Sopinka, who asked about it in the Supreme Court, did not criticize the tactic.

John was asked if on May 24th she had described a murder which she had not seen. Her reply was "I don't know that".[120] However, she agreed that her statement described David Milgaard doing something she didn't see.[121]

Her attention was drawn to many points of agreement between her statement of May 24th and Wilson's of May 23rd and 24th.[122] The suggestion was that police pressure, first on Wilson and then on her, had resulted in similar statements.

On the other hand, she admitted that it was possible that she had not told police the whole truth at first.

As for the allegation that she was kept in cells in Saskatoon, she said that she was in the cell block for just a few minutes before moving to the matron's room.[123]

She agreed that it was fair to say that she had held back rather than lied in her first statement, and it was possible, she said, that she told Roberts that she had seen something including the death of Gail Miller.[124]

117	Docid 310021 at 181.
118	Docid 121840 at 930.
119	Docid 121840 at 930.
120	T5196.
121	T5196.
122	Docid 009264.
123	Docid 003049.
124	T5315 and Docid 018589.

Detective Raymond Mackie told us that the police believed they were not getting the full story from Wilson and John. I accept that that was their belief. He says that his report of April 30, 1969[125] shows that they were still checking for other suspects (in this case, Cherneske and Nugget), notwithstanding the focus on Milgaard. Mackie did not recall the meeting of May 16th. He remembers bringing John from Regina, driving her past the funeral home, her reaction of fear at seeing two garbage cans, and taking a suitcase with some clothes to the Cavalier Motel. But he cannot recall taking her statement on May 24th. So Mackie has forgotten two major breaks in the case, Cadrain's statement and John's statement of May 24, 1969.

In his testimony at the Fisher trial in 1999, Mackie clearly remembered taking John's statement and he says we can rely on his testimony.[126] Mackie said that he remembers John telling him in 1969 or 1970 about Milgaard raping her in a Regina park. He believed that she was terrified of him, and that she acted terrified when they pulled into the alley behind the funeral home. It was like she had been there before.

John's statement to police on May 24, 1969 was eye witness testimony implicating Milgaard in murder. It was not coerced from her, so far as Inquiry evidence reveals, but accepting Milgaard's innocence, the most incriminating parts of the statement could not be true. One can only conclude that she succumbed to pressure from Roberts to tell him what he thought was the truth. There is a clear distinction to be made between coercing evidence from a witness in the sense of compelling assent or belief, and using persuasive techniques such as repetitive questioning and suggestion. The former is apt to produce an involuntary statement which would be inadmissible, while the latter would affect only the weight to be given to the evidence.

The version of events Roberts got from her was not impossible and should not have been seen as such by the police, the Crown or the jury. Although she did not repeat the most incriminating parts of her statement at trial, the jury heard them read, and in the circumstances might have ignored the judge's warning not to take them for truth of contents.

7. David Milgaard

With Albert Cadrain's revelations of March 2, 1969, police found themselves with a suspect – David Milgaard. Karst was sent to Winnipeg to interview him,[127] meeting RCMP officer Edmondson there.

Commenting upon the initial interview, Karst said that he found Milgaard's answers to be too vague.[128] To Karst, he seemed smart and street wise; but he had doubts about some of the things he said, like not remembering being in Saskatoon on a certain day. The police warning was read to him, so he would have known that the interview concerned the Miller murder, and that he could be charged with it. But Milgaard, albeit not asked, did not deny his involvement. Karst found this significant.

Wilson's statement was being taken in Regina at the same time by Inspector J.A.B. Riddell.

When he interviewed Milgaard, Karst had Cadrain's statement and general information about the crime. Asked if he was in Saskatoon this year, Milgaard replied "Maybe". When? "I'm not sure".[129] Karst thought

125 Docid 106667.
126 Docid 311672 at 693 to 700.
127 Docid 009233 at 234.
128 Docid 006586 and 009233 at 234.
129 Docid 006586 and 305273.

he was being evasive. After all, the year was only two months gone so why would Milgaard not be sure if he had been in Saskatoon?

Milgaard's description of his own record concerned Karst as did his admission that he had gone to Saskatoon a month before in Wilson's car. And he could not recall the time of arrival. Asked why, his reply was, "Time doesn't mean anything" or "days, maybe years",[130] again, an evasive answer. The report from him that they had been stuck in an alley looking for Cadrain's, and a church seemed odd:

> Q. Why were you in an alley?
> A. I don't know, like to drive I guess.[131]

Also he said that the alley was around an apartment block. Karst realized that these landmarks were near the crime scene. And he said that they had no money. That is why they brought the girl. Asked if he had changed his clothes at Cadrain's he replied only after a long pause, as though he had to think about it. He said, maybe his pants, which had acid from the battery, and maybe his shirt.

Asked if he had blood on his clothes, he replied, "I don't know. I don't think so…"[132] Karst conceded that it was possible that Milgaard did not know. As to why he drove around the block, he said:

> A. Yeah, around up the lane – maybe twice.
> Q. If you were tired and got stuck in the lane already why did you go in the lane again?
> A. I like to drive, I guess.[133]

That was the same explanation he gave for being in an alley and getting stuck.

Karst was concerned that he might have taken the car to get rid of something, or to see if there were investigators around. Later on, articles were found near Cadrain's house (Gail Miller's wallet and the toque) which police might have connected to the statement about the excursion in the car.

What Milgaard said about psychiatric treatment gave Karst concern as well, especially the part about his tendency to make snap decisions. Karst recalls that what Milgaard told him warranted further inquiries but would not be enough to charge him. I agree and I find that Karst would have been remiss not to investigate further.

Milgaard's hotel room and person were searched, he was arrested and placed in custody, then released.

Milgaard told police on March 3, 1969, that he spoke to an "old woman" for directions.[134] Wilson and John said nothing about this at first. He:

- admitted to a record of "sexual immorality, trafficking, stolen cars, B & E's, escape lawful custody;"[135]
- could not explain why they were driving in an alley looking for St. Mary's Church;
- confessed to drug use;
- was not sure if the others left him at any time in Saskatoon; and

130 Docid 006586 and 305273.
131 Docid 305273 and 006586.
132 Docid 305273 and 006586.
133 Docid 305273 and 006586.
134 Docid 006586.
135 Docid 305273 and 006586.

- confessed to buying drugs; passing bad cheques; to having been under psychiatric care for a habit of making snap decisions.

Charles Short and Eddie Karst visited Joyce Milgaard and her husband Lorne on or before May 5, 1969,[136] to speak about David as a murder suspect. According to Joyce Milgaard, her husband, Lorne, groaned, thinking that one of David's bad companions was involved. Police reporting at the time stated, "Father of Milgaard made statement to the effect that he was not surprised and had suspected something like this might happen."[137]

The latter version is supported in an interview reported in the Saskatoon StarPhoenix on December 8, 1989. A retired officer (unnamed) is quoted on Lorne's reaction as follows, "He looked at us and he said 'Well, I figured it had to happen some time'. Coming from him, that made us all rest easier".[138]

The police would have thought, I conclude, that they were dealing with a young suspect whose own father was not surprised that he was involved in a murder investigation.

Karst's investigation report of March 7, 1969 contains his assessment of the situation. He lists the points of interest, which are many, and justified a continuing interest in Milgaard as a suspect. Of these, the most important was Milgaard's inability to account for a period of time which could have included the murder.

136 Docid 006799.
137 Docid 006799.
138 Docid 004819.

FORM #23
SUBJECT GAIL MILLER MURDER OCCURRENCE NUMBER 641 48

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

B110

NAME OF FIRM OR
PERSON CONCERNED _____ ADDRESS _____

DIVISION ASSIGNED TO: Detectives TIME _____ DATE March 7th /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
_____ ADULTS
_____ JUVENILES

FILED: _____

DATE: _____

On Sunday, March 2nd, at approx. noon, one Albert Henry CADRAIN, DOB August 19th, 1951, of 334 Ave. O South of this City attended at the Police Station and advised S/Sgt. BRADY and Lt. SHORT, that he felt he had information pertinent to the murder of Gail MILLER approx. one month ago in this City.

After interrogating this youth Lt. SHORT advised me to take a stateme from him with regards to this information which was done at approx. 12: PM, March 2nd, in which CADRAIN advised us of the following incidents which he felt were of a suspicious nature with regards to one David Edgar MILGAARD of Langenburg, Sask.

That on the morning of Jan. 31st, MILGAARD along with a few other pers Ronald WILSON of Regina, and Nicole? JOHN arrived at his home at appr 9:30 in the morning. CADRAIN states that the MILGAARD youth seemed extremely nervous and he noted that he also had blood on his trousers and shirt and consequently MILGAARD changed these garments while at his place on the morning of Jan. 31st. It should be noted that CADRAI referred to as "Shorty" did not pay particular interest to these inci at this time as he states he was not aware of the murder until arrivi back in Saskatoon approx. one month later.

He also states that while the three above mentioned persons were visit at his place on the morning of Jan. 31st, MILGAARD Left his house alo and drove around the block several times which did not appear to be the normal thing for a person to do, and a short time later when havi the car repaired at the local garage at Ave. P and 22nd St. that he seemed very nervous and in a hurry, and also that while leaving the Ci he did not stay on the main highway and drove in an erratic and extre ly fast rate of speed, and also that MILGAARD appeared to be under some sort of influence of drugs etc.

It was also a point of interest that the MILGAARD youth and his assoc es appeared to be out of money at this time as they requested CADRAIN go with them as they were advised that he did have a little money in the bank which he could withdraw.

CADRAIN further relates the story of going on to Calgary on the after noon of Jan. 31st, arriving there in the early hours of the morning ar then buying some drugs noted as "Weeds" and proceeding on to Edmonton and then on to a small town 8-10 miles north of Edmonton known as St. Albert, where some friends were visited and the evening spent in a mo these further statements becoming rather vague at this time, CADRAIN's reasoning for this is that they were at this time well under the in- fluence of the "Weeds".

He further relates that they then returned to Calgary and then on to Banff, and approx. one week later after leaving Saskatoon they arrived in Regina, where he states himself and the girl, Nicole JOHN are dropped off at a local coffee and hippie house on Cornwall St. in Reg

106617

FORM #23
SUBJECT [redacted] OCCURRENCE NUMBER 6[illegible] /68

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

B111

NAME OF FIRM OR
PERSON CONCERNED _____ ADDRESS _____

DIVISION ASSIGNED TO: _____ TIME _____ DATE _____ /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
_____ ADULTS
_____ JUVENILES

FILED: _____

DATE: _____

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and further stated that he had not seen any of these persons, the gir nor MILGAARD or WILSON since that date. He then advised that he was consequently arrested by the Regina Police Dept. on a Vag. charge and then worked for several days on a farm out of Regina and consequently returned to Saskatoon approx. a month after the murder arriving here by Bus. He further stated that although he had some mention made of murder in Regina, he did not pay particular attention to it and only after he returned to Saskatoon and had conversation with his family did he become suspicious of the actions etc. with regards to MILGAARD and consequently was advised by his parents to attend at the Police Station and advises of same which he did.

Consequently on the afternoon of March 2nd, further inquiries were ma by myself and Lt. SHORT with regards to CADRAIN's stories and various parts of his conversation checked out with regards to MILGAARD's acti his nervousness with service Station attendents where the car was fi two tow truck drivers which he had been in conversation with, also the fact that CADRAIN was in custody in Regina, etc. etc. and it was felt that CADRAIN's information warranted further investigation.

Lt. SHORT advised the Chief of this information, consequently this Dept. was in touch with Insp. RIDDELL of the RCMP Detachment Regina, and through those efforts it was revealed that MILGAARD was presently staying at a Motel in Winnipeg, Man. It was then decided that a memb of this Dept. should attend in Winnipeg and interview this suspected MILGAARD.

On the morning of March 3rd, I attended at the Von Street Boys Correc ional Institute in Winnipeg where David Edgar MILGAARD, 16 years of age, DOB July 17th;, 1952, home address Langenburg, Sask. was being held on a suspicion of murder charge having been detained there by a member of the Mounted Police, one Cst. Charles COPPANG of the CIS Se that Division.

MILGAARD was transported to the Mounted Police Barracks where he was interviewed at length by myself and other members of the Mounted Pol along with S/Sgt. Stan EDMUNSON of Saskatoon who was attending in Winnipeg at the same time, and after a lengthy interrogation and stat ments taken from this youth, it was decided that there were many po for which his answers were too vague to be actually authentic.

MILGAARD's body was checked with regards to the physical marks, alth old scratches etc. were noted on his hands and on the back of his ne it was nothing that could be connected with any recent struggle. It should also be noted at this time that during the day of March 3rd, attended at Room #3 & #4 which was being used by MILGAARD at the Boul Motel in Winnipeg, the premises thoroughly searched, also his luggag clothing, etc. checked, however nothing was noted which would be of

106618

FORM #24
SUBJECT [redacted] OCCU[redacted]NCE NUMBER [illegible] /68

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

B112

NAME OF FIRM OR
PERSON CONCERNED _____ ADDRESS _____

DIVISION ASSIGNED TO: _____ TIME _____ DATE _____ /68

FURTHER INVESTIGATION _____

PROSECUTION ENTERED _____

SUBJECTS INVOLVED
OR PROSECUTED:
_____ ADULTS
_____ JUVENILES

FILED: _____

DATE: _____

- 3 -

any assistance in this investigation, however it was noted that all h shirts, etc trousers, etc. had been drycleaned and still had dryclean tags of Perths Drycleaning Business in Winnipeg where he stated all o his clothes had been drycleaned recently as they had become soiled, however as noted ~~in~~ and covered in the statement he does not know what happened to this particular clothing which he had changed at the CADRA residence on the morning of the murder, stating that he may have thro them in the suitcase or he may have thrown them out of the car or lef them in a Hotel room or in fact stated he didn't know what had become of them.

Through investigation and statements taken from MILGAARD there were several points of interest noted.

1. That his arrival time in Saskatoon coicided with the time of the Murder.
2. He can be placed in the vicinity of the Murder due to his own admission AND THAT of CADRIANS.
3. And we know he was travelling in the lanes having been ~~told~~ towed from s by tow trucks which we have information and statements with reg t o.
4. Also that MILGAARD attended at the CADRAIN residence and also th his own admission was in an excited condition and although he de this, CADRAIN stated that he had blood on his clothing, this clot not to be found or located at this time.
5. Also that from Insp. RIDELL's conversation with the other youth involved, Ronald WILSON in Regina, stating that certainly MILGAA was excited giving the reason as his girl friend having ditched for one of the other youths when in fact it is found through MILGAARD's statement that he was a little excited and in a hurry due to the fact that he was going to see his girl freind in St. Albert, Alta., this girl friend being Sharon WILLIAMS, he giving address as #54 Gillian Cres. St. Albert.
6. That we know these persons were under the effect of drugs throug their own admission,
7. Also that these persons were in financial trouble.
8. Also to be taken into consideration is the record and type of offences which MILGAARD has a record, this being covered in the statements taken from him.
9. There is also some indication from one of the Service Station att ants that while the vehicle was being fixed at the Garage at Ave. and 22nd St. that MILGAARD made various attempts to clean the a out.
10. And one of the most important factors to be kept in mind is the element involved, as there is no accounting for the time which t arrived in the City, which is approx. 5:00 or 5:30 by their own testimony and statements and we cannot account for any of their actions until approx. 20 minutes to 8:00 when they were stuck i

106619

FORM #23
SUBJECT _____ OCCURRENCE NUMBER 641 /68

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

B113

NAME OF FIRM OR
PERSON CONCERNED _____ ADDRESS _____

DIVISION ASSIGNED TO: _____ TIME _____ DATE _____ /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
_____ ADULTS
_____ JUVENILES

FILED: _____

DATE: _____

- 4 -

a lane in the 100 Blk. off of south of 22nd St. between Ave. T and U. This portion being covered by a further statement from Wally DANCHUK of 129 Ave. P South who had also observed these persons that morning.

Intensive interrogation and questioning of MILGAARD by myself and S/Sgt EDMUNSON reveal that he does not account for this period of time and states he just doesn't remember other than probably driving around looking for his friend "Shorty's" residence. It was also noted that Insp. RIDDELL had the same results with regards to the time element wh questioning the WILSON youth in Regina.

I might also add that a peculiarity of MILGAARD noted was that upon my arrival in Winnipeg and the questioning of him on the early morni of March 3rd, he did not appear nervous or in a tense condition as would be anticipated of a 16 year old youth being held on a suspicio of murder charge, being held several hours in anticipation of what m be coming, he made no mention of obtaining legal aid, which in the us custom when dealing with youths with a record of his type.

Also noted that MILGAARD has in fact received psychiatric treatment during the past years from the Psychiatric Centre in Yorkton, Sask. his doctor being at that time Dr. ANDRES. This portion being admitt by MILGAARD, however not checked out.

It was also noted that although MILGAARD's clothing has not been loc he states than when attending at the Trav-a-leer Motel in the early morning of Jan. 31st, in regards to obtaining a map for directions, he recalls his crotch being completely ripped out of his trousers. It was also noted that MILGAARD's reason for driving in the lanes while in this City on the morning in question his explanation for being in t lanes was that he was looking for his friend's residence and for St. Mary's Cathedral as he would be able to get directions from this, ho ever it is felt that anyone being lost and not knowing directions wo hesitate to drive in the alleys to get bearings.

It was noted that Insp. RIDDELL cheded out the WILSON vehicle which was located in Regina and found nothing that would indicate that it was involved in the Murder in the same, however it was also noted th the suitcase mentioned nor the articles of clothing were located in same, nor has the girl beein located or interviewed, Namely Nickole which may be of some value with regards to interrogation and furthe information with regards to this suspect MILGAARD. 106620

My personal feelings after interrogating this youth and after being in conversation with Sgt. EDMUNSON is that he could be responsible for an offence of this type and there are many areas which I think should be cleared up further with regards to time element and discr

Occ. #2
SUBJECT [redacted] OCCURRENCE NUMBER [redacted] /68

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

B114

NAME OF FIRM OR
PERSON CONCERNED _____ ADDRESS _____

DIVISION ASSIGNED TO: _____ TIME _____ DATE _____ /68

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED
OR PROSECUTED:
_____ ADULTS
_____ JUVENILES

FILED: _____

DATE: _____

- 5 -

Further detailed accounts of the conversation with MILGAARD with rega to his employment, typ e of person, type of answers received when questioning him and his general attitude are noted through the state taken from him which is attached to this file.

After a further conversation with Insp. RIDDELL I was advised that t MILGAARD youth should be released at that time due to insufficient evidence obtained with with which to lay a charge, consequently on the evening of March 3, the suspect was released to the Boulevard Motel.

As a point of interest it is noted that the CADRAIN youth was again interrogated and a further statement taken however he stuck close to his original story . He insists the marks on MILGAARD's pants and shirt were blood and that MILGAARD stated at the htime that he had blood on his clothes, however when interrogating the suspect he deni any knowledge of this blood on his clothing.

E. KARST, Det.

fz

106621

I find that Milgaard, despite his youth, was viewed by police as a suspicious character. In fact, Short regarded him as dangerous, an assessment which I regard as honestly arrived at, although it has always been hotly disputed by the Milgaard group.

Dr. Ian McDonald, psychiatrist and former dean of Medicine at the University of Saskatchewan practiced clinical and forensic psychiatry in 1969. He was called upon to give an opinion on Milgaard's fitness to stand trial, and met him at the police station on June 2, 1969.[139] He evaluated him as not psychotic, but with a history suggestive of a behavior disorder, at least. He was fit to stand trial as of that date. McDonald was surprised to find that Milgaard had needed psychological help at the age of five or six.

A behavioral disorder of the kind diagnosed affects people other than the patient. His anti-social personality leads to unreliability, family, spousal and legal problems. There is an inability to form sustaining relationships, and lack of concern for the future.

At the Inquiry McDonald recalled T.D.R. Caldwell, much later, requesting a diagnostic label for Milgaard for Parole Board purposes.[140] He gave him one: a sociopathic personality; a severe behavioral disorder. At that time, in 1972, he had collateral sources of information which were lacking in 1969, and these sources confirmed his clinical impression made at first instance.

But in laying out his limited involvement, he intended to warn that a single interview might not have been enough. The reader would have to give it appropriate weight.

He was struck by the early onset of Milgaard's problems, which indicated a lifelong challenge. He remains comfortable with the opinion he expressed in 1972.

In 1968 and 1969, David Milgaard has been portrayed by his mother and others as being a teenager who had given up an aimless lifestyle and was working steadily in direct sales. That was not the information the police had. Sharon Williams had painted a highly uncomplimentary picture of him.[141] The Saskatoon Police, in March of 1969, were told of his brushes with the law in Vancouver in 1967 and 1968,[142] including being picked up on suspicion of auto theft and robbery. Probation for possession of marijuana included banishment from British Columbia.

Calvin Tallis foresaw problems in putting Milgaard on the stand. Just as his client's character had heightened police interest in him as a suspect, the jury could have been adversely influenced had Milgaard put his character in issue while testifying.

8. Other Witnesses

We have discussed police dealings with the accused and his companions, Wilson, Cadrain and John, who had the potential for offering the best evidence in the case. I turn next to their dealings with other witnesses and what they learned from them.

In March of 1969, police interviewed Milgaard's girlfriend, Sharon Williams,[143] in St. Albert, Alberta. Her description of Milgaard gave police reason to think that he was a person of bad character. What they

139 Docid 006764.
140 Docid 000753.
141 Docid 178577.
142 Docid 097376.
143 T3751-T3893.

heard, I find, affected the course of the investigation to the extent that Milgaard was perceived to have been at least capable of being involved in the crime.

