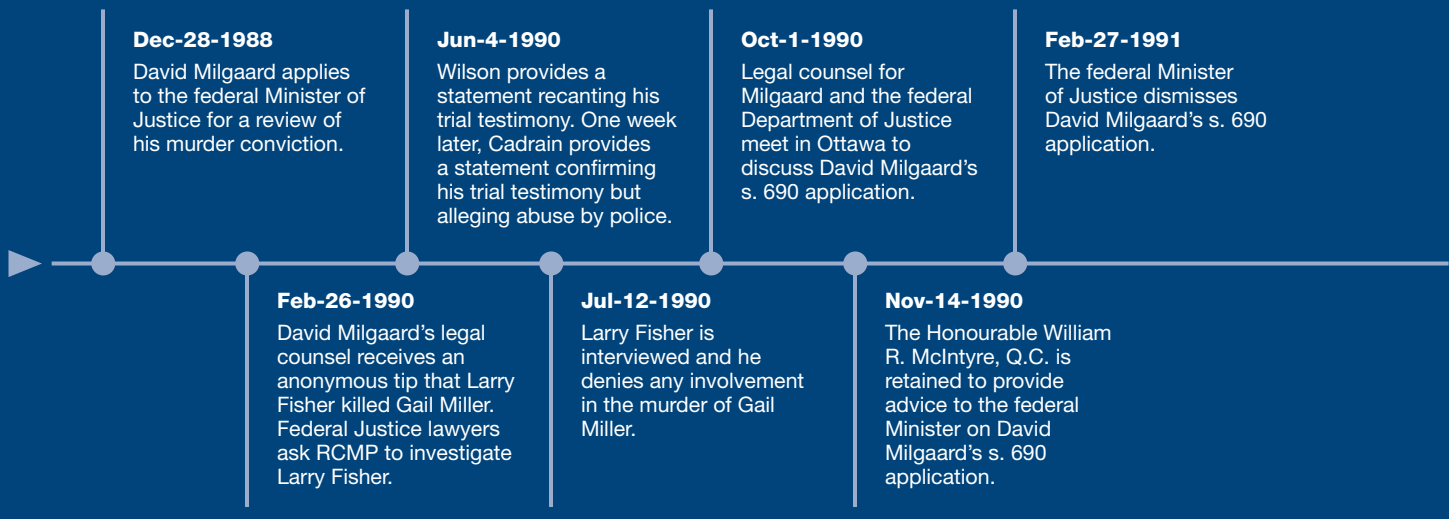
# Chapter 13
# First s. 690 Application



The gathering of material in support of the first s. 690 application to the federal Minister of Justice took about three years. The Wolch firm was retained by Joyce Milgaard at the end of 1985 and Asper began work in 1986 gathering information. That process culminated in the filing of an application under s. 690 of the *Criminal Code* on December 28, 1988. Two main grounds were advanced, relating to alleged misuse of forensic evidence at trial, and false testimony about the motel room re-enactment.

The evidence gathering efforts of the Milgaard group, including Wolch and Asper, and the Justice Canada investigation of the application produced information which ultimately came to the attention of Saskatchewan Justice and the police, so it is necessary to evaluate that information to answer the question of whether it should have caused authorities to reopen the investigation into Gail Miller's murder.

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

### (a) Approach of Milgaard Counsel

David Asper was only 27 years of age when he was handed the Milgaard file by Hersh Wolch in 1986. He was not yet admitted to the bar.

He had very little experience in criminal law and was, by his own admission, brash. Although he did not criticize her during his Inquiry testimony, Asper had to contend with Joyce Milgaard, an "untrainable tiger"[1] in the words of previous Milgaard counsel, Tony Merchant. She taped conversations with Asper without his knowledge, which he said cast "an unfortunate light on the solicitor/client relationship".

1 T20693.

At the Inquiry, Asper testified that Hersh Wolch "dumped"[2] the Milgaard material on him, adding, "I don't think we knew where we were headed".[3] After his initial review of the file, Asper drew quick conclusions that:

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

The latter belief persisted right up to the time of the Inquiry and, although he finally adopted a more moderate stance (his "view overall"[4] was that tunnel vision took over), the Milgaard group represented to the media for some 15 years that the continued conviction was not a mistake, but rather a cover-up.

From the point of view of the authorities – police, Crown officials and elected representatives alike – the idea that someone in authority had covered up the crimes of Fisher and kept an innocent person, David Milgaard, in jail for a crime he did not commit, was grave and it was false. And being false, it was monstrous. It was never proven up to the time of this public Inquiry, and it remains unproven. By the time Joyce Milgaard began her reopening efforts in 1981, the trial was more than 10 years in the past. An Inquiry held at that time might well have heard weighty evidence of either official propriety or impropriety, although even by that time certain documents had disappeared, and memories had faded. But no inquiry was held and it was not until 1989 that serious, professional and objective investigation began through Justice Canada. Neither their investigators, nor the RCMP Flicker investigation discovered wrongdoing in general, or cover-up in particular. I have listened to the supervising officer in charge of Flicker, Murray Sawatsky, and I have not the slightest reservation in saying that had the RCMP found evidence of a cover-up, he would have said so.

At this Inquiry, I heard even more evidence than that received by previous investigators, and none of it demonstrates official wrongdoing or cover-up. I concede that too much time has passed to make positive findings about some things. But of this I am certain, the case for a cover-up, or even tunnel vision on the part of the police has not been made. The persistent allegations by the Milgaard group of wrongdoing did not produce information on the basis of which the police or Saskatchewan Justice should have reopened the case earlier. In fact, one might infer that given the gravity of the unproven allegations, police and Crown officials might understandably have been unsympathetic to David Milgaard's cause. But, on balance, I find that they accepted the criticism with professional resignation, at least until Serge Kujawa was finally provoked into responding in kind, following the Supreme Court Reference in 1992.

A clear distinction must be borne in mind when discussing the third arm of our Terms of Reference, and that is between information coming to the attention of the police and Saskatchewan Justice which should have caused the investigation into the death of Gail Miller to be reopened earlier, and information which caused Milgaard to be released from prison and to receive a remedy through the Supreme Court of Canada. The information generated by the Milgaard group, true or false, no doubt led to the remedy, but it was not something which should have caused the authorities to react earlier on a principled approach, to reopen the investigation into the death of Gail Miller. The granting of the remedy was purely pragmatic, as will be discussed when reviewing 1992 events. The Milgaards had so far succeeded in weakening public confidence in the administration of justice that something needed to be done.

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| 2 | T35823. |
| 3 | T35823. |
| 4 | T28463. |

The approach taken by earlier investigators towards the reopening is illustrated in Peter Carlyle-Gordge's exchange of correspondence with Hersh Wolch in April 1986.[5] Said Carlyle-Gordge, "The key to the case is to get one of the three young Crown witnesses – Cadrain, Wilson or Nichol John – to talk and admit that they were leaned on to change their testimony".[6] That means that the Milgaard group first concluded that the police had coerced statements from the three, and then set about to get evidence in support. The group's efforts were finally rewarded in Wilson's case but not the other two.

Asper wrote to Carlyle-Gordge for the addresses of Wilson, John and Cadrain. Carlyle-Gordge replied on June 18, 1986,[7] giving an outline of the case. He said that it was unlikely that Milgaard committed the murder. That is interesting, because he testified at the Inquiry that while he worked on the case, from 1981 to 1983, he became convinced of Milgaard's innocence. He purported to see "massive perjury"[8] in a comparison of the preliminary and trial transcripts and later interviews. Carlyle-Gordge was much given to hyperbole.

Asper said that his first task in 1986 was to read trial transcripts. He said that the case looked implausible to him although he lacked experience. Until the first application was filed in 1988 he did legwork, focusing on the need to find new evidence pointing to innocence. He expected that the federal Department of Justice would help once he gave them something.

Asper says he treated the matter as a "war of liberation"[9] against the system: the people who imprisoned David, and the people who had the power to free him. They became the enemy. He reasoned that because Milgaard was innocent, "a whole bunch of people had to be wrong".[10] "The gloves came off"[11] when he perceived that federal Justice was not going to cooperate. That attitude explains what followed over the next five or six years.

Asper proceeded on the basis that five witnesses had lied, explaining to us that they must have if they said Milgaard committed a murder that he did not commit. At the time Asper had Milgaard's word for this, but no other proof.

It would have been much easier to proceed on the basis that Milgaard should have been acquitted, but instead Asper started with the proposition that he was innocent, and then looked for the evidence. Faith in one's client is a good thing in an advocate, but it does not justify the conclusion that anyone taking a different view is a villain. Why call Craig Melnyk and George Lapchuk liars because they saw Milgaard do something that he himself admitted might have happened? Even if Milgaard were innocent, might not Albert Cadrain truly have seen blood on his pants?

Asper did not follow the lead of Carlyle-Gordge and Tony Merchant, both of whom interviewed T.D.R. Caldwell and Calvin Tallis. They could have given him critical information about the conduct of the trial, particularly about why Milgaard was advised not to testify, and why Tallis cross-examined Wilson in the way he did. Asper now admits that he was wrong about his claim that Ron Wilson's first statement was not given to Tallis by Caldwell, and says that his criticism of Tallis' use of the statement was unjustified. As for Kujawa, Asper admitted that he regarded him as an enemy who had joined the fray.

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| 5 | Docid 156666, 162433. |
| 6 | Docid 162433. |
| 7 | Docid 162430. |
| 8 | Docid 164230. |
| 9 | T25145. |
| 10 | T25154. |
| 11 | T25154. |

Asper has given as a reason for not getting Caldwell's file, his expectation that the federal Department of Justice would do that. He thought that Caldwell might have withheld something, despite the warm reception accorded to Carlyle-Gordge and to Sandra Bartlett of the CBC when earlier approached by them for information, and despite the fact that Caldwell referred key policemen to Carlyle-Gordge and urged one of them, Raymond Mackie, to go ahead with an interview.

Asper said that the attitude of the Milgaard group was one of suspicion. He now agrees that what he previously criticized as Caldwell's failure to disclose, was no more than an honest mistake – a failure to reveal certain things that only now appear to have been relevant.

Although aware of previous Milgaard counsel's (Gary Young and Tony Merchant) work on the file, Asper did not request Merchant's file for years, and never asked for Young's. Had he done so, he would have seen that to get access to Saskatoon Police files, they had to go through the Saskatchewan Attorney General.[12] But Asper says that they were convinced that the Justice Department was not going to help them.

Some members of the Milgaard group reached early conclusions of wrongdoing and incompetence by officials and defence counsel, which were broadcast and came to the attention of police and Saskatchewan Justice who knew them to be false. As such, I find, they did not constitute information which should have caused them to reopen the case earlier, and caused officials both federal and provincial to be highly skeptical of anything emanating from the Milgaard group. Examples of discredited information provided by them are the Deborah Hall affidavit, the forensic reports of Drs. James Ferris, Peter Markesteyn and Colin Merry, the affidavit of David Milgaard, and worst of all, the Michael Breckenridge allegations, to be reviewed later.

Asper had the Carlyle-Gordge/Albert Cadrain information on his file which mentioned Larry Fisher as a rapist living downstairs in the Cadrain house. He did not make the connection, or just did not read the material. But he says that the police knew about the Fisher crimes and had interviewed him so they should have made the connection. I do not accept that. The police simply questioned Fisher in February 1969 as part of a canvass of the neighborhood. They had no idea he was a rapist.

During his testimony before the Inquiry, Asper was referred to a transcribed phone conversation that took place on March 11, 1983, between Carlyle-Gordge and Albert Cadrain's parents, Leonard and Estelle Cadrain. Carlyle-Gordge was looking for Linda Fisher because she and Larry Fisher lived in the Cadrain basement at the relevant time. He also called Albert Cadrain[13] who confirmed that Fisher lived there and was later caught for rapes. Carlyle-Gordge spoke to Albert's brother, Dennis Cadrain, on February 21, 1983,[14] and he placed an advertisement in the Saskatoon StarPhoenix seeking the whereabouts of Linda Fisher on March 26, 1983.[15] She and her common-law husband at the time, Bryan Wright, each replied by separate letters[16] but, as we have heard, Carlyle-Gordge did nothing about it. These documents escaped the attention of Asper. Asper testified at the inquiry that it is very painful for him to realize that they had Fisher's identity as a rapist in 1983, nine years before Milgaard was released from prison, but missed it.

12 Docid 331961.
13 Docid 333013.
14 Docid 325634.
15 Docid 159890.
16 Docid 213943.

It is regrettable, Asper told us, that the system put them in a position where they had to invite the national media to join their cause, putting the freedom of an individual above the reputation of others. In fact, I find that the system did not put them in that position. It was one of their own choosing.

On January 22, 1986, David Milgaard wrote to Hersh Wolch saying that he wished to use publicity to go on the offensive.[17] He hoped for a feature on CBC's The Fifth Estate. Although both Milgaard and his counsel spent much time in conversation and negotiation with The Fifth Estate, the feature he had hoped for, never came about until years later.

Despite being represented by counsel, Milgaard wrote directly to the Minister of Justice on January 28, 1986[18] indicating a desire to have his case reviewed. The Minister's office replied on March 11, 1986,[19] setting out the requirements for an application for mercy under s. 617 of the *Criminal Code* (which later became s. 690). Asper could not say if the letter was given to him in 1986. Nor does it appear that he himself asked the Minister's office for directions. The Minister opened a file on Milgaard on February 26, 1986.

Shortly after Milgaard's initial contact with The Fifth Estate, CBC journalists began their own investigative work into the matter having, for a time, considered producing a feature. On April 21, 1986, Gordon Stewart of The Fifth Estate sent Wolch transcripts of Carlyle-Gordge interviews of witnesses, adding that the trial transcript would be sent by Sandra Bartlett. On June 5, 1986, Asper was still reading the trial transcript[20] and the Carlyle-Gordge interviews which he had received from the CBC.

The first s. 690 application was filed on December 28, 1988, almost three years after the Wolch firm was retained. Asper told us that he had not contacted the federal Department of Justice before filing, and had not the "faintest idea" of the test for an application for mercy.[21]

Once the application for mercy was filed, Asper was provoked that the federal investigator in charge of the file, Eugene Williams, did not meet with him for 11 months. Unknown to Milgaard counsel at the time, the federal Department of Justice was awaiting a family application, which David Milgaard had promised in correspondence directly with Justice.

Asper opened his Inquiry evidence by speaking about the "bad guys",[22] meaning William Corbett, T.D.R. Caldwell, Eddie Karst, Eugene Williams and probably Joseph Penkala. He regrets making adverse comments about Calvin Tallis who, he says, is not a bad guy. The witnesses were, though, because they lied.

While criticizing the lack of a collaborative approach by the federal Department of Justice in the s. 690 application process, Asper admitted to not having approached Saskatchewan Justice officials for assistance until long after declaring war on them. Paranoia, he said, pervaded the Milgaard group. Their mindset was that for them to be right, everyone else had to be wrong.

17 Docid 162436.
18 Docid 333272.
19 Docid 333268.
20 Docid 162432.
21 T25287.
22 T25158.

One of Asper's first initiatives was to interview Milgaard in the penitentiary.[23] His report to Wolch says, in part, "He did not call any evidence at the trial, and say's (sic) that that was probably his problem".[24]

Asper's loyalty to both David Milgaard and his mother appears to have been unswerving, notwithstanding the client having fired him and Wolch many times. Asper commented that David Milgaard had no sense of what they faced. His mother, Joyce Milgaard, was the driving force.

By September 15, 1986, Milgaard was restive,[25] thinking of firing Wolch. Instead, he wrote to him[26] suggesting that he, his mother and Peter Carlyle-Gordge put together a presentation themselves while Wolch and Asper worked on a second. Asper thought that this would at least keep Milgaard busy and not fretting.

Two days after Deborah Hall's affidavit, he took Milgaard's,[27] also in support of the application, but could not explain the two year delay in submitting it. In the affidavit, David Milgaard denied throwing out a compact, something he had admitted to Tallis as having done.

Asper's explanation for not contacting Tallis was that the Milgaard group suspected everyone in the system, and they wanted to remain "sterile".[28] They finally met him on March 21, 1990, long after filing the application to Justice Canada.

Asper says that if he had it to do over, he would have contacted Tallis much sooner, and would have gotten professional investigators without waiting for the federal Justice Department. But they did not wait for the Justice Department. The reverse was true.

Caldwell had given permission to Gary Young to review his file.[29] Asper said that this would not have mattered to him because, from his philosophical perspective, the prosecuting authority should not be used.

Asper wrote to Wolch on October 24, 1986,[30] reporting on a visit to David in prison. In his memorandum, he recited an inaccurate account of Nichol John's "original"[31] statement which, he said, she recanted. She, of course, did not recant. She stated in court that she could not remember some of it. He also spoke of John having been incarcerated, while hallucinating, under very trying circumstances. There is no evidence of that. On the contrary, she was not incarcerated, not hallucinating, and was moved from cells where she was lodged for the night, to a room, at her request.

### (b) Hall Affidavit

Deborah Hall's affidavit of November 23, 1986,[32] was drawn up by David Asper after speaking to her on the phone. He then had her swear it. In paragraph 10 of the affidavit she says that she was shown a copy of the evidence of George Lapchuk and Craig Melnyk, and was shocked by how they described the motel room incident. There are some blanks in the text of the affidavit which Asper could not explain. He

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| 23 | Docid 213125. |
| 24 | Docid 213125. |
| 25 | Docid 182098. |
| 26 | Docid 213588. |
| 27 | Docid 301675. |
| 28 | T25249. |
| 29 | Docid 331926. |
| 30 | Docid 162421. |
| 31 | Docid 162421. |
| 32 | Docid 204444. |

said that Hall did not tell him the more incriminating version she gave to the Supreme Court of Canada. Lapchuk and Melnyk's trial evidence is attached to this document. It is interesting that in describing the re-enactment, Melnyk recalls Milgaard saying, among other things, "I fixed her",[33] the same expression used by Ron Wilson in recounting Milgaard's admission when he returned to the car in the alley. Both Lapchuk and Melnyk recount Milgaard making stabbing motions on the pillow.

Some three years after making this affidavit, Asper wrote to Hall on June 23, 1989, enclosing a copy of it, in preparation for Eugene Williams interviewing her. Williams' examination of Hall occurred on November 6, 1989.[34] In it she relates reading, at Chris O'Brien's house, what Melnyk and Lapchuk had said in their testimony at trial. But when Asper took her information over the phone, he did not refer her to the testimony. She said that it was five years earlier when she spoke to O'Brien, and she had looked at the transcripts for only five or 10 minutes then. She told Williams that she had seen Milgaard on his knees on the bed, bouncing and fluffing up the pillow; then punching the pillow sideways with a closed fist and also vertically, while saying "something like oh, yeah sure, or oh, yeah, right, in a sarcastic tone".[35] She added that Milgaard said, "…I stabbed her I don't know how many times and then I fucked her brains out. Right".[36] Hall said that she did not believe it, that he was being silly and stoned. But she had no doubt that he said it.

It appears, therefore, that Hall gave Williams a more lurid account than either Melnyk or Lapchuk had at trial, but one which agreed essentially with what they said, differing only in interpretation. She thought it was a joke. Confronted with the contrast between what she told him, and what she had told Williams, Asper said that he probably would not have used an affidavit of hers repeating what she told Williams, because it tended to corroborate Melnyk and Lapchuk.

### (c) Ferris Report

According to Asper, he and Hersh Wolch considered the report of Dr. James Ferris to be a breakthrough in terms of new evidence for the s. 690 application. However, I find that they had failed to grasp both the weakness of the report, and the nature of the defence put forward by Tallis.

As well, Ferris' report was not really new evidence. Properly understood, it simply restated arguments which had been made at trial, operating, as had the trial counsel, on the false assumption that Milgaard was a non-secretor. But the report proved to be one of the most sensational developments in the reopening of the case.

