

Chapter 11

Post-Conviction Events



1. Caldwell's Letters to the National Parole Board

Of all the people who incurred the wrath of Joyce Milgaard and her supporters over the years following the conviction of David Milgaard, perhaps none was more adversely affected than T.D.R. Caldwell, the prosecutor at the Milgaard trial. This is ironic, as I find that he acted in good faith throughout the prosecution of Milgaard, was at all times ready to help anyone who displayed an interest in the reopening effort, and was a credible and helpful witness at this Inquiry, prepared to admit any mistakes he had made, and in full sympathy with David Milgaard.

In my view, criticism of Caldwell was rooted in two things: firstly, the practice of Joyce Milgaard, and to a lesser extent some of her supporters, to attack indiscriminately anyone who had a part in her son's conviction; and secondly, Caldwell's imprudent action in writing to the National Parole Board about David Milgaard in the 1970s. This is a collateral issue in the Inquiry because I find that it did not play any part in the issues raised by the Terms of Reference. Specifically, the letters did not become a factor in the effort to reopen the investigation into the death of Gail Miller. But they certainly provoked the Milgaard group, providing a continuing source of fuel for the fire of their discontent. The letters, therefore, became relevant to the administration of justice in Saskatchewan about which I have been invited to make recommendations.

Caldwell says that he was motivated to write to the Board by reading its booklet¹ which sought input about prisoners from outside agencies. I accept that, but his response was rather more enthusiastic than prudence called for, and has turned out to be highly embarrassing for him. I note that the booklet calls for comments from the bench and the police, but says nothing about prosecutors.

Caldwell told us that his letter of January 14, 1972, to T.G. Street of the Parole Board² was written because the facts of the case were so shocking. One cannot disagree with that, or indeed with the idea of writing, except that it was something beyond the normal responsibilities of a prosecutor. Restraint was called for, in my view, and there should have been scrupulous attention to accuracy. Instead, Caldwell presented the theory of the Crown as fact instead of referring to the evidence. He did cite the judgment of the Saskatchewan Court of Appeal (which recited the facts based on evidence), but he should not have put something down as fact simply because he believed that it happened. Caldwell was proud of the part he played in the conviction. But here, I think, pride took him a step too far. Instead of letting the Parole Board deal with the matter, he interjected his own views. He mentioned the re-enactment and enclosed photos of the deceased.

In the letter, Caldwell said that he had read Milgaard's entire psychiatric history which contained "predictions by social workers... that he would one day kill somebody".³ He purported to know "a great deal about the personality of the accused"⁴ and repeated Albert Cadrain's tale of the girls in the bathtub. This, surely, was an excess of zeal. Cadrain's story was not evidence. Caldwell did, however, refer the Board to the Yorkton Psychiatric Centre, amongst other agencies, for follow up.

Using the booklet as a guide, he went through nine factors, expressing his certain view that Milgaard would return to a life of crime if released. He said, "From the above you will not be surprised to learn that I would be unalterably opposed to this individual ever gaining his freedom again, since I feel that it could confidently be predicted that he would return immediately to a life of crime, which might well soon lead again to another senseless and brutal killing of the sort described above".⁵

Caldwell told the Inquiry that he did not write to the Board about other offenders and he added, rather unnecessarily I thought, that he had strong feelings about the case and the offender.

The Board replied and Caldwell wrote again on September 27, 1974,⁶ this time prompted by a meeting with the new chairman William J. Outerbridge, and urged the Board to have Milgaard sign a release for psychiatric histories in the possession of Dr. Ian McDonald. He says that he regarded this as his duty. The Board's acknowledgment is a letter.⁷ They wrote to McDonald, copying Caldwell, saying that Milgaard had applied for day parole. This was during the seventh year following conviction. The Board also wrote to Caldwell seeking information.⁸ Caldwell replied on August 15, 1977,⁹ referring them to his 1972 letter enclosing a copy of the Saskatchewan Court of Appeal judgment and photographs of the deceased with some commentary. He said, "I cannot over-emphasize the danger which I think Milgaard would present to other persons if he were to have his freedom, even on a short and temporary basis... Milgaard is an