We heard from Williams, who testified that she was Milgaard's girlfriend in 1968 and 1969, and that she ran away with him a few times. In February 1969, he came to see her in St. Albert, along with Wilson, Cadrain, and John. She spent one night with Milgaard after which he and his companions left.

She has no memory of giving police a statement on March 20, 1969, but acknowledged her signature. She was led through this and later statements in an effort to refresh her memory. Although she said that some things in the statement were accurate, she professed no memory of others.

She was interviewed by Pearson of the RCMP[144] in 1991 and this she recalls. He asked her if she remembered the police interview in 1969 and she said that she did not.

Jim Templeton and John Dyck of the RCMP again interviewed her on April 16, 1993[145] and she remembered this as well. Again she was asked if the 1969 statement was true at the time, and she said that it was.

In 1969, John Malanowich was head of the Youth Division. He took Sharon Williams' statement[146] as described in his notebook[147] and report[148] of March 22, 1969. He was sent to St. Albert, Alberta for the purpose, meeting first with Wood, Short and Mackie, to discuss the murder file.

What he was looking for was an account of Williams' activities with Milgaard, and her feelings about him. He found her to be very cooperative. Her mother sat in the next room as he took the statement, with two Edmonton police officers present, one male and one female. I am satisfied that the 14 page statement was taken in appropriate circumstances, and that it accurately reflects what she said. He found her to be intelligent.

There was, I find, no reason to disbelieve her at the time. To Malanowich she was describing Milgaard as a young person out of control, buying and selling drugs; sexually assaulting her and giving her drugs to carry so that she, and not he, would be charged if caught – the kind of person who did not care for anyone. According to her, he had a bad temper, punched her; and she saw him committing a break-in.

The report records her as telling him that she thought Milgaard capable of murder. It is not in her statement, so she probably said this later, according to Malanowich who formed the opinion that Milgaard possibly committed the murder.

Short concluded in his report of March 22, 1969,[149] that the Malanowich report showed that Williams and John both thought that Milgaard was dangerous. That was significant to Malanowich and, I conclude, would be significant to other investigators as well.

I find that in 1969 police had reason to suspect Milgaard of being a person capable of violent crimes, although his record shows no related convictions for it.

144 Docid 008731.
145 Docid 037204.
146 Docid 006500 and 178577.
147 Docid 324652.
148 Docid 009245.
149 Docid 106640.

Art Roberts of the Calgary Police interviewed Sharon Williams June 11, 1969 with the polygraph.[150] She told him that Milgaard said "I tried to make a girl in Saskatoon"[151] another piece of information that would be important to police, according to Malanowich. He had the impression, as he told the RCMP in 1993[152] that she was terrified of Milgaard, and was holding back information – a suspect worth following.

The Saskatoon Police, once alerted on March 2, 1969 to Milgaard's possible involvement, did not focus on him exclusively. According to Penkala 38 people were checked between that time and May of 1969.

The timing of events was of great interest to investigators, to the trial, and to this Inquiry. Timing, it was suggested at trial, did not allow Milgaard the opportunity to have committed the crime. At the Inquiry it was argued that the theory of the Crown at trial was impossible for lack of opportunity and should have been recognized as such by police and the Crown. Thus both the investigation and the prosecution were flawed, and the impossibility referred to should have been apparent to investigators ever since, so that the case should have been reopened earlier than it was.

Motel keeper Robert Rasmussen told police that a young man in stocking feet stopped at his motel around 7:00 a.m. asking for a map.[153] At the preliminary, he set the time as shortly after 7:00 a.m. and in cross-examination said that it was between 7:00 a.m. and 7:30 a.m.[154] At trial he said shortly after 7:00 a.m.

Walter Danchuk and his wife Sandra gave evidence for the Inquiry from Nanaimo. It was video taped and played at the Inquiry.

Sandra Danchuk described her husband backing their car into the alley at 7:15 a.m., and being stuck in front of the Wilson car, whose occupants then came into her house.

Walter Danchuk had no independent memory of events but confirmed his March 5, 1969 statement to police.[155] At trial he testified that he backed onto the lane at 7:30 a.m. or 7:40 a.m. This is to be contrasted with the evidence of his wife who said that it was at approximately 7:15 a.m., and it illustrates the fact that witnesses' estimates of time are typically not precise.

The evidence was (William Campbell, Gary McQuhae, Walter Danchuk) that Wilson's car was not restarted in the alley until sometime between 9:00 a.m. and 9:30 a.m., so it follows that he, along with Milgaard and John, did not arrive at the Cadrain house until after discovery of Miller's body. The jury would thus have heard evidence, unchanged to this day, that David Milgaard was in the company of the Danchuks from about 7:15 a.m. or 7:30 a.m. until after the body was discovered around 8:30 a.m.

The judge in his charge to the jury fixed the window of opportunity for commission of the crime to the period 6:45 a.m. to 7:10 a.m.

Jurors are not bound by the judge's assessment of the facts, nor that of counsel, but the issue of timing was squarely before them.

150	Docid 009302.
151	Docid 009302.
152	Docid 034820.
153	Docid 045589.
154	Docid 007468.
155	Docid 006550.

9. Physical and Forensic Evidence

This subject has been discussed at some length in previous chapters, but it is necessary to return to the serological aspect because in the reopening effort the Milgaards were to allege that serological evidence proved David's innocence.

(a) The Investigation of David Milgaard

(i) Serological Evidence

Investigators assumed that Gail Miller's attacker had deposited the semen found in the snow, and that his serological profile was blood type A and a secretor. In mid-April of 1969 they obtained blood and saliva samples from Milgaard for comparison.

By Lab Report dated April 23, 1969, Bruce Paynter confirmed that Milgaard was blood type A. His examination had failed to detect the presence of A antigens, however, leading to the conclusion that Milgaard was a non-secretor. Consequently, the investigators were confronted with an inconsistency between Milgaard's serology, and the serological profile of the assailant. The inconsistency led one investigator, Edwin Rasmussen of the RCMP, to state as follows in his May 7, 1969 report:

> Milgaard was found to be of Group "A" however, is not a secretor and has also been eliminated as a possible suspect.[156]

Milgaard's potential involvement was not dismissed entirely, however. As other investigative leads failed to bear fruit, and attention refocused on Milgaard, efforts were engaged to reconcile the serological inconsistency. The intent was to determine whether Milgaard might have been the donor of the semen found at the scene notwithstanding that his serology was suggesting otherwise.

The original semen sample and the saliva samples were resubmitted to Paynter for confirmatory testing by correspondence dated June 2, 1969. By letter dated June 3, 1969, Penkala also forwarded a pair of white undershorts that had been obtained from Milgaard. Penkala asked that the shorts be examined for semen staining and, if present, that further testing be conducted in an attempt to detect the presence of antigens.

In his testimony at the Inquiry, Paynter could not recall the specifics of the resubmission but speculated that he was likely aware that the police had identified a suspect who did not fit their serological profile.

Joseph Penkala had previously consulted with Dr. Harry Emson on this same topic. Emson offered his own thoughts on the discrepancy by letter dated June 2, 1969. He speculated that the semen sample which tested positive for human semen contained A antigens only because of the disruption of cells caused by the freezing and thawing of the semen samples. He also offered that a person might have an anomaly of secretion such that they would secrete their antigens in one bodily substance, but not in another. Emson further suggested that a department more knowledgeable in the area might be contacted for advice. Paynter had no recollection of considering these alternatives.

Paynter did, however, retest the original sample of semen for the presence of whole blood. He told the Inquiry that he could not recall who had suggested this test but explained that the idea would have been conceived in an attempt to determine whether there was an alternative explanation for the presence of

156 Docid 250597.

A antigens in the sample. Paynter explained that if he could detect the presence of whole blood in the sample, the presence of A antigens could be attributed to this fact alone, thus accommodating the notion that the sample originated from a non-secretor such as Milgaard.

Paynter conducted a blood screening test on the semen sample as explained during his Inquiry testimony:

> A. That is a screening test that we used on suspect stains or suspect samples of – or exhibits where we suspected the stain or whatever may contain blood. It is a, we refer to as a presumptive test, much the same for blood as the acid phosphatase would be considered for seminal fluid. Okay. It did not identify something as being positively blood but it was a very good indication that blood was present. In this case, that gave a positive test, indicating a strong possibility to me that blood was present in that sample of liquid.
>
> Q. And what was the name of that test?
>
> A. That test was a very simple screening test we obtained from a commercial source, plastic strips with an embedded chemical on the end, these were referred to as hemostix and these would be used – the prime purposes was for hospital laboratories where they would check urine samples for the presence of blood. For them, that was good enough, it would indicate blood to them. We did not consider it a positive, completely positive confirmation test, but a strong indication that blood was present.[157]

Paynter obtained a positive reaction when he applied the hemostix test which suggested that blood might be present. However, there was insufficient sample to confirm the actual presence of blood by further testing means. This feature would become a point of discussion during Milgaard's trial. Paynter set out his findings in a lab report dated August 12, 1969.

With respect to the saliva samples that had been resubmitted, Paynter explained at the Inquiry that although his August 12, 1969 report indicated that the samples were not re-examined, his notes confirm that he did retest the specimens to confirm the presence of saliva. He did not, however, retest the saliva samples for the presence of antigens as Penkala had requested, explaining at the Inquiry that he would have trusted the original test results in this respect. He also confirmed that he did not suggest that a further saliva sample be obtained from Milgaard.

It is apparent that Paynter was confident in the results of his initial tests which had indicated that Milgaard was a non-secretor. The conclusion was proven incorrect in later years when it was discovered through proper testing techniques that Milgaard had always been a secretor. The Inquiry learned that the saliva samples were originally obtained and stored improperly, compromising the integrity of the sample such that the A antigens were destroyed, producing a negative result. At the Inquiry, Paynter acknowledged the fault in the original method.

Paynter's August 12, 1969 report also confirmed the presence of human seminal fluid on the men's undershorts which had been submitted. He did not, however, test the staining for the presence of A antigens as requested by Penkala because the undershorts were soiled, giving a high potential for contamination, and a general inability to obtain confirmatory results.

157 T11076-T11077.

(ii) Gail Miller's Wallet and The Bloody Toque

In an investigation report dated April 4, 1969, Raymond Mackie reported that he had obtained a leather folding wallet that had been found by two children. The report indicates that the children had found the wallet in the snow in front of one of the homes down the street from the Cadrain residence. In checking the snow in the location again, Mackie reported that he located two hospital cards bearing Gail Miller's name.

The Inquiry heard from both of the witnesses originally involved in the discovery of the wallet. One of the witnesses, Norman Remenda, who was the older child in 1969 but did not testify at Milgaard's trial, explained that the wallet was not found at the location identified by the other child witness at trial, but was instead found in a location further from the Cadrain home.

It is likely that little would have turned on this difference if Remenda's version had been presented at trial as the location in either instance was consistent with the suggestion that Milgaard had discarded the wallet during a drive around the block of the Cadrain home. The Inquiry did receive evidence that seemed to confirm that Mackie chose to rely upon the younger witness, Giles Beauchamp, for information.

In an Investigation Report dated July 2, 1969, Eddie Karst reported that he had retrieved a blood stained toque from Helen Gerse who lived in the house adjacent to the Cadrain home. The report confirmed that Gerse had located the toque on the boulevard at the front of her house and had noted that the toque appeared to be covered in a red substance. She had retrieved the toque at the time and removed it to the rear of her yard where it was taken on April 5, 1969 by Karst.

The wallet and the toque took on greater significance for the investigators once Milgaard was identified as a suspect, because of their proximity to the Cadrain residence. The location of the items fit with the theory that Milgaard had discarded them on his drive around the block after the group had arrived at the Cadrain's.

By letter dated April 21, 1969,[158] both the wallet and the toque were sent to the RCMP CDL; the toque to be examined for the presence of human blood and, if located, to establish the blood group, and the wallet to be examined by x-ray for fingerprints. By lab report dated April 23, 1969,[159] Bruce Paynter reported that human blood was located on the toque but that the blood was of an indeterminate group. Staff Sgt. Shane Kirby found no fingerprints on the wallet as noted in his April 29, 1969 lab report.[160]

(b) David Milgaard's Trial

Most of the relevant physical and biological evidence was entered at the preliminary hearing and trial without dispute. The main issue arising from the forensic evidence again related to the frozen semen that had been gathered by Joseph Penkala on February 4, 1969.

(i) The Serological Inconsistency

Milgaard's serological profile, although erroneous, was not apparently in dispute at trial. The Crown and the defence proceeded on the basis that Milgaard was blood type A and a non-secretor. As earlier indicated, it was determined in 1992 that Milgaard was a secretor.

158 Docid 324683.
159 Docid 324690.
160 Docid 324688.

Similarly, no one apparently disputed the conclusion that A antigens were present in the frozen semen sample. The jury was advised that the presence of A antigens strongly suggested that the donor was a secretor. Accordingly, the evidence was exculpatory.

Calvin Tallis understood the importance of this evidence. He testified at the Inquiry that he was confident that the serological evidence tended to exonerate his client. He believed that Caldwell understood the evidence in that way also.

In an attempt to overcome the thrust of this evidence, Caldwell advanced the theory that the A antigens in the frozen sample might be accounted for by the presence of whole blood from Milgaard. In other words, the A antigens would be present because they are a constituent of type A blood, not because the donor was a secretor.

This theory was assisted by the evidence of Emson who testified that it was common for young men to suffer from a condition (disease, infection or injury) which would cause them to bleed into their semen. Tallis cross-examined Emson who remained steadfast in his assertions. Tallis noted at the Inquiry that his own medical advisors tended to agree with Emson's assessment, so he was not equipped to seriously challenge this evidence.

In later years, Emson acknowledged that his testimony on this point was inaccurate, and that it was not common to find blood in semen samples in young men, or even older men. He again acknowledged this error at the Inquiry. It is impossible to determine what influence this erroneous testimony may have had on the jury. All parties agreed at the Inquiry that the serological evidence, although based upon the inaccurate conclusion that Milgaard was a secretor, strongly suggested that Milgaard was not the assailant. As noted below, the prosecution succeeded in establishing that there was still a possibility that Milgaard was the donor of the semen, notwithstanding the inconsistency, however slight.

Paynter testified at trial that he had conducted a particular test on the vial of semen which suggested the presence of blood. He explained, however, that there was no way to confirm the presence of blood and that there were other substances that might have provided the same results.

This uncertainty at trial on the issue of the presence of blood in the semen led Justice Bence to intervene during the prosecutor's questioning of Paynter. Bence initially confirmed his view that there was no evidence that blood was present in the semen, advising that he would not allow Caldwell to ask questions based upon this presumption. Beginning at page 950 of the trial transcript, the following exchange took place:

> Q. Now, when you on the second occasion tested the contents for the presence of blood as such, what result did you obtain?
>
> A. I obtained a positive result for blood with this test.
>
> Q. And is that the extent of what your finding showed you?
>
> A. Yes sir; there was insufficient blood in this sample – or coloring in this sample that I was able to attempt any confirmation tests to absolutely prove that there was blood present.
>
> THE COURT:
>
> Q. It turned out to be useless then, didn't it?

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

MR. CALDWELL

Q. As as I understand you, Staff, this would be a matter of the quantity you had to work with?

A. That is correct, sir.

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

MR. TALLIS: My Lord, my learned friend is using the question quantity of blood and with the utmost deference …

THE COURT: … there is no evidence whatsoever of blood.

MR. TALLIS: . . and I think accordingly the question should be framed differently.

…

THE COURT: Well there is no proof of any blood.

MR. CALDWELL I understand that and I can rephrase my question.

THE COURT: Yes –– go ahead.

MR. CALDWELL: This was in effect – well, I won't pursue that, My Lord – Alright now, if indeed there was blood as such – I'm asking about this time – in the sample at the time you checked for blood as such . .

THE COURT: … excuse me but there was no blood.

MR. CALDWELL: Well, My Lord …

THE COURT: … you just can't ask hypothetical questions like that unless you're prepared to prove that there was blood there. If you can't prove that there was blood there through some witness or other I won't allow you to pursue it.[161]

The exchange continued, however, leading Bence to the conclusion that there was no way to say with certainty whether the donor of the semen was a secretor. The following exchange at page 953 of the trial transcript is noted:

Q. If the result you got as I understand you was caused by any of those causes what can you say about the effect of this second or latter test, Staff, on the result you got in your first test?

A. If this test was caused as a result of blood in the liquid this would eliminate the necessity of the antigens being produced by a secretor that I found in the first test, because the antigens could be there as a result of blood being in the liquid.

161 Docid 041925.

THE COURT:

Q. So if it was blood the person might not have been a secretor?

A. That is correct; he would not necessarily be a secretor if it was blood that caused this positive test that I obtained.[162]

Bence similarly intervened during the cross-examination of Paynter by Tallis again highlighting the possibility that the donor of the semen might have been a non-secretor. At the Inquiry, Tallis noted that Bence's remarks in this regard diminished the progress he had otherwise made in demonstrating that the serological evidence was clearly exculpatory.

In the end, although Bence correctly established for the jury's benefit that there was no evidence of the presence of blood, the jury was still left with the possibility that the semen might have come from a non-secretor, such as Milgaard.

In his closing, Caldwell reviewed the physical and forensic evidence. On the issue of the semen sample found by Penkala on February 4, 1969, he said:

> You remember that the spermatozoa in the body was blood stained and Staff Sergeant Paynter found "A" antigens in the vial which contained the lump and he tested, later, the same sample for the presence of human blood and got a reaction indicating the presence of human blood and got a reaction indicating the presence of either blood or those two other extracts he mentioned, mainly leafy vegetables or leather, and that his evidence was finally to the effect that he could not say definitely if the person whose seminal fluid he examined was a secretor or not a secretor.
>
> The evidence of Dr. Emson, as I said, was that the spermatozoa in the body was blood stained and that there are a number of ways in which blood can get into the spermatozoa within the male person and all of this, I submit, while it does not have the effect of identifying Milgaard alone as the source of that spermatozoa, certainly had the effect of not eliminating him either, and that is the effect I ask you to give it. I am not saying it could only be him, I am saying that it certainly has the effect of not eliminating him, he is one of thousands.
>
> Now the reason for that is that, of course, the spermatozoa found frozen came from a person with type "A" blood, that is established. That includes the accused and, of course, it includes many thousands of other people, but it certainly doesn't eliminate him as the possible source of that spermatozoa, it is consistent with being his. I ask you to remember now that he does not have to be a secretor to get "A" antigens in to his spermatozoa if the antigens are found there as a result of whole blood being in his spermatozoa for the kinds of reasons that Dr. Emson mentioned. It could have got there from secreting – because the person was a secretor, but "A" antigens are a consistent constituent of "A" blood and could be found there for the reason that whole blood was there.
>
> Now the other thing I ask you to remember about that is that the "A" antigens in that frozen lump could not have been put there in any way, shape or form from the blood of Gail Miller or from the blood of Ron Wilson. You know what their blood is: Gail Miller's is "O"; Wilson's

162 Docid 041925.

> is B. It must have been from a type "A" person, and type "A" persons include the accused. So I leave that phase of the matter by stressing again that while this part of the evidence does not, of itself, identify the accused, it most certainly does not eliminate him.

Issue might be taken with some of Caldwell's remarks. He clearly attempted to draw a connection between the blood stained vaginal aspirate (which was no longer available) and the idea that blood was present in the frozen semen sample, using the former to corroborate the latter. He then moved quickly in his submissions to a discussion of how blood might get into semen for the reasons Emson outlined.

In reality, there was no connection to be drawn between the "reddish" coloured aspirate and the presumptive test for blood in the semen sample, at least in the manner that Caldwell was advocating. If there was blood in the aspirate, the obvious source was Gail Miller. Again, there was no proof that blood was present in the frozen semen in any event.

Caldwell also might have left the erroneous impression in the last paragraph quoted above that if there was blood present in the semen sample that it could not have come from Gail Miller. He perhaps unintentionally confused the question of the presence of blood with the presence of A antigens in this respect which lead to his comments. Paynter confirmed during his testimony at the Inquiry that the positive blood test could have resulted from the presence of any blood, including Gail Miller's blood, notwithstanding the presence of A antigens. Tallis was alive to this concept as well and dealt with it appropriately in his closing. In other words, the evidence was consistent with the donor of the semen being an A secretor and any blood present coming from Gail Miller.

Tallis emphasized the exculpatory nature of the serological evidence during his address to the jury: [As noted earlier, Tallis' address to the jury was transcribed in 1992 from shorthand notes and there are gaps in the transcription.]

> Now in the area of the seminal fluid, I have one or two observations to make. First of all, this is no criticism of Dr. Emson, but I think it is unfortunate that the sample that was from the vaginal cavity was not saved, because if it had been saved it is quite clear from his evidence that the blood could have been analyzed for grouping. Now much is said … this really is of no significance. Now members of the jury there is no suggestion that other than a non-secretor – and the possibility of secreting the blood factor in his seminal fluid is great – … the effect of that evidence that the seminal fluid contained what are called "A" antigens. Now this may be, and I suggest is something that you should consider pretty carefully, and as you see, if in fact the donor of that seminal fluid was an "A" group secretor, and there was no blood, as such, in the seminal fluid from that person with that "A" grouping, it cannot have been, the man could not have been the …
>
> Now it is suggested that the traces of blood that Sergeant Paynter found – that might have been blood – now frankly I am not here to argue that there was … at that time of year and I am not … anything to suggest that there is … out in that alley at that time, but what I say to you, members of the jury, is this: when you get down to the question of reasonableness, first of all, Dr. Emson points out that the blood in the seminal fluid in the vagina that he threw away – spermatozoa – could well have come from Miss Miller's "O" group. It could have come from her in two ways: from the inflammation that was referred to, or from the possible onset of menstruation; or from the donor. And then let's examine another point in this connection, when that frozen lump was found out in that area that had been … up, may I suggest to you that if there was blood in this sample, as he thought there

> might be, he could not say that for sure, but let's forget what … for the moment and be reasonable about this. Is it not more likely that since he scooped up the area to get the patch where the blood had seeped through, that it was some other blood in the snow? Is this reasonable? I suggest not. And as you see, if the blood that got into that seminal fluid was "O" group, and the donor didn't have any secreted blood in his seminal fluid, then of course, the result would have proved it. There is no suggestion in respect of the sample that that was done.
>
> There is no evidence that David is a person who is afflicted with any condition which caused blood to be in his seminal fluid, and I suggest to you that these other matters that I raised with you are more probable than the possibilities that have been urged upon you.[163]

Bence did not address the forensic evidence surrounding the semen sample and secretor issues during his charge to the jury.

