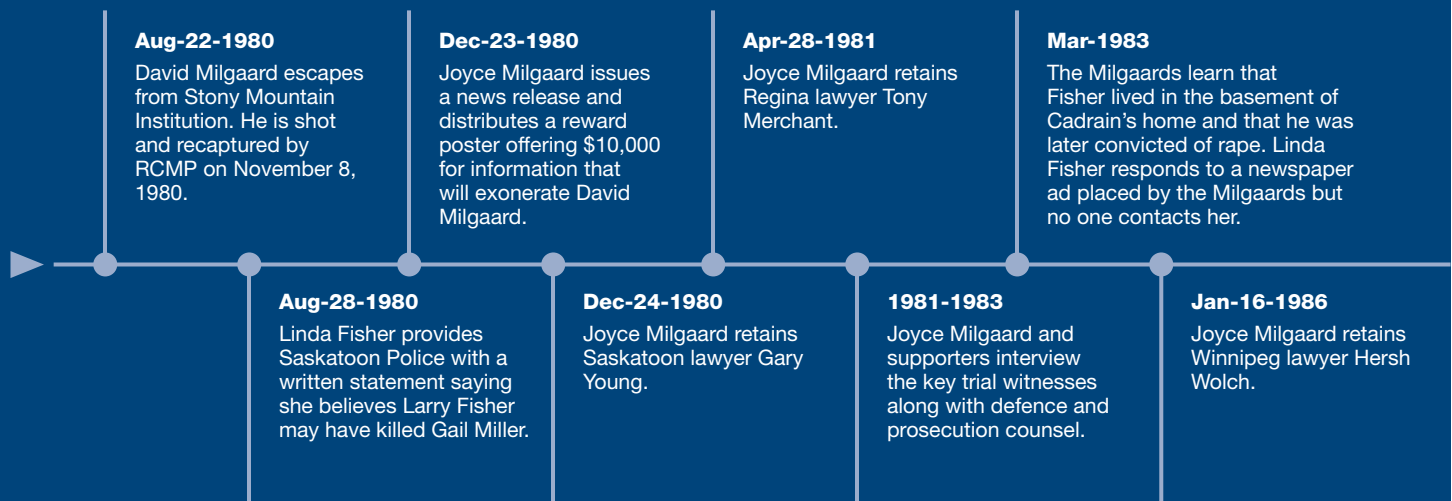


# Chapter 12

## The Reopening of the Investigation



## **1. Purpose of Review**

**Under the third Term of Reference, the Commission's business is to decide whether or not the investigation into the death of Gail Miller should have been reopened earlier based on information received by the police and Saskatchewan Justice.**

Joyce Milgaard started her long campaign to have her son freed in the early 1980s. A formal application to the federal Minister for a review of David Milgaard's conviction was made at the end of 1988. The reopening of the investigation into the death of Gail Miller officially began only after DNA test results were received in August of 1997. Those results opened the door to exoneration and compensation for Milgaard.

In order to decide whether the investigation into the death of Gail Miller should have been reopened earlier than 1997, based upon information which came to the attention of the police or Saskatchewan Justice, it is necessary to follow the generation of that information from the start. That means evaluating the information produced by Joyce Milgaard, her supporters and the authorities. The Milgaard group made extensive use of the media and the publication of information therefore must be examined as well.

The Commission heard from a large number of people who were responsible for generating information which came to the attention of police and Saskatchewan Justice. Not surprisingly, many were sensitive to criticism of their efforts. It is necessary to state at the outset that much of the information which came to the attention of the authorities and to police from 1980 to 1997 was unreliable and recognized as such by police and by the authorities. Some of the information was false and damaging to reputations, and proved to be counter-productive in the effort to have the conviction reviewed and the investigation into the death of Gail Miller reopened.

In criticizing the quality of information produced, it is not my intention to be critical of the producer. I am simply following the Terms of Reference.

We will approach the discussion of reopening efforts chronologically beginning in the early 1980s when Joyce Milgaard commenced her long campaign to have her son freed.

## **2. Responsibility for Review of Convictions**

Once Milgaard had been tried, convicted and his appeals had run their course, for all practical purposes, the matter was ended both for police and for Saskatchewan Justice.

No one has argued against a moral obligation to act on information coming to the attention of the authorities relative to the safety of a conviction, and I am satisfied on the basis of evidence I heard at this Inquiry that both police and Saskatchewan Justice have always been prepared to do so.