1	Docid 332055.
2	Docid 006824.
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8	Docid 006830.
9	Docid 006822.

extremely dangerous and unpredictable person, and I for one would not care to be in the position of allowing him to be released from custody on any terms whatsoever during his lifetime".¹⁰

It is obvious that Caldwell had become an anti-Milgaard advocate. That was not his role during the prosecution, and indeed he did not play it then. But once freed of prosecutorial constraints, he made it his business to see that Milgaard stayed in custody. I have no evidence of personal animus, and indeed his letters expressed what he saw as the public interest, but I wonder about the advisability of a prosecutor assuming such a role.

He acted, after all, in an adversarial position to Milgaard's defense at trial. There are clear lines of demarcation between agencies employed in the administration of justice. When the police present their evidence, they are finished. When the judge pronounces sentence, he is finished, and so are counsel, including the prosecutor.

I see nothing wrong with passing on information to the Parole Board which might assist them in assessing an inmate, but the Board is in the business of rehabilitation, and I fail to see how that process is helped by dated information and inflammatory comment. That said, I do not regard Caldwell's letters as misconduct for the purposes of this report.

Caldwell's letters to the Board did not delay the opening of the investigation into the death of Gail Miller because he continued to be cooperative with investigators, despite being pilloried by the Milgaard group through the press. But accusations of bias against him have led investigators up many a blind alley. This Inquiry has invested much time, effort, and money on what have proven to be baseless accusations of misconduct by him. One recommendation which I could make for the better administration of Justice in this province would be that prosecutors desist from unsolicited contact with the Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts. They should avoid leaving the impression that they are heavily invested in a case on a personal level.

2. Larry Fisher's Assault of Fisher Victim 7 March 31, 1980

Fisher was released from prison on January 26, 1980. On March 31, 1980, he raped and attempted to kill Fisher Victim 7 in North Battleford, Saskatchewan, in a protracted, vicious attack in which the victim's throat was slashed. More than a year later, he was convicted of rape and attempted murder and sentenced to 10 years in prison.

The similarities of this attack to the rape and murder of Gail Miller appear to have escaped everyone's attention. Had Linda Fisher's report to Saskatoon Police on August 28, 1980, about her suspicions of Fisher as the murderer of Gail Miller been followed up, one would think that the attack on Fisher Victim 7 only four months prior would have been noticed, even though Fisher was not convicted until June 11, 1981 in Prince Albert Court. He was on parole at the time of the Fisher Victim 7 attack and was investigated for it soon after the event. He was charged on April 3, 1980, and his preliminary inquiry started on August 7, 1980. Had Linda Fisher's report of August 28, 1980 been followed up, investigators would surely have spoken to him and realized that he was suspected of having committed a crime which bore striking similarities to the Gail Miller rape and murder.

The significance of the failure of Saskatoon Police to follow up on the Linda Fisher report calls for a more detailed review of evidence respecting it, although the failure itself was rooted in simple error and systemic factors. There was no misconduct for the purposes of this report.

3. Linda Fisher's Visit to Saskatoon City Police

The third arm of the Terms of Reference directs me to seek to determine whether the investigation into the death of Gail Miller should have been reopened earlier, based upon information which came to the attention of the police or Saskatchewan Justice. Officially, the reopening of the investigation did not take place until a DNA match was made in 1997 between Fisher and the semen stains on Gail Miller's clothing. Previous inquiries, however, had concerned themselves with the investigation into the death of Gail Miller, notably the s. 690 investigations by Justice Canada, the Supreme Court of Canada Reference, and the RCMP Flicker investigation, this over a period of almost seven years beginning in 1989. For most of that period, Fisher was regarded as a suspect in the death of Miller, but evidence linking him to the crime, and hence sufficient to charge him, was lacking. But that evidence might have been available years before arising from Linda Fisher's visit to Saskatoon Police on August 28, 1980. She told police that her husband Larry might have been responsible for the murder of Gail Miller. Her report was received, filed, referred and possibly evaluated on a cursory basis within the Saskatoon Police, but it went no further.