(ii) Gail Miller's Wallet and the Bloody Toque

As mentioned, most of the physical evidence was entered as exhibits at trial with little dispute. Other evidence, including the small bone handled knife found on the fence adjacent to the crime scene was determined by, both the prosecution and defence, to be irrelevant and thus was not tendered at all.

The Crown did, however, ask the jury to draw certain inferences surrounding the bloody toque found by Gerse, and Gail Miller's wallet.

The evidence at trial was inconsistent on the issue of whether Milgaard had been wearing a toque on the morning of the murder and, if so, what the toque looked like. Helen Gerse was called to testify and confirmed that she had located the toque as earlier described on a Saturday at the very end of January or early February. In his closing address to the jury, Caldwell noted as follows:

> Now the Crown invites you to infer that on his way into Cadrain's he discarded, the accused, the blood-stained toque right next door at 330 – remember, that's Mrs. Gerse's house right next door to Cadrain's – having used it to wipe the blood from him or his clothes. You will recall that Mrs. Gerse found it on a Saturday at the end of January, 1969, she said, or the very first part of February – and just … on this must have been on Saturday, February 1st, the day after the killing, because it could only be that date, Saturday, the very first day of February.[164]

Regarding the wallet found by Norman Remenda or Giles Beauchamp, the Crown similarly pointed to the item and its location as evidence supporting the conclusion that Milgaard had discarded the items during his drive around the Cadrain block. Tallis again made appropriate submissions in response.

In his charge to the Jury, Bence touched briefly on the relevance of the physical evidence generally. He referenced the various items scattered about the crime scene, the unusual feature of the coat containing knife punctures but the dress containing none, and the general state of the scene and Gail Miller's body, all towards the suggestion that the attack likely took place in the area where the body was found.

163 Docid 031255.
164 Docid 141905.

He counseled the jury to give little weight to the location where Gail Miller's wallet was discovered, or to the evidence involving the toque. On the latter issue, Justice Bence quite properly noted that there was no evidence that connected the toque to Milgaard or the Gail Miller murder whatsoever.

(c) Conclusion

The forensic evidence at trial relating to the semen was exculpatory and thus played no role in the conviction of David Milgaard.

10. Motel Room Re-enactment

On the eve of trial, Caldwell was told that the accused had re-enacted the crime at a Regina motel party. The informants were Craig Melnyk and George Lapchuk, who told their story to Wilson, who re-told it to police. The police interviewed Melnyk and Lapchuk, turning them over to Caldwell, who decided to call them at trial.

Ute Frank, who had been present at the party, refused at the last minute to testify.[165] Tallis interviewed her and had reason to believe that she would have incriminated Milgaard, so he did not call her.

Another member of the party, Deborah Hall, was out of the province and unavailable on short notice. In light of what we now know, including her Inquiry evidence, she too might have been a very damaging witness to Milgaard even though she said at the Supreme Court,[166] and before the Inquiry that she did not take Milgaard's performance seriously.

At the Inquiry, Tallis assessed the effect of the Melnyk and Lapchuk revelations at trial as "damaging"[167] and Brown assessed them as "incredibly damaging".[168]

The first motel room re-enactment witness to testify at the Inquiry was Robert Harris, who was 15 or 16 at the time and had been a friend of Milgaard, Melnyk and Lapchuk. By his own account, he was under the influence of drugs at the time.

He testified that while the young people were sitting around (Milgaard was in bed with one or both of the girls) a news report of the murder came on TV. Lapchuk asked David if he had killed the girl and David knelt on the bed with a pillow between his legs and made stabbing motions saying something to the effects of "yes, I killed her".[169]

Harris took it as an act, not a re-enactment, noting that Milgaard would do things just to attract attention to himself. He says he does not believe that Melnyk or Lapchuk were under the influence of drugs, a view that was shared by other witnesses, and a significant factor in assessing credibility. He was not contacted by the Saskatoon Police or by the prosecutor, although Frank's statement mentioned him. Neither the Lapchuk nor Melnyk statements mention him.[170]

165 See Caldwell's notes, Docid 006298, and his testimony at T16458.
166 Docid 047622.
167 T24048.
168 T37165.
169 T02797.
170 Docid 002129 and 009136.

Harris agreed in general with the trial testimony of both Melnyk and Lapchuk, although he does not agree that people in the room were shocked or surprised by what Milgaard did. He described Milgaard as a show boater and a clown, but had never known him to be violent.

Joyce Milgaard contacted Harris in 1981 but nothing came of it until the early 1990s, when he contacted her lawyers swearing an affidavit on February 29, 1992.[171]

Craig Melnyk was an important witness. He was 16 years old at the time. His evidence at trial, together with that of George Lapchuk's was strong evidence of a confession by Milgaard. Lapchuk is deceased, but Melnyk has never changed his story.

In 1969, he was a friend of David Milgaard's. They and their friends consumed marijuana, hashish, mescaline, and over the counter drugs. Milgaard, he says, was a hyperactive person who liked to be the centre of attention.

Asked to recount his memory of the motel re-enactment, Melnyk said that Lapchuk, Frank, Milgaard, Harris, and Hall were there. Melnyk could not recall either he or Lapchuk being under the influence of drugs, but he says that Milgaard was. This accords with the evidence of other witnesses present, and I accept it.

He said that the story of the killing came on television around 11:00 p.m., and Lapchuk teased Milgaard about it, whereupon Milgaard knelt on the bed with a pillow between his legs, made stabbing motions and said "I stabbed her, I killed her 14 times, fucking bitch",[172] then rolled over on his side and laughed.

Melnyk says he was surprised by this, and that Milgaard looked serious. He did not know whether to believe him or not. There was silence in the room, but nobody raised the subject again. He said that Hall, Lapchuk, and Harris left after an hour or so, but he stayed the night with Milgaard and Frank.

Before this incident, Milgaard told him that he had been questioned by police, and that he might be arrested depending upon the results of a saliva test.

Then, in conversation with Wilson, the motel incident came up and the next thing he knew, the Saskatoon Police visited him in Regina. I accept that this was what happened.

In his statement to police of January 19, 1970,[173] he related that Milgaard and Frank had intercourse on the bed several times during the evening and that Milgaard was taking drugs.

He quoted Milgaard as saying, "I killed her, I killed her, I fixed her" and "Yeah man, I did it" laughing hysterically and rolling on the bed.[174] At the time, he thought that Milgaard was capable of murder, being nice one minute and off the deep end the next.

He explained, rather convincingly, I thought, that he and Lapchuk had not gone to the authorities before then because it was not the thing for young criminals to do. He said that he was not on drugs that night.

He met just once with the prosecutor, and was not approached by anyone on Milgaard's behalf.

171 Docid 019554.
172 T3023.
173 Docid 009136.
174 Docid 009136.

He confirmed his trial testimony and said that when he testified he had not been on drugs for two to three days.

In conversation with Wilson, years after Milgaard's conviction, Melnyk recalled Wilson saying that Milgaard returned to the car carrying a wallet, with blood on his hands.

In the Supreme Court of Canada, Melnyk testified that he had told the truth at the trial, that he had no grudge against Milgaard, and did not testify for reward.

In cross-examination at the Inquiry, he said that he had no concern about leaving Ute Frank with Milgaard. It was a recurring theme in the cross-examination of motel witnesses that the re-enactment must have been nothing but a joke or everybody would have fled the scene. I do not think that that follows. The ones who stayed, except for Harris, said that they were unsure how to take the performance. Their very presence at Milgaard's ongoing display of exhibitionism in which they participated in varying degrees, tells me that they were far from squeamish, and there was no evidence that they feared Milgaard physically. His attentions towards Frank were, by all accounts, strictly sexual and non-violent.

Melnyk testified that there was no plot between him, Frank, and Lapchuk to get Milgaard. He insists that his story over the years has remained essentially unchanged and that appears to be the case. At no time did he say that he thought Milgaard was joking.

At trial, Melnyk was technically an unsavory witness because of his record and lifestyle, but over the years he has remained constant about what he says he saw and heard in the motel. I regard him as credible today, and see no reason why the Crown or police should not have put him forward as such.

An unexpected development came on the eve of Melnyk's Inquiry evidence. He told Commission counsel that sometime before the Milgaard trial, Lapchuk, Milgaard, Frank, and he were driving in a car in Regina's south end, taking drugs. Milgaard and Lapchuk were in the front seat. They were all stoned, he said, probably on mescaline. Milgaard said something like "I killed her"[175] as he ripped off his shirt and jumped in the back seat. Lapchuk and he left the car while Milgaard had sex in the back seat with Frank. Melnyk could not remember if this incident took place before or after the motel re-enactment. He and Lapchuk did not tell the Saskatoon Police about it, feeling that they should not get further involved. If I understand him correctly, Melnyk is saying that they saw the car incident and the motel re-enactment, not necessarily in that order, but when approached by police decided only to tell them about the motel re-enactment. That is not unreasonable because Melnyk's evidence is that it was only because of Wilson that they told the police anything, and what was discussed with Wilson was the motel re-enactment. Melnyk said that he revealed this for the first time only at the Inquiry because he just wanted to get the whole thing over.

Not surprisingly, Melnyk was challenged vigorously in cross-examination, but maintained his story. He expressed great frustration at having been subjected to repeated grillings over the years, saying that Milgaard should have some responsibility arising out of the motel re-enactment. He should either admit that Melnyk was truthful in his evidence or say that the re-enactment was a joke, if that was his position. Instead he has denied, at the Supreme Court of Canada, that it even happened. Melnyk's exasperation is understandable. Hall, Harris, Lapchuk, Melnyk and Frank all said that the re-enactment happened. They differed in details and interpretation, but I think it is common ground that the event took place. Milgaard himself told his lawyer that it could have; that he was stoned and, if it happened, he was joking.

175 T3111.

At the Inquiry, the witness was challenged on the basis that everybody now knows that it must have been a joke because Milgaard did not kill the nurse. Melnyk's reply was "that's a hell of a joke".[176] Indeed.

Melnyk said that up until his testimony at the Supreme Court of Canada, nobody, police or prosecutor, asked him if he took the display seriously.

In cross-examination at the trial, defence counsel asked Melnyk whether Milgaard was stoned, and about Melnyk kidding him about the Miller murder, so he seems to have been suggesting that the re-enactment was a joke.[177] Melnyk, however, was not directly asked for his interpretation of the re-enactment.

He was referred to what Hall said at the Supreme Court of Canada:

> I stabbed her I don't know how many times and then I fucked her brains out.[178]

And he said that that version would be consistent with what took place.

Hall testified that she was 17 in May of 1969, and a close friend of Ute Frank. As well she knew Milgaard, Harris, and Lapchuk.

She told of going to the motel with Milgaard, who brought drugs, and Frank. They all took drugs on the way. She said that Lapchuk and Melnyk showed up as did Harris, at about the same time. She did not see Lapchuk or Melnyk take drugs but saw Milgaard injecting some into Harris. She said that both Milgaard and Frank seemed pretty high all evening, especially Milgaard who was "bouncing off the ceiling".[179] Something came on the television about the Miller murder, and Lapchuk and Melnyk began teasing Milgaard about having done it. Milgaard reacted by fluffing the pillow and saying something like "Yeah, right … I stabbed her, I fucked her brains out, that's a good time".[180] In Hall's view, he was being sarcastic and showboating – making a joke. She said that she walked home around 1:00 or 1:30 a.m.

As to why she was not called at the preliminary or trial, Hall said that she ran away from home in June of 1969, going first to Toronto and then to Montreal, not returning to Saskatchewan until at least the beginning of February 1970. She said she had not been contacted in 1969 or 1970 by either the Regina or Saskatoon Police.

Except in detail, Hall's account of what went on in the motel room is not much different than other witnesses.

In 1981 Hall was contacted by journalist Chris O'Brien as a result of which she later swore an affidavit which was used in support of the first application under s. 690. She told the Inquiry that she realized that O'Brien was leading her in their interview.[181]

In my view the statement she gave to O'Brien cannot be relied upon. The tape was played and it graphically demonstrates that O'Brien was slipshod and suggestive with his questions, moving at breakneck speed through the transcript, making editorial comments as he went along.

176 T3131.
177 Docid 002134.
178 Docid 047622.
179 T3215.
180 T3216.
181 Docid 178010 and 047724.

Hall provided an affidavit[182] at the request of David Asper knowing that it would be used for certain proceedings for Milgaard's s. 690 application. The date was November 23, 1986.

In it, she swore that the drugs she had taken enhanced her memory. That is a dubious assertion on the face of it, and is negatived by her own evidence that she was dazed and had difficulty recalling times. A significant omission in the affidavit is her Inquiry evidence that David said "I stabbed her and I fucked her brains out".[183]

Asked to explain, she said that she did not think at the time that it would be "all that necessary",[184] and also that she was hesitant to use such language in her affidavit. Then she went on to say that she gave instructions for the affidavit over the phone and was distracted by the noise. She could not explain the two blank spaces in the affidavit.

She swore that Lapchuk and Melnyk had lied. Now she said that the word is too strong – "misrepresented"[185] might be better because they took what David was doing out of context.

When interviewed by Williams she said, under oath, that David spoke of "fucking her brains out" and that he "stabbed her I don't know how many times".[186] Hall said that by then she thought she had to tell it exactly how it was. I accept that that is what she heard.

Hall also claimed that everyone was laughing at Milgaard's words and she told Eugene Williams that in her opinion Milgaard was not being serious. Hall repeated the same words before the Supreme Court of Canada and she says that her testimony was true.

She revealed her attitude to the case in general when she recounted her meeting with Ute Frank in Ottawa after they had testified in the Supreme Court of Canada. She told Frank that Milgaard had been saying that he is innocent. She also said that he was the longest serving prisoner; and that whether or not he did it, he deserved to be out.

Frank was 17 at the time of the motel incident. Her Inquiry evidence as to how David was seen stabbing the pillow is essentially in agreement with what other witnesses saw, but she differed in other respects. For example, she said that there were between 15 and 20 people in the room at times, and she expressed great fear of Milgaard, something the other witnesses apparently did not observe.

She had been on intimate terms with Milgaard before going to the motel with him, and knew that he was a murder suspect. She supplied the syringes for the party, and was told that the drugs came from a veterinary clinic.

Her description of Milgaard's performance began, as in the case of other witnesses, with the TV news. She said that he rose from the bed and went into the bathroom from where loud noises were heard. Lapchuk opened the door to reveal Milgaard yelling and throwing himself against the wall. Freeing himself from Lapchuk's restraint, he ran across the room and threw himself into a wall, then grabbed a syringe and jumped on the bed where, straddling a pillow, he said "I killed her, I killed her"[187] then he flipped over and laughed hysterically. By this time she said that only herself, Lapchuk, and Melnyk were left in the room

182 Docid 026356.
183 T3216.
184 T3385.
185 T3388.
186 See Docid 001285.
187 T3523-T3524.

with Milgaard who held the door shut with a chair saying that if they ever repeated what happened, he would kill them. She said that after several hours he fell asleep and she ran home. She admitted having had sex with him both before and after the pillow stabbing incident because, she says, she feared him.

Ute Frank says that she visited Sharon Williams in St. Albert and warned her against seeing Milgaard again after what happened in the motel. She returned to Regina after several months and was questioned by police, denying at first all knowledge of the motel incident, but finally giving them a statement on January 19, 1970,[188] which she says was only partially true because she was afraid of Milgaard.

She was taken to Saskatoon for the trial but was so upset that she refused to tell prosecutor Caldwell what had happened.

Learning in 1991 of the investigation about reopening the case, she made a call to the Department of Justice, and then met with Eugene Williams in Nanaimo where she says she gave a more complete version of events, being no longer a frightened teenager.[189] This was on December 20, 1991.

One has to be alert to the possibility that the re-enactment witnesses got together at some point to agree on a version to tell. Lapchuk and Melnyk were together when they told Wilson, and he told the police, who interviewed them and turned them over to Caldwell for trial. Although they might have agreed on a version of the incident I do not have evidence to that effect. In any case, there are enough differences between the evidence of Lapchuk, Melnyk, Frank, and others to convince me, as I am sure it convinced the police and the prosecution, that Milgaard acted out a stabbing. Lapchuk and Melnyk had no motive for making up a story such as this, and in fact did not go to the police themselves. The police came to them through Wilson.

In the course of her evidence before me, Frank remarked that she did not come from a happy home. She feared corporal punishment from her father, for example. I note that although the young girls in Milgaard's circle of friends, such as Williams, John and Hall might not have shared identical upbringings, they had this much in common: they were only in their mid-teens, they were rebellious, and very much under the influence of the young men with whom they associated. These men, to use Melnyk's expression, were "young criminals", so I have an overall reservation about their general credibility, boys and girls alike, but without evidence of collusion, the basic similarity of their evidence on important points of the motel re-enactment is believable. The jury could reasonably have found that it happened, and it was up to them to interpret what they heard.

Lapchuk was one of the motel re-enactment witnesses. He died in April, 2005, but had been interviewed and testified several times.

Of interest are:

- 106676, the Investigation Report;
- 002129, his January 19, 1970 Statement;
- 006010, his Milgaard Trial testimony;
- 054420, his telephone conversation with Joyce Milgaard on January 24, 1981;
- 046753, another conversation with Joyce Milgaard on January 26, 1991.

188 Docid 054371 at 372.
189 Docid 168588.

Through it all, Lapchuk remained consistent with the story he gave to police in 1970. On the tapes and in the transcripts, he impressed me as a voluble, convincing witness. I am not here to weigh the truth of his evidence, but from what I heard and read I can judge the likely effect his evidence had on investigators and prosecutors. I think that they might reasonably have been impressed.

He was interviewed by Eugene Williams on August 2, 1990.[190] He told Williams that he would not change a word of his testimony in 1969; that it was the truth; that he had not recanted in prison when faced with recrimination for being an informer and would not do so now.

Before the Supreme Court of Canada,[191] Lapchuk testified that he had been truthful at the Milgaard trial and that he bore Milgaard no ill will, and that he, Lapchuk, received nothing for his testimony. He recounted conversations with Wilson in which Wilson said that he and John were sure that Milgaard did it. Wilson told him, he says, that he had seen blood on Milgaard's pants.

When interviewed by the RCMP on April 29, 1993, he said that the police treated him well, and that Karst was very pleasant. Lapchuk seemingly was never afflicted by the loss of memory which so characterized many other witnesses. Nor, it appears, was he afraid of anyone. His vivid account of Milgaard's actions in the motel (stabbing the pillow, saying "yeah I stabbed her, I killed her") featured detailed recall of who was there and where they sat.[192]

He described himself and his companions as borderline bad kids. Milgaard though, "was on the other side already".[193] Lapchuk told the RCMP "I don't know whether he killed her or not but I know damn well what I saw in that motel room".[194]

I believe that for both the murder investigation phase and the reopening phase, the police were entitled to think that what Lapchuk saw was a confession to murder by David Milgaard.

Wilson, who tipped the police to Lapchuk, and who later changed his trial testimony to Milgaard's benefit, was no doubt bought, in Lapchuk's view, "somebody got to him with money".[195] Wilson denied this in evidence before us, and there is no evidence to support the allegation.

Lapchuk's RCMP interview would have given them no cause to question the truth of his trial evidence. It probably did not reinforce it either, being liberally laced with braggadocio and street talk, mostly aimed at voicing his distain for the efforts of Joyce Milgaard and her group to achieve a reopening of the case.

A particular target of his criticism was Launa Edwards, his former wife, whose false stories, he said, would never end.

In his interview with the RCMP he remarked quite prophetically, as it happens, that he (Lapchuk) would find himself in an urn on the mantelpiece before the Milgaard matter was ever laid to rest.

The motel re-enactment witnesses were important at the trial, and they were important to the Inquiry to the extent that their evidence was relied upon by the investigators and the prosecutor. Not all the witnesses were called at trial, but we heard from all of them except for Lapchuk.

190 Docid 002131.
191 Docid 044326.
192 T3972.
193 T3985.
194 T3989.
195 T3992.

The witnesses did not tell identical stories, by any means, a fact which is not surprising in view of the drugs ingested by some of them. Nevertheless, because the evidence of the murder re-enactment was so important, the apparent reliability of that evidence to police and the prosecutor must be assessed.

Some of the young people who saw Milgaard's actions believed that he was joking, while others took him more seriously. Its impact at trial, according to evidence I will discuss later, was disastrous for Milgaard. The re-enactment might have been, and perhaps was, considered by the jury as a confession.

Melnyk and Lapchuk did not attempt to interpret it as a joke or otherwise in their trial testimony. Hall was not available to testify. Had she been, the jury would have heard that she thought it was a joke, but they would also have heard her describe the event in terms that were much more lurid than those used by other witnesses. Frank was not called because she refused to testify. Had she done so, her evidence, would have supported Melnyk and Lapchuk's account, and she might have told the jury that she thought Milgaard was being serious.