The author of the report, Ferris, was a forensic pathologist who testified at the Inquiry. Asked to comment upon DNA typing, he said that it had not yet been transferred to the forensic world in 1984 in Vancouver, where he worked, but they did work, in his lab, on the degradation of DNA. His lab was able to demonstrate that cellular structure of DNA could be broken down to the point that comparison typing was no longer possible. By the late 1980s Polymer Chain Reaction (PCR) technology made the typing of tiny fragments possible, but by then his lab was closed.

He accepted samples from the Gail Miller exhibits out of interest as an historic example, solely at the request of Joyce Milgaard. His lab was not equipped to give even a preliminary finding such as

33 Docid 204444 at 489.
34 Docid 001285.
35 Docid 001285 at 001317.
36 Docid 001285 at 320.

"inconsistent with David".[37] For that, a sample needed to be submitted to the FBI, or the Home Office in the United Kingdom.

They were not even equipped to do all the tests needed to identify semen, but they identified through fluorescent light examination of the panties, something that could have been semen, so they extracted it. Microscopic examination did not reveal identifiable lines so they stopped the test. They did not examine the dress for semen because the garment was too big for their testing facilities.

His initial contact was with Joyce Milgaard[38] and then later with Hersh Wolch[39] on July 16, 1987. His reply to Wolch of August 24, 1987,[40] warned him not to expect too much from the samples provided. He was hopeful, but not optimistic.

In obtaining a court order for the delivery of trial exhibits, Wolch filed an affidavit on November 9, 1987.[41] He referred to a new system of DNA typing, which had been used in England, and described Ferris as an acknowledged expert in DNA typing in Canada. Ferris said this was flattering. From what he told us there was no chance of him being able to do what Wolch hoped, but he got the exhibits, except for the coat. He did not examine blood or hair samples on the toque.

The Court order required Ferris to return the samples,[42] but he forgot. He said, however, that they were kept in a locked cabinet until Wolch formally requested their return. He sent his entire record to Eugene Williams of Justice Canada, including the profile on Milgaard's blood sample, but said that by today's standards, the work he did was amateurish. All they had done was to find some DNA.

His favourable report to Joyce Milgaard came from examining the trial transcripts – work he was familiar with – as opposed to DNA, which was new to him.

From February 1987 to September 1988, Joyce Milgaard and David Asper concentrated on following up the Ferris report, which wrongly assumed that the Crown had used the blood typing of semen found in the snow to convict David Milgaard.

By March 1988, Ferris realized that he could not do DNA typing on the samples provided. Joyce Milgaard understood from him, however, that the frozen semen proved David's innocence.

The Ferris opinion[43] expresses surprise that the semen was admitted in evidence, due to the danger of contamination by blood from the area. As to the A antigens in the semen, Milgaard, a non-secretor, would be excluded. In his opinion, Ferris said, "On the basis of the evidence that I have examined, I have no reasonable doubt that serological evidence presented at the trial failed to link David Milgaard with the offence and that in fact, could be reasonably considered to exclude him from being the perpetrator of the murder."[44]

That, of course, was Tallis' position at trial, but nobody in the Milgaard group, Ferris included, inquired about it. The jury had the issue squarely before them. The Crown submitted that the serological evidence

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| 37 | T23368 and following. |
| 38 | Docid 182095. |
| 39 | Docid 155420. |
| 40 | Docid 267809. |
| 41 | Docid 001585. |
| 42 | Docid 255114 at 115. |
| 43 | Docid 002486. |
| 44 | Docid 002486 at 492. |

neither inculpated nor excluded Milgaard – a fair position, given its suggestion that the A antigens might have come from whole blood.

Ferris told the Inquiry, as he had reported to Wolch on September 13, 1988,[45] that he was concerned about the integrity of the semen samples found in the snow.

In making his comments on the forensic evidence at trial, he did not have the addresses of Caldwell and Tallis to the jury. He had not spoken to either Harry Emson or Bruce Paynter. He told the Inquiry that it was his opinion that Gail Miller could have been capable of movement after being stabbed, and might have lived for 15 minutes at least. Therefore, where she was found might not have been the site of the stabbing. Still, he would defer to Emson, the pathologist who saw the body.

Ferris testified at the Inquiry that his statement, that the murder could not have occurred within the time frame available according to the evidence, was perhaps too strong. He meant that it was just something to look at. And he was not aware that the issue was raised before the jury. He does accept the RCMP finding that semen was recovered at the scene, but because of the potential for contamination, he does not think it was properly admissible. Everything depends upon the reliability of the sample.

He understood that Milgaard was a non-secretor. It was his task to work with the trial evidence, and in doing so he concluded that David, a non-secretor, could not reasonably have contributed the antigens found in the frozen semen. Not only did the serological evidence fail to link him, it could reasonably be thought to exclude him. But that said, the sample was of no value, and should not have gotten into evidence.

Tallis was later to testify before us that he took the same position, except that he did not argue against admissibility because he believed that the evidence excluded David as the donor of the semen found in the snow.

Ferris said that had he known, in 1988, that David was a secretor, he could not have excluded him; and the trial evidence could have been more incriminating had he been known as a secretor. He said that the most likely source of the blood detected in the semen was contamination.

Ferris knew that his opinion would be used by Hersh Wolch in his application to Justice Canada on December 28, 1988.[46] In that letter to the Minister, Wolch expressed the opinion that Ferris' evidence "had it been available at the time, would have clearly resulted in an acquittal".[47] Ferris said that he does not agree. Nor does he agree that the scientific evidence was not understood, or that the judge ignored the issue. He now can see from the charge that he did understand, as well as from the judge's interventions[48] when Paynter was examined by Caldwell, but he did not have that evidence before him when he wrote his opinion.

On May 3, 1989, David Asper wrote to Ferris[49] saying that The Fifth Estate program was not proceeding but that he had given his name to two reporters. Ferris said that it was not his practice to speak to the media about a case while it was ongoing. He became concerned when he learned that his report had been sent to the media and was receiving wide publicity. Evidence, he points out, can be taken out of

45 Docid 002486.
46 Docid 000002.
47 Docid 000002.
48 Docid 000002 at 072 and 073.
49 Docid 155495.

context, yet despite his stated reluctance to publicize his work before the end of a case, he appeared on television in October 1989 saying[50] that he would not have found David Milgaard guilty – speaking as a forensic scientist.

On August 5, 1989, Dan Lett published an article[51] saying that semen samples had been incorrectly analyzed by the RCMP, and that the Ferris report proved Milgaard's innocence. Ferris says that he was wrong on both counts.

We know that the Milgaards were inviting media coverage to supplement their application under s. 690, but surely this sort of sweeping and erroneous reporting could not have helped. To have publicized the report without Ferris' knowledge was at least discourteous, but to preempt the findings of the Minister of Justice was probably counter-productive.

At the time of publication, Eugene Williams of the federal Justice Department had sought expert evidence on the Ferris report. Before us Ferris agreed with the comments of serologist, Patricia Alain,[52] in her report of August 8, 1989, that showed lack of proof positive that Milgaard was a non-secretor, and that Paynter had not stated that blood was present in the sample, only that it could be.

I conclude that the Ferris report was not information coming to the attention of the police or the Crown which should have caused them to reopen the case earlier.

### (d) Drafting of Application

Three drafts of the s. 690 application were prepared:[53] Asper's, Heather Leonoff's (another lawyer in the firm), and the Milgaards'. Wolch favored Leonoff's as of December 19, 1988, with no reference to Nichol John. He wanted it to be brief and not too argumentative. Asper thought that they should deal with John's statement by showing that it could not be true, but he lost the argument.

In the filed application, counsel says that the scientific evidence about blood was presented at the trial but not understood. "Perhaps it was too new an issue for counsel and for the Judge."[54] As we have noted, the judge and counsel understood and presented the issue very well. In Asper's draft he omitted reference to the motel room incident, whereas, in the Leonoff draft, it figured prominently.[55]

In his covering letter submitting the application of December 28, 1988, counsel referred to the Nichol John statement: "We are in a position to factually demonstrate the errors in that statement and that it cannot possibly be true, but we have not done that because Nichole John (sic) testified in Court that the statement was not true".[56] She did no such thing. She said that she could not remember, and she also said that she told the truth to Detective Mackie.

Just before the application was filed, David Milgaard wrote to Wolch on December 22, 1988, saying that they had been holding back a "part two"[57] presentation idea. Asper explained this by saying that because their analysis of the facts was not new, they should get a foot in the door first with something new and

50 Docid 230173.
51 Docid 025909.
52 Docid 155497.
53 Docid 182082.
54 Docid 000002 at 016.
55 Docid 000002.
56 Docid 000002 at 003.
57 Docid 213440.

then analyze the facts. The only new information in the application, he said, was the Hall affidavit and the Ferris report.

Joyce Milgaard's telephone interviews with Wilson were not included in the s. 690 application filed with the federal Minister, nor was Wilson mentioned. Carlyle-Gordge's interviews of the Cadrains were not there, nor were Nichol John's interviews from 1981 by Joyce Milgaard and Tony Merchant. David Milgaard's affidavit was not there. Although none of these things was new evidence, Williams of Justice Canada was to testify that they would have assisted his review.

In stating the facts, the application said that the car became stuck around 6:30 a.m., that Wilson and Milgaard left in opposite directions looking for help, and that Milgaard (according to Wilson) returned to the car around 6:45 a.m. Although Wilson did not say this, Asper admitted that they had concluded this from the evidence. One could construct different scenarios based on the evidence, and they just "had to land on something".[58] This tells me that they had no clearer idea of the times than anyone else, including the jury. Their much vaunted "impossibility" argument is based on the Crown theory of the times, but that was only a theory. There could be others, as Asper concedes. What would impress the jury, he said, was that the group were in the area at the relevant times, and that Milgaard had the opportunity. But, he said, they had to put in something about the facts.

Asper could not say if they knew how Craig Melnyk and George Lapchuk's evidence got to the police, or where they got the idea that Tallis had made no effort to contact Hall, or if Wolch had even spoken to Tallis. They did not have Tallis' address to the jury, and so were unaware that he argued that the forensic evidence tended to exonerate Milgaard.

Asper says that he wanted to put in all the information they had, but was overruled by Wolch. The thinking was that anything that had been before the jury would be regarded as part of an attempt to reargue the case. Once the door was open, however, they would give everything to Justice who would then carry the investigation. He says that they expected an equitable approach by Justice, not an adversarial one. I am convinced that Justice was not being adversarial, merely cautious, for reasons which will follow. In contrast, the Milgaard group quickly became adversarial.

Asper conceded that Justice could have debunked Hall and Ferris soon after the application was submitted. I take this as a concession that their application was wanting. But he says that the political component of having the Minister involved played into their hands. Justice Canada ended up looking like the "evil empire".[59] This I find, was no accident. It is exactly what the media campaign orchestrated by the Milgaards was all about. Asper played a key role,[60] giving the CBC an ultimatum on December 28, 1988, to do The Fifth Estate piece or lose the story to other media.

When finally filed in December 1988, the s. 690 application contained only two grounds which, as we have seen, were soon discounted by Williams. The efforts of Eugene Williams and Rick Pearson were not assisted by the Milgaard group's parallel investigation, and any chance of meaningful exchange of information between federal investigators and the group was killed by giving the Ute Frank statement (which Williams had shared with Asper) to the press. Although Justice Canada assigned accomplished and skilled investigators, Pearson and Williams, Joyce Milgaard turned to Paul Henderson of Centurion Ministries to conduct interviews in which ideas of wrongdoing were suggested to witnesses to justify

58 T25590.
59 T25630.
60 Docid 163061.

recantation in their minds. Both Joyce Milgaard and Henderson admit that this strategy was used in the belief that David Milgaard was innocent, so the ends justified the means.

Asper reported to Joyce Milgaard on August 15, 1990.[61] The letter fairly summarizes what they had accomplished since the filing of the application in December 1988. From March of 1986, until the filing in December 1988, they had produced the affidavit of Hall and Ferris' report. They omitted to file needed documents, such as transcripts, which David Milgaard had been told long before to include. The Minister requested those documents on February 16, 1989, but they were not sent until May of 1989.

It was not until August 29, 1989, that the Minister was sent a copy of David Milgaard's affidavit. And Asper did not request Tallis' file until October 18, 1989, more than three and a half years after their engagement.

## 2. Justice Canada Review and Investigation of First Application

### (a) Eugene Williams Background

Williams was the Justice Canada investigator for the two Milgaard applications for mercy.

Employed at Justice since 1980,[62] he was a seasoned investigator and coordinator of the Conviction Review Group when he began work on the Milgaard application in 1989. His evidence is important to us in the context of the third branch of our Terms of Reference, dealing with information which came to the attention of the police and Saskatchewan Justice. Although he reported to Justice Canada, and not to Provincial authorities officially, he necessarily had contact with Saskatoon Police, the Provincial Crown, and the RCMP in the course of his investigation. The information he gathered went to the federal Minister of Justice and influenced the course of the Supreme Court Reference, whose opinion was ultimately relied upon by Saskatchewan on the issue of reopening.

Notwithstanding relevance, however, Justice Canada insisted on keeping the inquiry away from matters touching operation and management of its department, including the reasons for actions taken by its officials and advice given or received by them. Williams was thus constrained to some degree in what he said, as was the Commission in the questions it asked him. This impacted, to some degree, the effectiveness of the Inquiry, in evaluating information which came to the attention of the Provincial Crown and the Saskatoon Police. The process of evaluation was integral to the question of whether the authorities should have reopened earlier.

### (b) Standard of Application Review and Decision Making Process

Dealing first with the former s. 690 of the *Criminal Code*, explained Williams, the applicant is seeking an extraordinary remedy. All appeals must be exhausted. There is a presumption of regularity in the conviction.

There was no mechanism under s. 690 to declare innocence, and that remains the case.

The applicant is responsible for presenting the grounds because the Minister is not in a position to know the details. These must be explained by the applicant before the Minister can decide if the reasons given warrant a remedy. Instead, the Milgaard group put forward two grounds supported by a report and an affidavit, expecting a far ranging investigation by the Minister to follow. The Minister investigated the report

61 Docid 213052.
62 Docid 338010.

and the affidavit, found them both wanting, and wanted more. Nothing of substance was forthcoming, and the first application was refused.

The Court is sometimes asked to fill a role which the Minister might otherwise perform. That is what happened here. The Supreme Court was asked for its opinion on how to use the evidence presented to the Minister on the second application.

The test to be applied by the Minister in considering the first s. 690 application in this case was not well understood by all, certainly not by the applicant's counsel, who thought that what was needed was evidence tending to show innocence, nor by some federal and provincial officials who had the same idea.[63]

On the basis of Williams' evidence[64] at the Inquiry, I conclude that the test applied by the Minister at that time required the applicant to produce new information or evidence that a reasonable basis existed to conclude that a miscarriage of justice had likely occurred. "Miscarriage of justice" is an expression which would include innocence or probable innocence, but was not restricted to that.

Williams confirmed that the explanation given in the Minister's letter to Wolch of February 27, 1991,[65] was correct and the test is further explained in a briefing document provided to new Ministers on applications for the mercy of the crown.[66] It says, after explaining that a Minister acting under s. 690 may direct a new trial, or order a new appeal, or refer specific questions to the Court of Appeal for its opinion, that:

> The extraordinary powers provided to the Minister of Justice under s. 690, to order a new trial or an appeal in appropriate cases, are exercised by the Minister **'where the applicant demonstrates that a reasonable basis exists to conclude that a miscarriage of justice has likely occurred'**. The exercise of these powers does not contemplate the mere substitution of ministerial opinion for the judicial opinion of an appellate court.
>
> Instead, this special prerogative is reserved to rectify miscarriages of justice when conventional avenues of appeal have been exhausted. Thus, if a judicial remedy is available to an applicant, the Minister, generally, will not exercise the discretionary powers granted under this section.[67]

As I said, there is some indication that at least one official in Justice Canada left the impression with a Saskatchewan official in public prosecutions that the test to be followed is "that the defence must show that the accused is probably innocent at this stage".[68] Asked to comment, Williams said that that overstates the test and it is not the one he was applying because it places too high a burden on the applicant.

I accept, therefore, that in his work Williams was not looking for evidence only which indicated innocence or probable innocence, but rather was alert to indications which would provide a reasonable basis to conclude that a miscarriage of justice had likely occurred. I gather, as well, from his evidence that the applicant had professed innocence and that, therefore, was something that had to be evaluated. He need

63 Docid 027172.
64 T32290.
65 Docid 001529.
66 Docid 004426.
67 Docid 004426.
68 T32618 and Docid 027172.

not have proved either innocence or probable innocence, but must have shown something to indicate that innocence was more probable than not. Arguably, that is a distinction without a difference, but if I understand Williams correctly he means that something short of proof of probable innocence would suffice.

It should be remembered that the Milgaards set the bar high for themselves when they accompanied their application with claims of innocence, when all they had to do was raise concerns about the correctness of the conviction (a likely miscarriage of justice). That is not an easy thing to do either, because it means finding new evidence which, had it been considered at trial, might have affected the verdict. But it is something which is a good deal easier than proving factual innocence. In our system of criminal justice, not only should the factually innocent be acquitted, no one should be convicted unless found guilty beyond a reasonable doubt.

Williams' job was to collect information, not to argue with the applicant. The latter had experienced counsel who had had a chance to distil the grounds after full research. So Williams, not unreasonably I find, took the applicant's statement of the grounds as his only concern. Wilson was not there, so was not considered.

At the pre-screening stage, the investigator would be reactive. When that hurdle was passed, he would become more proactive.

In view of the claim of innocence and the Crown's position that whoever assaulted Gail Miller was the killer, it became vital to test any semen stains on her clothing. But then Williams found that Ferris had tried, and failed.

Neither Ron Wilson nor Albert Cadrain were eye witnesses so their evidence lacked conclusiveness, whether or not he spoke to them.

Interviews of the prosecutor and defence counsel would not be unusual, depending upon the issues.

The interaction between Saskatchewan Justice and Justice Canada is of interest. Williams said that he did not report to Saskatchewan Justice and so was reluctant to pass on information before the conclusion of the investigation beyond asking for materials.[69]

Williams was asked by Ellen Gunn of Saskatchewan Justice for information[70] of a substantive kind which he was reluctant to give, so he referred the request to his superior William Corbett. The latter told Gunn on a confidential basis that the Milgaard application was unlikely to succeed based on the Ferris report and the Hall affidavit. Gunn was the Executive Director of Public Prosecutions for Saskatchewan at the time, so such information, confidential or not, would hardly influence Saskatchewan Justice to reopen the case.

### (c) Dealings Between Milgaard Counsel and Williams

Asper remarked that Justice Canada officials could have stopped them with a letter about Deborah Hall, had they chosen to go public. This, in my view, amounts to an admission that the Hall affidavit which they drafted was at least inaccurate, whereas Williams' interview of Hall produced the truth. But it also points to a weakness in the Justice Canada method of doing business. At the time, at least, s. 690 investigators went about their inquiries without communicating the fruits of the inquiries to the applicant.

69 Docid 016105.
70 Docid 027172.

Williams explained that the reason for it was to avoid debates with the applicant who might get the idea that an issue was being prejudged by investigators, whose role was not to decide, but rather to advise the Minister. The difficulty with this, as Pearson pointed out, was that lack of communication between the applicant and Justice Canada investigators led to misunderstandings and it was his view, at least, that if the two sides had gotten together to exchange information, matters would have proceeded quicker. This raises a systemic subject which is appropriate to consider again in the recommendation section of this Report.

The failure of the first application was of course the main concern of the Milgaard group, but they also complained about the time it took to process. Justice Canada counters that had the application been filed completely in the first place with all relevant material it would have proceeded much quicker.

The first application was filed by the firm in December of 1988 but it was incomplete.[71] The transcript of the trial was needed.

Wolch favoured a strategy of sending material piecemeal to Justice Canada, says Asper, so as "to keep their interest up".[72] But Asper thought differently, favouring a "fulsome"[73] approach. Wolch won out, and the result was an application by installment which, I find from Williams' evidence and documents referred to elsewhere, delayed the application process while adding nothing to its chances of success.