Before considering the evidence relating to the Linda Fisher statement, it is necessary to note that for 10 years following the conviction, David Milgaard and his family concentrated their efforts on winning parole but were unsuccessful.

Not surprisingly, the conviction had thrown the Milgaard family into confusion, and it was the evidence of Joyce Milgaard, which I accept, that she continued to hope, until the early 1980s, that her son would be paroled. But David's continued failure to adapt to life in prison, his deteriorating mental state, not to mention his steadfast claims of innocence, finally persuaded her to give up on the idea of parole and instead seek a reopening of his case. She gathered supporters and hired counsel, three in succession.

With that background, I now move to a consideration of the circumstances surrounding the giving of the statement by Linda Fisher.

I will review what witnesses said about the report at the Inquiry, first the evidence of Linda Fisher, then Kenneth Wagner who took the report and finally Jack Parker to whom it was referred.

Linda Fisher went to the Saskatoon Police on August 28, 1980, at the urging of her companion Bryan Wright, with whom she had shared her suspicions. She had been drinking, and they arrived at 4:30 a.m. on August 28, 1980. At the Inquiry she confirmed that Wagner's report of her visit was accurate.¹¹ She could not explain clearly why she had failed to come forward sooner.

From her evidence at the Inquiry, we learned that Linda Fisher married Larry Fisher on December 16, 1967, and divorced him in January of 1979, having been separated following Larry's incarceration in 1970.

She and Larry moved many times,¹² staying in the Cadrain house for about a year, from the fall of 1968 to the fall of 1969. Larry used the private entrance to their suite, not the one which connected with the upstairs where the Cadraings lived.

11 Docid 025417, 103521 and 105323.
12 Docid 067059.

Larry rode the bus to work, catching it around 7:00 a.m. Sometimes he borrowed Cliff Pambrun's vehicle for important reasons, but not for long, and not overnight. Larry sought out other women, and Linda argued with him about this.

Linda Fisher says she heard of the October and November 1968 rapes on the radio and read about them,¹³ but had no suspicions or concerns about Larry as the culprit. He exhibited no unusual behavior.

On January 30, 1969, Larry did not return from work. Linda was very angry and packed to leave. She thinks that Larry had come home after 1:00 a.m. She woke between 9:00 a.m. and 11:00 a.m. to see him wearing dressy clothes, freshly bathed. She thought he had just come home from running around and argued with him until lunch time when she found her paring knife missing. Then she heard the radio report of the murder and confronted him, not seriously, about being the killer. His shocked reaction made her think she had overdone it, but she did not really suspect him. Her missing knife was a wooden handled paring knife, about 5 inches long, with rivets holding the handle. She never did find it.

Larry lost his wallet which a child returned about a week after the murder. It was found near Cadrain's house. This, Linda said, would not have made her suspicious of him as the murderer. He told her that he thought he dropped it getting out of a cab.

Within a week of the murder, the police came to Linda's door asking if she noticed anything unusual which might have been connected to the murder. She said no, not mentioning her knife, or her accusation, or her argument with her husband. It was not unusual. They argued regularly and she did not suspect Larry.

Larry wrote to her from prison in Winnipeg¹⁴ on March 5, 1971, by which time she knew about the rapes. Linda says that she probably began to suspect him of murder around 1970 and 1971. She claims to have asked him before March 5, 1971, if he had done it and he said, "no".

News of Fisher's Winnipeg convictions was published by the Saskatoon StarPhoenix on May 29, 1971.¹⁵ Linda does not recall reading this, or any stories about his Regina convictions. Milgaard's conviction for murder, although known to her, did not influence her. She said that although she still had her suspicions about Larry, she thought that he must not be the murderer.