Responsibility for initiating review of convictions should remain with the convicted person. It would be both unreasonable and impracticable to publicly fund a continuing watching brief on convictions. There is, however, room for improvement in the manner of reviewing claims of wrongful conviction both in the handling of the initial complaint and in its disposition. I recommend that initial complaints coming to the police concerning the safety of a conviction should not be left to their discretion, but instead should be referred to the Director of Public Prosecutions. As to the disposition of complaints, applications for mercy under the *Criminal Code* should be dealt with by a proactive, independent review agency.

## **3. Initial Steps Taken by the Milgaard Group**

### **(a) Joyce Milgaard**

The Inquiry heard from Joyce Milgaard about her early efforts to have her son's case reopened.

The Commission prepared a table of witnesses who were contacted and interviewed by Joyce Milgaard and her supporters, Chris O'Brien, Peter Carlyle-Gordge and Paul Henderson. It appears in this report as Appendix N.

Joyce Milgaard attended her son's trial, and about 10 years later, began her efforts to reopen his case. These continued until 1997 when DNA tests showed Fisher's involvement in the Miller attack.

Since 1997, Joyce Milgaard has continued to press for compensation, public exoneration for her son and finally for this Inquiry, whose Terms of Reference require us to scrutinize all reopening efforts, including hers, to evaluate the information generated – information which came to the attention of Saskatchewan Justice and the police – with a view to deciding if the investigation into the death of Gail Miller should have been reopened sooner.

As well, I am invited to make recommendations for the administration of criminal justice in Saskatchewan – an aspect of the Inquiry which invites consideration of how the administration of justice was affected by the efforts of those attempting to reopen Milgaard’s conviction.

Over the years Joyce Milgaard gained a sizable group of supporters, both lay people and professionals. For convenience sake I will refer to them as “the Milgaard group”, meaning those who tried to free David Milgaard. Individual members did not always agree, nor was there a membership as such.

David Milgaard’s conviction threw the family into turmoil and, I find from the evidence of Joyce Milgaard, that for the first 10 years of his imprisonment she could only hope that he would be released on parole. However, her son’s chances for parole were compromised by a prison break in 1973<sup>1</sup> involving armed robbery and unlawful confinement.

David, she said, refused to accept what was happening to him and would not settle down, escaping again in 1980.<sup>2</sup> Despairing of parole for him, Joyce offered a reward and began to reinvestigate the crime.<sup>3</sup> She began with no new evidence, but with a belief in David’s innocence.<sup>4</sup>

Joyce Milgaard frankly conceded to us that because of her belief in David’s innocence, she concluded that any incriminating event simply did not happen; and that the police must have twisted the facts to put him in prison. This was also the approach of the group she led. She can justly take credit for her epic struggle to free her son, but must also accept responsibility for the way she carried it out.

Her early efforts to gather information were not promising. As an example, in looking into the motel re-enactment, her son had told her that he had been in the motel, high, and did not recall people showing up.<sup>5</sup> Joyce Milgaard personally spoke to George Lapchuk, a witness to the motel room incident, on January 26, 1981,<sup>6</sup> but got no help from him. It appears from the interview that she accepted the motel re-enactment as a fact, but regarded it as a joke. Her lawyer, Asper, was later to state that it did not happen.

### (i) Ron Wilson

Joyce Milgaard spoke to Wilson on January 26, 1981.<sup>7</sup> She learned that when the three young people were looking for Pleasant Hill they were all “really stoned”.<sup>8</sup> Although this evidence did not surface at trial, Wilson was to say more or less the same thing at the Inquiry.

Joyce kept suggesting to Wilson that the police had pressured him. But he said that when he went for the lie detector test and they began showing him pictures and knives, things started coming back. He told her that David should not have gone to jail, but perhaps instead to a mental hospital, and that he used to flip out quite frequently, “usually when he was stoned”.<sup>9</sup>

Wilson was very uncertain about whether he saw blood on David, although at trial he said he did.

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1	Docid 332798.
2	Docid 190437.
3	Docid 159706.
4	Docid 219425.
5	Docid 155260 at 263.
6	Docid 054415.
7	Docid 331993.
8	Docid 331993.
9	Docid 331993.

It has been suggested that Wilson gave signs of recanting during this interview. I do not read it that way. On balance, I do not think that the interview gave her much cause for hope. Wilson could not remember much about the event, or about what he had said at trial.

In her second interview of Wilson on April 15, 1981,<sup>10</sup> Wilson told Joyce that he had not heard of the murder until May 1969, even though he said at trial that David spoke to him in Calgary about stabbing a girl. The point seems to have eluded her.

Although Wilson told her that he could not recall seeing blood on David's clothes, contrary to his trial evidence, he was not contacted again until 1990.