In the result, the jury was left with the description of an event which amounted to a confession, by two witnesses who simply recounted what they heard and saw without placing their own interpretation upon it. There was no suggestion before the jury that the incident had not happened. I find that the police were right in bringing the story to Caldwell, and that he was justified in presenting the evidence to the Court. Melnyk and Lapchuk were seen by defence counsel Tallis as unsavory witnesses, and questioned as such. Tallis, however, was constrained in going too deeply into their lifestyle, for fear of bringing Milgaard into that picture. He could not suggest in his cross-examination that the incident had not happened at all, because Milgaard himself had acknowledged to him that it might have.

The fact that Melnyk and Lapchuk came in at the last minute with incriminating evidence has been seized upon by the Milgaard group as a scheme to get evidence, in exchange for a favorable sentence for Melnyk on a robbery charge. In fact, he got a light sentence, six months, but we heard evidence that he was only a minor player in that robbery.

Quite apart from Caldwell's denial that there was any consideration given, the sequence of events belies it.[196] Caldwell had asked the police to pick up Wilson to ensure his attendance at trial. Wilson then told the police about the re-enactment he had heard about from Melnyk and Lapchuk. The police told Caldwell who sent them to interview the two, and as a result they were called to testify. So, I find from this and from the evidence of Melnyk, that far from seeking to testify in exchange for a reward, they were dragged into the picture – no doubt unwillingly, given their criminal and gang connections. I agree with Caldwell that promising them favors for testimony would have been outrageous in the circumstances, and I am satisfied that he did not do it. There is no evidence to show that either man expected any favors.

11. Mackie Summary

At the Supreme Court Reference in 1992 Milgaard counsel came upon a five page document.[197] It was a mixture of fact, theory and suggestion, but was seized upon by Wolch at the Reference, and is still described by the Milgaard group as a script for the Wilson and John statements on May 23 and May 24, 1969. The five page Mackie Summary was found on the police file but was not provided to Caldwell.

196 Docid 007070.
197 Docid 006799.

Asked about the document, Joseph Penkala said that Raymond Mackie was involved in discussions in May of 1969, and that the Mackie Summary served as an outline of discussions. He was not sure that it was used at the meeting on May 16, 1969, but the contents, theories and suggestions would have been discussed. He said that it must have been prepared some time before May 23rd, when polygraph operator Roberts was brought to Saskatoon.

Mackie was shown the document at the Inquiry and said that it looked like a typewritten version of a document he prepared and showed to Charles Short.

The document was intended as an investigative aid, and was likely prepared in late April or in May of 1969. Mackie could not explain how he had attributed to John a statement that they had seen a nurse near a funeral home. It was not in her March 11, 1969 statement.

He said that he was trying to develop a picture of what might have happened if Milgaard was the perpetrator. I accept this, and I find that the document was not, as alleged by Milgaard counsel, a blueprint for a case police were constructing against Milgaard.

Mackie had both John Malanowich's report[198] and Sharon Williams' statement[199] available before doing his summary. He could not be sure he read them then, but he agreed that the highly unfavorable picture of Milgaard, painted in them, raised questions which had to be answered.

He thought that the officers present at the May 16th meeting, Jack Wood, Joseph Penkala, Charles Short and Stanley Edmondson, would have been just as aware of the material Mackie summarized as he himself was.

Mackie said that his notebooks are gone, so there is no way to recreate his personal schedule. But his reports were done when he was working and they go up to May 4th – then follows a two week block where there is no indication of him being at work. He was probably on holidays, he said. So it is possible that he had not prepared the summary before the May 16th meeting. Then he and Karst went to Regina, spoke to John and interviewed Wilson on the 21st.[200] He acknowledged that some information in his summary is inconsistent with earlier statements, but it could have come from a source other than the makers of those statements, and the fact that he did not document something does not mean that it was not said.

Without particularizing, the first page of the five page summary gives a description of the suspect in the Fisher Victim 1 rape, and discusses evidence, both real and anecdotal, already gathered on the Miller file.[201]

Page five of this document is entitled "Summary" and consists of a series of points in a theory which has Milgaard as the killer and John and Wilson as witnesses to some or all of the events; an alternative theory has Wilson and Milgaard both involved in the theft of the purse, but Milgaard as the sole rapist and killer.

Finally, under the heading "Suggestions" one reads:

> – Nichol John, Wilson, and Cadrain be brought to Saskatoon where with all present the true story can be obtained ever [sic] if hypnosis or polygraph are necessary.

198 Docid 106643.
199 Docid 178577.
200 Docid 009264.
201 Docid 006799.

– Milgaard be located and a sperm sample be obtained if possible.[202]

On its face, I see nothing untoward about this document. Police must operate on theories when they lack direct evidence. They simply appear to have collected the evidence they had, formulated a theory based on it, noted their suspicion that Wilson and John were not telling the whole truth, and decided on a course of action to get the truth out of them.

The best record we have of the May 16, 1969 meeting is Inspector J.A.B. Riddell's report[203] of May 21, 1969 showing Milgaard to be the prime suspect. Penkala said that he was the prime suspect because of Albert Cadrain's evidence. The first statements of Wilson and John put Milgaard in the area where Cadrain said he was. So the reliability of Wilson's and John's stories needed to be checked. The means chosen were polygraph tests.

Asked to comment about the nature of the summary, Murray Sawatsky, who led the 1992 to 1994 RCMP investigation to be reviewed later, viewed it as very much an operational plan – they have become more sophisticated over the years. He has used them, without concern that they might lead to the fabrication of evidence.

To him the idea of using a polygraph or other means so that the "true story can be obtained" is a recognition of the officer's view that it might be hard to get the truth from the witnesses.

Sawatsky's investigators made a point by point comparison of the summary, and of what Wilson and John said later in their May statements. They found no direct correspondence or conformity.[204] Many Mackie Summary points did not find their way into the May 21 to 24 statements and vice versa, supporting the view that the summary was not a script. As well, their interviews with John did not disclose that police told her what to say. The same applied to Wilson.[205]

Sawatsky said, regarding the Mackie Summary, that sometimes a capable officer creates a theory that proves to be wrong. That does not show that it was unreasonable. You go with your best guess and look for evidence.

I am asked to draw inferences of wrongdoing from the Mackie Summary (which has an innocent and credible explanation), because John gave a confirming statement on May 24th to Roberts which was a lie. There is no evidence that Roberts used the Summary at all when he questioned John. We know that Saskatoon Police briefed him, and that what they told him led him to suspect Milgaard, but the suggestion that police drew the document as a script for him to follow is without foundation.

Peter Carlyle-Gordge interviewed Mackie in 1983[206] who told him that Milgaard was intelligent and manipulative. He did not recall Fisher. He also speaks of "listing things that were indicators to who was responsible".[207] This would, I assume, be what we have described as the "Mackie Summary". Its author said that upon return from holidays he went through the file and listed indicators of responsibility, satisfying himself that David Milgaard was the culprit. The Mackie Summary was discovered at the Supreme Court Reference by Milgaard counsel, who argued that it was a script prepared by police to follow in getting

202 Docid 006799.
203 Docid 250609.
204 Docid 023167 at 023446 to 023458.
205 Docid 023167 at 440 to 458.
206 Docid 325616.
207 Docid 325616 at 625.

evidence from witnesses such as Wilson and John. I am satisfied that it was not, in part by reason of what Mackie said to Carlyle-Gordge in 1983. The subject will be revisited again in detail.

12. Ron Wilson, Nichol John and Art Roberts

Earlier sections of the report have touched upon the questioning of Wilson and John between May 21 and May 24, 1969, but the fact that Roberts did not leave a written report with the Saskatoon Police about his polygraph exams and interviews of Wilson and John is a matter of concern, given the great importance of what they told him.

Joseph Penkala thought that Roberts would have left a report, but one could not be found.[208] The master file should have contained all information, and would have been "stringently protected".[209] Had anything been removed, there would have been a note of it. I accept this, and conclude that Roberts did not report to the Saskatoon Police. Our knowledge of what passed between him and Wilson and John must be gleaned from their testimony at various proceedings over the years, from Roberts' testimony at the Supreme Court of Canada, and to some extent by inference arising from acknowledgement of Milgaard's factual innocence. In view of that acknowledgement, John's statement to Roberts, and then Mackie, that she saw Milgaard stabbing the victim cannot be true.

It is important to know the background Wilson, John and Cadrain provided to the meeting of May 16th, which led to the polygraph sessions.

What they had to say would pique the interest of an investigator according to Penkala, and I accept this. The March 22, 1969 report of Charles Short sets it out.[210] To start with, police did not just take Albert Cadrain at his word. They interviewed him at length, and repeatedly. They interviewed both Wilson and John. They put Cadrain and John together, after which John offered her opinion that Cadrain was telling the truth. She said:

- Milgaard was of dangerous character;
- he had forced her to have intercourse several times; and
- she feared him.

Penkala agreed that bringing John, Wilson, and Cadrain to Saskatoon to get the true story was a reasonable approach. David Milgaard, as the prime suspect, had to be either implicated or eliminated.[211] The police suspected that Wilson and John had not given them the full story.

Mackie drove John around the area of the funeral home. He says that he would not have told her that Miller's body was found nearby, because he wanted to learn what she knew. He cannot explain why his report contains no reference to the events of May 23rd when Roberts interviewed Wilson and John. He cannot explain why he took John's statement on May 24th, when she had given her incriminating statement to Roberts on May 23rd. But he says that he might have been off duty by the time Roberts finished with John on May 23rd, and because they wanted him to take her statement, they waited until May 24th.[212] That is plausible.

208 Docid 105317.
209 T9294.
210 Docid 106640.
211 Docid 250609.
212 Docid 006645.

Mackie said that although her statement of May 24th does not refresh his memory, he would not have threatened, coerced, or manipulated her, or offered any inducement. He just did not do these things. We have evidence from Caldwell that John was frightened of Mackie, but she told us that he had not coerced her and there is no reason to doubt that evidence.

Jack Wood of the Saskatoon Police instructed Roberts and interviewed him along with Penkala and Mackie.[213] Karst said that he was not a party to fabrication of evidence, and he knows nobody who was. I accept that. He was not involved in the preparation of the "Mackie Summary", but would probably have agreed to the suggestion that John, Wilson and Cadrain be brought to Saskatoon where the "true story can be obtained".

Karst agreed with the evidence Roberts gave at the Supreme Court of Canada,[214] where he said that Wilson agreed to tell the truth to Saskatoon police. When he turned Wilson over to Karst, he said, "Thanks Ron, make sure you tell everything"[215] and Wilson agreed with this, as well, at the Inquiry.[216]

The Inquiry heard from Michael Robinson, an expert in polygraphs and interrogation.[217]

He served in the RCMP from 1960 to 1980 becoming the national polygraph co-ordinator. Following retirement, he continued in business as a polygrapher, performing a test on Fisher in 1990 at the request of Fisher's lawyer, Harold Pick. Because of Fisher's agitated state, Robinson got no result.

Robinson was called at the Inquiry to comment on the tests performed by Roberts. He said that in 1969, polygraphy was little known, and tests on witnesses were rare. Speaking generally, when police do a post-test interview following a deceptive result, they simply tell the interviewee that he was deceptive and then ask for an explanation.

In this case, Roberts got a deceptive result. This was followed by a statement of what Wilson knew, and Roberts then turned him over to Saskatoon Police. The nature of the deceptive result is not clear, Roberts having given a version at the Supreme Court of Canada which differed from what he told Caldwell in 1970, as reflected in Caldwell's trial preparation notes. Those notes indicated that Wilson lied on the question of whether he was deliberately holding anything back about the Gail Miller murder and whether he had intentionally lied to any question on the test.[218] At the Supreme Court, he said that Wilson lied to questions of whether he suspected someone of murdering Gail Miller, and whether he knew who killed Gail Miller.

Our concern is not so much the truth of what Wilson said, but whether the Saskatoon Police were entitled to rely upon what he said, and I find that they were.

On the evidence available to Saskatoon Police, Roberts conducted a proper test on Wilson and an unobjectionable interview. The Saskatoon Police then took a voluntary statement, which was passed on to the prosecutor. Wilson's trial evidence followed this statement, and the jury was entitled to act upon it as they saw fit.

213 Docid 043300 and 106676.
214 Docid 043300.
215 Docid 043300.
216 T5589, T5590.
217 Docid 002369 and 020161.
218 Docid 007022, 043300.

As for the John interview by Roberts, Robinson agreed that giving a witness a reason to cooperate as in "what if this had been your relative" would be a valid approach, as would a trigger, such as a display of real evidence. In John's case this was done with a show of bloody clothing. Robinson was surprised that the trigger worked so quickly. Although doubting that he himself would have used such a technique, Robinson said that Roberts was there to get at the truth, and I find that the Saskatoon Police and the prosecutor reasonably relied upon John's statement as being truthful. Caldwell had no reason to mistrust Roberts and regarded his tests as an impartial, scientific assessment of Wilson's credibility. I find that he was justified in bringing Wilson's evidence to court, as well as John's, but in the latter case it was of course elicited through interrogation, and not through the polygraph.

Caldwell was accused of failing to critically assess the May 23rd and 24th statements of Wilson and John. During the preliminary when Tallis became aware of Roberts' role, he asked to have him called as a potential witness.[219] He came, and Tallis and Caldwell interviewed him jointly, and then Caldwell did again.

If Roberts had acted improperly in coercing statements from Wilson and John, as alleged, he must have been a polished villain, standing up to examination in the Supreme Court of Canada. There is no direct evidence that he did anything except come to Saskatoon, do what he was asked and then leave the same day. Something short of coercion, however, must be inferred, and this arises from the acknowledgement at this Inquiry of David Milgaard's factual innocence. In view of it, as discussed in Chapters 3 and 4 of this report, John's report to Roberts of seeing Milgaard stab a woman cannot be the truth. One must infer that she was pressured into saying that by her interrogator, who thought he knew what the truth was, and thought he was getting it from her.

13. Report to Prosecutor

The detective in charge of case preparation in January of 1969 was Elmer Ullrich. He organized the file for the prosecutor before the preliminary, did a 21 page summary of witness statements, and delivered much, but not all of the police file to the prosecutor. He had no say in the decision to charge Milgaard. His work would have taken two or three weeks.

We see in his comment,[220] that the question of the stuck vehicle remained uncertain, and he suggested that Wilson and John were not telling the entire truth – perhaps to disguise their involvement. This tells me that the police were not presenting the prosecutor with a scripted scenario.

But to him, the case seemed to fit together. He had to take witnesses' statements at face value, not having seen them. He did the summary of events for the prosecutor.

He questioned why much should be read into time estimates. Experience teaches that people frequently err about this. I accept this.

He described the first four pages of the Mackie Summary as a sort of can-say for trial.

Ullrich's evidence illustrated, amongst other things, the disclosure practice as between police and the prosecutor. The police file was voluminous and contained much irrelevant material, which file managers like Ullrich would weed out before it could reach the prosecutor and then the defence, who got nothing directly from the police. In the result, information was screened twice for relevance before it got to the defence, first as between the police and the prosecutor, and secondly between the prosecutor and

219 Docid 006817A.
220 Docid 105608.

defence counsel. Modern standards of disclosure have taken much of the discretion away. The defence is entitled to see everything of relevance which the police have, subject to only a few exceptions.

Evidence at this Inquiry demonstrated that the defence did not receive all information which might have assisted, a subject which will be touched upon later. I find, however, that nothing of relevance was deliberately withheld. Any omissions in disclosure were the product of honest, mistaken belief that the material was irrelevant.

14. The Preliminary and Trial

Over the years, T.D.R. Caldwell has been blamed for Milgaard's wrongful conviction. At the Inquiry he was the subject of particular criticism for lack of vigilance as to the credibility of evidence he presented. The Inquiry heard evidence about his practice in general, the system he employed in this case, and the manner in which he handled particular witnesses.

Calvin Tallis too has been criticized for his conduct of the defence and other aspects of the trial which are thought to have contributed to the wrongful conviction.

(a) Prosecution

(i) Conduct of T.D.R. Caldwell

Prosecuting counsel in the Milgaard trial was Caldwell. He worked as a prosecutor from 1958 to 1991. In 1969, he was in the Saskatoon office with another prosecutor. He reported to Serge Kujawa who had a three person office in Regina.

The Information charging Milgaard are dated May 26, 1969.[221] They went first to City Prosecutor, Ben Wolff. The file came to Caldwell in June of 1969, and he and Tallis appeared in Court on July 3, 1969 to set the preliminary date of August 18, 1969.

Caldwell did not see the police file, which was much larger than the prosecution file. He saw what came to him through Ullrich.

Typically, he received some police reports, but not all. As an example, he received the February 5, 1969 report of Gerald McCorriston concerning Henry Diewold, the St. Mary's Church caretaker, who had not given a statement. Fisher's name was on the report arising from the bus stop interview, but it meant nothing to him, and so played no part in his trial preparation.

Documents were sent by the police to the Crown as they became available, but not everything was sent. For example, the Mackie Summary was an internal police document, and was not discussed with Caldwell.

By September 9th, Caldwell had all 95 civilian statements taken by police which, Tallis had asked him to review.

Caldwell decided which witnesses to call and interviewed them. We see a summary of the evidence he expected to call at the preliminary.[222] In my view, had it been presented as expected, it constituted a strong case for committal. There were apparently no discussions with Tallis about the matter not

221 Docid 267787.
222 Docid 105605.

proceeding to preliminary on a charge of murder. It was Caldwell's view at the time that everything which could have been done by police at the scene was done.

Caldwell chose his witnesses by reference to an index supplied by the police.[223] He had no physical evidence linking Milgaard to the crime. The semen found in the snow was thought to be from a secretor, and Caldwell introduced evidence that Milgaard was a non-secretor (which later turned out not to be the case), while still arguing that Milgaard might have been the donor of the semen.

Caldwell's trial summary was based on the Elmer Ullrich police summary.[224] The latter is an amalgam of known facts, allegations drawn from witness statements, and what I would term informed speculation – all of which is legitimate, in my view.

Asked to comment on the points he thought incriminated Milgaard, he mentioned:

1. The talk of purse snatching.
2. The arrival of the Wilson car in the area around 6:30 a.m.
3. Asking directions of a girl (probably Miller).
4. Wilson and Milgaard exiting the car and separating.
5. Milgaard jabbing at Gail Miller with knife as seen by John. The evidence does not mean necessarily that the knife penetrated the coat at that time.
6. Henry Diewold seeing lights in the alley.
7. Finding the purse in the garbage can and John saying Milgaard had put it there.
8. Wilson returning to the car, finding John hysterical and hearing Milgaard saying "I got her" or "I fixed her".
9. John seeing a struggle between Milgaard and the victim.
10. Cadrain seeing blood on Milgaard's clothes.
11. Milgaard leaving the Cadrain house to drive a few blocks.
12. Finding the victim's wallet near the Cadrain house.
13. Milgaard's anxiety to leave Saskatoon.
14. Milgaard throwing out the compact.
15. Milgaard driving fast.
16. Milgaard telling Wilson in Calgary that he had "hit a girl".
17. The belief that Wilson knew something, but was not at first telling the whole story.
18. Cadrain's account of Milgaard suggesting that Wilson and John should be done away with.
19. The Ullrich summary mentioned Milgaard's possession of a knife in the car on the way to Saskatoon, and his talk of purse snatching. This was important. Caldwell acknowledged that some uncertainties existed before trial as to the accuracy of the Wilson and John stories, but it was something for the jury to sort out.
20. The blood stained toque found in a Cadrain neighbor's yard had significance.
21. The evidence of Wilson. At first (on March 3, 1969) he said nothing to incriminate Milgaard but then did on May 23rd and 24th. Caldwell, as had some police officers, said that witnesses sometimes did this. Seldom does the full story come out on the first interview.

I am satisfied that the police did not set out to incriminate Milgaard through Wilson and John. They simply sensed that they were not getting the whole story from them, and so sought expert help from the polygrapher Roberts. They believed in the results he achieved, and so did Caldwell. As well, Caldwell

223 Docid 006301.
224 Docid 105605.

correctly observed that Wilson and John could be cross-examined on their statements of March 3 and March 11.

In preparation for trial, it was his practice to show witnesses the transcript of their preliminary inquiry evidence.

Caldwell explained his notes,[225] which included things to do and cryptic comments on the evidence. There is nothing inappropriate here.

A Nichol John

Caldwell said that in one of his pre-preliminary inquiry interviews with John, she ran from his office. He was certain that she feared David Milgaard for what she had said. This was a suspicion that was only deepened by her declaration to others outside the courtroom at the preliminary inquiry to the effect that she had seen everything, and it was a wonder that he did not kill her too; and that she would say nothing. I am satisfied that going into the preliminary inquiry, Caldwell was justified in thinking that he had the right accused, and a strong case against him. Three of Milgaard's friends had, after all, implicated him without any apparent motive to lie. One of them, Wilson, spoke of John's hysteria upon Milgaard's return to the car, and her statement to him (Wilson) that she had seen the stabbing. She also said that she repeated this to him in Calgary.

In fact, at the preliminary, John did not describe a stabbing. Despite this, Caldwell did not think his case was weakened. I agree with him as far as committal goes. There was still some evidence upon which a jury could convict, but surely to lose an eye witness account of the attack was a serious thing for the Crown. Caldwell and his colleague, Perras, in fact prepared to challenge John on her forgetfulness at trial under s. 9(2) of the *Canada Evidence Act*, should the need arise.

The suggestion was made that Raymond Mackie bullied John into making the statement of May 24th, and as a result she would not repeat it thereafter. That suggestion was disputed by Mackie at the Inquiry during his testimony and by John in her Inquiry testimony.