Examined by Justice Canada counsel, Asper remained a constant critic of the role played by Williams and Justice Canada in this case. He was unapologetic about having called Williams and Corbett bad guys, and the federal Department of Justice the evil empire for having engaged in a war of liberation, where liberty trumps justice, and the ends justify the means.

I find that whatever effect his war of liberation had on Milgaard's release from prison, it did not supply information on the basis of which Saskatchewan police or Crown officials should have reopened earlier.

The first s. 690 application was finally filed at the end of December 1988. As Asper put it to Joyce Milgaard, on January 5, 1989, here "at long last"[74] was the package submitted to Justice Canada. He said that "there was huge anxiety to get something filed"[75] and they were persisting in the media effort, expecting the CBC to air the Fifth Estate feature on March 28, 1989.

Asper assumed that Justice Canada would assign a lawyer to deal with the application. On February 16, 1989, Minister Doug Lewis replied to Wolch,[76] asking for certain essential materials, some of which were called for by the nature of the application, and others of which Milgaard himself had been told about by Minister Crosbie in 1986. The law firm had not asked Justice Canada what supporting materials were needed before filing.

1989 saw federal investigators working on the application as filed, once all materials were provided; the Milgaard group conducting an energetic media campaign; and David Milgaard busying himself with the family presentation.

71 Docid 004868.
72 Docid 162407.
73 T35837.
74 Docid 219251.
75 T25636.
76 Docid 004868.

On May 9, 1989, Wolch sent documents to justice officials which they had requested,[77] offering his explanation of the John statement, and saying that he would be sending the Milgaard family presentation once it was prepared.

Milgaard wrote to the Minister on June 15, 1989.[78] He said that he and his family would be making a video as part of their presentation. Asked about this, Asper said that as counsel they did not know what was going on, and were kind of waiting to see what Justice Canada was doing.

The Wolch firm was long overdue in getting the exhibits back from Ferris. Both Saskatchewan Justice and Justice Canada were waiting for them.[79]

By the time Asper was in touch with Williams, the latter had had the Ferris report reviewed by serologist, Patricia Alain.[80] Asper said that he found Williams standoffish, curt and skeptical. Asper was giving information directly to the federal Minister.[81] It is not surprising if that was in fact Williams' attitude, because he would have known of the weakness in the Ferris report, and the fact of Asper writing to the Minister instead of to him would not be a way to foster mutual trust. Asper says that it was a tactic to "yank the political side of the office and alert them to our matter".[82] As he says, their relationship was deteriorating.

Asper describes the lack of progress by Justice on the application as "bureaucracy in the extreme".[83] However, Williams explained his approach in a memorandum of October 1989,[84] noting that the application was incomplete until May 1989, when Justice Canada received needed documents. They had just located John, and wanted to interview her and Hall.

Although Asper says that Deborah Hall was angry after being interviewed by Eugene Williams, he conceded that had she told him what she told Williams, he would have taken a different view of her evidence. I should think so, in view of the much stronger language she attributed to Milgaard as contrasted with what appeared in her affidavit. Even though he now sees it as very weak, said Asper, they had to "get the door open"[85] with Hall's affidavit.[86]

Of interest on the subject of delay is the fact that although the Minister asked, on February 16, 1989, for particulars about Nichol John, it was not until April 3, 1989, that Wolch did something about it.[87] And then he was coy. He said, in his memo to Asper, "…we could either give them everything at once or piecemeal if we want to keep their interest up".[88]

Joyce Milgaard described the family presentation as a make work project for David, but the difficulty was that the Minister was expecting it as part of the application, and Wolch was telling the Minister to

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| 77 | Docid 032928. |
| 78 | Docid 333294. |
| 79 | Docid 182104. |
| 80 | Docid 002477. |
| 81 | Docid 010056. |
| 82 | T25722. |
| 83 | T25758. |
| 84 | Docid 333314. |
| 85 | T36160. |
| 86 | Docid 001285 at 320. |
| 87 | Docid 162407. |
| 88 | Docid 162407. |

expect it.[89] Williams was still waiting for it in October 1989,[90] and David Milgaard was still promising it in December 1989.[91] It was never filed.

On October 11, 1989, Williams of Justice Canada wrote to Wolch[92] saying that they could not conclude their investigation because David Milgaard had notified them that his presentation was to be part of the application. Joyce Milgaard says she was not aware of this. At least some of the information in the first application was coming to the attention of Saskatchewan Justice, and ultimately all of it did when the application was finally considered by the Minister. Accordingly, both the quality of the information and what was done with it was of concern to us. As it turned out, it was an application by installment, and its submission to the Minister was delayed for that reason.

On October 18, 1989, Asper finally wrote to Calvin Tallis asking for his file, but by this time it could not be located.[93] Also needed was a waiver of solicitor/client privilege from Milgaard. All of this resulted in delay. Joyce Milgaard told us that she heard, at the time, that his file was missing, which made her very suspicious. But, of course, she had already copied his file in 1981, and given the material to Asper in 1986. By the time Wolch and Asper met with Tallis in 1990/1991 they had committed to a number of positions that were contradicted by Tallis' version of the facts, as communicated to him by David Milgaard in 1969.[94]

Final submissions were asked for in September 1990. In October, Wolch and Asper requested and were granted a meeting with Justice Canada officials, where documents were exchanged and issues discussed. I conclude that the applicant was thus afforded an opportunity to make his case fully to the departmental advisors of the Minister, who then prepared a report which they referred to the Deputy Minister.

### (d) Steps Taken by Eugene Williams to Investigate First Application (up to February 26, 1990)

Williams was the only departmental lawyer to interview witnesses. He prepared a chronology of events[95] on April 23, 1992, and I accept its accuracy. It effectively answers the charge of procrastination made by the Milgaard group against Justice Canada.

Commenting on the first application filed, Williams described Wolch's[96] accompanying letter as a tease, and inaccurate in its reference to Nichol John's statement. She had not testified in court that the statement was not true – only that she could not remember parts of it. Still the parts which she did recall formed part of the fabric of circumstantial evidence which convicted Milgaard, so he thought that he should consider her evidence.

Williams agreed that both the Hall affidavit and the Ferris report could provide grounds for a remedy, and he asked Wolch for essential documents on February 16, 1989.[97] He did not recall Wolch or Asper asking for collaboration, but if they had, he would have explained his role to make inquiries and, to the

89 Docid 032905.
90 Docid 157023.
91 Docid 333331 at 332.
92 Docid 157023.
93 Docid 153499.
94 Docid 153486.
95 Docid 337474.
96 Docid 000002.
97 Docid 004868.

extent possible, to keep them informed. It was their responsibility, however, to bring forward evidence of a miscarriage of justice.

Following his review of the transcript, he said that he and Asper would have been in touch, usually by phone, every two weeks, with Wolch an occasional participant. His duty was to inform and advise the Minister alone, so he did not share ministerial communications with Asper. Moreover, the decision was the Minister's, not his, so it would not do to give someone false hope, or to dash hope.

For example, his view of the Ferris report was unfavourable, but it would have been inappropriate to say so to Asper, so he listened a great deal. He had an unfortunate experience at first which caused him to not share interview memos or statements. He had shown the Ute Frank statement to Asper, only to see it published in the newspaper in October 1989. But nevertheless, he sometimes obliged Asper by asking authorities for documents Asper wanted.

Significantly, Asper and Wolch asked for neither the prosecution nor the police files. Had they done so, Williams would have supported their request.

Williams assumed (as he was entitled, I find) that counsel for the applicant would have explored all potential grounds, and selected the ones which fit the criteria. Milgaard's letter to the Minister of April 29, 1989[98] said that he and his family would be filing their own application, so Williams expected something from them, and Wolch said to expect it.[99] With this outstanding, Williams could not tell what issues might be raised, and he could not complete his work. But they never did receive a family presentation.

In neither the first or second application was it alleged that Nichol John's May 24th statement being read to the jury was a miscarriage of justice. The issue was raised in the Court of Appeal and found not to be unfair. The Supreme Court denied leave, and so Williams would not look behind that.

Williams, like everyone, found the circumstances of the killing to be very puzzling, with the fatal stabs going through the coat into the body but not through the dress. But he had to focus on the serological evidence, and that of Melnyk and Lapchuk. That, I agree, was the required approach. The stab mark issue leads only to a conclusion of a two stage attack and possibly to two attackers, neither of which had been raised as grounds.

Once Williams studied the Melnyk and Lapchuk evidence, he compared it to Hall's affidavit, then interviewed her.

He had serologist, Patricia Alain, look at the forensic evidence.

A repeated ground advanced in wrongful conviction cases is tunnel vision. Williams was alive to the theory expressed by some police officers (before Milgaard became a suspect), that a serial rapist could be the murderer. But they did not turn on Milgaard when they first heard of him from Cadrain. Instead, they closely questioned Cadrain.

He recalls David Milgaard complaining to the Minister, from time to time, that he did not know what was happening, but Williams says he was keeping Asper up to date. When Asper, Joyce Milgaard and her son complained to the media about lack of progress, Williams says that he could not get into specifics. All he could say in response is that they were working on the case, investigating the grounds advanced.

98 Docid 333294 at 299.
99 Docid 032905 – May 8, 1989.

Williams received the Frank statement and some photos from Fred Dehm of Saskatchewan Justice on June 29, 1989. The statement was of interest because Frank was in the motel room. Her statement neither confirmed Melnyk and Lapchuk's version, nor contradicted Hall's. It was neutral. Caldwell had told Williams that Frank was not called to testify because she was too upset, and because Tallis did not think she would help his client.

In a rare display of exasperation with Asper, Williams, on October 2, 1989, sent the Ute Frank statement to him, chiding him for misdescribing it to the Minister without having read it. Williams says that Asper had already publicized it as well.

In October 1989, Wolch wrote to Williams[100] threatening (as Asper confirmed) to go to the media about the slow pace of the investigation. Williams testified that he was not influenced by this. He was waiting for the promised family presentation, and intended to interview Deborah Hall in conjunction with a trip West planned for November. He had other responsibilities, he said. We know that Justice Canada received about 30 applications per year.

He wrote to Wolch on October 11, 1989,[101] telling him that he could not complete his investigation without the family presentation. There were misstatements of fact in the press, published across the country, that he could do little about. A real problem for Williams was that such wide publicity often inspired questions in the House of Commons, requiring him to prepare briefing notes for the Minister. If that took half a day to prepare, the time was lost to the investigation.

Williams' briefing note to the Minister of October 16, 1989,[102] sets out rather well the state of the investigation with an overview of the issues. In my view, it reveals no information, even if it had reached the Saskatchewan Justice office, which should have caused them to reopen the investigation into the death of Gail Miller.

Williams recalled John's declaration outside the preliminary inquiry court room that she "saw it all",[103] but because it was not in her statement, and she had not told this to police or to him, or at trial, it was less important than her statement, which was under oath.

Williams arranged to interview Tallis,[104] John and Hall.[105] Hall's interview was to be under oath. She had not testified at trial, but had sworn an affidavit in support of the Milgaard application.

Williams had a brief meeting with Tallis on November 6, 1989.[106] He was satisfied that Tallis understood the secretor evidence, and that his ability to advance the Ferris position was frustrated by the questioning of the trial judge who elicited from Paynter the admission that because he could not rule out contamination, he could not be sure that the semen in the snow came from an A secretor. He also learned from Tallis that Frank had been brought to Saskatoon for him to interview. He chose not to call her, Williams gathered, because she would corroborate Melnyk and Lapchuk.

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| 100 | Docid 157021. |
| 101 | Docid 157023. |
| 102 | Docid 333314. |
| 103 | Docid 003847. |
| 104 | Docid 157030. |
| 105 | Docid 333324. |
| 106 | Docid 333324. |

Williams says that what he got from Deborah Hall differed only in perception from what Melnyk and Lapchuk said. That, and the fact that Tallis had interviewed but not called Frank, convinced him that the Hall ground did not merit relief.

### (i) Deborah Hall

Williams needed support for Deborah Hall's assertion that Melnyk and Lapchuk lied about the motel room re-enactment. On its face, her affidavit would call for relief, but Williams' duty to the Minister was to find out if it was accurate. He tried to get the witnesses' words, not his own. The manner of expression in Hall's affidavit concerned him.

In her affidavit,[107] Hall speaks of reading a transcript. This interested him, as did her consumption for the first time of a strong drug, and the difference between her description of Milgaard's actions, and that of Melnyk and Lapchuk.

In Williams examination of Hall before a court reporter[108] she describes what she read of Melnyk and Lapchuk's testimony. Williams wanted to know if she had been directed to only snippets of the record or had she read it in context. Hall indicated that she had not read it all. She disliked George Lapchuk and was displeased with his suggestion that he had driven her home on the night in question. Williams said that this seemed to colour her testimony. It became apparent to Williams that what Asper and Chris O'Brien said to Hall affected her statement, which had been drafted by Asper based on a conversation she had five years before with O'Brien, having read only portions of the transcript of the evidence of Melnyk and Lapchuk, not including the cross-examination of Lapchuk.

Williams says that in his interview of Hall, he spoke quietly to her and that her demeanor did not change. He questioned her closely as to the motions she observed Milgaard making as he sat on the bed striking a pillow. In the end, he said, her description matched that of Melnyk and Lapchuk. She volunteered her memory of Milgaard saying, "I stabbed her I don't know how many times and then I fucked her brains out. Right".[109] This, said Williams, added to what Melnyk and Lapchuk had said, so it caused him to question the truth of her affidavit, meaning that ground of the application had failed the preliminary assessment.

The fact that the affidavit had been prepared after a telephone conversation between Hall and Asper, with no time for Hall to re-examine the transcript, spoke volumes. Williams said that Hall's interpretation of the episode as a bad joke was not, in itself, a ground for relief. That was something for the jury to consider, had it been argued. And, I observe, the jury did not hear from Hall, and so the defence was spared from dealing with the highly inflammatory words she attributed to Milgaard. In the result, her position had changed from that expressed in her affidavit where she said that the re-enactment did not happen.

Williams recalled no complaints from Hall about his treatment of her. Hall was later to say that Williams was intimidating, and put words in her mouth. Williams denies this, and refers to the transcript which, he says, covers everything. I accept that. My reading tells me that he pressed for details but was not suggestive. The most damning parts of what she said were obviously spontaneous.

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| 107 | Docid 000002 at 038. |
| 108 | Docid 001285. |
| 109 | Docid 001285 at 320. |

Asper invited Hall to speak to Williams.[110] She did.[111] We listened to the tape. Williams speaks softly, getting her personal history, then her version of the motel room incident. She recounted the Chris O'Brien meetings in which she says she read the Melynk and Lapchuk evidence in 10 minutes – but then conceded that she had not read all of it.

She told him that she was stoned from horse tranquilizers, and that Milgaard and Frank were having sex right in front of her. Then he sat on her lap, wanting her to join in.

In telling her story to Asper on the phone, she did not have access to the transcripts which she had seen briefly five years before. She had not thought of the matter since speaking with O'Brien.

Williams questioned her very closely about Milgaard's response to the murder report on TV, and to the accusation that he did it. She said he giggled – nobody else did. Then, she recounted his words, which were not in her affidavit: "I stabbed her I don't know how many times and I fucked her brains out."[112] But she took it as a crude joke. The interview ended quietly, as it had begun.

I find nothing untoward in the questioning of Hall by Williams. But Asper criticized the method of questioning, the fact that she was sworn, and the fact that he challenged her. While conceding that Williams had to probe, Asper said that he should have been more neutral and dispassionate. I do not find that he was passionate, having listened to the tape. As for neutrality, he had to probe for the truth. If neutrality means leaving her story unchallenged and undetailed, then he was not neutral. But then, says Asper, Hall called him complaining that Williams had been aggressive with her. He was angry and wrote to Williams.[113] He was referred to Hall's testimony at this Inquiry.[114] She said that "she kind of allowed him to put words in my mouth".[115] Asper agreed that Williams had not done that. And he has no doubt that the affidavit used for the application would not have passed the preliminary assessment had it included what she told Williams.

Williams said that Hall did not complain to him about his questioning.[116] I can only interpret Hall's complaint to Asper as an attempt to discredit what she told Williams. Perhaps she was embarrassed at having misled Asper. There is no question from the tape of what she told Williams, and she confirmed it here under oath.

Joyce Milgaard said that she was surprised by the Hall/Williams interview of November 6, 1989,[117] in which Hall disagreed with parts of her affidavit of November 23, 1986, submitted in support of her s. 690 application. She was concerned that it might affect their application and, of course, it did.

### (ii) Ferris Report

Williams, as we know, looked into the Ferris report in 1990 and discounted it, as well as the reports of Markesteyn and Merry, which it spawned.[118] He had had the report evaluated by analyst Patricia Alain. At the time, Williams did not consider that it was his position to explain to the applicant why the reports of

110 Docid 166262.
111 Docid 337469, 001285.
112 Docid 001285 at 320.
113 Docid 010035.
114 T3405 and following.
115 T3413 and following.
116 T32746 and following.
117 Docid 001285.
118 Docid 002483, 185365, 004374.

Ferris, Markesteyn and Merry were not accepted. Today, his department's investigative brief is given out, and Patricia Alain's brief would go to the applicant. That is surely an improvement in the process. Had it been done at the time, the applicant, as well as the public, might have learned that frozen semen was not used to convict David Milgaard, as some commentators alleged.

When it came to forensic evidence, it appears to me that Henderson, Asper, and the journalists were clearly out of their depth. Part of the reason might be that the arguments of counsel were not in the trial transcript. It was not the practice then to make verbatim records of addresses by counsel. For this Inquiry's purposes, where the performance of both crown counsel and defence counsel has been called into question, what they said to the jury is of importance. Fortunately in this case, reconstructed arguments were prepared from tapes and counsel's notes, but it could easily have been otherwise.

Williams said that officials in fact discussed their concerns about the Ferris report with Wolch and Asper on October 1, 1990, but the ground was pursued anyway until February 1992 when tests showed David Milgaard to be a secretor, thereby undercutting the basic premise of the Ferris report.

### (iii) Nichol John

The applicant had asserted the impossibility of John's statement so Williams was interested in what she could say. He met her in Kelowna. She was reserved, mentioning that she had been harassed in the past by Joyce Milgaard. Williams was unaware that there was a transcript of an interview of John conducted by Merchant and Joyce in 1981. It would have been helpful to know, because her memory should have been better that much closer to the event.

Williams taped his interview with John, but did not put her under oath because she, unlike Hall, had already testified. In hindsight, Williams told us that he would have had her take the oath.

Because of allegations of coercion, Williams wanted to see to what extent John's evidence might have been influenced by police. He interviewed her on November 7, 1989,[119] and asked her about her May 24, 1969, statement. She told him that there were very few things in the statement that she remembered saying, however, she did remember being stuck in the alley and stopping and talking to a girl.

John said that what she told Detective Raymond Mackie was her best recollection, and that she did not lie. She remembered a church, but not a funeral home. I observe that this would make sense. In the alley at the rear of the funeral home, there was nothing to identify it as such, but looking west, she would be facing St. Mary's Church. She remembered the boys getting out the car, each going separate ways. It was dark and cold, then daylight, but she recalled nothing in between. At this point in the interview, John became tearful and upset.

She remembered "sitting in the alley with the church at the end, with the headlights on, and there was two garbage cans about half way down the alley".[120] She remembered finding a cosmetic case "as plain as day in the glove box…and I said who's bag is this? Nobody answered and David grabbed it and threw it out the window".[121]

119 Docid 003230.
120 Docid 003230 at 246.
121 Docid 003230 at 246 and 247.

John's companion at the interview repeatedly tried to get her to say something that "no one likes to admit happened…",[122] but she refused and Williams did not insist.

She was asked about police pressure to say certain things. She denied it. She recalled police saying "… take your time…we don't wanna put words in your mouth…".[123]

After a break, the interview resumed, and John and her friend Dale returned to the subject she refused to speak about previously. This time she said, "…David raped me before we left Regina, okay, and I still went with him anyway. There you go".[124] She said it happened in a motel room on Rose Street. And, she said, he did it again after leaving Saskatoon.