During their conversation, Joyce Milgaard asked Wilson: "...Did David ever tell you that he did it...?" He replied, "Just that he'd fixed her...". He added that he was always scared of Milgaard: "Like when he got stoned up and stuff he would lose control". When Joyce asked him if he honestly believed that Milgaard had done it, he replied: "No. I don't know". He had nothing to offer in response to the suggestion of a reward. Joyce said: "I do have \$10,000 and I am willing to pay that \$10,000 out to anybody that can prove David, you know...". But Wilson replied, "Well, I can't do that".<sup>11</sup>

Joyce Milgaard also wanted to show Wilson his March statement which she had obtained from Tallis' files. Wilson told her, "...I was pressured a bit, but I wasn't pressured to the point where I'd convict your son".<sup>12</sup>

Wilson asked for a copy of the trial transcript to review but Joyce Milgaard never got it for him because she suspected him.

**(ii) Nichol John**

At the Inquiry, Joyce Milgaard conceded that Chris O'Brien's efforts to get information from John had an adverse effect,<sup>13</sup> that Karst did not tell witnesses not to speak to her, and that John did not say she was traumatized by her overnight stay in jail.

Told at first by John's lawyer to stay away from his client,<sup>14</sup> Joyce Milgaard finally arranged an interview of John in the presence of both her lawyer, Merchant, and John's lawyer, Leslie.<sup>15</sup> As was the case in the Wilson interview, many suggestions were put to John that her evidence was the product of coercion by police. Both Wilson and John resisted the suggestions, with John telling her that the police "treated me good".<sup>16</sup>

**(iii) Calvin Tallis and T.D.R. Caldwell**

Tony Merchant interviewed Tallis, learning from him that Milgaard had given him certain incriminating information which made it unwise to call him as a witness at trial.

Joyce Milgaard had a supporter, Carlyle-Gordge, interview Caldwell twice, learning that he genuinely believed in Milgaard's guilt. However, Caldwell encouraged police officers to speak to Carlyle-Gordge.

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10	Docid 177468.
11	Docid 117468.
12	Docid 177468.
13	Docid 048643 at 048673.
14	Docid 219491.
15	Docid 048643.
16	Docid 048643 at 048662.

Joyce Milgaard told us that she suspected everyone. As an example, when Carlyle-Gordge and Caldwell spoke about Tallis,<sup>17</sup> Caldwell told him that they had combined forces to put a guy away. It should have been perfectly obvious to anyone reading the transcript of the tape, that Caldwell was speaking of himself and Tallis prosecuting an accused, Klassen, for two separate crimes, unrelated to the Milgaard case. Instead, Joyce Milgaard jumped to the conclusion that the two had conspired to put her son away. Now she wishes that she had known the true facts which, she says, she only discovered on the day of her Inquiry testimony.

**(iv) Albert Cadrain**

In February and March 1983, through the efforts of her supporter, Carlyle-Gordge, Joyce Milgaard became aware of Albert Cadrain's mental illness. At the Inquiry, Joyce admitted that she had not complained to Tallis at either the preliminary inquiry or at the trial that Albert Cadrain seemed mentally ill, but in May of 1990 she and David Asper discussed the need to show that Albert was "looney"<sup>18</sup> at the time of the trial. The difficulty was that the Cadrain family members, except for Dennis, said that he was not. The Milgaard group had a problem with Albert Cadrain. He had not recanted his story of seeing blood on Milgaard. He never did before he died.

**(v) Linda Fisher**

Joyce Milgaard said she was unaware of Merchant's efforts on February 25, 1983, to have a tracing firm locate Linda Fisher. In the letter, Merchant notes that Linda Fisher formerly resided at 334 Avenue O South, Saskatoon and was married to Larry Fisher "who is presently in prison for a rape charge".<sup>19</sup>

Merchant's efforts were unsuccessful,<sup>20</sup> but a newspaper ad placed by Carlyle-Gordge in March or April 1983<sup>21</sup> brought responses from both Linda Fisher and her common-law husband Bryan Wright. Joyce Milgaard also was in possession of Carlyle-Gordge notes<sup>22</sup> referring to Larry and Linda Fisher.

Joyce Milgaard's writing appears on Linda Fisher's letter of March 27, 1983 responding to the newspaper ad,<sup>23</sup> and she knew about Linda's family.<sup>24</sup> She recalled looking for Linda's daughter, Tammy, at Pleasant Hill School.

Larry Fisher had obviously attracted the interest of Joyce Milgaard and her supporters, but they did not realize his significance. Somehow he had managed, for 13 years, to maintain a low profile in relation to the Miller murder.