Conversation about Larry as possibly being the murderer went on in her family throughout the 1970s. Family members concluded that Milgaard would not have been convicted without serious evidence, and she says that that was a significant reason for her not going earlier to the police.

After Larry was charged in Winnipeg, two Saskatoon Police officers spoke to Linda in Saskatoon. Although the details they gave caused her to suspect Larry of the murder, she still did not tell them about the missing knife or about her conversation with Larry on the morning in question. I find that her suspicions were simply not strong enough to motivate her to a formal statement until some 10 years had passed. Some 12 years after making her statement in 1980, she gave an interview to the Saskatoon StarPhoenix¹⁶ around the time of the Supreme Court of Canada Reference, expressing uncertainty over who had done the murder. Either Fisher or Milgaard might have, she thought.

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14	Docid 020175.
15	Docid 159724.
16	Docid 048855.

(a) Report to Kenneth Wagner

Linda's report and statement were taken by Wagner of the Saskatoon Police¹⁷ in August 1980. At the Inquiry, she confirmed its accuracy. She expected, quite reasonably, that she would be contacted by another police officer but this did not happen until an RCMP member spoke to her around 1990.

At the time, Wagner was in charge of a patrol platoon, and was aware of the Milgaard conviction. As the senior officer on duty on the night of August 28, 1980, he was expected to review all occurrence reports and assign them to the appropriate division.

Linda Fisher was referred to him by the front desk officer. She introduced herself and apologized for having liquor on her breath, saying that she needed it for courage. In his view, however, she was sober and coherent. He took her statement and said that someone more conversant with the case would probably contact her.

Wagner had no recollection of the Saskatoon rapes in 1968. He was in the patrol division at the time, and like other officers we have heard from, tended to concentrate on his own files to the exclusion of cases outside his division.

Linda Fisher told Wagner that her suspicion was triggered by the North Battleford incident involving Fisher Victim 7 and her missing paring knife. Also, she recalled talk that a broken knife had been found near Miller's body, and Larry's reaction to her suggestion that he had probably killed her became implanted.

Wagner's interest in her story focused on the knife. He "definitely"¹⁸ thought that someone would follow up.

17 Docid 025417, 103521, 105323.
18 T14963.

COPIES
WITNESS STATEMENT FORM

FORM # D46

NAME Linda Lillean Fisher OCC. NO. 1041/107
 ADDRESS 1340 Ave E.N. Saskatoon PLACE Saskatoon Sask.
 D.O.B. April 20-51 DATE August 28/80
 Phone - 653-3312 TIME 0430 hr. (am pm)

Linda Fisher states, my maiden name was
Linda Lamborn. My adopted father was
Hugh McDonald. He lives at Canora Sask

I married Harry Earl Fisher, Born Aug 21, 1944
at North Battleford, on Dec 14, 1967.

Harry was born and raised at North Battleford
His mother, Marcy Fisher still resides there

We were living at 329 Ave D. South ("O")
when that nurse was found murdered.

David Gilgord was convicted of that murder
and was to have come to our house

that morning. He apparently knew the Bodrain
family who lived upstairs in that house.

We lived in the basement suite.
The police have never talked to me

about this murder.

I divorced Harry 2 years ago while
he was serving time for rape. He has

been involved in several cases since.
The last time was last March in North Battle

ford when he slashed a 56 year old woman and drove
her while was out of prison as a parole. I think

FORM #7 D47

WITNESS STATEMENT FORM

NAME Linda Foster OCC. NO. _____
 ADDRESS Box 2 PLACE _____
 DATE _____
 TIME _____ (am pm)

Something has been bothering about that murder ~~to~~ ever since it happened. I should have come forward long ago.

The day of the murder or the day after I found my pair of knife missing.

Harry and I were not getting along well and I said to him "You probably killed that nurse" He went very pale but at that time I didn't think any more of it.

It has been bothering me ever since, especially when Harry started raping women.