She talked of having flashbacks, of seeing somebody stab a woman. Then she had one, seeing "a woman laying on the ground and a guy straddled over her…she's screaming".[125]

Williams said that because some of her statement did not get into evidence, he wondered what he could do with it. If she said it was false, that would be new evidence, and relevant to a ground under s. 690. If she said it was true, that would also be relevant, but detrimental to David Milgaard. Had she indicated undue influence on the part of police, that would be exculpatory and relevant under s. 690.

Williams could not ignore her complaint of rape. On the one hand, the fact that she continued on the trip with him raised doubts that it happened, but on the other hand, if it did happen, it could have provided a motive for her inculpatory statement.

He said that her apparent flashback during the interview appeared to be genuine. What she related did not adopt her statement, but it did not identify the straddling person as someone other than Milgaard, so it did not support the applicant.

During the interview, John drew a map for Williams which was similar to what he knew to be the crime scene. She seemed to have witnessed a violent event which made a deep impression on her.

Williams said that she was highly disturbed during the interview, and it made a significant impression upon him. To say that the interview did nothing for the applicant's cause would be an understatement, in my opinion. If it came to the attention of Saskatchewan Justice, it could only support the conviction in their minds.

He accepted that John had seen something. He had no evidence that Roberts inspired her incriminating statement and, as with any witness, there could have been a number of reasons why she did not tell everything the first time she was questioned.

John complained about Joyce Milgaard pressuring her. Williams replied:

> Well she's also, through her lawyer, pressing the Department. The difference between you and the Department is that we have to respond.[126]

122 Docid 003230 at 248.
123 Docid 003230 at 251.
124 Docid 003230 at 253.
125 Docid 003230 at 262.
126 Docid 125206 at 212.

Asked to clarify, Williams said that he meant that as a private citizen John was not obliged to respond whereas the Minister had a duty to do so – but he might have expressed it more artfully. I think it was artful enough. What he said was literally true, but underlying it is the unmistakable tone of exasperation with Joyce Milgaard. He is not merely educating John. He is commiserating with her. But exasperation, especially if merited as here, does not equate to bias. It is obvious from all the evidence that Williams worked through a fog of frustration in dealing with Joyce Milgaard.

In his experience, he said, it is not unusual for witnesses not to tell all they know at first. It is fair to assume that a witness' best recollection is closer to the event, but only if one accepts that she told all she knew in her first statement.

John told Williams that she had not lied in her statement; that what she told Mackie was true even though she could not remember some things.

He was not troubled by her discussion with Wilson, or by Roberts showing her the victim's coat. These things are matters of weight.

Williams was clearly impressed by John's flashbacks.[127] He questioned her to see if they could relate to other sources such as scenes from a movie. But he concluded that the flashback she had during the interview was real to her. She had seen something. He was moved by her condition. Her body shook uncontrollably, she was tearful and afraid. He was approaching a belief that she had witnessed a murder, but still lacked details.

I find no evidence of bias on Williams' part in the way he did his interviews. In my view, if one is to get results – meaning the truth from a witness – he or she must be appropriately tested, and much will depend upon the circumstances of the witness; hostile, frightened, evasive, cooperative, strong, weak and so on.

## 3. Larry Fisher

### (a) The Sidney Wilson Tip

I have found that the police could not be faulted for not having made the connection between Larry Fisher's rapes and the murder of Gail Miller before August 1980. At that time, however, Linda Fisher made her report to Saskatoon Police, and they did not act upon it. I find further that from that time until February of 1990 nothing more about the Larry Fisher connection came to the attention of police or Saskatchewan Justice which should have caused them to reopen the Milgaard case. But then came a telephone tip to Wolch on February 26, 1990[128] by one "Sidney Wilson", that Larry Fisher had killed Gail Miller. Wolch told Asper who in turn wrote to Williams on February 28, 1990.[129] Williams asked the police to investigate. They did, searching for Sidney Wilson, and finally finding Bruce Lafreniere, from whom we heard at this Inquiry.

At various times, Lafreniere has either denied using the alias Sidney Wilson or has admitted the possibility. He told us that his story about Fisher arose from a tavern conversation with Arnold Poitras. He said that he reported it as well to the RCMP in Shellbrook. If he did, the report could never be verified.

127 Docid 125206 at 236 and following.
128 Docid 035694 at 697.
129 Docid 001810.

Lafreniere's tip got both the Milgaard group and Justice Canada started on Fisher as the murderer, resulting in new evidence which led to David Milgaard's release after the Supreme Court Reference in 1992.

Asper was out of the country when the Sidney Wilson tip came to Wolch in February 1990, and he could not recall if he had heard about Peter Carlyle-Gordge's search for Linda Fisher in 1983, and his discovery that Larry Fisher had been living in the Cadrain house. Asper said that although the Milgaard group contacted Williams about the tip, they followed up on it themselves because they had lost confidence in Justice Canada by this time. He did, however, have some misgivings about conducting a parallel investigation of Fisher and, at first, was willing to keep the investigation out of the media, as requested by Pearson who had been assigned by Williams as investigator. Asper said that Pearson's attitude was good, and that he was working as quickly as he could.

Saskatoon Police cooperated in the investigation by assigning Inspector John Quinn as liaison officer. He looked for information arising from the Sidney Wilson tip, and police tried to find John Parker's notebooks to determine any follow-up on the statement provided by Linda Fisher on August 28, 1980.

### (b) Investigation of Larry Fisher Information by Justice Canada

The call from David Asper of February 28, 1990, about the Sidney Wilson tip had raised a ground for remedy – a third party had committed the murder. Up to that point, it had not been the responsibility of Justice Canada to look for a different killer. They focused on the grounds stated. Once told about it, however, they investigated, and within days learned much about Fisher. Williams said that had Rick Pearson indicated that there was enough evidence to charge Fisher, it would have called for a remedy. Mere suspicion would not suffice, but would be reported to the Minister for consideration.

Asper's letter to Williams of February 28, 1990[130] made it clear that they expected the Fisher matter to be fully investigated. That, effectively, introduced a further ground into the application under s. 690, so a report could not then go the Minister until the additional ground was investigated.

Asper called Williams with additional information, including that Larry Fisher took the bus at 6:30 a.m. on January 31, 1969. That would give Fisher an alibi. He would have been at work at the time of the murder if that were so.

The Fisher grounds evolved over time. Later the emphasis shifted from Fisher as killer to evidence that a convicted rapist, with a method of operation similar to the killer, lived in the neighbourhood. If put before the jury, such evidence might have affected the verdict. And then the matter was raised of Fisher being in court for rape before the Milgaard appeals were finished.

#### (i) Engagement of Sgt. Rick Pearson and RCMP Investigation

On February 28, 1990, Eugene Williams of Justice Canada enlisted the help of Sgt. Richard (Rick) Pearson of the RCMP in investigating the Larry Fisher matter as an added ground for relief under the s. 690 application.

Pearson was located in Saskatoon and Williams in Ottawa, but according to Pearson they met at times and frequently corresponded and called – at all hours – almost 150 times.

130 Docid 178736.

Frequent mention has been made of Pearson in reviewing steps taken by Eugene Williams to investigate the first application but, because of his prominence in the investigation, the present section is devoted to Pearson's efforts.

Pearson served in the RCMP from 1965 to 2003. Williams called him on February 28, 1990, seeking his assistance with the Fisher investigation. Because he was now looking for a killer, Williams needed the expert help of someone who had coercive powers. Pearson had not heard of Williams, Fisher or Milgaard. Because of the importance of his investigation, Pearson's occurrence report[131] is attached as Appendix O. He testified at length at the Inquiry.

Williams warned Pearson to be sensitive because of media interest. He expected Asper or Joyce Milgaard might put Fisher's name in the media, and this could both impede his investigation, and put Fisher in danger in prison.

In his March 1990 letter of instruction,[132] Williams asked Pearson to detail Larry Fisher's personal history for the period of December 1968 to February 1990; to find Linda Fisher and Sidney Wilson and provide their personal histories; and to find out what he could about relationships between the above persons.

Pearson had been in charge of three uniformed detachments before 1988, when he moved to Saskatoon G.I.S., and was the sergeant in charge when Williams called. His work involved major crimes which included, to that point, around 150 sudden death investigations, of which 25 – 30 were homicides.

It is hard to imagine a more qualified investigator than Pearson being assigned to the Milgaard application. But Joyce Milgaard was not content. She launched a parallel investigation through legal counsel and an organization called Centurion Ministries which concerned itself with wrongful convictions.

By approaching, or trying to approach, witnesses before a professional interviewer could see them, the Milgaard group accomplished little except to frustrate Pearson's efforts. Despite this, he managed to conduct a thorough investigation which ended in 1992.

Although having served since 1965 in Saskatchewan, he had not heard of the Miller murder, or of Milgaard or Fisher. It was a constant theme in the examination of police officers and of Caldwell at the inquiry, that the 1968 rapes were such notorious events on the Saskatchewan crime scene that every police officer (and prosecutor, for that matter) must have been aware of them, and must have made the connection with the strikingly similar attack upon Gail Miller. But time and again we have heard officers say that the rapes did not come to their attention, or at least that they had no memory of them. One must be cautious in accepting this from people who are said to have been negligent in not taking note of them, but Pearson is not such a person. If he had not heard of even the Miller murder and of Milgaard's conviction, is it not possible the other police officers did not? Violent crimes, no doubt, attract public interest at the time, but how long does the public memory last? And how noteworthy to a busy police officer are three or four rapes or even one murder, out of the many that happened in Saskatoon in 1968 and 1969? One must be alive to the notoriety given by hindsight to the crimes in question.

Pearson's focus in both applications was on Fisher as a murder suspect and incidentally, of necessity, David Milgaard. Some of the people and matters he looked into were Victim 8, Victim 12 and the Breckenridge allegations.

131 Docid 056743.
132 Docid 001810.

Asper told him that he had no funds to hire an investigator and hoped that Pearson would keep in touch, and Pearson did. Then he became aware that Centurion Ministries had been hired by the Milgaards. He did not deal directly with Paul Henderson of that organization.

Pearson turned over his notebooks[133] to the Commission. Besides the long document[134] based on his notebooks, he had 250 pages of notes, not typed. He also reported to his superiors at the RCMP on a number of occasions.[135]

Regarding the first s. 690 application, Pearson's main interest was Larry Fisher as a suspect and he started on this quickly, contacting the Battleford RCMP on March 7, 1990, and then Fisher's mother and wife the next day.

Pearson contacted Linda Fisher[136] and learned that Joyce Milgaard had already taken a statement from her. This concerned him because Joyce Milgaard mistrusted everyone and had become her own investigator, reluctant to turn over information even to her own lawyers. Williams shared his concerns.[137]

Pearson tried to get information from Larry Fisher and gain his confidence. Meanwhile, Joyce Milgaard was generating adverse publicity about Fisher, which Pearson worried would affect Fisher's response to his enquiries. His chief concern was that his best chance of getting an admission of guilt to the killing from Fisher lay in gaining his confidence, without having him alarmed and on the defensive. Even Joyce Milgaard's approach to Linda Fisher had the potential to cause difficulties, because having to follow someone else made it even tougher for him as a police officer to get reliable information.

Pearson's first meeting with Williams was on March 23, 1990.[138] They discussed the need to get a blood sample, statement and polygraph, if possible, from Larry Fisher to learn of his movements around the date of the murder. Expecting that an innocent man would try to convince police that he had not done the murder, Pearson thought that Fisher, if indeed he was innocent, might seize the chance for a polygraph.

Williams and Pearson had a cordial meeting with Saskatoon Police. This is not without significance. It is hard to imagine that a scheme to suppress evidence would not have been widely known among the Saskatoon Police. Why, if it existed, would senior officers be so open to RCMP and federal Justice Department investigators?

In discussions with Williams, the latter told him of the need to show a link between Fisher and the murder – not just suspicions, but some hard evidence. Pearson said that in his understanding of the law, the fact that Fisher committed a number of violent rapes around the time of the murder would not be enough, because evidence linking them with the murder was lacking.

No one has criticized Pearson's investigation which may be seen in detail in Appendix O. Reference to it will be made in later sections, but for the moment it will suffice to say that he found nothing putting Fisher at the scene of the crime or, in general, linking him to the crime such that he could be charged. Pearson was suspicious of him, but by the time the matter was referred to the Minister of Justice in the fall of 1991, Pearson was still looking for evidence against him.

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|---|---|
| 133 | Docid 332535. |
| 134 | Docid 056743. |
| 135 | Docid 332553. |
| 136 | Docid 056743 at 746 and following. |
| 137 | Docid 016114, 004906. |
| 138 | Docid 056743. |

He considered interception of Fisher's private communications, but decided that it was not practicable in the penitentiary. What he really wanted was a polygraph exam of Fisher.

Pearson told us that he had no direct evidence against Fisher in 1990 relating to his movements on January 31, 1969. His work records had been destroyed in 1988. Fisher agreed to talk to him only without prejudice, and he could not get a blood test from him for a long time. When he did, it was type A, which did not exclude him.

Williams and Pearson discussed the similarities with, and differences between, the murder and Fisher's rapes. The two Fort Garry's rapes did not indicate a common perpetrator with the Miller murder. He said that one must be very careful when looking at similar act as an identifier. A large number of sexual assaults feature assailants with knives.

They looked for continuously repeated approaches and compared them with the Miller murder. The level of violence is important amongst other circumstances such as the age of victims, time of day, results of resistance, types of assault and, with serial rapists, escalating violence. Such evidence is referred to a trained analyst. As I understand the matter, Pearson was looking for evidence that would show Fisher as the killer. As such he needed evidence which would support a criminal charge. To be admissible in the court as an identifier, the similar fact evidence must have probative value which exceeds its prejudicial effect, and similar fact evidence is highly prejudicial so the standard is high. But similar fact evidence can also be used by the defence to raise a reasonable doubt that someone other than the accused was the perpetrator, and a lower standard applies.

The task of Pearson and Williams, then, was not to look for a defence for Milgaard of reasonable doubt through similar fact evidence, which would have met a modest standard of similarity, but rather evidence which would show that Fisher was the killer, and if that was to be done by similar fact, the similarity needed to be striking.

Applying that standard, the Fort Garry rapes increased suspicion of Fisher as killer but not enough to lay a charge. The Fisher Victim 7 attack was completely different from the Fort Garry rapes. The level of violence there might be explained by his assault as a youth by someone resembling Fisher Victim 7. Because Fisher might be charged with a criminal offence, they had to be careful in the gathering of evidence which might be used in court. That, of course, was not a concern of the Milgaard group for whom a Fisher conviction was not essential to have David Milgaard freed.

Pearson knew nothing of the Milgaard plan to get a confession from Fisher under threat of exposure. Had he known, he would have put a stop to it. Why would Fisher confess? He was too experienced for that. And if he did, he could withdraw his confession. More to the point, when he became aware that he was accused of murder, he might become more careful in his responses, exercising his right to remain silent. In fact, when he interviewed Fisher in July 1990 after his name had been publicly linked to the Miller murder. Pearson found him to be quite defensive. There is a much better chance of getting information from a subject if he does not know your interest.

In Pearson's interview of Linda Fisher, the latter confirmed the description she had given to Joyce Milgaard of her missing paring knife, as brown and wooden handled. It could have been used in the Winnipeg assaults, thought Williams.

After receiving the Fisher offence dates from Asper, Willams passed the information on to Pearson who investigated in March, and again in July 1990, finding, at that time, that the rapes were committed in Saskatoon, not Regina.

Williams met with the Saskatoon Police on March 23, 1990, about Fisher matters,[139] asking for records of his rapes. They got some, but not much, information.[140] Files could not be found, something to be noted in connection with an allegation from the Milgaard group more than a year later that the files had suddenly gone missing then to cover up Fisher's crimes.

The information Williams had about the Fisher assaults for the first application was:[141]

- FV1, FV2 and FV3 – summaries only – no files (Saskatoon 1968);
- FV4 – partial file – (Saskatoon 1970);
- FV6 and FV5 (Fort Garry 1970); and
- FV7 (North Battleford 1980).

He and Pearson looked for signature features in these crimes, including the nature of the attacks, whether robberies occurred, and if there was an increasing level of violence.

They still wanted a statement and blood sample from Fisher, and perhaps a polygraph. Although not admissible in evidence, a failure by Fisher would be of great interest to the investigation. If he had nothing to hide, why would he not agree to a test?

With coercive powers, they probably would have interviewed Fisher before July 1990, but lacking them, they were criticized for being slow, even though they were trying, through Fisher's counsel, to get to him.

On April 5, 1990, Williams noted that his report to the Minister would be completed within two weeks of April 12, the deadline given for Asper to submit anything further. He said that pressure was being felt from the Milgaards, the media, the House of Commons, Justice Canada and the Minister's office, even though the Fisher ground had been added only on February 28, 1990. Had the Fisher ground and the required materials been there at the filing of the application, the investigators would have finished their work much sooner. The media record, he said, was much more favourable to the application than was the evidentiary record.[142]

Williams says that although he did not expect Fisher to confess, he thought that Pearson, being a skilled interviewer, might get something useful.

### (c) Interviews of Larry and Linda Fisher

#### (i) Milgaard Interview of Linda Fisher

As a result of the anonymous tip from "Sidney Wilson" to Hersh Wolch's office, reported to Williams of Justice Canada at the end of February 1990, Joyce Milgaard and Henderson approached Linda Fisher on March 9-11, 1990.

139 Docid 056743 at 759.
140 Docid 056743 at 758 and following.
141 Docid 114920.
142 Docid 229635.

The interview was taped and a transcript was prepared.[143] When Linda described her missing paring knife, Henderson was unaware of the description of the murder weapon. Had he been, he admitted, he might have thought Linda was wrong in suspecting her husband. That, apparently, is what the Saskatoon police thought, as we have seen. As it was, I find, he wrongly assumed that Linda Fisher's missing knife was the murder weapon.

Henderson took a six page written statement[144] from Linda following their taped interview. He could not explain leaving out a description of her missing knife – an oversight, he says. But he also says that he spent four or five hours with her in taking a six page statement. I do not accept that he overlooked something as significant as a description of what was thought by Linda Fisher and him to be the murder weapon. He admits that he wanted to get from her the strongest possible statement.

He was not aware, he said, that the Department of Justice (Williams) had taken a statement from Linda Fisher two weeks after he did,[145] with Williams showing her a photo of the murder weapon, and Linda saying it was not hers. That, admitted Henderson, would have altered his views.

Williams received a letter from Wolch on March 16, 1990, enclosing the Linda Fisher statements and other material.[146] He regarded the letter as largely advocacy insofar as David Milgaard's innocence was concerned and in relation to proving Fisher's guilt, but it was relevant to the application, advancing the thesis that if Fisher did it, Milgaard did not. Some thought was given to whether both Fisher and Milgaard were involved, given the two stage attack.

Williams found the statement of Linda Fisher,[147] taken by Henderson, to be "conclusionary".[148] Significantly, there was no description of her missing paring knife, an item of prime importance if it matched the murder weapon.

#### (ii) Pearson/Williams Interviews of Linda Fisher

Pearson's first visit with Linda Fisher was on March 13, 1990. He was favourably impressed, and remained so. At the time, Linda felt strongly that Larry committed the murder. She told Pearson that she became concerned about it after hearing about his rapes. In her statement to Pearson of March 14, 1990,[149] Linda was able to give a specific description of her missing knife. He concluded that it was not likely the murder weapon. Still, in Pearson's view, that was not enough to eliminate Fisher as a suspect, although it seems to have been why the Saskatoon Police did so.

Although Pearson had been led to Linda by a story about her seeing blood on Larry's clothes, the fact that she now said she saw none did not concern him. The former story had come through an anonymous tip. He still thought that the Saskatchewan rapes were done in Regina because of a CPIC search, but he said that it made no difference to his investigation. The suspicion was still there. I accept that.

As to Henderson of Centurion Ministries approaching witnesses, Pearson said that, in general, there is a concern when someone with an interest gets to a witness first. He can influence what is said. Pearson's concern, I find, was well founded.