Moreover, on the available evidence, John told Art Roberts on May 23, 1969 what she had seen, and simply repeated herself on May 24 to Mackie.

Notwithstanding John's refusal in interviews to adopt the crucial parts of her May 24th statement, and her failure at the preliminary to do so, Caldwell said he had hopes that she would at trial because he believed it to be true. Her declaration outside the preliminary inquiry courtroom convinced him of this. But he prepared for the worst, by studying the new s. 9(2) procedure under the *Canada Evidence Act*.

At David Milgaard's preliminary inquiry, John said that Milgaard came back from the elevator with a flashlight and a knife.[226] She also saw a maroon handled paring knife in the car. The three of them talked about purse snatching and break-ins. They arrived in Saskatoon around 6:30 a.m., looked for Cadrain's place, stopping a girl for directions. They then drove half a block, made a U-turn and got stuck. Milgaard got out to inspect, re-entered the car, and then they got going again, turning into an alley and getting stuck at the entrance to the alley behind the funeral home.

225 Docid 007049.
226 Docid 030692 at 696.

Both Wilson and Milgaard got out to get help, going in opposite directions. At this point in her straightforward narrative she said that she could not recall what happened next, except that Wilson got in the car, then Milgaard. They drove down another alley and their car stalled.

She then described the stops at the Danchuk's and the Cadrain's; at the garage to have the car fixed; at a friend of Cadrain's; and finally leaving Saskatoon. She spoke of finding the cosmetic case, and of Milgaard throwing it out. Her narrative continued, as it began, without hesitation. The only break in it occurred when she could not remember what happened after Wilson and Milgaard left the car in the alley. It would have been an easy inference to make that she held back, not that she could not remember.

She told of driving to Calgary, then Edmonton and St. Albert, meeting Sharon Williams and staying overnight with her in a motel. Then they returned to Calgary, then drove to Banff, and finally to Regina.

Caldwell's questions took her back to the alley behind the funeral home where they were stuck. She was no more helpful this time, saying only that Wilson must have been back in the car when Milgaard returned, and she did not know how the car was freed.

In my view, John significantly implicated Milgaard at the preliminary inquiry, notwithstanding her failure to repeat the most incriminating parts of her May 24th statement.

Caldwell made a note of a striking event. Outside the courtroom at the preliminary inquiry, he came upon Albert Cadrain, Peggy Miller and Mary Marcoux. He wrote down on the spot what they told him:

> All heard N. John say 'I don't know why he didn't kill me too. I was right there and saw it all, but I'm not going to say nothing'.[227]

I accept that this would make a strong impression on Caldwell. It would reinforce his belief in Milgaard's guilt, and it would later provide a reason for his eye witness turning on him at trial by saying she could not remember. Caldwell testified that he thought he could not get this declaration in evidence. He might well have put it to John in the inquiry at trial under s. 9(2) of the *Canada Evidence Act*, but he did not try. If this was an error, it worked to Milgaard's benefit. Confronted with it, John might have admitted fear of Milgaard and adopted her statement.

John began showing fear of testifying even before the preliminary. Caldwell interviewed her more than once, and once she ran out of his office in tears when Mackie was present, never telling him that she had witnessed a murder. He did not go back to Mackie, because he learned that John was very upset with him. And Art Roberts, the polygrapher, was in Calgary. Who was he to go to for help? So he called her at the preliminary, hoping for the best. She disappointed him, but he could not cross-examine his own witness and was not prepared at the time for an s. 9(2) hearing.

There is no evidence to suggest that Caldwell's handling of John was improper from the time of his first interview to the conclusion of the trial. He put her forward as a credible witness, and had recourse to available remedies under the *Canada Evidence Act* when she proved to be less than co-operative at trial. The details of what transpired at trial relating to her evidence are dealt with elsewhere in this report. Although Caldwell's handling of the s. 9 *Canada Evidence Act* issue had profound consequences for the conviction, he acted within the law and in good faith.

227 Docid 003847.

Caldwell's Inquiry testimony about John's trial evidence and his perspective is interesting. He said that he advanced her May 24th statement as the truth. He had no evidence that she had been under the influence of drugs at material times, and he reminded the jury that she had been kept in cells before giving her statement.

At trial, he said, she told less than the whole truth. He said quite frankly that going through with her, in the jury's presence, all the details of the attack which he described in her May 24th statement but could not remember at trial, would enable the jury to draw the inference that what she said in her May 24th statement was the truth. This is an important admission for two reasons:

- It comes from a former prosecutor whose long career was in the criminal court;
- It is against interest in that it lays him open to the criticism that he set out to evade the witnesses' refusal to adopt part of an out-of-court statement, the contents of which were not before the jury for truth of content.

But in the final analysis, Caldwell was entitled to do what he did. Criticism is more properly directed at the law itself in the form of s. 9, the application of the section by the judge at Milgaard's trial, and the great prejudice it holds for an accused.

B Ron Wilson

Caldwell acknowledged that Wilson's record raised a credibility issue, but that nevertheless he advanced Wilson's May 23rd and May 24th statements as the truth. He had confidence in the police interviewers and had no evidence that Wilson had been under the influence of drugs at material times. He noted that if Wilson had intended to frame Milgaard he could have used more inflammatory and specific language than he did. For example, instead of saying "I got her" or "I fixed her", he might have said stab or rape.

He had warned Wilson to be truthful, and he believed him when he related Milgaard's admissions. For one thing, Wilson was a friend of the accused with no motive to lie and some of the evidence he gave, in Caldwell's view, like the purse going into a garbage can, would be known only to someone who was there. The latter is perhaps not a strong reason for believing Wilson, given that police might have told him about the purse or he might have read it in the newspaper.

Asked to comment on Wilson's evidence at the Inquiry, where he said that Caldwell had urged him to stretch the time away from the car, Caldwell denied having done so but admitted that it was possible that he spoke to Wilson just before the trial to discuss the time element. I accept this.

Other important points in Wilson's evidence were that Milgaard told him "I got her" or "I fixed her"; that he and Milgaard were away from the car at the same time; that he saw blood on Milgaard's clothes, which Milgaard changed at Cadrain's; that Milgaard threw a compact out of the car; and that John screamed on the way to Calgary.

Because of the reported talk in the car between Milgaard and Wilson about purse snatching, Caldwell had concerns about Wilson and John being regarded as accomplices. Their testimony about such talk could supply a motive for the attack, but if it made accomplices of them the judge would need to warn the jury about accepting their evidence, which was important for the Crown. So Caldwell decided not to ask Wilson about it.

What he did, in essence, was to refrain from calling relevant evidence, helpful to the Crown in one respect, but potentially damaging to the credibility of the Crown witnesses. I think that the decision was his to

make. If the defence, who knew of the alleged purse snatching conversation, had wished to raise it, they might have done so in cross-examination of Wilson and John.

I am satisfied that Caldwell put up Wilson in good faith as a credible witness.

Wilson's evidence that Caldwell had encouraged him to stretch his estimate of the time Milgaard was away from the car is categorically denied by Caldwell, and I accept his denial. In terms of credibility, Caldwell and Wilson are at opposite ends of the spectrum with Caldwell at the top.

C Albert Cadrain

Albert Cadrain, Caldwell agreed, was a key witness because of what he said about Milgaard having blood on his clothes and changing them; being excited to leave town; and Wilson and John being afraid of Milgaard as evidenced inter alia by her behaviour at the preliminary and at the trial. He read Milgaard's statements[228] which did not admit the offense, and which he did not regard as being accurate.

Cadrain was interviewed by Elmer Ullrich, Raymond Mackie and T.D.R. Caldwell on August 25, 1969.[229] At this time, Caldwell heard Cadrain tell of Milgaard having sex with girls in the bathtub, and said that one Schellenberg could corroborate it. Caldwell wanted the latter interviewed, not so much that Cadrain's credibility was in doubt, but because he was interested in possible evidence of aberrant sexual behaviour. I think that this answers the objection that Caldwell should have doubted Cadrain in general if he was capable of coming up with such a wild story. It was a highly unusual act, if true, but, as later suggested to Caldwell (and he agreed) not so unusual given Milgaard's acts of public sex in the motel.

D Other Witnesses

Caldwell thought that the evidence of church caretaker Henry Diewold would be important. He was between St. Mary's Church and the rectory, around 7:00 a.m. He could see eastward down the alley, to the degree possible with the ice fog, and he saw headlights facing him. John said that their car was stuck in the entrance to that alley at about that time.

That Danchuks did not see blood on Milgaard and nothing incriminating was found in Wilson's car belongs to that category of evidence which does not prove the negative, i.e. that the blood was not there, or that the evidence was not in the car. It was something to take into account, but not something, in Caldwell's view, which detracted from his case against Milgaard. Other things, like the evidence of garage mechanics that Milgaard was in a hurry and was anxious to clean out the car, could be incriminating.

Caldwell had the Penkala report concerning the frozen lumps in the snow which contained human pubic hair. He noted how to deal with the secretor issue. There was obviously a problem here, but there was no indication that he intended to deal with it inappropriately. In any case, the most that Caldwell could hope for in relation to such evidence was that Milgaard would not be excluded by blood type as the donor of the semen.

Caldwell did not know if Milgaard would testify until the close of the Crown's case, and Tallis told us that he decided only then. Caldwell obtained Milgaard's background and psychological files to be ready for possible defenses based on insanity. This was done in serious cases.

228 Docid 006586 and 153079.
229 Docid 106684.

(ii) Disclosure

The prosecution has also been severely criticized by the Milgaard group for failing to disclose material which would have been helpful to the defence.

The Supreme Court of Canada in the Reference in 1992 gave its opinion that disclosure met the standards of the day. Those standards were a good deal less stringent than at present.

The modern standard of disclosure has been set by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R 326. While the Crown has a general duty to disclose all relevant information to the defence in the case of indictable offences, the prosecutor retains a degree of discretion, subject to review, in the following areas:

- excluding what is clearly irrelevant;
- withholding the names of persons to protect them from harassment or injury;
- to enforce the privilege relating to informers; and
- the timing of disclosure in order to complete an investigation.

The discretion of the Crown extends to both the withholding of information, and to the timing of disclosure. As to relevance the Crown must err on the side of inclusion, but need not include what is clearly irrelevant. Disclosure of all relevant information being the general rule, upon review the Crown must bring itself within an exception to that rule. Failure to disclose impedes the right to make full answer and defence.

Privilege, to justify exclusion, must constitute a reasonable limit on the right to make full answer and defence. The obligation to disclose is triggered by a request by, or on behalf of, the accused, made at any time after the charge. Initial disclosure should occur before the accused is called upon to plead or elect mode of trial.

Subject to the reviewable discretion of the Crown, all relevant information, including witness statements, must be disclosed. The obligation extends to notes and verbal communications where no written statement exists.

By tradition, prosecutors are ministers of justice, and not adversaries.

In contrast to the above, the standards of disclosure in 1969 were much lower. Caldwell and Tallis agreed that although the defence was not legally entitled to see witness statements in the Crown's possession, they would be provided.[230] They also agreed to the duty set out in *Dallison v. Caffery* (1964), 2 AIIE.R. 610 (C.A.):

> The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence.[231]

Requests for documents by Tallis, and replies by Caldwell began on June 10, 1969, and continued right up to the preliminary inquiry on August 20, 1969. The letter of June 10, 1969,[232] written by Tallis is a

230 Docid 007063.
231 Docid 161000 and 007037.
232 Docid 007063.

study in contrast between the 1969 practice of discretionary disclosure, and the present day mandatory disclosure under *Stinchcombe*. Tallis asked for copies of statements and related reports even though, he said, "I may not be entitled to them as a matter of law …" He asked, as well, for any psychiatric reports.

Tallis requested the names of all witnesses whom Caldwell did not intend to call, but who might be useful to the defence.[233] This was on August 21, 1969 after the preliminary had started. Some adjournments were requested by the defence during the preliminary, and I conclude that defence preparation was ongoing throughout. I note that Tallis came into the picture in only June and that summer holidays intervened.

Caldwell met with Tallis for an hour on September 8, 1969, to discuss: calling an additional witness; admissibility of other offences by the accused; production of lie detector materials; calling Roberts himself; and the calling of Shirley Wilson.[234]

On the same day as the meeting with Tallis, Caldwell listed his remaining witnesses including some for the defence, Shirley Wilson and Roberts, and possible witnesses "to show prisoner innocent".[235]

He and Tallis interviewed Roberts. A list of possible exculpatory witnesses was considered[236] by Caldwell. He wrote to Tallis the next day[237] reporting that he had read all 95 civilian witness statements. He cited *Dallison v. Caffery*, supra, as defining his duty.

He then reviewed the only statement that he thought might apply. Tallis had a chance to meet police officers at Caldwell's office and question them himself. Tallis was referred to the report of Elliott about a man in a car waiting across the street while he and Gail Miller sat in Elliott's car in the early morning hours.

As noted, Caldwell did not send to Tallis, the Victim 13 statement[238] nor the Victim 10 and Victim 12 statements,[239] which bore notations "Indecent assault, not connected".

The notations were placed on the file by police, apparently, certainly not by Caldwell who, I find, was influenced by them. They were probably put there by police as their own comment, and perhaps for Caldwell's benefit. In other words, "don't waste time on this – it is unconnected to the murder".

Caldwell then reviewed for us the statements he had in search of material facts which might "show the prisoner to be innocent" (*Dallison v. Caffery, supra*). He had not viewed Victim 12 as being in that category but concedes that had he been aware of the rapist/murderer theory he would have referred the Fisher Victim 1, Fisher Victim 2 and Fisher Victim 3 matters to Tallis, as well as Victim 10, Victim 13 and Victim 12. But he was not, and he did not. It is unfair to tax Caldwell in 1969 with what we know today. I am satisfied that he gave Tallis all the information he honestly believed relevant.

Tallis was certainly alive to the challenge presented by the statements elicited by Roberts, and the question of why Milgaard would change his clothes in Regina and again in Saskatoon – he asked that both Roberts and Shirley Wilson be called as Crown witnesses at the preliminary and trial. Caldwell obliged, agreeing to call them, thus sparing Tallis the tactical disadvantage of calling them himself and

233 Docid 007037.
234 Docid 048305.
235 Docid 007014.
236 Docid 006369, 183170, 006373, 007014 and 006327.
237 Docid 007011.
238 Docid 006400.
239 Docid 006404 and 006402.

having then to address the jury first. It was Caldwell's trial practice to allow Tallis to review officers' notes ahead of time.

Caldwell was referred to the Gerald McCorriston report,[240] which recorded Margaret Merriman saying that she watched out her window at 226 Avenue N South for a few minutes but saw nothing. Caldwell says that when he now looks at a map and the report of her statement he can see the possible significance of her evidence to the defence. He concedes that had he noted it then, his proper course would have been to call her and pass along the substance of what she could say to Tallis.

But Tallis, of course, had asked Caldwell to look at witness statements for items potentially helpful to the defence. Caldwell did not do this with police reports and, in the practice of the day, he need not have. I find that he simply failed to notice the Merriman item or, if he did, placed no importance on it. There is no question here of willful failure to disclose.

In the practice of the day, neither the RCMP nor the Saskatoon Police owed a direct duty of disclosure to the defence. The RCMP reported to the Saskatoon Police and the latter dealt with the prosecutor who was expected to disclose to the defence matters which might assist.

The RCMP also reported to the Saskatchewan Attorney General as a matter of contract. The J.A.B. Riddell document,[241] is an internal memo directed to headquarters of F Division. It relates the services rendered to Saskatoon Police to date, March 20, 1969, and a history of the file. The matters covered were, as we have heard from Joseph Penkala, well known to Saskatoon Police.

Caldwell has been wrongfully accused over the years of misconduct and dereliction of duty in the matter of disclosure relating to a knife found on the fence near the body, Wilson's first statement to police and Fisher as a suspect. These matters have been referred to elsewhere.

The Milgaard group have maintained that the Crown's theory of events at trial was impossible, and they have laid great emphasis on this over the years and at the Inquiry. They have maintained that Caldwell failed to disclose evidence of certain witnesses who could say that Gail Miller always walked down Avenue O to her bus stop because his theory was that she must have walked down Avenue N where she encountered her killer. Caldwell suggested to the jury that Avenue N was the route, but conceded that it could be either Avenue O or Avenue N and the trial judge left that open to the jury.

On January 19, 1970, during the course of the trial Caldwell sent copies of the Dennis Elliott (who drove Gail Miller home) statement to Tallis along with about 13 others. One might think that such production was a little late in the day to have been of any use but I heard evidence from both Caldwell and Tallis that they were in frequent conversation with one another and that Tallis would have known or seen the contents of statements in Caldwell's possession.

Caldwell says that his office was proactive in disclosure, although the term might not have even been in use then. They disclosed freely upon request except for the distinction between police reports and witness statements. The former were not released. As the evidence was to show, most of the items making the possible connection between the murder and the Fisher rapes were contained in the police reports. This was long before *Stinchcombe*, of course, and police reports were withheld for good reason – to prevent the dissemination of sensitive information which might harm innocent third parties. But over

240 Docid 002096 at 102.
241 Docid 065399.

time, the Courts have seen an overriding public interest in disclosure and production of police reports is now routine.

In 1969, defence received what the prosecution thought it should, and this of course placed a heavy burden on the prosecutor who himself had not received the entire police file.

Seen in this light, the disclosure asked for by Tallis and granted by Caldwell was rather extensive. Caldwell wrote to Tallis in September 1969, telling him of possible exculpatory evidence. Further letters passed between them up to trial time. Caldwell said that Tallis had been asking for disclosure throughout the case.

In terms of the standard of disclosure, this case is more an illustration of the wisdom of *Stinchombe* than it is of failure by police and prosecution in 1969. To the degree that Caldwell might have failed to meet the standards of the day in terms of disclosure, he nevertheless acted in good faith and did not suppress evidence. A further discussion of this point will follow.

Caldwell said that he viewed his role as being independent of the police service. He reviewed statements and did his own assessment of witnesses through interviews. Three of the main ones were Ron Wilson, Nichol John and Albert Cadrain, and none complained to him of mistreatment by members of the Saskatoon Police. He had no impression of coerced or planted evidence. His practice was to interview important or doubtful witnesses in the presence of a peace officer. He says that he did not view prosecution as a matter of winning or losing, but rather as the performance of a public duty.

As prosecutor it was his sole duty to present credible evidence. He would not presume that a witness's evidence had been tainted by coercion, but if there was any hint of it in his interview, he would follow it up through a good, sound investigation. This raises a good point. It is tempting to say after the event that Caldwell should have been more vigilant for tainted evidence, but there was no hint of it. He has testified that he was dealing with Saskatoon Police officers who were professional, experienced and reliable. He was impressed with Calgary officer Art Roberts' credentials. I have no evidence of a poor reputation amongst Saskatoon Police of the day.

As for John being kept overnight in cells, he thought that it was her idea. She wanted to be in a secure setting and in fact was moved to the matron's office when she asked. So, as far as he was concerned, there was no intimidation intended. Indeed, the Inquiry evidence showed that none resulted.

On the subject of late disclosure, the practice of the day was to give defence counsel earlier access to statements but not necessarily copies of them. I find that to be implied in the correspondence between Tallis and Caldwell. The latter suggests that Tallis saw some statements before he received copies.

The Cadrain, Wilson and John statements were sent on only August 15, 1969,[242] quite close to the start of the preliminary inquiry on August 18th, but Wilson was not called until August 27th, Cadrain until August 28th and John until September 4th.

Tallis obtained some adjournments. Years later, Milgaard counsel were given access to statements of Victim 12, Victim 1, Victim 10, Victim 9 and Victim 11, as we see from David Asper's letter of January 27, 1992.[243] A list of materials filed at the Supreme Court by Asper indicates that Victim 10's statement was

242 Docid 007042.
243 Docid 157294.

amongst them.[244] The fact that they were still on the Crown file argues against any idea of suppression. None of them could fairly be said to constitute information tending to show the innocence of the accused, albeit they showed that there was activity by sexual assault offenders in the area at the time, something which would be disclosed in the present day as a matter of course.

Caldwell was charged with having failed as a gatekeeper of the evidence, when he did not see the significance of a serial rapist at work. But as he explained, in 1969, police forces were not using profiling of potential criminals as an investigative tool. Only years later, perhaps in the 1980s and 1990s did authorities begin to think that criminal behavioral patterns could be discerned. However that might be, the fact is that in 1969, Caldwell did not consider the significance of the rapes in 1968, not having been alerted to them by the police.

Tallis did not receive the Victim 12 report, and he said that he could have used it to argue that the murderer also attacked her, and there was no suggestion that Milgaard had attacked Victim 12. It would not have been a strong argument, given the timing of events, but he said he would have expected disclosure even then. Caldwell admitted a lapse of judgment about this.

The description of the Victim 12 assault is in no way similar to the Miller attack. The suggestion by Joyce Milgaard's counsel that disclosure of this assault to Tallis by Caldwell would have "blown his case [against Milgaard] to smithereens",[245] depends upon one concluding that the Miller and Victim 12 attackers were one and the same – and that Milgaard was at the motel around 7:07 a.m. – the time of the Victim 12 attack. That was, and is, far from an inevitable conclusion. It also overlooks the fact that if Larry Fisher was assaulting Victim 12 at 7:07 he would have an alibi for the Miller murder happening seven or eight blocks away at the same time.

I find from Tallis' Inquiry evidence, that had full disclosure by today's standards been made, he might have received information leading to further lines of inquiry, particularly through cross-examination at the preliminary inquiry. For example, had he received all the police reports, he would have seen Sid Sargent's report about a young woman dressed like a nurse at Avenue N and 20th Street between 7:00 and 7:05 a.m. If that was Gail Miller it would be improbable that Milgaard had anything to do with the murder.