As discussed in another section of this Report, Linda Fisher had made a complaint to Saskatoon Police in August 1980 voicing her suspicions about her husband, Fisher, as the murderer of Gail Miller. Police did not follow up on this report and Joyce Milgaard knew nothing of it in 1983.

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17	Docid 225006.
18	T26895 and following.
19	Docid 332585.
20	Docid 216089.
21	Docid 213943, 159890.
22	Docid 224990 at 998.
23	Docid 213943 at 947.
24	Docid 333001.

**(vi) Other Witnesses**

Joyce Milgaard publicly complained that police were blocking her efforts to speak to witnesses. She said so on the Roy Norris Show<sup>25</sup> in 1991, repeated it in her book in 1999, and was still saying it by the time of this Inquiry.

She referred to it in one of her taped conversations, however, she conceded that she continued to put out a strong message that police were doing this even after she realized that it was not so.

The Commission has prepared a document listing witnesses contacted and interviewed by Joyce Milgaard and/or O'Brien, Carlyle-Gordge and Henderson. By reference to Appendix N, it appears that of some 30 witness contacts or interviews up to and including 1983, none was disclosed to authorities for the purpose of the s. 690 applications or the Supreme Court Reference.

**(vii) Conclusion**

Joyce Milgaard's early reopening efforts illustrate the difficulty faced at the time by an applicant seeking to right a wrongful conviction.

An imprisoned convict was in no position to gather evidence himself. Members of his family or other supporters were typically unsuited to the task of winning the confidence of reluctant witnesses and conducting effective interviews. Police and authorities, although not unhelpful if approached in the right way, had confidence in the regularity of the conviction, and were mistrusted by family and supporters for having achieved the conviction in the first place.

**(b) Retaining Gary Young**

Young, a lawyer since 1972, acted for the Milgaards from December 1980 to May of 1981. His practice was mostly in civil law.

His retainer was to get Milgaard out of jail. To do so under s. 617, as it then was, he believed that he needed evidence that someone else had committed the crime. He read the transcript and found no reason to think that the conviction could be set aside. He had no knowledge of the Fisher rapes in 1968 and 1970.

He never concluded that Milgaard was probably innocent.

Young's approach was to get access to the Saskatoon Police file and to the witnesses. He did not succeed in obtaining the police file before his retainer was terminated, but at his request, the Saskatoon Police contacted Wilson, John and Cadrain.<sup>26</sup> All three replied that they did not want their whereabouts made known.

Although the Saskatoon Police did not give Young the information he hoped for, he did not regard their refusal as unreasonable, because he could still approach the Attorney General. He did not have the impression that the police were being defensive.

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25  
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Docid 337105.  
Docid 219408, 047947, 059610, 106839, 025332, 106841, 106842.

Joyce Milgaard told Young not to have the police contact Wilson or John.<sup>27</sup> Young knew that she had done so, and we know that she had had no success with them.

Young recognized the problem associated with John not recalling her statement at trial, and the Crown managing to bring it before the jury anyway.

He had a conference call with Joyce and David Milgaard and Carlyle-Gordge on January 22, 1981.<sup>28</sup> Asked about the motel room incident, David said he remembered being high but did not remember Lapchuk and Melnyk being there. He quite freely recounted looking over a woman on the street with a view to snatching her purse.

Young wrote to the Registrar of the Court of Queen's Bench asking him not to destroy the exhibits. He was able to review Tallis' file on March 11, 1981, although it was spartan, the work product having been removed. Joyce Milgaard copied Tallis' file during Young's review.

Young was given access to the Crown file by prosecutor Caldwell. His services were terminated as of June 15, 1981.

**(c) Chris O'Brien**

O'Brien testified at the Inquiry that he met the Milgaards through a friend while working as a radio journalist in Moose Jaw. Attracted to a possible story by the emotional approach of the Milgaard family, he set about gathering information. He was told by the Saskatoon Police that he could not have access to their file or to their officers unless permission was granted by the Attorney General. He went no further with that approach.

O'Brien contacted John, but was rebuffed. He tried to pressure her.<sup>29</sup>

He met Deborah Hall by chance and took an audio tape of their rather disappointing interview, which he assured her would never be used. He then sent it to Joyce Milgaard.<sup>30</sup> O'Brien said Hall had some recollection of a re-enactment having taken place but this was not his idea of "the definitive sound bite".<sup>31</sup> O'Brien's evidence is of value only to the extent that it demonstrates that when he spoke to Hall she recalled some kind of a re-enactment taking place.

When Hall spoke to David Asper later on, however, she denied that it happened. Her 1986 affidavit to that effect became evidence for the first s. 690 application.