The description of the missing knife is as follows

It was a short handled ordinary folding knife ~~with~~ with a smooth blade about 4 inches long. The handle was ~~silvery colored~~ wooden and brown colored.

I have never found that knife.

I have spoken to Mr. McPittigan about this matter being on my mind.

Harry was never questioned about this case.

WITNESS STATEMENT FORM

FORM #7

D48

NAME _____ OCC. NO. _____

ADDRESS _____ PLACE _____

DATE _____

TIME _____ (am pm)

I am presently a hook on Arco Rock
construction camp at Robsart Sask. In
the Maple Creek area.

I will be home next Sunday Aug 31 if
the detective wish to see me.

~~Wagnel Dagnel~~

In Wagner's report of taking Linda's statement he says, "This woman seems quite sincere. She had a slight order (sic) of alcoholic beverage on her breath, but was sober".²⁰ He concludes, "this report is being left in the event that a follow-up is to be done".²¹

Wagner told Linda that the investigating officers who handled the original case would no doubt be in touch with her, but nobody was.

Central Registry staff typed a report dictated by Wagner. It was not returned to him but rather, he thinks, to his relief inspector on day or afternoon shift. One can conclude from the notation on the report that it was referred to Jack Parker, but not by him, says Wagner, and I accept that. Had he done an assignment of the matter, however, it would have been to a detective sergeant and would appear in the form it bears.

When Wagner switched to day shift, he went to the Detective section to inquire into the Linda Fisher complaint. Parker happened to be there and Wagner asked if he had seen the report. He had. Asked if the knife Linda Fisher described was the knife found near the body, Parker replied "No, it's not even close."²² I accept this evidence and prefer it over that of Parker who says that he recalls no such discussion with Wagner.

(b) Referral to Parker

A handwritten notation in the divisional assignment box reads "Staff Sergeant Parker"²³ indicating that the Wagner report was sent to Parker for review. In his testimony at the Inquiry, Parker could not recall seeing Wagner's report or of discussing the knife, statement or investigation with Wagner, although he could not deny that the discussions might have taken place. He agreed that the police should have followed up on Linda Fisher's information.

Other officers and Justice officials were questioned at the Inquiry about this situation. Joseph Penkala was unable to explain why the Linda Fisher report was not followed up. He himself had no recollection of it in 1980. He said that he might have been skeptical of such a statement, given 10 years after the event by a person who had been drinking, but he would have followed it up nevertheless had he been aware of it.

One can accept that there were reasons to be skeptical of Linda Fisher. She waited over 10 years to make a report and only did so at 4:30 a.m. She had been drinking. She was estranged. On the other hand, she was not intoxicated and what she reported was so sensational that it should have excited comment and discussion within the force.

Penkala could not recall anyone asking about Linda in 1983 although Joyce Milgaard's lawyer had instructed a process server to find her by October 12, 1983.²⁴ Penkala, however, said that he would have followed up on the report had he been aware of it, but could not deny that the Milgaard conviction with all appeals exhausted might have explained the lack of follow-up.

Eddie Karst testified that he was not aware of the statement. Had he been, he would have taken the statement to Charles Short, Raymond Mackie, or Jack Wood for action. Had he been assigned to

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investigate, he would have started by checking with Linda Fisher, then Larry Fisher. He might also have checked with the Cadraings as to Fisher's activities. It would be up to his supervisor as to where to go next. Somebody, he said, should have taken steps.

Murray Sawatsky, who led the RCMP Flicker inquiry, commented that Linda Fisher's report to Wagner was not a common occurrence in police experience. He had never seen one like it.

In 1980, he said, no force had a policy to deal with such things. It was up to the individual officers to evaluate. In his view, it would not have been unreasonable to discount the complaint given the circumstances in which it was made, and Linda Fisher's description of her missing knife.

Murray Brown of Saskatchewan Justice said that had the report been brought to the attention of his department, they would have asked the police to look into it.