143 Docid 076270.
144 Docid 050603.
145 Docid 004930.
146 Docid 155610.
147 Docid 050603.
148 T34199.
149 Docid 004916.

Pearson was invited at the inquiry to compare Linda Fisher's statement to Henderson and Joyce Milgaard,[150] and the one to him[151] taken four days apart. He noted a number of differences which later concerned him because being close in time, he would have expected the statements to be very close in content, but they were not. Henderson has her saying that she had a very distinct memory of the morning of the murder, whereas Pearson had the impression that her memory was indistinct. On the important question of the missing knife, she gave Pearson a specific description, but did not describe it at all as Henderson recorded it. As to Larry Fisher's reactions, Linda said Larry looked shocked, but not like a guilty person who had been caught, as Henderson had it. One might think that Henderson was leaving out some things and embellishing others. Williams was concerned about the two statements and wanted a legal deposition taken from Linda, which Pearson arranged.

Williams needed Pearson as an expert to interview potential homicide related witnesses, but Williams did the Linda Fisher interview himself. He had many things to check with her – when did Larry come home; did he catch the bus at 6:30 a.m.; did she really hear a radio broadcast about the murder at 9:00 a.m. only half an hour after the body was discovered; did Larry Fisher borrow Clifford Pambrun's car; could that have been the car parked outside Gail Miller's rooming house; and was her missing paring knife used in the murder?

The fact that Joyce Milgaard was going to witnesses like Linda Fisher ahead of Williams was disturbing to him. He had been asked to conduct the inquiries, and he had the help of the RCMP. He was dealing with sensitive information, and he knew that witnesses had been unhappy with Joyce Milgaard's contacts. He said, and I accept, that how questions are put about historical events can inform the answers which might be the product of confabulation instead of honest recall. Both he and Pearson were concerned. The nature of Henderson's interviews raised questions. Despite Asper's assurances that Joyce Milgaard would agree to let them do their work, she continued to do interviews, and Linda Fisher's mother complained of being bothered by Joyce Milgaard. Witnesses can be put off to the extent that they will not talk to investigators. For example, Larry Fisher might prove to be defensive if he heard that he was a suspect before Pearson got to him.

Pearson learned about the August 1980 report by Linda Fisher to Saskatoon Police,[152] which highlighted for him the need to question her. Williams looked into it. The Saskatoon Police wrote to him on March 22, 1990,[153] saying that Inspector Wagner had referred the complaint to Staff Sergeant Parker, now retired, and he could not be contacted. For Pearson, Linda Fisher's August 1980 statement was just more cause for suspicion.

Williams was curious about why Linda had waited until 1980, and what might have prompted her to come forward then. He thought perhaps that because she had been drinking and had come to the police station in the middle of the night, the perception of the police could have been coloured.

Williams took a statement from Linda Fisher on March 24, 1990, under oath.[154] He had no concerns about Linda's credibility, but wanted clarification. She told him that her accusation of Larry on January 31, 1969, was made out of anger, nothing else. The fact that he had faced accusations of improper questioning with Hall, and that he was able to show a record under oath influenced Williams to do the

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|---|---|
| 150 | Docid 004925. |
| 151 | Docid 004916. |
| 152 | Docid 056743 at 749. |
| 153 | Docid 155226 at 227. |
| 154 | Docid 004930. |

same with Linda Fisher. Williams says he spoke quietly to her, and she was not intimidated by him, or by the fact that the interview was in a police station. I accept that. The missing knife was key, so he questioned her closely about it. Had her description matched the murder weapon, it would have provided a link between Fisher and the murder weapon. As it was, her evidence neither linked nor excluded Larry Fisher.

Williams questioned the date of the occurrence Linda Fisher reported, because he would have expected the details of the murder to have been on the air only the day after, and if the argument happened on Saturday instead of Friday, there would be reason for Larry not going to work.

Because of her admission that she accused him out of anger and nothing else, Williams concluded that it was not a serious accusation. He was looking for either exculpatory or inculpatory evidence, he said, and I accept this. In the result, his examination of Linda Fisher neither linked Fisher to the murder nor lessened his suspicion of him.

On June 12, 1990, Asper and Wolch wrote to Williams[155] asking if the Fisher investigation was complete. They knew that it was not, said Williams. They conveyed rather serious complaints about Williams' examinations of Hall and Linda Fisher, and lectured Williams on the proper way to go about things. Williams was not unduly concerned. What he had done was supported by the written and oral record. Williams said that when Asper and Wolch spoke of fairness, and interviews with the applicant's counsel present, it was really an attempt to get Justice officials to change their methods – including how they did their interviews. But significantly, the Milgaard group had not asked Williams to share in the eight hour Wilson interview.

In their letter to Williams, Asper and Wolch said that after being questioned by Williams, Deborah Hall told them that she was "left with a very negative impression about" Williams and that he "was twisting everything that she said, and made her feel 'like an ass'", and that Williams "made her feel like she was not being believed, and in fact was somehow lying about the contents of her Affidavit". The letter states that Linda Fisher "had much the same feeling" after Williams questioned her. That much was invention, as we shall see.

The audio tape of the Williams interview of Linda Fisher[156] was played for the Inquiry. Williams' tone is quiet, and there was no apparent stress in Linda Fisher's voice. She discusses her 1980 statement to the Saskatoon police. She had been drinking and probably would not have gone there had she not been. Laughing, she volunteered to Williams that she was not falling down drunk, and probably had had about six beers. Linda remained at ease throughout the interview, chuckling occasionally. She described her missing knife in detail. She said that her accusation to Larry of him having killed the nurse was not serious – she did it from anger. Linda was referred by Williams to her March 10 and 11, 1990, statements to Joyce Milgaard. She declined to change anything, but was not positive of the times.

Williams asked Linda if she had been drinking when she gave her August 1980 statement; asked her to describe the paring knife; asked if Larry was at home or at work at the time of the murder; would she have known if he came home to bed and then left for work; had she just assumed that he had not gone to work; was there any other fact causing her to believe he was the murderer; and could his shocked reaction have been due to consciousness of guilt for the rapes he had done.

155 Docid 010035.
156 Docid 004930.

Williams questioned Linda closely about her belief that Larry Fisher had not gone to work. She agreed with him that it was possible that he had gone, but returned home without her noticing as she was in bed. She did the laundry and saw no blood on Larry's clothes.

I do not fault Williams for this line of questioning. The idea of Larry Fisher as murderer had been advanced as showing Milgaard's innocence. Williams had a duty to test the allegation, and found that Linda's suspicion of Larry as the killer arising from their argument alone was due to her missing knife and Larry going pale when she accused him. Williams clearly tried to make the case with her that her suspicions arising from Larry's reaction might have been due to his guilt about rapes, and about Larry not having gone to work, but he did so in a quiet, and not an insisting, tone of voice.

Linda Fisher told the Inquiry that she had no complaint about her interviewers, Pearson and Williams, and that she did not think Williams was trying to discredit her statement. Notwithstanding the fact that Joyce Milgaard and Paul Henderson had interviewed Linda Fisher on March 10 and March 11 without notification to Justice Canada, Wolch and Asper complained that Justice Canada interviews should take place in court, with both sides represented.

In his interview of her on March 24, 1990,[157] Williams questioned Linda Fisher closely about her three page statement to Saskatoon Police, and then about her statements to Joyce Milgaard. There is no hint from the text of the interview that Williams was trying to sway her point of view. At the Inquiry, as noted earlier, she underwent a two and a half hour cross-examination mostly concerning the fairness of the Williams' interview. She described Williams as being soft-spoken and not intimidating, and that she did not have the sense that he was trying to discredit her earlier statement. Williams was not only entitled, in my view, but obliged to find out what substance there was to Linda Fisher's 1980 belief that her husband might have been guilty of the murder.

As we have heard, Williams took a statement under oath from Linda Fisher in Pearson's presence. The conduct of the interview was questioned but Pearson found that the questions were relevant, important and proper. He said that the interview was professionally conducted and freely given and, in his view, Linda Fisher was suspicious of her husband as the murderer, rather than convinced. Pearson, in his testimony before us, said that he spoke to Linda Fisher before and after the Williams' interview, that the latter's manner was professional and not intimidating, and that Linda was, in fact, not intimidated by either Williams or himself.[158] I accept that.

I accept that Williams did not act improperly nor did his superiors, who kept him on the file. He said that they chose not to give up on the investigation in the face of a succession of patently false accusations. The process of application by installments and the media campaign were trying, but they persevered.

At this point, one might speculate on what might have been accomplished by a follow up in 1980 by the Saskatoon Police, had it been done. Fisher was in prison then, as in 1990, and so was Milgaard. Police could have contacted Fisher, as they did in 1990, but there is no reason to think he would have been more cooperative. The break in the case might have come sooner, though, by determined professional police work. Although the rape files were probably already missing, similar act analysis could have been done; exhibits scrutinized more carefully; witnesses re-interviewed; Fisher placed under surveillance and his communications intercepted; and perhaps most importantly, Fisher's work records for January 31, 1969, might have been available. Murray Brown also testified that the prosecutor and investigators of the

157 Docid 004930.
158 T19122.

Fisher Victim 7 case would have taken a look at Fisher's involvement in Gail Miller's murder, as this would have helped their own case against Fisher.

### (iii) Pearson Interviews of Larry Fisher

Pearson was assigned to look for evidence which would justify a charge against Larry Fisher for the murder of Gail Miller. His strategy was to establish a rapport with Fisher and persuade him to take a polygraph test. If innocent of the Miller murder, he would have nothing to lose by agreeing and might even be anxious to demonstrate his innocence. If he refused, then that might indicate guilt although it would depend upon his reasons for refusal.

On April 10, 1990, Pearson met with Larry Fisher, who knew in advance the purpose of his visit. He tried to establish a rapport, the approach being, I am prepared to view you as innocent of the murder – what can we do to clear you? Fisher spoke freely enough but told him nothing of substance, saying that he wanted legal advice. This was not the usual reaction of an innocent person, but Pearson took account of the institutional setting and did not eliminate him.

In Pearson's view, a Fisher polygraph with post-test interrogation by a trained police officer was needed. But his counsel would not agree, insisting on a private operator.

Pearson had asked Fisher on April 10, 1990 to provide a blood sample, submit to a polygraph, and give a statement of his activities at the time of the murder. But Fisher stalled saying, through his lawyer, that he would talk to Pearson only at the end of May.

On April 24, 1990 Fisher's lawyer asked Pearson not to contact his client,[159] but Joyce Milgaard imposed a deadline of May 7, 1990, for action to be taken, or she would go public with her allegations.[160] As a result, Pearson went to see Fisher unannounced on May 8, 1990, only to find him mistrustful of everybody and refusing to give a blood sample. Pearson left, still thinking him a good suspect, but without enough evidence to charge him. Despite his best efforts, Pearson had got nothing from direct contact with Fisher.

He tried unsuccessfully to see Fisher in Prince Albert on June 6, 1990. Fisher's lawyer was unavailable. Two days later Pearson met Fisher, but Fisher stalled, saying that he wanted to make a legal deposition rather than say things twice. Meanwhile, the media was reporting that an unnamed suspect was being interviewed. Fisher was hearing these reports, and Pearson thought that the publicity had the potential for hampering his relations with Fisher.

Fisher was concerned about what other inmates might do to him and had to be moved to the Regional Psychiatric Centre in Saskatoon. His counsel now requested a list of questions for him, so police lost the chance for a face-to-face interview.[161] Investigators were, however, moving ahead with similar fact analysis, something that Pearson had not been instructed to do at the beginning of his assignment. This held the potential for fresh evidence, as opposed to events which gave rise only to suspicion.

On June 19, 1990, two days before Larry Fisher's name was released to the public, Linda Fisher was being asked by the CBC to speak to them. She asked Pearson what to do, and he advised against it as Larry could be innocent. I think that the advice was sensible. Linda would have to face Fisher again some

159 Docid 057214 and 284335.
160 Docid 112912.
161 Docid 015803.

day and her safety could be compromised by what she said publicly about him. As well, for the purpose of the s. 690 application, there was simply no advantage in publicly naming him as a suspect.

Pearson cautioned Asper about the potential negative impact of Joyce Milgaard going to the press about Fisher. Joyce tried to contact Fisher in prison but was denied access.

Fisher's safety in prison was compromised,[162] and Pearson's only chance to have him undergo a polygraph examination was frustrated by his agitated state.

#### (iv) Larry Fisher Polygraph

Mention has been made about Pearson's efforts to get Larry Fisher tested on the polygraph. He finally succeeded through Fisher's lawyer, Harold Pick, who insisted that a private polygrapher do the test on condition that, if Fisher passed, Justice Canada would get the results. If he failed, or the test was inconclusive, Justice Canada would get no report although Williams and Pearson could interview Fisher.

A polygraph was attempted on Fisher in July 1990, but Pick reported that the operator could not interpret the readings. Mike Robinson, the polygraph operator, told Pearson that Fisher's test was frustrated by a safety issue. Pearson interviewed Fisher as well. In the interview, Fisher denied having anything to do with the killing, but admitted to all other crimes for which he was convicted. When pressed, he threatened to leave. He expressed fear of what inmates would do to him if he went back to Prince Albert, now that he was accused of being Miller's killer. In 1990, and indeed until the DNA results were known, Pearson said that the investigators remained puzzled as to who was the culprit; Fisher, Milgaard or both of them.

#### (v) Williams Examination of Larry Fisher

In July of 1990, Williams was able to interview Fisher.[163] The CBC had broadcast his name, linking him to the murder and he had been threatened by inmates.[164] With his counsel present, Fisher agreed to speak only on condition that what he said was to be used for the s. 690 process only.[165]

Williams asked about:

- Fisher's marriage;
- his use of Pambrun's car;
- the toque found in a back yard;
- Fisher's interview by the police;
- a knife portrayed on a poster by police;
- Linda Fisher's accusation that he took her missing paring knife and killed Miller;
- Gail Miller's murder;
- the similar fact evidence;
- fears for Fisher's safety on the unit; and
- Fisher's beatings in Headingly.

Williams wrote a memorandum to file[166] about the interview. He concluded that Fisher's responses to his questions disclosed no knowledge of details of the murder, which he denied committing. No link to the

162 Docid 010016.
163 Docid 011841.
164 Docid 011840.
165 Docid 061960.
166 Docid 338056.

murder was shown, although Williams did not find Fisher entirely credible. Williams could not make firm conclusions about the similarity of Fisher's rapes to the murder. Had it been so compelling that it pointed to Fisher as the murderer, it would have merited a remedy. But the information he had did not meet the threshold.

### (d) Media Reporting of Larry Fisher and the Effect on the Investigation

Henderson says that he must have been convinced by what Linda Fisher told them, and from "basic instincts",[167] that Fisher was the killer, but admitted that more work was needed before going public. He had not examined the evidence against Milgaard, and did not think they could establish Fisher's guilt.

On April 20, 1990, Asper expressed concerns to Williams about Joyce Milgaard telling the press about Larry Fisher, and saying that his firm preferred keeping such allegations confidential until they could be thoroughly investigated.[168] Williams noted that such assurances from Asper "…usually preceded a media piece that was critical about the speed of our investigation".[169] In this instance, the complaint reached the media before the assurance got to Williams.

At first Joyce Milgaard did not want Fisher's name publicized for fear he might be killed before being brought to justice,[170] but by May 12, 1990, she was giving everything to the media.[171] CBC disclosed Fisher's name on June 21, 1990,[172] and Joyce Milgaard said that she was glad and really did not care what Justice Canada thought.

I conclude from Pearson's testimony at the Inquiry that his best hope for evidence against Fisher, as the killer of Gail Miller, lay in the polygraph test. At the time, it was reasonable to think that if Fisher had nothing to hide he would welcome such a test. Joyce Milgaard interfered in Pearson's efforts, and a successful test could not be done. In hindsight, Fisher had a great deal to hide and might never have agreed to a polygraph test on that account alone, but whatever chance there was of getting Fisher to incriminate himself in the Miller death was effectively blocked.

The Milgaard group grew impatient rather quickly with Justice Canada's perceived failure to involve them in the investigation, and they began going over Williams' head and plotting strategy which, I find, was designed to yield the evidence they wanted, rather than help Justice Canada with the investigation.

In June 1990, Fisher's name as a murder suspect was released in the media, and Asper wrote to Justice Canada on June 22, 1990, saying that he could no longer control what was published, but he wanted to assure MacFarlane that they would "…not be taking positions adverse to the Department of Justice".[173] At the Inquiry, however, he told us that all the evidence which they presented to Justice would be preceded by "blaring horns"[174] to bring pressure.

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|---|---|
| 167 | T22590. |
| 168 | Docid 333384. |
| 169 | Docid 333384. |
| 170 | Docid 336804 at 810. |
| 171 | Docid 159867 and 159870. |
| 172 | Docid 009487. |
| 173 | Docid 009487. |
| 174 | T26921. |

## 4. Albert Cadrain and Ron Wilson Statements – June 1990

### (a) Milgaard Engagement of Centurion Ministries – Paul Henderson

Joyce Milgaard did volunteer work with an organization called Centurion Ministries based in New Jersey. She persuaded its director, James McCloskey, to look into her son's case. McCloskey sent his investigator, Paul Henderson, to Canada on a limited engagement. Together with Joyce Milgaard, Henderson conducted a parallel investigation to that being done by Williams and Pearson. Much publicity resulted, and we must examine the information generated by the Milgaard group and Centurion Ministries to see if it should have caused police or Saskatchewan Justice to reopen the investigation earlier.

McCloskey declined to testify at the Inquiry but Henderson did.

Paul Henderson of Centurion Ministries helped the Milgaards from 1990 to 1993. By then he had had a long career in journalism followed by five or six years as an investigator for the wrongfully convicted. His association with Centurion Ministries started in 1987, and the Milgaard matter was his second case for the firm, whose work in seeking out and righting wrongful convictions he described for us.

Centurion Ministries, he said, takes on three or four cases per year, screened by founder McCloskey. Typically, they take a long time to resolve. Priority is given to the cases of the longest serving prisoners amongst the applicants. They must be indigent to qualify. They look for indications of innocence. In four of their cases, he thinks, prisoners were shown to be guilty, not innocent as they pretended.

An average of five years is spent on an investigation before a case is presented to the appeals court. They do not approach the police force involved. That, he said, would be a waste of time.

After investigation, Centurion Ministries petition the court to overturn a conviction and grant an evidentiary hearing. The office of the District Attorney then investigates independently in an effort, he says, to find fault with Centurion's work.

Normally, they do not seek media help. Despite the fact that the media campaign was not something Centurion would engage in, Henderson said that he went along with it.

A Centurion Ministries pamphlet[175] contains case histories in which it is claimed that innocence was established. A closer reading, however, shows that reasonable doubt was raised, and convictions were set aside. Not to denigrate the work of Centurion Ministries, it is not helpful for them, just as it is not helpful in this Inquiry, to confound innocence with reasonable doubt. Of interest is a statement in the pamphlet which reads "…freedom can only be secured by developing evidence sufficient to earn a retrial".

Henderson says that another feature of Centurion's "ministry" is that they commence work only when they believe in the convicted person's complete innocence and integrity. However, the Milgaard case did not receive the usual screening, because Joyce Milgaard persuaded McCloskey to look into the matter and Henderson was sent to Saskatchewan for a week to do so. There he was shown some documents, and given information relating to Linda Fisher's report to police and to Larry Fisher's rapes.

Henderson said that Centurion operates at first as an independent truth seeker but at some point becomes an advocate. I find that that point came very early in his investigation of the Milgaard case.

175 Docid 333207.

### (b) Approach to Investigation – Henderson

Henderson appeared on the scene about 14 months after the filing of the first application. He was critical of both the Justice Canada investigation, and the rejection of the application, adopting a spiteful tone in reference to Minister Kim Campbell, saying that she was not fair minded.

Although he came in mid-way through the process and was not privy to all information gathered, he was not seriously concerned, he said, because he had Joyce Milgaard, Asper and Wolch for his sources.