O'Brien said that it was apparent to him in 1981 that Joyce Milgaard was carrying on a media campaign.

**(d) Peter Carlyle-Gordge**

Joyce Milgaard enlisted the help of Carlyle-Gordge who made inquiries as her agent, masquerading as an author of a book. He approached Caldwell and was given access to the Crown file on a weekend, and was allowed to tape an interview. Caldwell also offered to show Carlyle-Gordge exhibits, and he referred him to Tallis and Mackie. Caldwell was helpful to Carlyle-Gordge<sup>32</sup> but cautioned him not to publish

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27	Docid 331941.
28	Docid 155260.
29	Docid 022756 at 766.
30	Docid 178010, 047724.
31	T21182-21183, T21192 and T21298.
32	Docid 332042.



materials about Milgaard which had not been entered into evidence. He was concerned about Albert Cadrain's report regarding Milgaard's sexual escapades in Calgary. Caldwell's reward for being helpful was to see their informal interview (which had taken place before Caldwell had a chance to review his file) broadcast without permission, and to be accused by the Milgaards of instructing Carlyle-Gordge not to make any reference to the Saskatoon rapes. That was not true.

Carlyle-Gordge spoke to Caldwell in February and March of 1983. His main interest was in learning what happened between Wilson's and John's first and last statements. However, he also wanted background on other suspects, preparation for trial, and Caldwell's view of the case. He had no views about Caldwell personally, but was convinced that the Crown's case could not be true.

In this, Carlyle-Gordge was at odds with the police, the Crown, the jury and the Court of Appeal. He mentioned that time, geography, motive, and place "couldn't work".<sup>33</sup> I find it remarkable that he could reach this conclusion on the basis of the same evidence presented at trial. More to the point, he told us that John's statement convicted Milgaard because it was put before the jury when it should not have been. Perhaps he was correct. Others have said the same. As to his doubts based on the time available for Milgaard to commit the crime, he said that he understood Milgaard to have been at the motel at 7:10 a.m., but he was also aware that Rasmussen said at the preliminary inquiry that it could have been as late as 7:30 a.m.

Carlyle-Gordge said he believed that Caldwell was being frank, and that he did not recall Caldwell ever suggesting that he should conceal references to the Saskatoon rapes. He had no knowledge of the fact that later, in the civil proceedings, Milgaard counsel had used parts of his Caldwell interview to accuse the prosecutor of suppressing evidence. This is a great irony. What Caldwell did, as must have been obvious to any impartial reader, was to caution Carlyle-Gordge not to publish material which could be harmful to Milgaard, for example, the unsubstantiated reports of the latter raping girls in a bathtub in Calgary – something about which Caldwell did not lead as evidence at trial.

He described Caldwell as a true believer in the justness of Milgaard's conviction, and said that he gave full cooperation, giving him full access to his file and encouraging him to speak to police officers. He saw no evidence of Caldwell conspiring to convict an innocent man.

Carlyle-Gordge met John for only a very short time, did not interview Wilson, but in February of 1983, did an interview of Cadrain. He failed to get his hoped for retraction, and became very frustrated. Although he suspected that police had pressured the three of them between March and May 1969, none of them said so.

When Carlyle-Gordge met Cadrain on February 18, 1983, Cadrain continued to say that he saw blood on Milgaard. Carlyle-Gordge did not challenge him about it. On February 21, 1983, he interviewed Albert's brother, Dennis Cadrain, as well,<sup>34</sup> again hiding his connection to Joyce Milgaard. He was impressed by what Dennis told him except for his assurance that Albert went to the police to be a good citizen. Carlyle-Gordge said, "who knows what motivated Albert. I don't know".<sup>35</sup> He also asked Dennis if he knew Larry Fisher, saying that Albert had mentioned him. He could not tell us, however, why he asked Dennis about Fisher.

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T21485.

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Docid 230175, 325634.

35

T21470.

Although Carlyle-Gordge concluded, from interviewing Father Murphy and Dennis Cadrain, that Albert did not go to the police to get the \$2,000 reward, Joyce Milgaard is quoted in an October 20, 1989, Saskatoon StarPhoenix article<sup>36</sup> as saying that the \$2,000 reward offered by police induced Albert Cadrain to testify.