Because of the Milgaard claim at the Inquiry that the activities of a serial rapist in the area were notorious at the time, it was interesting to hear Tallis say that:

- he had not seen The StarPhoenix article of December 14, 1968[246] warning women;
- he had not heard of the rapes, or of a serial rapist;
- his contact on the west side made no mention of them;
- he did not hear of the Victim 11 assault, even though he lived nearby.

Tallis had no information that the Saskatoon Police and the RCMP had thought of a single perpetrator for the murder and the sexual assaults. He would have called Caldwell had he known. But, of course, Caldwell did not know either. The RCMP report dated March 20, 1969, did not surface until 1993.[247] It would have helped, Tallis says, as would Cpl. Edwin Rasmussen's report of May 7, 1969,[248] about Fisher Victim 1, Fisher Victim 2 and Fisher Victim 3. The latter, he thinks, would have formed the

244 Docid 019987.
245 T17768.
246 Docid 039527.
247 Docid 065399.
248 Docid 250597.

evidentiary foundation for an argument that a third party, not Milgaard, had murdered Gail Miller. Milgaard was not in Saskatoon when these attacks occurred. The evidence was important enough to attract the attention of experienced investigators, and was the sort of thing he expected to get from the Crown. Caldwell, not having seen these reports, cannot be faulted for not telling Tallis. As for the police not telling Caldwell, although Rasmussen in his report said that there was a strong possibility that the three rapes and the murder were directly connected, he also made it clear that the three sexual assault victims were interviewed at length and could not help with identification. This is another example of decisions for disclosure being made at the time first by the police and then by the prosecutor. Nowadays, such information would go to the defence.

Joseph Penkala saw a similarity between two of the rapes and the murder,[249] and this fact could have assisted Tallis. But Caldwell either missed it, or failed to appreciate its significance to the defence. One can understand, therefore, the advantages of a system of disclosure which puts all relevant police reports before the defence. At the Inquiry, Caldwell denied suggestions put to him by Milgaard counsel that he suppressed or withheld material, and I find that there is no substance to these allegations. That said, even innocent failure to disclose might contribute to a wrongful conviction.

As for post-conviction disclosure, prior to the Milgaard appeal being heard in November of 1970, Fisher had confessed to the Winnipeg and Saskatoon rapes. Had he known this, says Tallis, at any time before judgment came down in January of 1971, he could have applied to have new evidence considered by the Saskatchewan Court of Appeal, and after that by the Supreme Court of Canada. But the fact is, he did not know, and I find no duty on anyone to have told him unless, of course, someone in authority had made the connection. Of this I have no evidence. Tallis said that he knew nothing to justify the allegation that Kujawa and Caldwell had made the connection but conspired to withhold the information. They were of the highest personal and professional integrity, and would have told him of pertinent information before the appeals expired.

He saw nothing unusual in the direct indictment procedure used to receive the Fisher guilty pleas in Regina. Prisoners from Prince Albert were regularly brought to Regina for criminal appeals and air transport was available.

I observe that the post-*Stinchcombe* era, while it has brought increased work and responsibility for the Crown in terms of the volume of material which must be disclosed, has at the same time made the Crown's task easier because they have less discretion. In my view the 1969 – 1970 situation placed a rather unfair burden on the prosecutor. He was expected to decide what was helpful to the defence and to produce that while, as a general rule, withholding police reports. Today's situation is quite different. Everything of possible relevance is produced at the cost, I am sure, of releasing confidential and perhaps irrelevant information. But, apparently, a higher public interest is being served.

Asked to comment about Serge Kujawa, Tallis said that he had experience with him both at trial and on appeal, and that Kujawa probably gave him a little more disclosure than he was entitled to. He cooperated, making concessions where called for, and could be relied upon to carefully consider any request.

I am satisfied that Tallis received full cooperation from the Crown, both at trial and on appeal. In hindsight, he might have benefited from fuller disclosure relating to other crimes of sexual assault in Saskatoon in 1968, had he thought of introducing such evidence as a defence based upon the rapist also being the

249 Docid 105520.

murderer of Gail Miller. Tallis did not tell us he would have advanced such a defence, rather that disclosure would have opened further lines of inquiry to him. I find that to the extent that material relating to other sexual assaults came to Caldwell's attention while preparing for the Milgaard trial, he rejected them as being unrelated and not requiring disclosure. It was a decision within his discretion.

Kujawa, as we know, was not involved with the trial. He argued the appeal, and he spoke for the Crown on Fisher's guilty pleas in Regina.

He agreed that there was an ongoing duty on prosecutors relating to disclosure – to give relevant evidence to the defence. But it relates to evidence, not mere suspicion. He said that once Milgaard's appeals were exhausted, he simply went on to the next case and Wolch, for one, did not bring anything to him to cause him to reopen the matter. This raises a very good point. I have evidence from people who dealt with him at the time to indicate that inquiries to Kujawa would have received due consideration. While Hersh Wolch and David Asper have given no satisfactory reason for failing to approach him.

Reporter Dan Lett wrote an article April 22, 1992, provocatively entitled, "Milgaard lawyers heap scorn on Kujawa".[250] They describe him as either incompetent or dishonest when he failed to disclose key evidence. And it also says that Caldwell frequently sought his advice. Kujawa says that he advised him only once regarding s. 9(2). I accept that. Nor was it correct to say that he failed to disclose material to Milgaard's lawyer because he thought it irrelevant or that he kept evidence under wraps, perhaps intentionally, for more than 20 years.

Asper was quoted in the Globe and Mail on May 2, 1992,[251] as saying that it was not a question of whether there was a cover-up, but rather how widespread it was. Kujawa commented that he failed to give the comment much notice, given the source.

(iii) Crown Theory at Trial

It is customary in a criminal trial by judge and jury for the prosecution to put its theory of events before the jury to assist their understanding. What counsel says in this regard is not evidence. That comes in the form of witness testimony, and exhibits entered as evidence.

Crown counsel develops his theory from an opening statement of the facts as he expects them to be shown and a closing address to the jury in which he puts forward his theory of the facts as demonstrated by the evidence. Caldwell's closing address is Appendix G.

A jury is always told that they are the finders of fact, and that they are not to accept anything said to them by counsel on the facts, unless it is borne out by evidence in the trial.

Broadly speaking, Caldwell suggested that Gail Miller left her rooming house and walked south towards 20th Street to catch her bus. On the way, Milgaard, Wilson and John pulled up beside her in Wilson's car and asked for directions. They then became stuck in the alley near where her body was found with Wilson and Milgaard leaving in opposite directions to look for help. Before Wilson's return to the car, Milgaard grabbed the victim in the alley, raped her and stabbed her to death and then returned to the car.

At the Inquiry, Milgaard counsel tried to demonstrate by a video re-enactment that the scenario described by Nichol John in her May 24th statement was impossible, and therefore fabricated. The fact of the matter

250 Docid 160397.
251 Docid 039567.

is that there was no convincing evidence to show whether Gail Miller walked down Avenue N or Avenue O or the alley, or even that she had been picked up at her residence in a vehicle and then dropped off somewhere. I did not find the video to be helpful.

Caldwell suggested that the woman stopped by the Milgaard group for directions was Gail Miller, but even that much is not certain from the available evidence. As he said, he simply put a plausible theory to the jury in opening, in order to give them an idea of the case which the Crown sought to prove. But he made it clear to them that the facts were for them to find; that it was open for them to disagree with the Crown theory and still return a verdict of guilty.

Deputy Chief of Police James Forbes had written to Caldwell on July 8, 1969,[252] giving, I find, a fair representation of the facts as they were known to police at the time. Caldwell said that he thought that Gail Miller had walked down Avenue N, but others thought that Avenue O was her most likely route. Having listened to the evidence and having read the transcripts and other documents in this matter, I find that the police, the prosecution and the jury might have concluded that her route was not of prime importance. The trial judge said as much in his charge. Miller might have walked straight down Avenue O to the bus stop from her front door. She could have exited the back door and down the alley or down Avenue N via 21st Street. There simply is no persuasive evidence of the route she took – only possibilities. We do know that it was -41.1C with a south wind at 18 kilometres per hour. Anyone who has walked in these conditions into the wind knows the urgent need to find shelter. The alley would afford that to some degree because of trees and houses on all sides. So Gail Miller might have chosen the Avenue N bus stop because she could find more shelter from the wind en-route. The jury had more than one possible route to consider.

What Caldwell suggested to the jury was that the victim walked on either Avenue O or Avenue N, (he favored N) and that Milgaard and his two companions stopped her for directions on Avenue N between 20th and 21st Streets. He did not try to compute the timing of the events after that, leaving it to the jury to sort.

In his view, the window of opportunity for Milgaard to have committed the murder of Gail Miller was between approximately 6:45 a.m. when she was last seen at her rooming house, and about 7:30 a.m. when Milgaard, John and Wilson arrived at the Danchuks, due allowance being made for inaccuracy in reporting times. That was reasonable, I find, given the evidence.

In his jury address, Caldwell dealt with the question of time in approximations because, he said, that is the way the evidence was; Wilson only guessed at times. John said they got to Saskatoon around 6:30 a.m. The motel keeper said that they opened around 7:00 a.m., and that the shoeless man asking for directions arrived soon after; say around 7:10 a.m. Sandra Danchuk said that their car became stuck between 7:30 a.m. and 7:45 a.m., and that within a few minutes the car with three people arrived. Gail Miller was last seen at her residence between 6:35 a.m. and 6:45 a.m. The judge suggested three possible routes for her walk to the bus – Avenue N, Avenue O or the alley. And he pointed out that there was nothing at all to show positively that the person who was stopped for directions was Gail Miller.

Caldwell acknowledged certain other difficulties he was faced with such as the fact that there was nothing to corroborate the Wilson and John statements that their car was behind the funeral home, the fact that neither the Danchuks nor Robert Rasmussen saw blood on Milgaard, the fairly short time available for the commission of the crime – although experience told him that time estimates by the witnesses were far

252 Docid 007059.

from exact; the odd circumstance – which he could not explain to the jurors and told them so – that stab marks pierced the coat but not the uniform; the handedness of Milgaard not matching the probable right hand which delivered the stab wounds; and inability of witnesses to see clearly through the ice fog, Henry Diewold being an example.

The trial judge's charge to the jury[253] merits careful reading for the fair manner in which the evidence was reviewed, and for the way in which the jury was presented with a set of facts which emphasized the general picture instead of "a theory" to which the facts had to fit. He was at pains to explain to the jury that they were the finders of fact. Jurors, as we know, must be unanimous in the verdict they reach but may arrive at it by different routes.

The judge simply presented the evidence as he saw it and allowed the jury to reach their own conclusions as to what happened. He said:

> …it would appear from the evidence that the accused, Wilson and John were all in that neighborhood, around 20th and "O" and "N" and the location of the church and of the funeral chapel and of the motel and of the service station.[254]

In my view this properly instructed jury heard evidence from which it could have reasonably concluded that David Milgaard had the opportunity to commit the Miller murder. I find that Caldwell did not mislead the jury on this point, either intentionally or inadvertently.

I accept Caldwell's evidence that he put Cadrain forward as a credible witness, having interviewed him before both the preliminary inquiry and the trial. He had no concerns about drug use at relevant times, and noted that Cadrain, after repeated questioning by police, had not changed the essence of his story. I accept that he saw no indication of mental problems in Albert in 1969 and 1970, nor did others, Joyce Milgaard amongst them, who testified that she noticed no signs of mental illness in Cadrain at trial, and she did not bring the subject to the attention of Tallis.

Albert's brother Dennis Cadrain now thinks that Albert was mentally ill at the time, but he did not warn anyone. Other members of his family disagreed with his present assessment of Albert's condition at the time of trial.

Joyce Milgaard knew, according to her Inquiry evidence, that Albert Cadrain was hospitalized only in 1972, well after the trial, for mental illness. Yet knowing that, she wrote in her book in 1999 that:

> …the jury unfortunately never heard that Shorty was diagnosed as a paranoid schizophrenic.[255]

She admitted that the reader would conclude that the Crown put up a paranoid schizophrenic as a witness and kept it from the jury.

Cadrain died some years prior to the Inquiry, and had gone through protracted periods of mental illness since 1972. Never, throughout his preliminary and trial testimony at the Supreme Court of Canada review, or in the many interviews conducted by investigators, did he resile from the essential points in his statement to police of March 1969, that he saw David Milgaard at his house on the morning of

253 Docid 006175.
254 Docid 006175 at 190.
255 Docid 269317 at 367.

January 31, 1969 with blood on his clothing. I find that Caldwell was properly convinced of his credibility, and acted accordingly in putting him forward as a Crown witness.

He produced witnesses for cross-examination only so that Tallis would not have to call them, and then be obliged to address the jury first. Art Roberts and Shirley Wilson were examples of this, and Marie Indyk was another.

(b) Defence Counsel

Calvin Tallis of Saskatoon was retained by Joyce Milgaard through the Legal Aid Plan to defend her son David. He was her first choice.[256] According to Caldwell, Tallis was the leading defence lawyer in the province at that time.

Tallis testified that he never turned down legal cases unless he had a conflict. His experience in both defending and prosecuting was helpful to him.

In connection with her choice of lawyer to defend her son, Joyce Milgaard said years later that she was stuck with a legal aid lawyer. That opinion was not shared by others. Her second lawyer on the reopening, Tony Merchant, acknowledged that Tallis was known as the best, or one of the best, criminal lawyers in the Province. His work on legal aid files was no different than on private retainers.

Tallis was also held in high esteem by the police, Joseph Penkala agreeing that he was the best defence lawyer in Saskatchewan, and he was faced with a difficult case to defend.

Murray Sawatsky, who led the Flicker Investigation, said that throughout he heard many complimentary things about the professionalism of Caldwell and Tallis, except from Joyce Milgaard. He said she said that Tallis was incompetent and accused him of conspiring with Caldwell to have her son convicted. The result of that was that Sawatsky had to warn Tallis as a suspect in a criminal offence for an accusation he thought was absurd. He said, however, that Tallis offered to answer any questions and did so in an open and forthright manner.

(i) Conduct of Calvin Tallis

As we have seen, Tallis was Joyce Milgaard's choice of counsel. Despite what she later said about him he was a good choice, as may be seen from his preparation, and from his conduct at the preliminary inquiry and trial.

The present section will deal with his preparation for trial, as well as certain issues he faced at the trial itself. Although much of the area has already been covered in consideration of evidence relating to Caldwell.

A Meetings with Client

Tallis testified that his first comprehensive meeting with David Milgaard was on August 4, 1969, and there were two more before trial[257] in Prince Albert. He also met him daily in private during the preliminary inquiry and trial. Although he received copies of the Cadrain, Wilson, John statements only on August 15, 1969, he was aware of their contents August 4, 1969, and says that he would have told his client of their

256 Docid 032248.
257 Docid 065492, 065407.

contents. He knew, as well, about the statements of March 3, 1969, and April 18, 1969, given by David Milgaard to the police.

He spent quite a bit of time, he says, going into this client's background, including his difficulties in school and with the law. He did not discuss Milgaard's sexual conduct, with his parents, out of respect for his privacy.

In his three visits to his client in Prince Albert, and in phone conversations, he kept him fully informed, and gave him appropriate cautions and instructions, such as to avoid discussions with friends and with peace officers in the absence of Tallis.

B Building the File

Tallis testified that in building a file he used a check-list, and copious notes which were then typed and simplified in memos. There would have been more than 50 memos by the time of trial, some short and others two or three pages in length. His file was left with the law firm when he was appointed to the bench in 1976. The firm changed offices more than once. The file could not be found, but the last persons to have seen it were Joyce Milgaard and her lawyer, Young, in early 1981. Young told the Inquiry that Joyce Milgaard copied much of it, but that he returned the file.

C Conspiracy to Convict

The Commission has prepared a chronology of Tallis' involvement in the case.[258] To read it is to wonder why anyone would have the temerity (and some had) to suggest that Tallis offered only a token defense to David Milgaard. To listen to his testimony, and to the testimonials offered by witnesses as to his competence and integrity, is to conclude that any suggestion such as that made by Joyce Milgaard that Tallis and Caldwell colluded to achieve her son's conviction, had no foundation in reality. As he told the RCMP, Tallis described as absurd the suggestion of Joyce Milgaard that there might have been collusion between him and Caldwell to convict her son.[259]

He referred to the extensive publicity between 1989 and 1997 surrounding allegations of misconduct by the authorities, and by him. Some of them appear in the Alberta Justice report of August 15, 1994.

The RCMP Flicker Report mentions the allegation of collusion on the part of Caldwell, Tallis and Saskatoon Police.[260] All assumed guilt, it was said, and so Milgaard was given only a token defence.

Tallis observed that this amounted to allegations of corruption and professional misconduct of the most serious type. He categorically rejects them. He endeavored, he says, to fulfill his duty, and it was very painful for him to be so accused after having done his best.

(ii) Defences

The forensic evidence went in as expected, and Tallis regarded it as essentially exculpatory. The trial judge told the jury that there was no evidence of blood in the semen samples found in the snow, thus discounting the possible explanation offered by the Crown for the presence of A antigens, which might have been contributed by Milgaard in semen mixed with his blood.

258 Docid 335405.
259 Docid 044864 at 865.
260 Docid 032805 at 032818.

The suggestion that the jury was confused about the secretor issue, and that the semen samples in the snow were used to convict Milgaard, has no merit. My assessment of the trial record is that the jury was left with the argument that Milgaard was one of thousands of possible donors of the semen which, in the circumstances, neither identified him nor excluded him.

Art Roberts, the polygraph operator, presented special problems for Tallis. It was he who had obtained the critical oral statements of May 23 from Wilson and John, but made no record of the circumstances of the taking of the statements.

Roberts played a pivotal role in this case, but although Tallis interviewed him, he got nowhere. Roberts represented himself as an expert polygrapher, and refused to discuss the taking of statements. Even on the polygraph test he was unhelpful.

Tallis concluded that he would be of no help to the defence, and that it would have been a grave mistake to call him.

Had there been a *voir dire* on the circumstances surrounding the taking of the John statement, Tallis could have challenged Roberts. But to raise polygraph issues before the jury risked having them conclude that the witness had passed the test. I accept all this.

Tallis had no indication of coercion by police, although he wondered about Roberts' role. Still, John at trial did not say that she was coerced in giving her statement.

The case was not easy to defend. Milgaard's friends had implicated him without apparent motive.

A Evidence of Ron Wilson

Examples abound of Tallis' trial preparation for Wilson's evidence based on the latter's testimony at the preliminary.[261]

Although Tallis regarded Wilson as treacherous, Milgaard could not give a reason for him to lie. Tallis was alert to the possibility that he had been coerced by police, and wanted to explore this with Roberts. He got nowhere, as we know.

Tallis said that he went over Wilson's first statement with his client, and thinks that Milgaard told him that he, John and Wilson had not spoken to each other before giving their statements, but the fact that Wilson and John later changed theirs to inculpate Milgaard would suggest to police that, in fact, they had tailored their first statements to protect Milgaard. Bearing in mind that Wilson, John and Milgaard had been together for about a week, police would recognize that they at least had the opportunity to get their stories straight.

As with his own client's statement, Tallis had to be aware of significant omissions in Wilson's and John's initial statements, such as theft of a battery, break-in at the elevator, talk of purse snatching, stopping a woman to ask directions, leaving the vehicle when stuck, throwing out the compact, and stopping at the Trav-A-Leer.

Wilson also said, at first, that Milgaard was never out of his sight for more than two minutes, and that was the time he drove around the block. Milgaard had told his lawyer of two stops, and then of driving around

261 Docid 179451. His writing appears at page 5 (179474) and in 179291 at 179334. The notes at the end sketch out examination-in-chief of Milgaard should he testify.

the Cadrain block, meaning he was out of Wilson's sight more than once. In view of this, Tallis thought it very risky to have his client testify. The use of Wilson's first statement invited the conclusion that it was an effort to protect his friend, and the significant omissions in that statement made it unwise, in Tallis' view, to put the statement before the jury as the complete truth. He did not raise with Wilson the subject of throwing out the compact, because he had been told by his client that he had done it.

Tallis said that because of Roberts' uncooperative stance, there was little information to be had about the circumstances of Wilson's second and third statements of May 23rd and May 24th. Roberts simply assured him that Wilson was telling the truth, and declined to talk about pre or post test questions put to the witness. Roberts explained more fully to the Supreme Court of Canada, as we know, and Tallis said that if he had done so with him, he could have had more scope to cross-examine Wilson.

Roberts was not being frank with Tallis. He acted not merely as a technician, but as an interrogator, using the polygraph as a tool.

Not knowing this, Tallis had to be careful about mention of the polygraph to the jury lest they infer that the test supported Wilson's statement – and Tallis did not want to concede that the statement was truthful in any way. If he tried to discredit Wilson's post polygraph statement by reference to the polygraph test, he might succeed only in reinforcing it. As well, the Crown might then have called Roberts who, he had reason to believe, would be unhelpful.

There were both consistencies and inconsistencies between Tallis' client instructions, and what appeared in Wilson's May 23rd and May 24th statements. Tallis was interested in explaining inconsistencies, but in so doing had to be careful to avoid introducing hearsay. He did not want Wilson's statements before the jury.

Tallis thought that to have the three Wilson statements – March 3rd, May 23rd and May 24th – in the jury room was to invite a conclusion that the March 3rd statement was given to protect Milgaard, whereas the truth lay in the May 23rd, May 24th statements.

Tallis stated that Wilson tried to be convincing at trial, and that there was no suggestion of police pressure on him.