Asked about the process followed by Centurion Ministries, Henderson said that they go into the field believing in innocence.[176] Without being critical of that approach, the result must be an investigation slanted in favour of the client, and one which is apt to produce interviews lacking in objectivity. There are other factors, of course. A statement on its face reflects, to some degree, the manner of its taking and audio recordings, where they exist, are even better evidence.

Henderson said that Centurion Ministries had not done its usual amount of investigation in the Milgaard case. He did not even interview or meet David Milgaard until he was released. The reason, he said, was because of his rapport with Joyce Milgaard.

It takes Centurion about five years to have a typical case ready for presentation to the court. Justice Canada had completed its fact gathering (until further grounds were raised) by January 16, 1990, just a year after filling of the application,[177] and less than a year after the application was complete and ready for processing – an interesting comparison when one considers the accusation against Justice Canada by the Milgaard group of foot-dragging.

Henderson's assessment of Milgaard's innocence was not, I find, a product of his own investigations so much as a reliance upon what he heard from Joyce Milgaard and Asper. He then set out to develop evidence to support belief of innocence, focusing first on getting a recantation from a key witness or witnesses. He said that a common tactic was to suggest an "out" to a witness whom he believed had lied in order to persuade the witness to recant. Police coercion would be an example. He would not, however, deliberately solicit a lie, insisting that making up something and planting it in the mind of a witness was wrong.

Henderson was part of the media campaign, appearing on the "Shirley Show" on September 17, 1991, with Asper, Boyd and Joyce and David Milgaard. There he asserted that there was no evidence against Milgaard; and that two of the three witnesses who testified against him had recanted. Before us, Henderson said that he misspoke. Only one recanted. Henderson was confronted with Wilson's statements to Boyd and Rossmo[178] and to Williams, that police had not mistreated him, conceding that Wilson might have thought that he had to give a reason for recanting to him (Henderson), so he chose police mistreatment.

Sawatsky's Flicker investigation found that Henderson and Joyce Milgaard caused problems, as one sees from Sawatsky's letter of August 5, 1994.[179] It records that Henderson:

- harassed Nichol John's mother;

176 T29131 to 29135.
177 Docid 157037.
178 Docid 040497.
179 Docid 050396.

- tried to get Albert Cadrain to change his story; to manipulate him and put words in his mouth;
- gave misleading information to Dennis Cadrain;
- taped Linda Fisher before asking her permission;
- suggested to Linda Fisher, along with Joyce Milgaard, a description of her knife which matched the murder weapon;
- suggested scenarios to Cliff Pambrun; and
- resisted questioning by investigators by not responding as promised.

### (c) Henderson Interviews of Albert and Dennis Cadrain

The Inquiry heard from Henderson, Joyce Milgaard and Asper about their strategy and objectives in interviewing witnesses. We also listened to taped conversations in which they discussed the subject. In a nutshell, they began with a belief in David Milgaard's innocence, concluded from that that the witnesses who had incriminated him had lied, and set out to have them recant, offering as an inducement to do so the suggestion that police had coerced them into giving incriminating evidence. By so stating, they could justify their lies at trial. The strategy was unsuccessful with John and Cadrain, who did not recant, but it worked with Wilson, and a following section of this report is devoted to his recantation.

A secondary strategy developed with Cadrain, when he would not recant his testimony about seeing blood on Milgaard's clothes. The objective then became to show that he was mentally ill at trial so that his evidence could not be relied upon.

The first objective was to get a key witness to recant. Henderson found John to be unapproachable, but was able to speak to both Albert Cadrain and his brother Dennis. He hoped that Albert would tell him that what he told police was untrue, but Albert would not resile from his original statement that he had seen blood on Milgaard's clothes on the day of the murder.

Henderson interviewed Dennis Cadrain, thinking at first that he was talking to Albert. He told Dennis that they had evidence "to show very clearly that Larry Fisher was the person who committed this crime…".[180] He now admits that this was an overstatement. They did not have enough evidence.

But he told Dennis that Albert, Nichol and Ron "were manipulated, coerced, threatened…".[181] Dennis told him that when Albert came home from Regina, they talked and then Albert went to the police. I find that this essential fact appears to have been missed in the effort to show that Albert was coerced.

Dennis told Henderson that Albert had told him of seeing blood on Milgaard's pants. Asked if this affected his thinking about the Saskatoon Police putting the idea in Albert's head, Henderson replied that perhaps the Regina Police had given him the idea. He firmly believed in Milgaard's innocence, and was highly skeptical of any evidence given by the police. In my view, he was so biased against the police that any evidence he gathered affecting them must be viewed as unreliable. Henderson admits that, as discussed with David Asper and Joyce Milgaard,[182] his plan was to get a statement from Dennis that Albert was mentally incompetent, and was worked over by the police.

Albert refused to recant, and Henderson reported to Asper that it would be pointless to continue with him. He told Dennis "Now, we've heard today that he's [Fisher] confessed".[183] That, of course, was untrue.

180 Docid 050412.
181 Docid 050412 at 050414.
182 Docid 335929 at 950.
183 Docid 050412 at 419.

Henderson says that he did not fabricate it, and perhaps got it from Asper (as I understand him) or it could have been part of his strategy to convince witnesses that because Fisher confessed, their testimony would be suspect. They could be in trouble and it would excuse their false testimony if they said it was coerced.

Henderson, obviously, was inviting witnesses to accuse police of coercion to deflect blame from themselves for giving false testimony.

He also told Dennis that the RCMP was convinced that Fisher was the murderer. That, he says, was based only on gut instinct, because he had not dealt with the RCMP.

Henderson's interview of Albert Cadrain is recorded in his memorandum to Asper of May 28, 1990.[184] Albert was delusional, he said, but convinced that he told the truth at trial. He reported to Joyce Milgaard by phone on the "good stuff"[185] he had obtained from Albert and Dennis. One item at page three of the statement notes that Albert went on his own to the police. Henderson says "…they had a witness that they had very likely coerced, planted, programmed into believing these things."[186] Henderson now concedes, rather late in the day, that this would not be so, knowing that Albert went voluntarily to the police. Henderson's memorandum of May 28, 1990 is reproduced below:

184 Docid 154605.
185 Docid 301838.
186 Docid 301838 at 301844.

Paul Henderson
INVESTIGATIVE SERVICES

219 FIRST AVE. N., #131
SEATTLE, WA 98109
(206) 283-0961

TO: David Asper

RE: Cadrain interviews on 5/26/90

DATE: May 28, 1990

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BACKGROUND - Last week we received a telephone number in the Vancouver area supposedly that of Albert Cadrain. On the evening of May 24, I called this number from Saskatoon and it was Albert's brother, Dennis, who answered the phone. Dennis was surprisingly receptive to the call and spoke at length about Albert and his brother's role in the 1970 Milgaard murder trial. He explained that Albert has a transient lifestyle in the Vancouver area but stays with him on occasion. Dennis indicated he had information that might be helpful in the Milgaard investigation and agreed to meet me in Port Coquitlam, B.C., on Saturday. He said he would try to have Albert available, but could not promise that his brother would talk to me. We arranged to meet at a restaurant near Dennis' home.

Dennis and Albert both showed up. We got acquainted over coffee at the restaurant and it became immediately apparent to me that Albert is stuck on the same old record. He was literally ranting and raving about how he remains convinced that David Milgaard was Gail Miller's killer. He talked about seeing the bloody clothing on David and witnessing Nicol John freak out over David on the morning of the murder. He described how David broke off the aerial from the car (to prevent him from hearing about the murder on the news) and how David made a solo trip to the library in

Calgary to read about the murder. Albert presented a detailed conspiratorial theory about David being connected with the Mafia and how this has continued to haunt him (Albert) through the years. He said he has always feared that David would kill him and and possibily harm his family if he is released from prison.

The most surprising comment from Albert during the initial restaurant rendezvous concerned the bloody clothing he claimed to have seen on David. Contrary to his statement and trial testimony, Albert claimed that David threw the clothing in a garbage can at the rear of the Cadrain house and that it was immediately picked up by a garbage truck and hauled off. (I would later correct Albert on this by reading to him from the transcript. His reaction to this was to shake his head and appear confused.)

During this initial talk, I detailed the developments relating to Larry Fisher and made a strong case for his guilt, noting also that the RCMP has been meeting with Fisher in prison and that a confession could be coming. This served to slow down Albert a bit, but he was soon back on the same old track. Dennis Cadrain will tell you that his brother truly believes what he says and that all of this has somehow become imprinted in his mind. After spending a lot of time with both brothers, I would have to agree with Dennis that Albert is not likely to see the situation any other way - even in the face of a confession from the real killer. For Albert to recant his testimony would be for Albert to lie.

Contradictions from Albert were not surprising to his brother. It became immediately apparent that that Dennis views Albert as being mentally deficient in ways. But in dealing with Dennis it's important to keep in mind that he is extremely protective of his brother. Dennis treats Albert somewhat like a child but also feels immensely sorry for him and doesn't want him to end up looking like a monkey.

TAPED INTERVIEW AND STATEMENT - After spending about an hour at the restaurant we went to Dennis Cadrain's house nearby. Considering his family's poverty-level existence in Saskatoon, Dennis has done very well. He's married with a family, makes good money as a carpenter ($27.50 an hour, he said), and lives in a well-kept split-level home valued at somehwere around $200,000.

Dennis agreed to a taped interview and politely asked his brother, Albert, if we could talk alone. (Albert's response was to shrug and comment, "Oh, you want me to get lost, eh?.) Throughout the interview, Dennis paced back and forth and constantly peeked around the corner to see if his brother might be within hearing distance. The most promising information emerging from this interview concern the observations of Celine Cadrain and the question of Albert's sanity at the time of trial. As mentioned earlier, Dennis revealed that he became seriously concerned about his brother's mental health when Albert told him he'd seen a vision in the clouds of the Virgin Mary stomping on a serpent with the head of David Milgaard. What Dennis did not tell me was that he personally intervened following this and convinced

Albert to commit himself to a mental institution. Albert, himself, later told me this.

I made it clear to Dennis that I wanted to be sure the statement he signed accurately expressed his feelings and insights. It was carefully crafted with his assistance, and I would expect Dennis to stand by it when he is contacted by authorities.

INTERVIEW WITH ALBERT - I offered to buy Albert dinner and we returned to the restaurant alone, where he talked practically non-stop about the Milgaard case and his life in general. Dennis says that Albert has never been quite right sincethe police in Saskatoon worked him over mentally 20 years ago. After listening to him ramble on, it became apparent that Albert is either out of touch with reality or has lived a very strange life.

Albert talked about his childhood and lamented his plight as the "dummy of the family." He admitted to dropping out of school after the failing the sixth grade three times. He expressed resentment of both his mother and father for making him feel like a reject in the family. Albert said his father made him work to help support the family from his early teenage years and that of all of the children he was the only one his mother never baked a birthday cake for. Additionally, he said he resents his mother for not letting him take piano lessons as a child.

Albert claimed to have had "died" at age 15 or 16 after drinking a "quart of wood alcohol" to impress his friends. "I actually died and went through the tunnel; I felt my soul leave my body,"

he said.

Albert said his Yogi training at the Saskatoon YMCA instilled him with supernatural powers, such as the ability to see auroras (halos) around the heads of others. "I was seeing them on people all the time; I was like a priest, eh? I saw purple on Milgaard, and that means he murdered someone - that's what purple means, eh?" Albert said he doesn't have such visions these days because he's been out of touch with his Yogi exercises. But the power could return with practice, he said. "You have to be in the corpse position,' he explained.

Albert volunteered that he was committed to a mental institution following the Milgaard trial. He was initially reluctant to identify the hospital, expressing concern that it might be used to discredit his testimony, but finally volunteered: "University Hospital...fifth floor...nut ward."

Albert added: "I did it on my own because Dennis said I was crazy."

It was apparent that Albert resents Dennis for persuading him to committ himself and that he (Albert) feels that his brother, as well as the hospital staff, were incorrect in their assessment of his mental health. Albert volunteered that he was diagnosed as being schizophrenic and said he was subjected to repeated shock treatment and continuously sedated with medication. Albert said the doctor who treated him had a name sounding like S-C-H-O-O-D-A.

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Albert said he's not sure how long he was hospitalized. He said he hated every minute of it and that he threw his medication out the window. Also that he almost killed himself by violating his doctor's orders not to drink any water. Shock treatment and water can be lethal, he explained.

Albert said he remembers Larry Fisher as being "just like any other guy." Fisher, he said, got him a short-lived job at a masonry company, where Fisher worked, and also "wanted me to hang around with him and pick up sluts in the pool hall." Albert said he didn't care to socialize much with Fisher because, for one thing, he felt that Fisher was only trying to mooch from him.

As for David Milgaard, Albert admitted that he would "really feel bad" if he was responsible for sending the wrong man to prison. He admitted finding it "hard to believe that David did it." But he added:

"Why was Nicol John so freaked out (by David)? And why did David snap off the aerial one half mile out of town. I wanted to listen to the news and find out why everyone was being stopped by the cops heading out of town. (Interesting point: were there really roadblocks, or is this another distortion by Albert?)

"I can't change my story because if I do it's a lie. I'm not changing my story - I won't lie for the devil."

ADDITIONAL INSIGHTS - I found Albert to be a likeable but pathetic little guy. I mentioned that we'd talked to his wife,

Barbara, and met his children in Saskatoon. Barbara had told us how Alberta deserted the family a few years ago and led us to believe that she couldn't understand why. It seemed from talking to Albert that he really loves his children, as Barbara had acknowledged to us, and that he misses them. Albert presented a different picture of Barbara than the one who Joyce and I picked up on when we visited her last week. He described Barbara as a lesbian who flaunted her sexual affairs with women, as well as with other men, in front of him and the children. He said she gave him gonorrhea several times also that she also carved up his face with a knife. Albert bears the scars of proof. The tip of his nose has been severed (and crudely reattached) and he has several other nasty facial scars as well.

I suppose that the point of detailing all of this is to provide a better understanding of where Albert's brother, Dennis, is coming from. Dennis feels badly about his brother's life and made it clear that he doesn't want Albert subjected to humiliation.

Dennis talked about Albert's generosity and expressed resentment over what he called implications by Joyce Milgaard that his brother testified against David Milgaard for the reward money.

"Money means nothing to my brother," he said. "It means absolutely nothing to him at all. I remember when he'd work his ass off on a job then come home and spend every penny of his earnings taking all of us to the movies and buying us things.

"When Albert got the reward money he wanted to donate it all to famine relief. We were able to talk him out of that. Then he

insisted on giving the money to my mother and father to help support the family. My father took the money, then paid it back to Albert when he got married."

A final point: I found it interesting that Albert seems to personally accept responsibility for the Milgaard conviction. All of you who've been involved in the case through the years have a better understanding than I as to how the witnesses evolved. But from talking with Albert I got the distinct impression that he may have had an even more significant role than anyone realizes, and that without his influence Ron Wilson and Nicol John may have never turned against David. How police might have played Shorty against the others is anybody's guess. But if Shorty was the catalyst, and if we can show that he was not mentally competent to testify 20 years ago, Saskatoon police look real bad and the Crown is over a barrel.

Additionally, Dennis Cadrain also told me he is almost sure that police interviewed his sister and that she made it clear to them that she saw no blood on David's clothing. According to Dennis, the only Cadrain children at home that morning were Albert, his 5-year-old brother, Kenny, and the sister, Celine, who was 19 or 20 at the time. Surely the police would have talked to Celine, and you can also bet that the Crown would have brought her in as a witness to back up Albert if she had told police she saw blood.

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187 | Docid 054362.

Williams interviewed Albert Cadrain after Henderson, and speaking of Henderson's interview of Cadrain, he writes:

> In response to my inquiries to determine whether Mr. Henderson, the investigator working on behalf of Mr. Milgaard, had questioned him, Albert Cadrain advised that Mr. Henderson had spoken to both Dennis Cadrain and himself during a dinner or luncheon meeting. Albert Cadrain stated that Mr. Henderson did not appear to be very interested in what Albert had to say after Albert maintained the accuracy of his trial testimony. Thereafter, Mr. Henderson spoke primarily to Dennis and Albert did not follow their conversation.[188]

According to Henderson, James McCloskey and Asper sent him back to Albert Cadrain. Although Albert was "locked into his testimony",[189] they hoped to cast doubt on his credibility by focusing on his mental state.

Henderson re-interviewed Cadrain on June 24, 1990, at which time Cadrain told him that he had undergone numerous repeated interrogations by police, and could not stand the constant abuse and pressure. Despite his claims of abuse, Cadrain still reported seeing blood on Milgaard's pants.

Dennis Cadrain convinced his brother Albert to speak to Henderson, and he concluded that what Henderson wanted was for Albert to say that he was lying. Dennis admitted to having told Albert that Milgaard had spent enough time in jail even if he was guilty. It is likely that this advice played a major role in Albert's decision to sign the statement for Henderson which Dennis describes as having been "very heavily… choreographed by Paul Henderson"[190] who would keep saying things until Albert agreed with him. According to Dennis, the words were not Albert's and Henderson was being "quite a creative writer".[191] I accept this.

The full text of Albert Cadrain's statement to Henderson follows:[192]

> APPENDIX "L"
>
> COPY
>
> Statement of Albert Cadrain
>
> I, Albert Cadrain, declare as follows:
>
> I live with my brother, Dennis, at 1841 Manning Ave. in Port Coquitlam, B.C. I was a key witness for the Crown in the 1970 murder trial of David Milgaard who was charged in the stabbing death of Gail Miller in Saskatoon in January 1969.
>
> My involvement as a witness began after I returned to my home on Avenue O South in Saskatoon following a trip to Alberta with Ron Wilson, Nichol John and Milgaard. I learned about the murder on the same and recall telling members of my family that I believed I had seen blood on Milgaard's clothing on the morning we left town. After conferring with my family, I called Saskatoon police. They arrived at my house a short time later and took me

188 Docid 002969.
189 T22839-T22845.
190 T2649.
191 T2606.
192 Docid 052967.

to the police station. I recall that I was questioned that first time 10 to 12 hours. I felt that they were accusing me of the murder. When they finally took me home late that night I was mentally drained and shaking.

As I can best recall, I was picked up by police and questioned 15 to 20 times. I remember two detectives in particular, Karst and Short, working me over they worked like a tag team; one would be the bad guy and the other would act like he was my friend. The bad guy would scream at me then the other would offer me coffee and cigarettes. Then they would switch roles.

They asked me the same questions repeatedly, time after time after time, until I was exhausted and couldn't take it anymore. This went on for months, continuing through the preliminary hearing. They put me through hell and mental torture. It finally reached the point where I couldn't stand the constant pressure, threats and bullying anymore.

As a result of the abusive treatment, I developed serious stomach ulcers and was actually spitting up blood for a long period of time. I also became very paranoid. At one point I had told the detective about David Milgaard bragging about being in the mafia. After they finally finished with all of the questioning and interrogation police advised me that I was the star witness and said I'd better find some place to hide because they didn't want the mafia to kill me.

The paranoia got worse following David Milgaard's trial. It reached the point where I couldn't sleep or eat. Finally, at the urging of my brother, Dennis, I voluntarily committed myself to the psychiatric ward at University Hospital in Saskatoon. I was drugged 24 hours a day and subjected to repeated shock treatment. The experience was hell on earth. A person would be better off dead than going through what I did in that hospital. I came out of the hospital like a walking zombie and it took many years for my memory to come back.

Before I walked into that police station I was a happy normal kid. But everything changed after that. My life has been ruined because of all of this shit. From the evidence it now appears that David Milgaard is innocent. To know that my testimony helped cause him to spend all those

Page 2 – Statement of Albert Cadrain to Paul Henderson

years in prison only adds to the stress and to the burden I've been carrying through my entire adult live.

I feel that the Saskatoon police did a terrible thing to me 20 years ago. My life has never been the same and it never will be. Those detectives pushed me over the edge and I cracked.

I have provided this statement to Paul Henderson of Centurion Ministries of free will and accord.