Carlyle-Gordge acknowledged the interest the Milgaard group had in Fisher in the early 1980s, but said that he was not a serious suspect. However, Carlyle-Gordge had a copy of notes made by Tallis<sup>37</sup> and had written “Fisher” in the margin next to a description of the Cadrain house. Further, next to notes about Miller perhaps being attacked in a car, Carlyle-Gordge wrote “check car, Fisher, Mahar”.<sup>38</sup>

He also tried to locate Linda Fisher through Estelle Cadrain. His notes<sup>39</sup> reveal efforts to trace Linda and Larry Fisher, as does the ad he placed on March 26, 1983, in the Saskatoon StarPhoenix,<sup>40</sup> seeking the whereabouts of Linda Fisher. This produced a reply,<sup>41</sup> which he does not recall getting, as well as a letter from Linda,<sup>42</sup> to which he did not reply. All he can say is that, if he had gotten the letters, he would have passed them on to Joyce Milgaard. In fact, he must have. The Commission received the letters from Joyce Milgaard.<sup>43</sup>

Carlyle-Gordge did not overlook Saskatoon Police as a source of information.

He interviewed Raymond Mackie<sup>44</sup> and found him cooperative, and encountered no hostility from other investigators. Police, he agreed, were simply insisting that procedures be followed, so when Young wrote to the Chief of Police asking for addresses,<sup>45</sup> police then asked the witnesses for permission. No witnesses told Carlyle-Gordge that police had instructed them not to talk to Joyce Milgaard. Albert Cadrain told the police that he did not want his address released.<sup>46</sup> John refused permission to release her address<sup>47</sup> and even filed a complaint against the Saskatoon Police because she thought members had released her address<sup>48</sup> against her wishes. Yet Carlyle-Gordge reported this as impropriety because he believed what Joyce Milgaard had told him – that police had instructed witnesses not to talk to them.

Carlyle-Gordge was first attracted to the Milgaard case out of journalistic curiosity, and then became an advocate. He wrote a chapter in a book entitled, “The Winnipeg 8, The Ice Cold Hothouse”,<sup>49</sup> ostensibly about Joyce Milgaard’s life, but intending to publish facts about her son’s case at the same time, to get public exposure.

Carlyle-Gordge admits some of his facts were wrong, such as those concerning stab wounds in the victim’s coat and a missing boot, witness’ accounts (Albert Cadrain’s included), police hinting to Wilson

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36	Docid 001542 at 543.
37	Docid 224933.
38	Docid 224933 at 224935.
39	Docid 224990 at 998.
40	Docid 159890.
41	Docid 213943.
42	Docid 213943 at 947.
43	Docid 213943 at 947.
44	Docid 155260 at 325616.
45	Docid 331953.
46	Docid 106839.
47	Docid 106841.
48	Docid 025335.
49	Docid 020446 at 458.

that life would be very difficult for him, and information about John that he got, not from her, but from Joyce Milgaard.<sup>50</sup>

He also admitted that what he portrayed as malfeasance and wrongdoing by the police were matters that were before the jury, with whose findings he disagreed. It was apparent from his evidence that much of what he wrote was provided to him by Joyce Milgaard, such as the contention that Saskatoon Police contacted all the chief witnesses and instructed them not to speak to her or to Carlyle-Gordge.

It is clear that Carlyle-Gordge simply accepted what Joyce Milgaard told him and did no checking. He admitted that were he a magazine editor, he would not approve for publication a story such as his.

Long before Carlyle-Gordge wrote his story and his letter to the Winnipeg Free Press,<sup>51</sup> Ron Wilson had told Joyce Milgaard in 1981<sup>52</sup> that police made no deal with him, nor did they threaten him. Wilson gave evidence to the same effect at this Inquiry.<sup>53</sup> Yet Carlyle-Gordge publicly theorized that Wilson's evidence had been coerced. He told us that he came to his views on Milgaard's case through the application of "rigorous logic".<sup>54</sup>

Carlyle-Gordge admitted at the Inquiry that he said things to fit his theory, like police threats against Ron Wilson, because he was convinced that Milgaard was innocent. In his view, the ends justified the means – a remarkable admission, I would have thought, but one which was shared by others, such as David Asper and Joyce Milgaard. His laudable efforts on her behalf were unfortunately undermined by what he wrote about the case, relying on what she told him.

As she sensed resistance from the police, Joyce Milgaard began to publicly state, through Carlyle-Gordge and others, that police were preventing her access to witnesses and to files. One should not, however, underestimate the difficulty she faced. Without resources or influence, she had no easy entree into the police department. But the evidence shows they did oblige her by contacting witnesses for permission to release their addresses, and she could have had access to police files through the Attorney General's department if sufficient cause had been shown. Caldwell proved to be cooperative, and she obtained access to the prosecutor's file.