Eddie Karst was skeptical of Wilson's statements until after the Roberts' interview.[262] Tallis said that this tells him that Roberts played a much greater role than he had led him to believe.

Referring to Caldwell's notes[263] where he showed his intention to leave out Wilson's evidence about the purse snatching discussion lest he be regarded as an accomplice and draw a warning by the judge as to the weight of his evidence, Tallis said that he was unaware of any such tactical considerations on Caldwell's part. His own concern was simply to keep out prejudicial evidence.

Tallis told us that he regarded Wilson as treacherous, and he treated him accordingly.

In discussing Wilson's trial evidence,[264] Tallis pointed out that Wilson said that he saw a knife on Milgaard between Regina and Saskatoon;[265] that he went no more than five blocks from the car after he and

262 T12738.
263 Docid 006938.
264 Docid 005172.
265 Docid 005172 at 005179.

Milgaard got out;[266] that they had gotten stuck around 6:30 a.m., something which Tallis could not dispute because Milgaard was unsure of the time.

The judge was not satisfied with the distance evidence and questioned Wilson.[267] Wilson finally settled on a walk of four blocks out and four blocks back,[268] and said he was in the car for five or six minutes before Milgaard came back.

So, in terms of the distance walked, the trial evidence showed three blocks further, in total, than the preliminary evidence.

Tallis confronted Wilson at length about the difference in distance walked, as related at the preliminary and the trial. Wilson's explanation was that he had more time to think about it. Tallis was concerned that Wilson might say that he was just trying to help his friend at the preliminary inquiry. I find that Tallis did all he could on this contentious point.

Questioned by the court about the age of the woman in the street, and the amount of blood Wilson saw on Milgaard's pants, he answered that he did not see the woman's face and that the blood spot was no bigger than 1.5 to 2".

Tallis successfully objected to the evidence of "fast driving" by his client,[269] fearing that it would show consciousness of guilt.

He was able to get Wilson to say that when Milgaard returned to the car he saw no blood on him, nor did he see him carrying anything in his hand like a compact or wallet.

Tallis questioned Wilson, as well, about his talk with officers Kenneth Walters and J.A.B. Riddell in Regina. Wilson acknowledged that he did not consider himself a suspect at the time, and told Riddell that he had nothing to hide – all by way of showing that his first account to police was more believable than his testimony.

He got him to admit that he had told Riddell that he and Milgaard had nothing to do with the crime, but then when he pressed Wilson about not giving Riddell particulars of where they had been, he answered "I didn't give him everything".

That answer concerned Tallis, as well it might. Wilson was saying that he held back some information from Riddell.

The jury put a question as to whether the parties in the car were under the influence of alcohol or drugs on the trip from Regina to Saskatoon. This concerned Tallis because he thought they might link impairment to the frenzied nature of the attack, so it was important to show them that there was no drug use at relevant times.[270]

Tallis prudently asked for, and received, a warning from the judge to the jury to disregard anything they heard outside of the trial court room about the case – in particular to evidence given at the preliminary inquiry, some of which was published, the ban on doing so not yet having come into effect.

266 Docid 005172 at 192.
267 See Docid 005172 at 005195 and following.
268 Docid 005172 at 196.
269 Docid 005172 at 229.
270 Docid 005172 at 306.

The trial judge, to Tallis' dismay, asked Wilson a series of questions about when he first began to implicate the accused, and got the answer that it began in Regina around May 22nd and continued in Saskatoon. This, of course, weakened the suggestion that Wilson's change of heart on May 23rd and May 24th resulted from police pressure.

Tallis tried to minimize the effect of the judge's intervention by eliciting from Wilson an admission that he used LSD[271] from the time he was released from jail until he was picked up on August 8th, and that he experienced hallucinations. But again the judge intervened and got Wilson to say that he was not under the influence of drugs on May 22nd or May 23rd.

Tallis remained apprehensive about Wilson to the end of the trial, fearing that he would add to his already damaging evidence.

In his jury address, Tallis argued that Wilson was not credible – an unsavory witness, and that the jury should prefer evidence from witnesses Rasmussen and the Danchuks.[272]

He also tried to impress upon them the discrepancy in his preliminary inquiry/trial evidence about the distance walked.

I find that Tallis' handling of Wilson was thorough and sensitive to the many difficulties it presented – difficulties which were apparently beyond the comprehension of certain commentators.

In an article by Dan Lett of the Winnipeg Free Press,[273] July 17, 1990, two lawyers, David Asper and Hersh Watson, are quoted as saying that the Crown did not disclose the March 3rd Wilson statement to Tallis which, had it been known, would have been revealed in court:

> "It is painfully obvious from the transcripts that Tallis did not direct Wilson to the original statement… It strikes me that it would be serious misconduct for the Crown not to provide that information to the defence."[274]

And the article says:

> Asper said it is inconceivable that Tallis, if he had known of the original statement, would have ignored it at the trial.
>
> "I can see no reason (for the statement to be withheld),….Any lawyer would have questioned it and it would have been quickly exposed in a court".[275]

The article is entitled "Witness statement withheld, lawyers say". It goes on to quote Wilson as describing his trial testimony as "a bunch of crap".[276] "The first one [statement] was the one that was supposed to be in Court. If they had used it then, it would all have been over."

This article was part of a media campaign orchestrated by Joyce Milgaard and her lawyers, Wolch and Asper, assisted by Paul Henderson. I am concerned with it because the campaign produced information designed to generate public interest and pressure on the authorities (see Asper evidence to follow) to

271 Docid 005172.
272 Docid 031255 at 031284.
273 Docid 004752.
274 Docid 004752, comments of David Asper.
275 Docid 004752, comments of Ken Watson.
276 Docid 004752.

grant a review of the Milgaard case, a matter then under concurrent examination by Justice Canada under s. 690 of the *Criminal Code*.

The article, I am sorry to say, is typical of the media campaign which was counter-productive to the Milgaard objective. One cannot expect authorities to react favorably to false information and damaging accusations.

Whether the authorities should have reopened the case based upon information such as this depends upon its quality. The first thing to note is that the article is based upon a false assumption. The witness statement was not withheld from the defence. It was not produced in court for sound tactical reasons, as we have heard explained by Tallis. Wilson was questioned about it, but it was not shown to him.

Tallis said that he never sensed police pressure on Wilson; that he recalls no discussion with Asper and Wolch about Crown misconduct; and that he made use of the information in the March 3rd statement in his cross-examination. In his view, if pressed too far, Wilson was likely to have explained his March 3rd statement as an effort to protect his friend. He tended to improve his evidence, not change it.

Tallis knew from the start that the trial would be difficult. Wilson, for example, without apparent motive to lie, gave what seemed to be understated evidence implicating Milgaard, and Caldwell was quick to point this out to the jury.[277]

Cross-examination at trial by Tallis was thorough as to Wilson's failure to incriminate Milgaard throughout all of the police questioning up to the 22nd or 23rd of May, 1969. So that fact was squarely before the jury.

B Evidence of Albert Cadrain

Tallis did not interview the three main witnesses, because there was a risk that in so doing he might be accused of having exercised undue influence upon them.

He did not bother with Celine Cadrain because his client had told him that she was in bed until after he had changed his clothes.

Albert Cadrain's reliability could be questioned. He was not bright, but Tallis noted no signs of mental instability at the preliminary inquiry or at the trial. Indeed, the weight of the evidence supports that observation. Mental illness manifested itself only a few years post trial. Cadrain's parents were viewed as responsible people. Tallis checked on the reward money before trial and found that none of Milgaard's friends had applied for it.

In drafting questions for Cadrain, he took into account the fact that Cadrain had reported voluntarily to Saskatoon Police. This posed some problems for the defence.

Tallis was taken through his cross-examination of Cadrain at the preliminary inquiry where he questioned him closely about seeing blood on Milgaard. He used the technique of skipping from one area to another. If a witness had programmed his evidence he would be unable to follow the program.

He also tried to draw out Cadrain on the subject of whether he thought of himself as a suspect – something which might have motivated him to implicate Milgaard.

277 Docid 141905 at 141929.

He questioned him on his use of drugs in an effort to show unreliability. Tallis noted the preliminary inquiry evidence in summary,[278] and from it drafted his trial cross-examination. Based on the fact that Cadrain had not implicated Milgaard to Regina Police, he thought at the preliminary inquiry that Cadrain's evidence was of less force than he expected.

Tallis' cross-examination of Cadrain at trial was thorough and focused on Cadrain's interrogation by Regina Police, before he gave his statement in Saskatoon. Tallis tried to establish that Cadrain was treated like a murder suspect in Regina, giving him motivation to implicate Milgaard. He also delved into the reasons why Cadrain did not report to Regina Police that Milgaard had blood on his pants, making the point to the jury in his closing address.[279]

But at trial, Cadrain added his account of Milgaard throwing out the compact. All Tallis could do was ask why he had left it out of his statement and preliminary inquiry evidence. He could not challenge it because Milgaard had admitted it to him.

C Evidence of Nichol John

When Tallis began his cross-examination of John at the trial he had her acknowledge that she had never spoken to him. This was a precaution against anyone suggesting that he had influenced her to not repeat incriminating parts of her statement. To interview major Crown witnesses is to run that risk.

She testified that both Milgaard and Wilson changed their pants at Cadrain's. Her answers are interesting:

> Q. And now I gather that you did not see any blood or anything like that on Ron's trousers, that he changed?
>
> A. No.
>
> Q. And you did not see any blood, or anything resembling blood on the trousers that David changed?
>
> A. None that I can recall at least.
>
> Q. Pardon?
>
> A. I said none that I can recall.[280]

John gave an unequivocal answer to the question of blood on Wilson, but an "I can't recall" answer about blood on David, an answer she repeated, having been given the chance to be unequivocal. Had Tallis pressed her further, she might have said something much more incriminating, as she did in her statement.

He knew about the bone handled knife which Cst. Ian Oliver had found on the fence near the body. It could not be identified as the murder weapon, but it would not help Milgaard's case because Wilson and John had spoken of such a knife in Milgaard's possession, so Tallis had no interest in seeing it put in as evidence.

278 Docid 179259.
279 Docid 031255 at 282 and following.
280 Docid 030692 at 030743.

John's evidence at trial proved pivotal. Because of the way she was questioned, and because of her professed lack of memory, she might have left the impression with the jury that she was trying to protect her friend, said Tallis.

John gave Saskatoon Police a written statement in which she said she saw Milgaard stab the girl with a knife in his right hand, so it was in David Milgaard's interest to show he was left handed. Tallis was anxious to do this. Karst gave him this information.[281]

He acknowledged that the five page Mackie Summary would have been particularly valuable to him for Roberts' cross-examination. The Crown should have had to call him in a *voir dire* under s. 9(2) to speak to the circumstances of John's statement of May 24th. As well, if there was a recording he should have had it for the same reason. The s. 9(2) problem was compounded by the jury hearing the statement.[282]

D Evidence of Eddie Karst

Not the least of the challenges facing Tallis at trial was the fact that Karst, a well respected and very able investigator, testified for the Crown.

His client did not suggest to him that he had been pressured by Karst, whom Tallis knew as an experienced, forthright officer. An example of his candidness appears in his report of April 18, 1969,[283] where he observes that John seemed to be telling the truth and if she was that David Milgaard could not be involved in the murder.

But in his report of March 7, 1969[284] Karst had noted 10 points of interest relating to Milgaard. Tallis acknowledged that they were all factors with which he had to contend.

So Karst, one may conclude, was both perceptive and open minded. In his report he remarked upon Milgaard's psychiatric history, the group driving in the lanes of west Saskatoon, and the fact that his own friends had incriminated him. Tallis agreed that these were matters of concern to him as well.

E Strategy

His strategy for trial was to undermine the credibility of some witnesses; deal with the blood evidence (which he thought favored Milgaard); emphasize the improbability of Milgaard having been able to do the crime in the short time available; show that no tire marks were found in the alley to suggest a stuck vehicle; point to the complicated state of the victim's clothing to show that the attack had taken some time; and point to Milgaard's normal appearance at the Danchuks.

At the preliminary inquiry, bearing in mind that Robert Rasmussen and the Danchuks had no bias, he wanted to tie down witnesses as to their time estimates, and get helpful evidence from the Trav-A-Leer and Danchuk stops. From the police he hoped to get evidence about the absence of tire marks in the alley.

Tallis had argued at trial that there was no time for Milgaard to have committed the murder. At the Inquiry he said that he viewed the video which attempted to show that the Crown theory at trial was impossible. But it was based upon arguable assumptions, Gail Miller walking down Avenue O being one of them.

281 Docid 076809 at 815 and following.
282 Docid 006864.
283 Docid 009254.
284 Docid 106617.

And the video was predicated on John's complete statement as evidence, whereas only parts of it were adopted by her.

F Secretor Issue

I am satisfied that he prepared himself well to meet the secretor issue. The issue itself has been examined in some detail elsewhere in this report.

Acting under Legal Aid, Tallis had no funding for expert witnesses on forensic matters, relying instead upon his contacts within the medical profession in Saskatoon. From these he informed himself on the science involved, and realized that with Milgaard being thought of as a non-secretor, he could not have contributed the antigens found in the semen in the snow, and to that extent the evidence was exculpatory.

G Scene Inspection

Tallis says that he inspected the scenes of all significant events both on foot and by car. Although Avenue O offered the more direct route to the bus, he could not discount the possibility that Gail Miller exited the back door and went down the alley. In fact, he spoke to a lady who had walked down the alley earlier that very morning. It was easier, apparently, to walk on the snow packed by vehicles in the alley than to use the unplowed sidewalks. Tallis' memo[285] illustrates his attention to detail. He did not rule out the possibility of Miller having been raped elsewhere and dumped in the alley and killed there.

H Miscellaneous Matters

The case consumed most of his time from July to September, and required much night and weekend work.

He asked Legal Aid[286] on December 19, 1969 to fund second counsel, Ian Disbery, because of the importance of the case. He was refused.[287] Tallis used him nevertheless, and also had his own secretary at the preliminary to take shorthand notes. During both the preliminary and the trial, Tallis was given the use of a room in the Court House for client consultation.

Because of the many hours of preparation needed he asked for a modest additional amount.[288] The information on the court file[289] also shows some of the services performed. He said that the four month interval between preliminary and trial was not unusual.

Early in his retainer, on June 7, 1969, Tallis cautioned his client about speaking to the friends who had implicated him, or with others, including psychiatrists. David, on that first visit, denied that he or any of his friends were involved with the murder.

Joyce Milgaard demonstrated early on, her inclination to take matters into her own hands. On June 2, 1969, unknown to Tallis, she expressed to her son her intention to interview Cadrain, John and Wilson.[290]

Tallis said that there were real risks in doing this. The trial could be tainted by suggestion of pressure being brought on witnesses.

285 Docid 224933.
286 Docid 065426.
287 Docid 065422.
288 Docid 065410 and 065407.
289 Docid 267787.
290 Docid 006763.

He thought that the charge of the trial judge was favorable to the defence, as were several rulings during the trial.

His client had never suggested to him that the Saskatoon Police tried to frame him.

In Tallis' opinion, which I share, the jury could not avoid being impressed by the fact that Milgaard's own friends incriminated him, Cadrain being of perhaps lesser importance in this regard.

I Motel Re-enactment

The motel re-enactment evidence of Craig Melnyk and George Lapchuk was of course damaging, although, says Tallis, the jury should have had regard to their unsavory characters. He would have liked a choice between a judge alone trial and a jury trial, but that was not an option in Saskatchewan at the time.

As we know, Tallis learned of the motel re-enactment only on the eve of trial.[291] He could not recall what his thoughts were as to an adjournment, but he said that the court had fixed dates, and adjournments were difficult to get. As well, he had to think of the possible publicity. But he told his client at once, and initiated inquiries in Regina about Melnyk and Lapchuk.

Caldwell gave him three statements (Melnyk, Lapchuk, Frank) on January 21st, the day after he himself received them.[292] Significantly, when told about these statements, his client could not recall the incident, although he could not deny it. If it happened, he said, he was stoned and making a joke.

Tallis tried to locate Ute Frank and Deborah Hall, but the latter could not be found. He spoke to Caldwell about having Frank available to testify.

In view of the unsavory characters of Lapchuk and Melnyk, he thought it unwise to speak to them.

His client thought that Frank would be reliable, so Caldwell had her brought to Saskatoon where Tallis interviewed her. He found her cooperative, and repentant about her former lifestyle, now abandoned, she having found faith. Tallis accepted this. She recounted the re-enactment done by Milgaard and did not treat it as a joke.

Nothing she said gave Tallis a basis for challenging the credibility of Melnyk or Lapchuk. He inferred from what she told him that she thought Milgaard might well have killed Gail Miller. And in view of what his client and Frank told him, he felt that he could not suggest that the re-enactment did not happen. There is something to be learned from this by all counsel and by the public, and it is that counsel's duty to act in the best interests of his client does not extend to making suggestions to the court which he, the counsel, has good reason to believe are incorrect.

According to Tallis, Frank would have been an even more damaging witness than Melnyk and Lapchuk. As we know, she bolted from Caldwell's office and refused to testify – having held back some information from him.

After listening to Milgaard and Frank, Tallis thought that Hall would not help their cause either. That view was certainly justified by what Hall said in the Supreme Court of Canada.[293] Of all the witnesses'

291 Docid 007070.
292 Docid 007069.
293 Docid 047622.

accounts, this one was the most lurid, although Hall said that she took it as a joke. Tallis would not have called her, had he known what she would say.

At the Supreme Court of Canada, Melnyk and Lapchuk testified generally in conformity with their statements. At trial, Tallis knew about their criminal records, and was able to question them with a view to contrasting their characters with those of upright witnesses like the Danchuks.

In later testimony Murray Brown, of Saskatchewan Justice, said that they searched their files for evidence that Melnyk and Lapchuk had been paid to testify. There was nothing. It was a serious matter because the implication was that their evidence was fabricated. He said that if any arrangement is made with any witness there is an abundance of detail left on file.

That the re-enactment happened was, I think, the subject of overwhelming evidence – not only from the witnesses who were there, but also from what Milgaard told his own lawyer. Notwithstanding that in his affidavit for the Supreme Court Reference Milgaard denied re-enacting the crime in a hotel room. His supporters have continued, right up to the time of this Inquiry, to say that the re-enactment did not happen. Finally, they resorted to describing it as a kind of constructive non-event. It was a joke, therefore, it was not a re-enactment.

A rather painstaking review of what Caldwell and Tallis did at trial was necessary, because of the very serious allegations made against both of them by the Milgaard group over the years. Those allegations are without foundation.

(iii) Decision Not to Testify

The decision to testify in one's own defence in a criminal case is difficult, both for the accused and for his advisors. The accused is not obliged to do so, having the right to remain silent, with the onus remaining on the Crown to prove his guilt beyond a reasonable doubt. That onus stays with the Crown and never shifts.

Defence counsel is not concerned with demonstrating his client's innocence to the court. His duty is to see that his client gets a fair trial, and to try by all legitimate means to raise reasonable doubt. Legitimate means do not include suggesting facts which he knows not to be true, on the basis of what his client has told him. Tallis' advice to his client and his conduct of the defence were founded in ethical considerations.

To begin with, Tallis did not have the ability to choose between trial by judge alone or by judge and jury. In Saskatchewan, at the time, murder charges had to be tried by judge and jury. Conventional wisdom has always been that juries want to hear from an accused that he did not commit the crime, notwithstanding the fact that it is not their function to find that the accused did not do it. They are there to decide whether or not the Crown has met its onus of proof of guilt beyond a reasonable doubt.

With that background, one can understand the anxiety of defence counsel in recommending to his client that he not testify in a trial by jury. Even before that, a decision must be made by counsel as to whether he will advise his client one way or the other. Some counsel leave the decision to take the stand entirely up to their client, but Tallis was not one of those. He believed it was his duty to offer the best advice he could, based on the evidence. In this case, he advised both David Milgaard and his parents that in his judgment it would not be in Milgaard's best interests to take the stand. We have already noted some of his reasons for so doing.

In 1969 David Milgaard told both the police and his lawyer that he had not murdered Gail Miller. He repeated his denial at the Supreme Court Reference.

David Milgaard's evidence was presented at the inquiry on April 24, 2006, by video tape.[294] Parts of it related to interaction between him and his lawyer.

He said that he could remember only some things from 1969 and 1970. Without prompting, he mentioned only being at the Cadrain house, leaving town, getting lost, and driving to Alberta.

He says that he really wanted to testify but Tallis did not want him to. As I found earlier, Tallis advised against it, but I do not accept that Milgaard expressed a strong desire to testify. In fact, he said that he and his parents made the decision. He cannot recall testifying at the Supreme Court of Canada. His memory was better in 1969, he says, and adds that the police treated him well. He had no reason to dispute what he told Tallis.

He said, or at least implied at first, that he had not thrown out a compact from the car. But confronted with what Tallis said about it, he admitted that he might have thrown one out, and that he might have told Tallis that he did.

He was not able to explain why his first statement to the police lacked the detail he later provided to his lawyer.

On the motel re-enactment incident, he was reminded that he told Tallis that if it happened, he was stoned and that Frank confirmed what Melnyk and Lapchuk said had happened, and that is one reason Tallis did not call him to the stand. He said, "I guess I must have did it".[295]

Although denying that he and his companions had anything to do with the Miller murder, Milgaard told his lawyer other things which made testifying problematic for him, such as telling Tallis about stealing a battery in Regina and breaking into the elevator at Aylesbury. They had no money, except for John, who had a little. Milgaard told him that he had a knife with a flexible blade, good for slipping door locks. He said that he lost track of it. Tallis expected a significant area of questioning about this, should Milgaard testify. Although Milgaard could not specify his route or time of arrival in Saskatoon for his lawyer, Tallis concluded that they had gone to the Pleasant Hill area, driving up and down the avenues between 20th and 22nd Street, looking for Albert Cadrain's house. His client could not help him with landmarks, but Tallis thought that there was a good possibility that the jury could conclude that the group was in the vicinity of the murder.