Dated June 24, 1990 Signed: "Albert Cadrain"

I am satisfied that whatever Cadrain said to Henderson was not accurately reproduced by him. Although signed by Albert we know that he was unable to read statements shown to him by the RCMP.

It was obvious from Henderson's evidence that he:

- believed Cadrain when he said that police pressured him;
- thought he was "nuts";
- realized that he had not varied from his trial evidence;
- left some things out of the statement because he disbelieved them;
- believed what Dennis Cadrain told him about Albert's mental instability; and
- put down allegations of police mistreatment to discredit Albert's trial evidence.

Henderson admitted that it was a mistake for him to assume that police had coerced Albert Cadrain's statement about seeing blood on David Milgaard, when he had evidence available to him which showed that Albert gave police the story before they began to question him.

Henderson conceded that he was not saying that the Saskatoon Police set out to build a case against an innocent person. As we shall see, that certainly was McCloskey's message.

When the RCMP interviewed Dennis Cadrain in the course of the Flicker investigation in 1993,[193] they were told that Henderson persisted in writing things that he (Dennis) had not said, putting words in his mouth and trying to manipulate Albert.

Confronted with this, Henderson did not conceal his contempt for the interviewer Constable Dyck, referring to him as "this character" and "this Mountie", accusing him of having an agenda to impeach the statements Henderson had obtained from Dennis and Albert.[194]

I find that the statements of Dennis and Albert, given to Henderson, are suspect on their face. No help was needed from Constable Dyck to impeach them. When Albert was interviewed by the RCMP on June 2, 1993, one sees a remarkable contrast in his manner of speech compared to the Henderson statement.[195] It is voluble, profane and pointedly critical of Henderson. I have seen a video of Albert speaking, and what appears in the RCMP interview is unmistakably Albert. He said, in one of many trenchant comments about Henderson, "…if anybody was trying to change my story it was Henderson, not the cops. It was Henderson".[196]

Asked to comment, Henderson said "I think Albert was manipulated by those police, Templeton and Dyck, and I think that Albert was telling them what they wanted to hear."[197] A follow up interview was done by Templeton and Cox the next day. Albert told him that there was a conversation between Henderson, Dennis and himself before the statement was taken. He said that his brother Dennis "…was my coaxer. He was my manager. He coaxed me. Come on, he done his time, let him go."[198]

Henderson says that he turned over the statement he had taken from Albert to Centurion for use in the s. 690 application. Because he had concerns about Albert's credibility he would not have recommended its release to the media. But on June 26, 1990, Dan Lett wrote an article in the Winnipeg Free Press headlined "Milgaard witness says detectives 'tortured' him".[199]

193 Docid 049398.
194 T22867.
195 Docid 326611.
196 Docid 326611 and T1993.
197 T22871.
198 Docid 326707 at 718.
199 Docid 039118.

Henderson agrees that the headline was "way too strong", because Cadrain had spoken of "mental hell and torture".[200]

He told a reporter in August of 1990 "… no question in my mind that an innocent man was railroaded into prison".[201]

That was a surprising conclusion to have reached, based on scant evidence. Both aspects of it, innocence and "railroading" or police pressure were based largely on hunches.

By the time Henderson took Albert's statement, he was visibly mentally ill (see earlier evidence). Yet Henderson gave it to Asper without reservation, and Asper passed it to Lett who published parts of it in a form which was an affront to the integrity of the Saskatoon Police in general, and Karst in particular. Who could blame them for not joining the Milgaard cause when the supporters of that cause were publishing such things about them?

So-called evidence like this should not have prompted the authorities to reopen the case. On the contrary, knowing it to be false, the police involved would naturally be resentful and disinclined to help, although I have no evidence that they reacted negatively to the detriment of the reopening. What matters is that such revelations which came to the attention of the authorities, which they knew to be false, should not have caused them to reopen the case, and I so find.

### (d) Williams Review of Cadrain Information

In their letter to Williams, Milgaard counsel raised allegations by Dennis Cadrain about his brother Albert's mental stability, so Williams looked for confirmation by others of Albert's testimony. This was taking time. The Milgaard group was calling for speedy resolution, while at the same time adding to the investigative burden. The message for him, as Williams understood it was "do you really want it known that one of the trial witnesses was a looney or is psychiatrically infirm, and that this infirmity is manifested by visions? Do the right thing, be the hero, open up this thing immediately."[202] In his view the message was really destined for the media, and it soon appeared there. But Albert's mental condition at trial raised a genuine s. 690 issue, although not a difficult one in some respects. Other people saw the compact being thrown out, so nothing turned on Albert's mental deficits at the time, if he had any. But following on the heels of the dog urine furor, the public would question the basis upon which people were being convicted of murder. Although the Dennis Cadrain statement raised concerns they were answered by the fact that Albert had told his brother the story before going to the police, which he then voluntarily did. The police continued to question him, challenging his incriminating evidence. The suggestion by Dennis that police had planted ideas in his brother's head could not be true, and Dennis provided no details to support either unreliability or coercion.

In his meeting with Dennis Cadrain, Williams found that some of the broad statements he made were not based on trial testimony, but reflected subsequent experiences with Albert.

Because of Albert Cadrain's stay in the psychiatric centre, Williams was on the lookout for the onset of illness and the report of visions, questioning whether mental factors could have coloured Albert's perception of events.

200 T22876.
201 Docid 216860.
202 T34575.

Williams' June 16, 1990, memorandum to file records his interview with Albert Cadrain.[203] He found him agitated, but responsive, confirming the two most incriminating pieces of his trial evidence: seeing blood on David Milgaard's clothes; and seeing him throw out the compact. Because the latter was reinforced by what Tallis had told him, it helped to make Cadrain believable. He confirmed everything he had said at trial except in saying that Milgaard had put his clothes in the garbage instead of in the car.

Williams thought that signs of mental illness would have appeared during the intense period of police interrogations, preliminary inquiry and trial – an issue which could have been tested in Court. He did not believe that Albert's mental condition affected his perception of past events. The suggestion that police worked on him to get incriminating evidence was the opposite of what happened. Albert went to the Saskatoon Police voluntarily, and despite his treatment by the Regina Police on an unrelated matter, he told Saskatoon Police what he had seen, only to be met with disbelief and repeated questioning. Yet he did not complain of coercion.

From his interview with him, Williams found Albert Cadrain to be lucid and able to relate events. He had not been presented with psychiatric evidence showing mental illness at trial, only Dennis' suspicions and Asper's suggestion of visions. Williams suspected that the mental instability issue was designed for the media.

Pearson found the Cadrain family to be honest and sincere, a fact which would, I conclude, lend credence to what various members, including Albert, had said. He took Estelle Cadrain's statement.[204] It is of interest in terms of what Albert told her and of Albert's treatment by the Saskatoon Police, which she identified as good, and his mental state at the time of the murder and the trial, which she also identified as good.

### (e) Ron Wilson

In approaching Wilson, Henderson adopted tactics already discussed with Joyce Milgaard and David Asper, suggesting police mistreatment as a reason for having lied at trial.[205] It worked, as may be seen in Wilson's recantation.

Wilson did not complain of mistreatment to the RCMP, to Joyce Milgaard, to Rossmo and Boyd, or to this Inquiry. As noted elsewhere, he seemed to go out of his way to be helpful to the police, using persuasive language in his statements, and referring them to Melnyk and Lapchuk. Apparently convinced in his own mind of the importance of what he had done, he applied for the reward shortly after Milgaard's conviction.[206]

Henderson described Wilson as a weak-willed person, more inclined than others to tell police what they wanted to hear. There could be truth in that, but it should be noted that Henderson wanted a retraction from Wilson, and that is what he heard.

He conceded that he did not know the case well before interviewing Wilson. As we know, the interview lasted six to eight hours. Henderson has given various estimates. The result was a mere six page written statement, not in Wilson's words, but rather a composition by Henderson, in form if not in substance. Henderson explained that, wherever possible, he uses a witnesses' own words, but sometimes has to

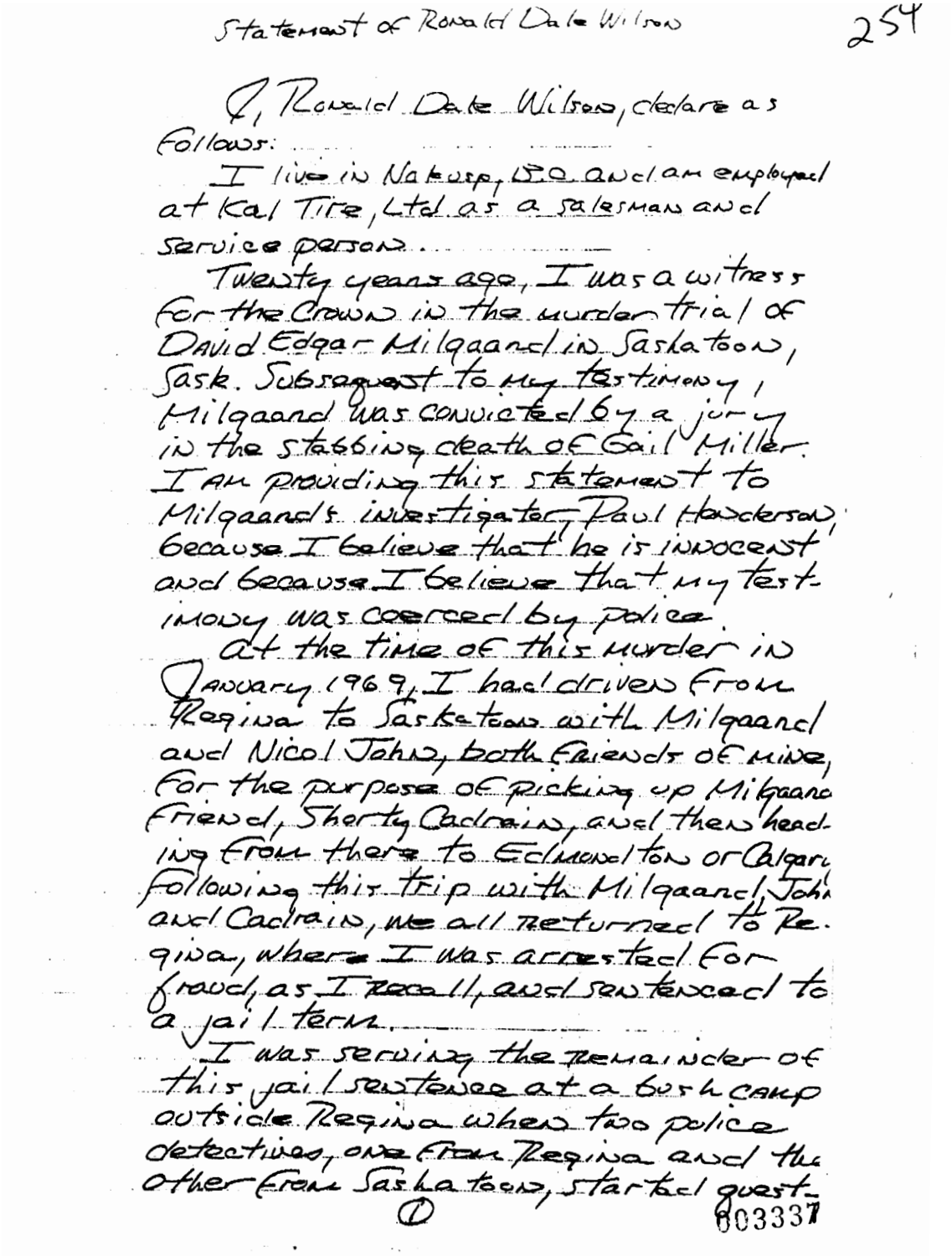
203 Docid 000836.
204 Docid 002619.
205 T28988-T28994.
206 Docid 003336.

suggest words like "coercion".[207] He said that his practice is to get a witness to agree on virtually every word he puts down in a written statement. Albert Cadrain, however, told the RCMP that Henderson had pressured him, and Ron Wilson testified before us that Henderson supplied some words for him in the course of his interview.

Henderson has been asked many times over the years to produce tapes of the Ron Wilson interview. He has promised many times to look for them – including once at this Inquiry – but again, his reply was as it has always been, that he could not find them. Were it necessary to draw an adverse inference relating to the genuineness of Ron Wilson's recantation, I would do so on that account, but resolution of the issue requires no inference. The recantation is unreliable on its face.

The recantation was submitted to Justice Canada as part of the first application under s. 690, but was not believed. It came to the attention of Saskatchewan Justice, and Murray Brown has testified that he disbelieved it as well. It remained in the material as part of the second application, and was before the Supreme Court of Canada. I will consider it in light of the Inquiry evidence from Wilson, who gave it, Henderson, who took it, Asper, for whom it was important new evidence and Williams, who investigated it. Because of the prominence received by the recantation in various proceedings over the years, it is reproduced below.

207 T22567.



Statement of Ronald Dale Wilson 254

I, Ronald Dale Wilson, declare as follows:

I live in Nakusp, B.C. and I am employed at Kal Tire, Ltd. as a salesman and service person.

Twenty years ago, I was a witness for the Crown in the murder trial of David Edgar Milgaard in Saskatoon, Sask. Subsequent to my testimony, Milgaard was convicted by a jury in the stabbing death of Gail Miller. I am providing this statement to Milgaard's investigator, Paul Henderson, because I believe that he is innocent and because I believe that my testimony was coerced by police.

At the time of this murder in January 1969, I had driven from Regina to Saskatoon with Milgaard and Nicol John, both friends of mine, for the purpose of picking up Milgaard's friend, Shorty Cadrain, and then heading from there to Edmonton or Calgary. Following this trip with Milgaard, John and Cadrain, we all returned to Regina, where I was arrested for fraud, as I recall, and sentenced to a jail term.

I was serving the remainder of this jail sentence at a bush camp outside Regina when two police detectives, one from Regina and the other from Saskatoon, started quest-

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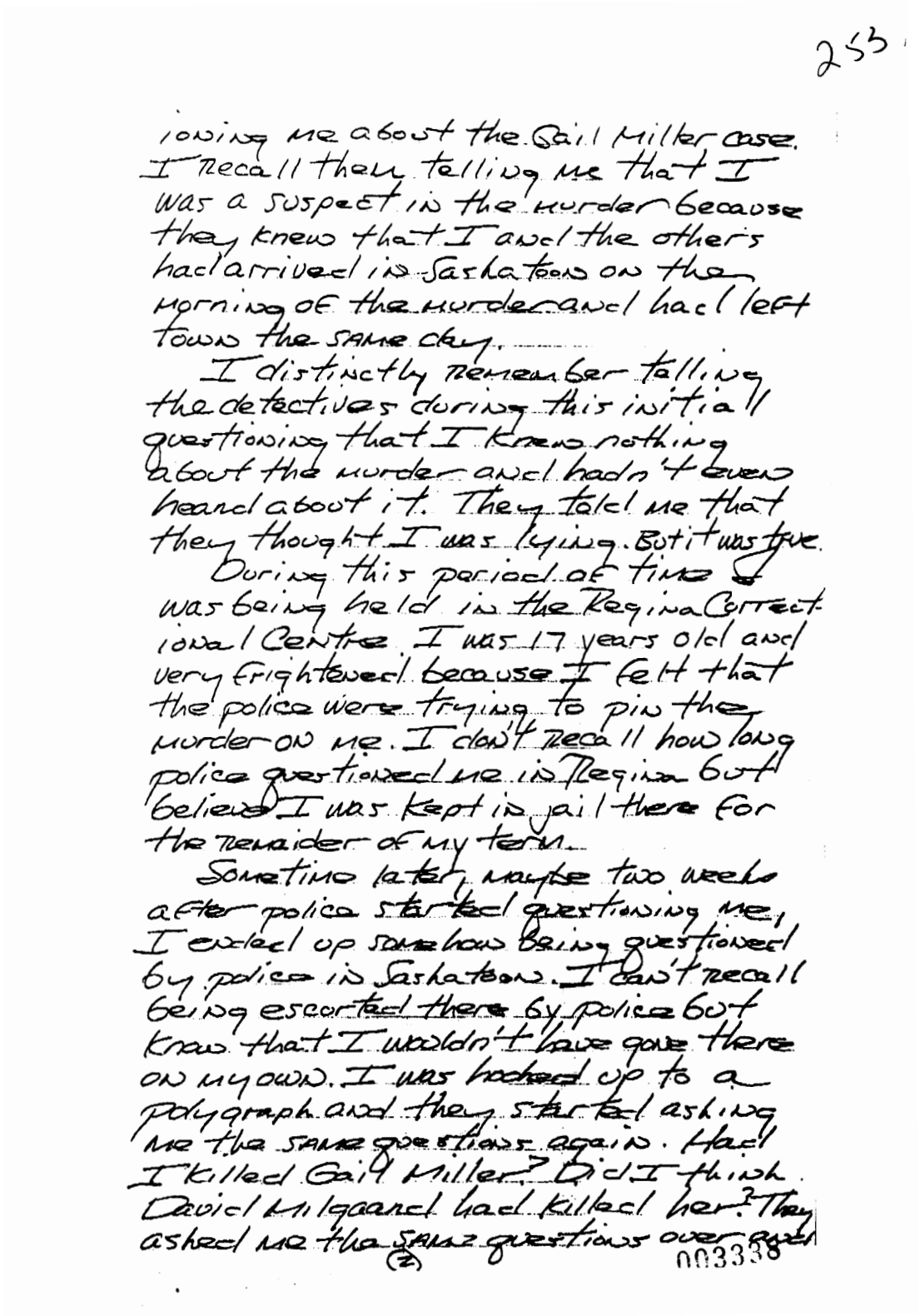

253

ioning me about the Gail Miller case. I recall them telling me that I was a suspect in the murder because they knew that I and the others had arrived in Saskatoon on the morning of the murder and had left town the same day.

I distinctly remember telling the detectives during this initial questioning that I knew nothing about the murder and hadn't even heard about it. They told me that they thought I was lying. But it was true.

During this period of time I was being held in the Regina Correctional Centre. I was 17 years old and very frightened because I felt that the police were trying to pin the murder on me. I don't recall how long police questioned me in Regina but believe I was kept in jail there for the remainder of my term.

Sometime later, maybe two weeks after police started questioning me, I ended up somehow being questioned by police in Saskatoon. I don't recall being escorted there by police but know that I wouldn't have gone there on my own. I was hooked up to a polygraph and they started asking me the same questions again. Had I killed Gail Miller? Did I think David Milgaard had killed her? They asked me the same questions over again

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over. I kept answering no, I didn't kill Gail Miller and didn't think David Milgaard had. I recall that I was questioned on the polygraph twice for maybe as long as six hours. It was like a sweat session. My mind was exhausted and I was mentally scrambled. If remember it now being like brainwashing. Finally I began to implicate Milgaard in the murder telling police the things they wanted to hear.

I am now certain that I was manipulated by police into lying and later giving false testimony against Milgaard.

I also recall that sometime prior the point where I started to implicate Milgaard police were using statement allegedly made to them by Shorty Cadrain to convince me that David had killed Gail Miller.

One of the allegations, I recall, was that Cadrain had seen blood on Milgaard's pants on that morning at his house. In court, I testified as to having seen the blood on Milgaard myself. Presently I have no recollection of seeing the blood on his pants. I believe that the police somehow convinced me that I had to have seen the blood because Cadrain had.

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From reading the transcript of my 251
1970 trial testimony, a copy of which
was provided to me by Paul Henderson
on this date, I can attest to having
made the following additional alle-
gations against Milgaard in the
trial:

— that I saw Milgaard with a
maroon-handled paring knife prior
to our arrival in Saskatoon from Regina
on the morning of the Gail Miller
stabbing death.

This was not the truth. I saw
no knife prior to our arrival in
Saskatoon. I recall that David
purchased a paring knife to cut
our meat and cheese on the trip.
But this was when we stopped for groceries
in Rosetown — after we had left
Saskatoon.

I recall that detectives showed
me several knives, including one with
a maroon-handle, and that they
pressured me to tell them that the
knife with the maroon handle was
the one I saw and that I had
seen David Milgaard with this
knife before we got to Saskatoon.