Although Carlyle-Gordge was on the right track with his interest in Fisher, and did much useful investigative work, he became distracted by the idea of police misconduct and obstruction which he uncritically accepted from Joyce Milgaard. Although his work did not come to the attention of the authorities until the RCMP Flicker investigation in 1993, he produced no information coming to the attention of police or Saskatchewan Justice which should have caused them to reopen the investigation into the death of Gail Miller.

**(e) Anthony Merchant**

Gary Young was succeeded by lawyer Tony Merchant, whose services were paid by Howard Shannon, Milgaard's former employer. Merchant testified at the Inquiry that his retainer was to get Milgaard out of jail, because he had been wrongfully convicted. He knew little of the case, and nothing of Milgaard or Fisher in the 1968 – 1970 period.

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50	Docid 020446 at 462.
51	Docid 159819.
52	Docid 046761 at 775.
53	T7211; T5982; T5983; T5658-T5659; T7208-T7216.
54	T21247.

Merchant contacted the Milgaards on April 28, 1981.<sup>55</sup> He explained to Joyce Milgaard that raising a reasonable doubt was not enough to obtain relief. The Milgaards and Carlyle-Gordge seemed to think that uncovering a number of small errors in the transcript of the trial would get the matter reopened, but his sense of an s. 617 application was that the exercise of discretion depended upon showing probable innocence by, for example, a witness recanting. He needed something big, but finding the real killer was not his objective.

Merchant did not try to get the police investigation files, nor was he asked to. Conscious of Tallis' great reputation, he did not think there was cost benefit in duplicating what Tallis had done, and he told this to Joyce Milgaard.

Merchant encountered a problem with Joyce Milgaard acting as an investigator. According to him, she was overzealous and unfavorably impressed people, like the parole authorities and John. Had David been released, says Merchant, he could have worked through him with his former friends.

In terms of the quality of information being produced through the efforts of Joyce Milgaard and her supporters, Merchant was referred to an interview of John at which the latter's lawyer Larry Leslie, Joyce Milgaard and himself were present.<sup>56</sup> He said that John was co-operative to begin with but, by the end of the meeting, was defensive because of Joyce Milgaard's overzealous manner, pressing John to the point where she would no longer speak. Merchant believed John when she said that she could not remember and he saw his task as getting her to recall the truth. Joyce Milgaard, on the other hand, tried to get John to remember what Joyce wanted to hear.

A reading of the interview transcript shows that John did not respond well to the suggestion of police pressure, at one point leaving the room.

In general, John did not resile from her trial testimony. Joyce Milgaard got nowhere with her, which is unsurprising given the fact that a succession of professional questioners had failed to do so, both before and after this interview.

Towards the end, Joyce Milgaard asked John if she had any questions. The reply was: "Just one question. Why did you wait so long?".

Leslie began offering evidence on Nichol's behalf, Joyce Milgaard followed with references to a film they had made showing that David could not possibly have done it. Merchant tried to ask John some questions but Joyce Milgaard intervened. Leslie joined in. Merchant asked if she had ever been Milgaard's girlfriend. She said no, but that Milgaard had raped her. She was to tell the same thing to Williams 10 years later. Merchant plunged ahead, asking her if she had had sexual relations with Wilson and Cadrain. This brought the reply that Milgaard forced his will on people. He was a con artist. Joyce Milgaard joined in a dialogue with John, to Merchant's annoyance. Then followed a confused discussion about psychiatric examinations and lie detector tests.

In my view, the interview produced nothing favorable to David Milgaard, and some things that could be viewed as incriminating such as:

- being stuck in an alley with a church in view;
- breaking into an elevator;

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Docid 332564.  
Docid 048643.

- speaking to a young woman on the street;
- Wilson and Milgaard leaving the car in different directions;
- the police treating her well;
- Milgaard being in a hurry to leave Saskatoon; and
- Milgaard raping John.

Merchant contacted Tallis as well as Ken Howland, a member of the National Parole Board, who thought Milgaard was innocent. At the request of the Milgaards, Merchant tried to locate Linda Fisher on October 12, 1983.<sup>57</sup>

In a letter of September 29, 1982, Merchant asked the Registrar of the Court of Appeal to have Justice Tallis provide copies of his interview notes with Milgaard, and says that "...Milgaard is likely to be out on parole by June of next year."<sup>58</sup> Merchant thought that he had a deal with the Board, but his client began using drugs in the institution and that ended his chances for parole.