I conclude that the failure of Saskatoon Police to follow up on Linda Fisher's complaint of August 1980 was an error. Had it been done, the reopening of the investigation into the death of Gail Miller might have commenced many years sooner than it did. Reports such as that of Linda Fisher should not be dealt with at the discretion of the police force receiving them, but rather should be forwarded to the Director of Public Prosecutions for the province.

4. Bruce Lafreniere's Visit to RCMP in 1986

The Inquiry heard evidence that a further report was made to police, this time the RCMP, in 1986 relating to Fisher as a suspect for the rape and murder of Gail Miller. If such a report was made, it was not followed up, and it should have been for the same reasons considered in regard to the Linda Fisher report. There is some question, however, that the report was in fact made to the RCMP.

Lafreniere testified that he reported to the RCMP in Shellbrook in the mid 1980s about information he had linking Fisher to the Miller murder. The report, he said, was made to Cpl. William Simington, but the latter testified that he had no memory of receiving such a report. It could have been made. There were nine officers in the detachment at the time.

Lafreniere, although appearing to be truthful at the Inquiry, used an alias in 1990 in reporting to Wolch's office which does not reassure me about his alleged complaint to Simington. Had such a complaint been made, says Simington, there would have been a file opened, referenced to Fisher, Milgaard, and Lafreniere. The file would be sent to Prince Albert – the regional detachment – along with the occurrence reports. Simington would also have noted the report in his notebook (which he no longer has). Had the Prince Albert detachment found a need to follow up, they would have passed the information to the Saskatoon Police Service.

The name Milgaard would have alerted him, and the file would have been kept for five years or more at Saskatoon Subdivision. According to Simington, it is very doubtful that there would not have been follow-up. He does not think that the meeting took place.

In June 1993, in the course of the RCMP Flicker investigation, RCMP officers interviewed Simington about his involvement in the matter.²⁵

Although Simington recalled the Milgaard case as being high profile for a number of years, he had no memory of a serial rapist active in 1968. His successor in Shellbrook, Sgt. Corbett, was not familiar with Lafreniere either. Simington told investigators that the Milgaard case was one of three of that notoriety, and he would have noted any of them. He says that it is 100 per cent likely that he would have referred such a complaint to subdivision.

I find that there is no proven failure by the RCMP in this instance to take appropriate action.

5. Conclusions

It has been argued that even if Linda Fisher's 1980 report to Saskatoon Police had been followed up, Fisher's involvement in the crime could not have been shown at that time. That might well be, because the sophisticated DNA typing which finally led him to being charged was not available in 1980. But that does not answer the question posed for us – whether the investigation into the death of Gail Miller should have been reopened earlier.

It is my finding, based upon evidence I have heard, that Linda Fisher's report should have been followed up by the Saskatoon Police, by reference to Saskatchewan Justice. Had it been, Fisher's movements on the morning of the murder, January 31, 1969, could have been verified, the similarity of his other rapes considered and fresh evidence made available to David Milgaard on the basis of which he could have launched a realistic application for mercy under the *Criminal Code*. Young, counsel for Joyce Milgaard was at the time looking for information to support such an application.

Instead, Linda Fisher's report lay dormant in the files of the Saskatoon Police until, on February 26, 1990, Milgaard's counsel, Hersh Wolch, received an anonymous tip that Fisher committed the murder of Gail Miller. By this time, an application for mercy had been launched and successful efforts were soon made to locate Linda Fisher and investigate Fisher's possible involvement in the Miller murder. But 20 years had passed since the murder, memories had faded and documents which would have enabled the tracing of Fisher's movements on the morning of the crime, had disappeared.

I conclude, therefore, that the decision by Saskatoon Police not to follow up on the Linda Fisher report was not reasonable. There was no policy in place at the time to deal with such matters, but there should be henceforth. I would recommend that complaints of this nature be transmitted directly to the Department of the Attorney General, Director of Public Prosecutions, with whom responsibility for a follow-up will then reside.