David Milgaard told him about asking a woman for directions, and that she did not know and kept walking. He described her as an "older"[296] woman, and Tallis concluded upon questioning of his client that this meant 35 to 40 years of age. She wore a dark coat. Milgaard admitted that he thought about robbing her, and Tallis was concerned about the Crown getting evidence of motive, should Milgaard testify.

Tallis had information from his own client that they had been stuck before getting to the Danchuks, and that he and Wilson got out, going in opposite directions for help. They soon returned and their car was pushed by a couple of fellows. Wilson's statement had David away from the car for a longer period of

294 Docid 337386.
295 T27750.
296 T27690.

time, and making references to the crime upon his return. All of this would be problematic if David were to testify because the jury might conclude that his client was stuck near the scene of the crime.

Milgaard's account to Tallis of the visit to Cadrain's generally matched the evidence. Tallis sought an explanation for his client's change of pants at Cadrain's, but got none. The pants could not be found. This left Tallis at a disadvantage, not being able to display the pants to the jury, free from the blood Cadrain says he saw there.

Tallis asked him about the reason for leaving Cadrain's and driving around. The answer was that he liked to drive, but he assured Tallis that he had thrown nothing out, a concern, because of the wallet and toque found nearby. This was another factor in the decision not to testify.

Most significantly, I find, Milgaard told him that he might have thrown out a compact found by John in the glove compartment. He did not know where it came from, or why he threw it out. Cadrain, Wilson and John all testified that he threw out the compact – damaging evidence – and Tallis was constrained by ethical and professional considerations in challenging them, because of what his client had told him. Had Tallis called his client he would have led the evidence from him to take the "sting" off of it. He discussed this several times with his client, searching for an explanation.

Because of the frenzied nature of the attack on Gail Miller, Tallis avoided raising the question of drug use, for fear that the jury might conclude that the attacker was under the influence of drugs. As well, he was concerned that if he called Milgaard and the latter put his character in issue, the Crown would question him about drug use.

He was aware of Milgaard's two statements to the police, and Tallis had to be mindful that if he testified, the Crown might use them in cross examination.[297] Milgaard had no complaints about the manner of the police in taking the statements, and Tallis had some concern about his client's uncertain reply when asked if he had been in Saskatoon, because it could be used in cross examination to show evasiveness, were he to be called.

Another point of concern was that both Wilson and Milgaard had stated that they had stolen a battery. This reflected poorly on character, and was the sort of evidence Tallis wanted to keep out of the trial.

In his March 3, 1996 statement, Milgaard could tell police only that they arrived in Saskatoon in the morning, he did not know the day or whether it was light or dark. He told of speaking to an "old woman"[298] on the street. Such a description would not fit Gail Miller, of course, so the police might have concluded that they asked directions from somebody else. A key element in the Milgaard "impossibility" theory would thus be absent.

In his statement, Milgaard omitted being stuck before stopping at the Danchuks. Had he testified, he might have been cross-examined on this significant omission.

He also stated to police that he did not know if there was blood on his pants ("I don't think so"[299]), but he told his counsel that there was not. This concerned Tallis, as did his explanation for leaving Cadrain's to drive around, up the lane – "I like to drive I guess".[300]

297 Docid 006586, 153079.
298 Docid 006586.
299 Docid 006586.
300 Docid 006586.

Significant omissions in an accused's statement can be used against an accused if he testifies. Examples are: thoughts of robbing a woman; being stuck in the interval between asking a woman for directions and arriving at the Danchuks; throwing out a compact; having a knife in the car before arrival in Saskatoon; and of breaking into an elevator.

Tallis said that he would be concerned about how the jury would regard these things, were Milgaard to be cross-examined about them.

Omissions in his later (April 18, 1969) statement to Detective Robert Barrett[301] were also of concern. As well, he told of driving to Calgary at "60-70-80 or 90, because I like driving fast".[302] Tallis would not want this in evidence because the Crown might use it as consciousness of guilt.

Although in this statement Milgaard denied murdering Gail Miller, it would be self-serving to get it in evidence. The rest of what he said, or omitted to say, would have to go in as well.

Milgaard swore an affidavit in support of his application to the Minister November 25, 1986.[303]
He attaches a photocopy of "a narrative that I made for my lawyer".[304] Tallis says that he was not shown it. He received some notes, but not the narrative attached to the affidavit. The notebook he saw would have been on his file, and the latter has disappeared.

The narrative attached to the affidavit conforms in some respects to what Milgaard told him, but there are differences. I note that the narrative relates changing pants at Wilson's in Regina because of spilt acid, which conforms to Mrs. Wilson's evidence. He also records changing his clothes again at Cadrain's but does not mention a reason.

The narrative omits any reference to throwing out a compact.

Tallis said that his client could not deny doing a re-enactment of the crime in the motel. He said that he was stoned on drugs, and if he did it, it was joke.

He knew that Milgaard's story about driving around while at Cadrain's would arouse suspicion, and lead to robust cross-examination because of the wallet being found nearby, and also because of the explanation given that he liked to drive.

Tallis told his client that he thought that some of his evidence would strengthen the Crown's case.
The formal decision not to testify, however, was not taken until the Crown closed its case.

Tallis said that he had a good working relationship with David Milgaard and his family.

When he testified at the Supreme Court of Canada[305] Milgaard said that they were directed to the downtown by a woman; that they stopped at a garage, and got the heater fixed and ate chicken soup. Tallis said that his client did not tell him that. Had he done so it would have been followed up as a potential alibi. And although Milgaard told him in 1969 that he might have thrown a compact out of the car, he told the Supreme Court of Canada that he did not. He also told them that by September he had no idea of the case against him. Tallis says that in fact he discussed the case with his client in significant

301	Docid 153079.
302	Docid 153079.
303	Docid 301675.
304	Docid 301675.
305	Docid 120408, 231940.

detail, and got his version of events. There would be no reason to withhold from Milgaard what his friends were saying. On the contrary, Tallis was searching for motive. Was there friction between them? He needed to know this from Milgaard. I accept Tallis' evidence and conclude that Milgaard was not being truthful in this respect before the Supreme Court of Canada. It was not the case, said Tallis, that Milgaard (as he told the Supreme Court) asked him to speak to the garage man. He questioned his client about possible friction arising out of jealousy over John or the reward money, but Milgaard dismissed both.

His client recalled entering the Trav-A-Leer Motel in his stocking feet to get a map; being at the Danchuks; driving down an alley; driving Ron's car in a circle; transmission trouble and changing his pants.

On the assumption that his client was at the Trav-A-Leer around opening time (7:00 a.m.), Tallis concluded that there was probably insufficient time for David to kill Gail Miller.

Chief Justice Bence, the trial judge had suggested a 35 minute window of opportunity from 6:45 a.m. to 7:10 a.m. and Tallis thought that this was probably accurate. The jury obviously thought that Milgaard had sufficient time to do what was alleged, but his client could not help Tallis with the times.

More than 10 years after the conviction, both David Milgaard and Joyce Milgaard began to complain that David Milgaard had not testified at his trial on the advice of his lawyer, although he wanted to.

I prefer Tallis' evidence which was to the effect that although he advised David and his parents against it based upon the evidence of the Crown, he left the choice with them. At the Inquiry, Joyce Milgaard said that she urged her son to follow the lawyer's advice, and that he did.

Tallis says, and I accept, that he discussed the question of testifying with Milgaard many times – before and after the preliminary, and during the trial. He told him that in his view, testifying would not strengthen his case, and he reviewed the areas which might cause him trouble. On balance he thought it would not be in his interest to take the stand.

Tallis operated on his client's word that he had not killed Gail Miller, but the client had admitted certain incriminating actions which he could not therefore challenge in the cross-examination of witnesses. Nor could he risk provoking Crown witnesses into amplifying already harmful testimony, or indeed causing the Crown to call more harmful witnesses.

Accepting his client's word that he had no blood on his clothes, Tallis could challenge Albert Cadrain that he was mistaken or lying when he said he saw it there. However, he could not risk questions which might provoke the Crown into calling Kenneth Cadrain, Albert's young brother, who had related to his mother seeing blood on Milgaard's clothes. Such witnesses are difficult to discredit. What motives have they to lie? This case illustrates the precarious ground on which the defence counsel found himself. They must be ethical and professional, but at the same time aggressive in defending their client's cause, as they know it.

As discussed elsewhere, Milgaard's hippy lifestyle would be looked upon with disfavour by a jury, and Tallis had to be aware that he would not present a sympathetic figure on the stand.

I find that the decision not to testify was that of David Milgaard and his parents, taken on the advice of defence counsel Tallis. It was an informed decision, based on advice from a seasoned, ethical defence counsel who had taken all relevant factors into account.

(c) Trial Judge

Tallis commented on other aspects of the trial. In his view he got a favorable charge on the time issue, the judge placing the window of opportunity between 6:45 a.m. and 7:10 a.m., even though he could have extended it to 7:30 a.m. based on Robert Rasmussen's evidence. Tallis said that the judge's tone and manner in delivering his charge were also favorable.

The motel room re-enactment was covered appropriately, the judge telling the jurors that if they had a reasonable doubt that it happened, they should disregard a witnesses' testimony that it did; but if they believed the witness, they then had to decide if the accused meant what he said. Tallis asked for, and got, a recharge to emphasize parts of the evidence which tended to exculpate the accused. This was very worthwhile because jurors tend to place weight on the judge's directions, and to hear him emphasize things on a recharge would have been helpful to David Milgaard.

The fact that the jury deliberated into the next day gave Tallis the belief that they were being careful and conscientious.

The judge's interventions during the hearing of evidence, on the other hand, were harmful and could not have been predicted, especially when John was testifying. Her cross-examination should have been in the absence of the jury, as both he and Caldwell suggested. But the judge ruled otherwise, and that alone, according to Tallis should have stopped the Court of Appeal from invoking the curative provision in the *Criminal Code*.

15. Appeals

From a strictly legal point of view, notwithstanding any errors in procedure at trial, the most incriminating parts of John's May 24th statement were not available to the jury to use for truth of content, because they were properly cautioned by the trial judge more than once not to do so. The Saskatchewan Court of Appeal recognized this, and made appropriate rulings.

Tallis filed a Notice of Appeal.[306] It relied in part upon prejudice to the appellant on account of the s. 9(2) procedure.[307]

A five member Court heard the appeal,[308] noting that no objection had been taken to the jury charge.

The ground of appeal which most concerns us is the alleged error in application of s. 9(2) of the *Canada Evidence Act*, in that the initial cross-examination by the witness on her statement should have been in the absence of the jury, and defence counsel should have been allowed to cross-examine the witness concerning the circumstances under which the statement was given and to adduce evidence before the judge made a ruling on adversity. Tallis could have put questions to the witness as to how information was obtained from her by Art Roberts on May 23rd, and by Raymond Mackie on May 24th, and he might have asked for Roberts to testify (Caldwell said that he would have agreed).

The court said that the initial application to cross-examine on an inconsistent statement should be made in the absence of the jury because, should leave to cross-examine be refused, the jury would have heard

306 Docid 006851.
307 See Appendix K, Memorandum of Law.
308 Docid 009340.

it said that the witness had on another occasion made a statement inconsistent with what she was now saying. This "…might have a very adverse effect on the jury's deliberations."[309]

309 Docid 009340 at 009365.

The Court then laid down a seven step procedure:

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In my opinion, a procedure that would give effect to the legislation, and at the same time eliminate the possibility of any adverse effect upon the jury, would be as follows:

(1) Counsel should advise the Court that he desires to make an application under Section 9(2) of the Canada Evidence Act.

(2) When the Court is so advised, the Court should direct the jury to retire.

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

(4) the learned trial Judge should read the statement, or writing, and determine whether, in fact, there is an inconsistency between such statement or writing and the evidence the witness has given in Court. If the learned trial Judge decides there is no inconsistency, then that ends the matter. If he finds there is an inconsistency, he should call upon counsel to prove the statement or writing.

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

(6) If the witness admits making the statement, counsel for the opposing party should have the right to cross-examine as to the circumstances under which the statement was made. A similar right to cross-examine should be granted if the statement is proved by other witnesses. It may be that he will be able to establish that there were circumstances which would render it improper for the learned trial Judge to permit the cross-examination, notwithstanding the apparent inconsistencies. The opposing counsel, too, should have the right to call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted.

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

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The sixth point addresses the difficulty Tallis saw in the inability to cross-examine the witness as to the circumstances under which the statement was given, without risk of having the witness, in front of the jury, adopt something incriminating in the statement about which she had not testified on the stand.

But on a *voir dire* Tallis could have pressed the witness about her treatment by Roberts, or Mackie. If it appeared that she had been treated oppressively or coercively, the trial judge might have considered that it would be improper to permit cross-examination on the statement, notwithstanding the apparent inconsistencies. The jury would then have been left with Nichol John's *viva voce* evidence which lacked any mention of seeing a stabbing.

On the other hand, if nothing untoward appeared from the initial inquiry into circumstances, the trial judge would then decide whether to permit cross-examination. If he allowed it, the jury would be recalled to hear cross-examination relating only to the content of the statement. This must be in the presence of the jury, said the Court of Appeal, because its purpose is to test the credibility of the witnesses' evidence already given before the jury. They are the judges of credibility, so the cross-examination would be meaningless if conducted in their absence. In practice, I think this could result in the witness adopting the inconsistent parts of her statement, which would end the proceeding, or the witness might continue to be inconsistent. If she did, the Crown could ask the judge to consider the inconsistency in deciding whether she was adverse. If he decided that she was, the Crown could then move to a separate application under s. 9(1), asking for permission to cross-examine his own witness at large, based on a finding that she was hostile.

In the case at bar, the Court of Appeal said that the trial judge was justified in making his finding of hostility, considering the cross-examination on the statement allowed under s. 9(2).

Although he did not allow cross-examination in the absence of the jury on circumstances of making the statement (which he should have), he did allow cross-examination under s. 9(1) in the jury's presence and nothing took place there that would not have occurred had he followed the procedure suggested. But that is so only because Tallis could not prudently ask the witness certain things in the presence of the jury. Had the trial judge followed the procedure later laid down by the Court of Appeal, Tallis would have been free to ask whatever he pleased in the jury's absence relative to the circumstances surrounding the taking of the statement, without fear of what the witness might say on the merits. And he might have uncovered circumstances which would have persuaded the judge not to permit further cross-examination on the statement under s. 9(1).

Tallis explained what he would have done had cross-examination on circumstances been allowed in the absence of the jury. His cross would have been wide-ranging, covering contact with the polygrapher and other police officers. The onus would have been on the Crown to call other law enforcement people involved directly or indirectly with the witness in the taking of the statement. Any recordings would be produced and played. Tallis would want to know if she had been pressured or manipulated.

But it must be remembered that Tallis was faced with a law which allowed a jury to hear a previous inconsistent statement, and a highly incriminating one. That result could be avoided only by a trial without jury (not an option in Saskatchewan in 1970), or by a change in the law. As to the latter, the law has developed with *R. v. B (K.G.)*, [1993] 1 S.C.R. 740 to an even more inclusionary level in terms of the reception in evidence of out of Court statements.[311] We, as judges, should never forget the tragic and

311 A prior inconsistent statement will be admissible for its truth where there are circumstantial guarantees of reliability. Where the prior statement was made to a person in authority, the judge must be satisfied that it was made voluntarily and that there are no factors which would tend to bring the administration of justice into disrepute if the statement were admitted for its truth. See Appendix R.

costly consequences of the Milgaard case in weighing the probative value of out of Court statements against the possible prejudice to the accused.

Caldwell frankly concedes that the jury might have reached conclusions on the basis of John's May 24th statement, but Chief Justice Bence told them to disregard the parts that she had not adopted. He did this while she was still on the stand, and he did it in his charge. If the jury followed instructions, was there proof beyond a reasonable doubt without the crucial parts of John's May 24th statement? They still had evidence of admissions by Milgaard through Wilson, Lapchuk and Melnyk, Cadrain's evidence of blood on Milgaard's pants and the circumstantial evidence of Milgaard's movements and behavior that morning, which included the throwing of the compact out the car window.

The guilty verdict stood until 1992 when the Supreme Court recommended a new trial because of new evidence. So, the "wrongful conviction" of Milgaard in 1970 can be described, as such, not on the basis of evidence that was heard, but rather on the basis of evidence which later came to light. That is a narrow, legal view based on a finding that the jury was properly instructed. But for the purposes of this Inquiry, the matter should not end there. I have evidence from reliable sources, from which I conclude that the trial judge's instructions to the jury about disregarding those portions of Nichol John's May 24th statement which she did not adopt on the stand, amounted to an effort at damage control, which could not repair his destruction of her credibility in front of the jury, nor his error in not permitting cross-examination in the jury's absence on the circumstances of the giving of her statement.

Tallis gave us some background to the filing of the appeal. He said that the s. 9(2) issue was a major point, as was the time factor. He and his firm were prepared to carry the appeal with or without legal aid.

At the time, factums were not filed.

They corresponded on September 17, September 22 and October 7. Tallis recalls no effort by Serge Kujawa to delay the hearing. Indeed, there is no evidence of this.

Kujawa argued for the Crown in his usual reasonable tone, according to Tallis. Much attention was paid in argument to the s. 9(2) issue, and whether reversible error had occurred. One member of the panel showed great interest in the time factor, so Tallis traced it for him. The verdict was not found to be unreasonable on this account, nor on the serological evidence.

In his testimony before us, Kujawa said that he had not been involved earlier in the case, except for giving Caldwell advice on the s. 9(2) matter. He could recall little of the appeal, but could say, and I accept, that he would not have used the prosecution file in preparing for it. Had he had any concerns about the conviction he would have done something about it if he could. I accept this.

Tallis advised Milgaard to seek leave to appeal to the Supreme Court of Canada. Legal Aid was denied, but by this time Milgaard was getting advice from a Mr. King.

Milgaard's appeal counsel, D. A. Crane, filed material to Ottawa for the Supreme Court of Canada application for leave to appeal.[312] Kujawa made a brief oral presentation, after which leave was denied by Martland, J. who said, "In making this decision we express no view as to whether before granting the leave to cross-examine provided for in s. 9(2) of the *Canada Evidence Act*, the Court is required to

312 Docid 066573, 066543.

conduct a *voir dire* as to the circumstances in which the statement in writing was obtained."[313] That marked the end of Kujawa's involvement in the Milgaard file.

16. Findings and Conclusions

(a) Conduct of Investigation

The mildest accusation made by the Milgaard group against the Saskatoon Police is that they fell victim to tunnel vision. Until well into the Inquiry, Milgaard counsel maintained accusations of deliberate wrongdoing by police. Long after the murder investigation, in 1992, the Supreme Court of Canada said that they had been presented with no probative evidence of misconduct by the police. Wolch protested that that was so only because he was not allowed to present it. That is not so, I find, but even if it had been the case, the same objection can no longer be made. We have deliberately thrown the door open to any and all evidence tending to show that the police were guilty of misconduct during the investigation, and a case for it simply has not been made.

Nor did police suffer from tunnel vision which I take to mean focusing on Milgaard as a suspect to the exclusion of all others. On the contrary, the Inquiry evidence showed that the police followed every lead they could think of, and that included a theory that one perpetrator could have been responsible for the 1968 rapes and the Gail Miller murder. They had, however, no suspect for the rapes. When Albert Cadrain approached police on March 2, 1969 they suddenly had Milgaard as a suspect for the murder but not the rapes. Quite properly, their attention became mainly focused on the murder suspect although they continued to follow other leads as well.

There was, however, a critical failure to record the circumstances surrounding the taking of statements from John and Wilson on May 23 and 24, 1969. Whatever happened during the taking of the statement from John by Art Roberts of the Calgary Police and Raymond Mackie of the Saskatoon Police, the result was a radical change in what she had previously told police – essentially, that Milgaard did not have the opportunity to commit the murder. Suddenly, she told Roberts that she had seen Milgaard stab a girl. Her formal statement was taken only the next day by Mackie. Neither he nor Roberts left a report as to the circumstances surrounding John's statements, which must now be seen as the result of pressure by Roberts.

(b) Conduct of Trial

I conclude that Tallis' preparation for trial was thorough. He met frequently with the prosecutor before the preliminary inquiry to hear what evidence the Crown had, and what it intended to lead. He properly informed his client of progress in the case and offered timely advice.

His advocacy at both preliminary and trial was skilled and ethical. His client David Milgaard received a sophisticated, dedicated and nuanced defence.

It is his hope that the work of the Commission will have a positive, educative, effect causing some to reconsider their tentative opinions. I gather from the evidence of Joyce Milgaard and Asper that they have in fact done so.

My conclusion with respect to the conduct of the trial by Crown and defence is that neither counsel did anything to contribute to the wrongful conviction of David Milgaard.

313 Docid 046911.

On the basis of Inquiry evidence and from what appears in the trial transcript, it is likely that by his interventions the trial judge destroyed the credibility of John when she said she could not remember the most incriminating parts of her May 24, 1969 statement to police. The jury heard the statement read and might well have concluded that the truth lay in it, notwithstanding the warning to take only adopted parts of the statement for truth of contents. The inconsistent statement might never have gotten before the jury but for a procedural error in the application of s. 9(2) of the *Canada Evidence Act*. In deference to the trial judge, this section was new and he made a reasoned effort to apply its provisions. Nevertheless, the combination of legal error, and impatience probably contributed to the wrongful conviction.