In his meeting with Tallis on November 29, 1982, Merchant was told that Milgaard had given him written instructions not to testify; that there was no question that he was with the friends who testified against him; that he and Wilson had gotten out to push the stuck car, and that he was away from the car; that he had changed clothes at Cadrain's house; that he threw out a compact which John found in the glove compartment; and that he could have said, while on drugs, that he stabbed her 14 times. So Merchant thought that Tallis had good reason not to call Milgaard at trial. On December 12, 1982, he wrote to his client saying, "More than ever, I believe that unless we can persuade some witnesses to recant their story, then very little can be done."<sup>59</sup>

By February 9, 1983, Merchant was corresponding with Howard Shannon and Roger Renaud about employment for Milgaard, who had a parole hearing upcoming in May or June. Parole was denied to Milgaard in 1983, the board remarking that he continued to feel he was innocent, and that he was dominated by his mother.<sup>60</sup>

Merchant's notes of August 15, 1983, record a phone conversation with Howland discussing Milgaard's problems, which included continuing to say he was not guilty, using drugs in jail and escaping custody.<sup>61</sup>

Merchant hoped to apply for day parole in January of 1984, but Milgaard suffered a mental breakdown on October 14, 1983.<sup>62</sup> On November 14, 1983, Merchant wrote to Joyce Milgaard saying that a further parole application should not be made for at least six months. His retainer was over by the end of 1983,<sup>63</sup> but he remained in contact.

In her book, "A Mother's Story",<sup>64</sup> and in an interview with RCMP in 1993, Joyce Milgaard expressed concern about Merchant because of her belief that Gail Miller knew Colin Thatcher, and that Merchant acted for him. Merchant did not understand the concern. He worked for Thatcher on family matters. But she began to think that Thatcher was Miller's killer, and that powerful people were working against her son, David.

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57	Docid 213627.
58	Docid 219528.
59	Docid 183639.
60	Docid 182263, 028337.
61	Docid 332595.
62	Docid 219537.
63	Docid 216121.
64	Docid 269317.

**(f) Conclusion**

Joyce Milgaard's early efforts towards the reopening of her son's case produced no information coming to the attention of police or Saskatchewan Justice which should have caused them to reopen. She was hampered by a lack of resources and a lack of expertise.

**(g) Engagement of the Wolch Firm**

As we have seen, Joyce Milgaard moved from Merchant as her lawyer because she suspected him of being in collusion with Colin Thatcher, who, she thought, might have been Gail Miller's killer. She retained Wolch, it seems, on the recommendation of Carlyle-Gordge. This was around December 1985. She confirmed Wolch's retainer by letter January 16, 1986, paying him \$2,000 to cover "...a visit with David, the perusal of all transcripts, documents, research data that Peter [Carlyle-Gordge] will provide and a final meeting with us...".<sup>65</sup>

Leading up to that, the Milgaard group, especially David Milgaard, had high hopes for the exposure a Fifth Estate feature would offer their case.<sup>66</sup> Resort to the media for help was a feature of Joyce Milgaard's strategy even before retaining Wolch's firm. When she did this, she came into contact with Asper, an articling student in the firm, who had important media connections through his family.

Asper, we know, started work on the case in March of 1986. Joyce Milgaard says that she relied on Wolch and Asper to take the necessary legal steps to apply for relief to the Minister. In addition to legal input, Asper investigated as well, and she passed on Carlyle-Gordge's theories to him. She paid the \$2,000 retainer and something towards disbursements. Beyond that, Wolch's firm acted pro bono. Then, from 1990, acted under a contingency agreement.

Although Joyce Milgaard said that she gave the Wolch firm all the information she and her supporters had gathered up to the end of 1985, Wolch was writing to Carlyle-Gordge in April of 1986 asking for information<sup>67</sup> because he had little to work with. At the Inquiry, Joyce Milgaard testified that she had no idea why he would say that because she had brought boxes of material to him.

Asper's initial efforts were concentrated on interviewing David Milgaard.<sup>68</sup> Of interest is the fact that Milgaard told him that no compact was thrown from the car, contrary to what he had told Tallis before trial. Asper continued to work on Milgaard's behalf over the next seven years, in the course of which much information was generated and was brought to the attention of police and Saskatchewan Justice. The following chapters of this Report will demonstrate that while the efforts of the Milgaard group, including their legal counsel, produced information which led to Milgaard's release from prison, it was only in 1997, with DNA typing, that information came to the attention of police and Saskatchewan Justice which should have, and did cause them to reopen the investigation into the death of Gail Miller.

The efforts of the Milgaard group had fallen short, not for lack of trying, but for lack of expertise. I will review evidence in due course from a former member of the English Criminal Cases Review Commission, which convinces me that had such an agency been in place in 1980, and had an application been directed to it by the Milgaards, the investigation into the death of Gail Miller would probably have been reopened.

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65	Docid 213127.
66	Docid 213802, 213635, 219247.
67	Docid 162433.
68	Docid 213125.