— that Nicol John was hysterical
when I returned to the car after
we'd gotten stuck in the snow and
I'd gone for help.

I have no recollection of her
being hysterical at that time. The

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allegation that Nicol became hysterical after witnessing a murder to be place makes no sense to me. If Nicol had seen Milgaard kill someone she would never have continued with us on the trip.

— that someone found a woman's compact in the glove compartment of the car after we left Saskatoon.

I have no independent recollection today of this having occurred.

— that when we were a band together in Calgary, Milgaard told me he'd "hit a girl" or "got a girl" in Saskatoon and put her purse in a trash can.

This testimony was planted in my mind by police. At no time did Milgaard confess anything like this to me.

By the time Milgaard went to trial police had me convinced, in one sense, that he was guilty. Deep down I wasn't sure, however, and I felt badly that I may have been manipulated into testifying against an innocent person and putting him away.

At the time, I was heavily involved in drugs, including heroin, speed, marijuana and LSD. I consider myself not to have been mentally stable at that period of my life.

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I have thought about David Milgaard many times. He's been in my thoughts off and on for the past 20 years. I know how he has suffered in prison - where it must be like time is standing still. David Milgaard was my friend.

I was manipulated into lying against him - manipulated into believing my own lies.

I have been haunted throughout all of these years by my role in helping convict David. Although he has suffered the most, I feel that I was also a victim of this case.

I have provided this statement to Paul Henderson of Centurion Ministries because I like and in the interest of justice for David Milgaard, whom I believe to be innocent.

DATED June 4, 1990 Ronald Dale Wilson
Nakusp, B.C.

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Supplement to Statement of Ronald Dale Wilson

I, Ronald Dale Wilson, declare as follows:

In reading a transcript of the 1970 trial testimony of Nicol Johns on this date, I learned for the first time that Nicol claimed that our car became stuck in an alley behind a funeral home on the morning in January 1969 that we arrived in Saskatoon.

It is true that our car got stuck in the snow while we were driving around looking for Shorty Adrain's house that morning. It is also true that at some point we stopped the car and asked a lady for directions.

But I saw no funeral home in the location where we became stuck. I recall that we became stuck at an intersection at the end of a block. I do not recall seeing a funeral home and would have so testified if I had been asked that question during the trial.

This statement has been given bona fide in the interest of justice

DATED June 4, 1990
Nakusp, B.C.

Ronald Dale Wilson

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Ron Wilson testified at the Inquiry and gave his version of the recantation, which was made in two parts to Paul Henderson of Centurion Ministries on June 4, 1990. It bears a signature but is not in his writing.

At the Inquiry, Wilson testified at some length about the circumstances of his statements to Henderson. Henderson called him at home saying that he represented Joyce Milgaard. They spoke of what others had said, including a recantation by one of the Cadrains. There was no such thing.

Wilson explained that he knew he had lied at trial, but although he had been thinking of telling the truth since about 1988 or 1989, he only decided later in the afternoon with Henderson to change his story.

After reading some transcripts which Henderson showed him, he says he resolved to set things straight.

He claims that he did not tell Joyce Milgaard earlier because he was not comfortable with her; nor did he tell Milgaard because he would not be able to reach him; nor the police, because he feared being charged with perjury. But he admitted that by telling Henderson the police were bound to find out eventually. None of the reasons he gave is convincing or even plausible, leaving me with the suspicion that Henderson had a lot to do with it. He said that he felt guilty for having lied, but he testified that he had known this since 1970. Why this sudden guilt 20 years later?

He said that 90 per cent of the written statement is in his own words, but reading the typed version[208] and listening to his testimony reveals a marked difference in the manner of speech. For example, the statement "I believe he was innocent and I believe testimony was coerced by police" is too pat and formulaic to have been spontaneously uttered by him.

At the Supreme Court of Canada, Wilson testified that the police were courteous and non-threatening to him,[209] leaving judges with no reason for having lied at trial, in contrast to his recantation to Henderson where he said that the police had coerced him into lying. Wilson, for good reason, was not believed at the Supreme Court.

Henderson told the Inquiry that in obtaining Wilson's recantation, he spent all morning with him in preliminary discussion. There is no record of what was said, but Henderson told him of his suspicion that witnesses had been coerced and, as I understand him, he followed the strategy mentioned above, which was to convince that witness that it would be easier to admit now that he had lied if he could say that he was pressured into doing so. Wilson agreed that this is what happened.

In the afternoon they went over his statement line by line, taping what was said. The tape has not survived.

The combined morning and afternoon sessions totalled seven or eight hours. Henderson says that he planned the contents of the statement. Wilson, he said, "was no Rhodes scholar".[210] The statement, "I believe my testimony was coerced by police," is in Henderson's words, not Wilson's. In general, he said, the statement was not verbatim, but rather his own representation of what Wilson told him. That is obvious. It is literate, draws inferences (e.g. "If Nichol had seen Milgaard kill someone she would never have continued with us on the trip"), and is sometimes melodramatic: "I was manipulated into lying against him – manipulated into believing my own lies".

208 Docid 052969.
209 Docid 120748 at 935.
210 T22754-T22755.

He says:

> By the time Milgaard went to trial police had me convinced in one sense, that he was guilty. Deep down I wasn't sure, however, and felt badly that I may have been manipulated into testifying against an innocent person and putting him away.

If he was unsure, at trial, of Milgaard's guilt, how can he (or Henderson, who wrote it) explain that on February 9, 1970, soon after the trial, Wilson wrote asking for some of the $2,000 reward "since I was one of the main witness (sic)"[211] – hardly the words one would expect from a witness who, deep down, was unsure of his friend's guilt, and might have been manipulated into putting him away.

Wilson signed the six page statement composed for him by Henderson. But then, apparently, Henderson spotted an oversight, and wrote the additional narrative which Wilson signed in which he declared that he saw no funeral home in the vicinity of where they were stuck.

In a Saskatoon StarPhoenix article of June 9, 1990, Henderson is reported as saying that getting Wilson to recant took about eight hours of gentle prodding.[212] That is accurate, he said, but added that Wilson essentially admitted in the first hour that his testimony was not true.

Asper sent the Wilson statement to Ottawa, but not before he sent it to Dan Lett of the Winnipeg Free Press. Asper encouraged Wilson to get counsel (Watson) and warned the latter that Williams of the federal Justice Department wanted to interview Wilson, and might be aggressive. Asper denies telling him that he should not agree to an interview.

They were determined to get to Wilson before Justice could interview him,[213] and then to see him represented by counsel before the Justice interview. In fact, they delayed providing contact information to Justice.

I find that Asper, in so acting, must have had concerns about Wilson maintaining his recantation, although he said that his concern was Wilson possibly facing perjury charges. Yet Wolch, on June 6, 1990, sent statements of Ron Wilson and Dennis Cadrain to Williams, chiding him for not having spoken to them before then.[214]

The next day, Asper was reported in the newspaper to be "shocked" that Justice had not contacted the principal witnesses.[215] He said that it was part of their campaign of pressure on Justice to act, but it must be remembered that they were trying at the same time to keep Williams away from Wilson.

Wilson refused to talk to Williams after his lawyer Watson heard from Asper that other witnesses complained about their treatment by Justice.[216]

Asper complained that Williams did not believe that anything was wrong with the conviction, and was always able to quickly rebut anything he said. On June 12, 1990, a complaint was made about Williams' aggressive questioning of witnesses, and on June 18, 1990, Wilson declined an arranged interview. Asper admitted to being the source of the allegation that Williams mistreated witnesses. This, I find, caused

| | |
|---|---|
| 211 | Docid 003336. |
| 212 | Docid 004760. |
| 213 | Docid 334936 at 334963. |
| 214 | Docid 157077. |
| 215 | Docid 004759. |
| 216 | Docid 003558. |

the abortive trip of Williams and an RCMP officer to Nakusp, B.C., and could only lead to mistrust of the recantation by Wilson, a mistrust that persisted through the Flicker inquiry.

Meanwhile, the media campaign was in full swing. Dan Lett of the Winnipeg Free Press reported on June 7, 1990, under the headline "Milgaard witness says police forced him to lie".[217] He reported that Wilson said sheer fright forced him to agree with anything the police said. From the evidence I heard at this inquiry, from police who knew and interviewed Wilson, this is nonsense. He began to implicate Milgaard in Regina, and on the way to Saskatoon for the Roberts' interview. He was a streetwise young man with biker connections, and no stranger to the justice system.

Although the Milgaard group was going their own way through the media, doing private interviews of witnesses and blocking access to Wilson, Asper took a peremptory stance with Justice, writing on June 12, 1990 to demand information from them and complain about their investigators' interviewing technique in the Deborah Hall interview.[218]

At the Inquiry, Asper complained about Justice Canada engaging in an adversarial process, and he refused to acknowledge that Williams had an obligation to test the evidence presented to him under the s. 690 process. That is tantamount to saying that Justice should accept, without question, any affidavit presented by an applicant as prima facie proof. Justice had a legitimate concern about the integrity of all evidence presented to it.

### (f) Eugene Williams Review of Ron Wilson Recantation

Williams told us that he did not view Wilson's May 23-24, 1969 statement as a recantation, but rather as a development of his first statement, taking account of his trial testimony. But then came the statement given to Henderson which Williams first heard of in the Winnipeg Free Press.

The first piece of information Williams received about the Henderson interview process came in a June 9, 1990, article from the Saskatoon StarPhoenix: "Getting a key witness to recant testimony used to convict a man of a 1969 murder took about eight hours of gentle prodding, an American private investigator probing the case said Friday".[219]

Williams wanted to hear from Wilson how the six page narrative, which was not in his own words, came about.

A recanting witness was not an unusual ground to advance. But they had no inkling that this was coming, and he had to ask himself how it was done so quickly. A witness does not come to such a decision lightly because he risks a charge of perjury. But Wilson, he thought, was the last thing they could raise, having attacked the re-enactment, the forensic issue, the knife, and John and Cadrain.

He sensed a pattern – additional grounds by installment, supported by press coverage to keep things going. No doubt he was correct. Asper confirmed it in his evidence. But Williams expected that if Wilson provided a ground for the application, it would have been raised because the Wolch firm started on this in 1986. He was unaware of Joyce Milgaard's interviews of Wilson in 1981. The transcript would have helped him. Had he known that Wilson did not recant then, why now? Why after eight hours of discussion with Henderson?

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|---|---|
| 217 | Docid 216811. |
| 218 | Docid 010035. |
| 219 | Docid 004760. |

His approach to the recantation was to look at the facts then in dispute, and for objective indicators of the new version. Did the accounts of other witnesses confirm the recanted facts? Was there any bias evident? And why had Wilson lied under oath? What sort of a person was he – shy, easily influenced? A recantation, being a very serious thing, needed to be tested for genuineness, but not credibility at that stage. Lying under oath when a buddy is on trial for murder, and then recanting the evidence 20 years later calls for an explanation. Williams' duty was to provide the Minister with sufficient context to decide weight.

Wilson's statement made him uneasy. The manner of its release was again, in his view, calculated to put Justice Canada on the defensive. He thought that it was geared for the media, and he was skeptical. Police manipulation, and a frame was alleged in the recantation, but nothing of the kind appeared in the trial transcript. Wilson was asked at trial and did not say so. And he was not the type to be intimidated by the police.

Williams found the phraseology curious: "I believe my testimony was coerced by police." Either he was or he was not coerced. And someone with a command of language (not Wilson) wrote the statement (e.g. "subsequent to my testimony").

The circumstances under which he made his incriminating statement of May 23, 1969 needed to be looked at because his description of the polygraph session did not match what Williams knew of such testing. He was surprised that no complaint had been made in the past. Words like "sweat session, mentally scrambled, brainwashing" suggest unlawful police activity.

To Williams, the statement was well crafted to suggest that Albert Cadrain had not seen blood. Wilson said he saw it because the police told him that Albert did. Now, by saying that he could not recall seeing blood, Wilson was implying that Albert did not see it either. This, for Williams, signalled the influence of the writer, not the words of Wilson.

All of this set the stage for coercion or manipulation as the explanation for Wilson's trial evidence. But he had had the chance at trial to disassociate himself from his May 23rd statement and did not, standing up to cross-examination. Williams recognized that Wilson was "no shrinking violet." Fresh from the dog urine publicity, Williams thought that the recantation was designed to make them give up and just grant a remedy. But Wilson needed to be spoken to. His previous statements, preliminary and trial evidence required investigation. He looked for polygraph results.[220] He spoke to Karst, Short and Roberts. If the 1969 and 1970 evidence bore scrutiny, the accuracy of the recantation came into question, and that would be pointed out to the Minister.

A day after getting the Wilson statement, Williams wrote to the Kelowna RCMP[221] asking them to set up an interview with Wilson. That was done, but upon arrival in Nakusp, on June 18, 1990, Wilson refused an interview. Watson, his lawyer, said that other witnesses, according to the Milgaard lawyers, had been uncomfortable with Williams. Williams was disappointed, as well he might have been. Nakusp is deep in the mountains of southeastern British Columbia. He had come from Ottawa.

After meeting with Watson, Wilson's lawyer, Williams thought there would be no interview. He prepared a memorandum on June 19, 1990, in which he listed the allegations Wilson made in recantation as key

220 Docid 105315.
221 Docid 333463.

departures from his trial testimony.[222] Williams noted that defence counsel, at the preliminary inquiry and trial, put detailed questions to Wilson about his contacts with police. At the preliminary inquiry, Tallis dug for evidence of police influence but unsuccessfully. With past police contacts, questioning was not new for Wilson, and Williams concluded that he had not been a frightened 17 year old. On May 21, 1969, he had admitted some facts in his first statement which either Milgaard told his lawyer, or were confirmed by further investigation, so Williams did not think that the first statement was truthful. As well, some things which he recanted were known to be true from other sources.

Of the recantation, Williams' conclusion in his memorandum is worth noting: "In these circumstances, little if any weight can be given to the allegations contained in this recent statement. It also appears that the applicant has intervened to discourage or prevent any attempt to question this witness to determine the accuracy of the statement."

For Williams, getting stuck was a focal point in the trial, because it led to the separation of the boys, and a chance for David Milgaard to commit the crime. The window of opportunity was an important issue at trial, and Williams was surprised to see it not addressed in the meeting with Henderson. But it was omitted in Wilson's March 3, 1969, statement, so that did not tell the whole story. In his recantation Wilson did not recant getting stuck, seeing a woman, or asking her for directions.

Timing was of concern. Williams was surprised by the claim of coercion coming one and a half years after the application was filed, when Wilson had not complained at trial, nor had Wolch or Asper complained, and Williams had heard only good things about police conduct.

When he gave his recantation to Henderson, Wilson claimed that he had been intimidated by police into lying. The subject of police misconduct had been added as a ground to the first application under s. 690, so Williams was of course concerned to look into it. It struck Williams that Wilson had never complained of this before, so why now, and why had he not done so at trial? When he finally managed to interview Wilson, nothing Wilson told him seemed to match his complaint of improper police behaviour. As for police intimidation, Williams was persuaded from the record, and from what Wilson told him in the interview that there had been no coercion.

From the record and from Wilson's interview, Williams was convinced that the latter had not been intimidated by police, and the record gave no hint of that.

Williams did not find the Wilson recantation credible, nor did the Minister who considered it in the s. 690 applications. The Supreme Court of Canada did not find Wilson credible in general, but the Court recognized his recantation as new evidence which a jury might consider.

On the basis of Inquiry evidence, I find neither Wilson nor his recantation to be credible. We heard from Brown of Saskatchewan Justice that it was not believed by them, and I find that that was for good reason, so in the result it was not information coming to the attention of the police or Saskatchewan Justice which should have caused them to reopen the investigation into the death of Gail Miller.

### 5. Joyce Milgaard Encounter with Kim Campbell

Joyce Milgaard and David Asper took advantage of Minister Kim Campbell's visit to Winnipeg in May of 1990, to publicly present her with the Ferris report. Asper told Joyce to say, "If your officials won't give

222 Docid 003561.

this to you, I am, I will".[223] Clearly the aim was to embarrass Justice Canada. In the result, says Joyce Milgaard, the encounter was a disaster for her personally, but the public response was good. Minister Campbell rebuffed the offer of the report leaving the impression that she was uncaring. The encounter led to a later meeting with Prime Minister Brian Mulroney.

Asper told us that the episode made a great story, Campbell's refusal to speak to her provoking a public outcry and marking a turning point in their case. He had some concerns that the media campaign might be counter-productive but thought, on balance, that they could win a political battle against the Minister. It has been argued that the wrongfully convicted should not be denied the chance to exercise political pressure when all else fails. That seems reasonable, but the exercise of political pressure during the course of what is supposed to be an impartial investigation is another matter. To admit that that is acceptable is to invite political avoidance of legal process, and that should not happen.

## 6. Opinions from Dr. Markesteyn and Dr. Merry on Frozen Semen and Dog Urine Theory

The Milgaard group received and relied upon an opinion by Ferris that the serological evidence at trial derived from the frozen semen samples in the snow could be taken to have exonerated Milgaard. They received further expert commentary in 1990 from pathologists Drs. Markesteyn and Merry to the effect that the frozen samples in the snow might have been dog urine and not human semen at all. This hypothesis was seized upon by the Milgaard group for its value in discrediting the trial evidence, and it received wide publicity. One unintended result was that the opinion of Ferris was undermined because it was given on the basis that he was dealing with human semen.

In her Inquiry evidence, Joyce Milgaard said that she did not understand the serological evidence.

In a letter to one Alan Aitken (a reporter, I assume) on March 27, 1990, Asper said that one of the three major foundations of the Crown's case was "the evidence of experts who claimed that semen samples found at the scene of the crime belonged to David Milgaard."[224] This assertion was wrong. No expert said this, and it was not argued.

In late May 1990, in a conversation between Joyce Milgaard, Asper and Henderson, Asper said that he heard that Ottawa was having independent serologists examine the Ferris report.

On May 30, 1990, Asper was awaiting Merry's report on the possibility of semen in the snow being dog urine. Joyce Milgaard said that this was important to them because she believed that her son was partly convicted on the semen samples, and now it seemed that they were not semen, but rather dog urine. She said they were concerned that this could undermine the Ferris report (which was based upon the samples being human semen) but the sensational aspect favoured them. This illustrates the preference she had for publicity over substance. She seems not to realize what a negative effect this must have had on the Justice Canada officials evaluating the s. 690 application.

Merry's report[225] to Asper of June 1, 1990, that the samples might be dog urine, evolved to a report in the Toronto Star that it was dog urine. Although concerned that they could lose the Ferris arm of the application leaving them only with the Hall affidavit,[226] Joyce said that the possibility of the substance

223 Docid 336804 at 825.
224 Docid 162388.
225 Docid 106948.
226 Docid 336785 at 797.

being dog urine was so newsworthy that it did not really matter that it might be wrong. It was a chance to show how bad the evidence against David was.

Peter Markesteyn, a retired forensic pathologist[227] testified at the Inquiry. He said that Asper contacted him, not vice versa as Asper had testified. I accept that. Markesteyn was asked to see if Ferris' opinion had forensic value,[228] and the hope was that he would support Ferris. He said that the journalist Dan Lett learned of his involvement[229] but he does not know how. Markesteyn said that he never commented to the press on findings, and that the Toronto Star was wrong in reporting that he was to give an opinion on Milgaard's innocence, as he did not do that.

Markesteyn was given the judge's charge to the jury[230] on May 15, 1990 by Williams. It had no effect on his findings, he said. On May 29, 1990, Williams noted in his file[231] that he had asked Markesteyn for a copy of his report and would send a copy to Brown of Saskatchewan Justice. Here is a good example of s. 690 matters being transmitted to Saskatchewan Justice, which highlights the relevance of s. 690 matters to our inquiry.

Markesteyn agreed to address the question of whether the scientific evidence exonerated Milgaard. He knew Colin Merry as a serologist,[232] so he asked his opinion. He did not realize that Merry was in direct contact with Asper.

Markesteyn considered the possibility of the substance in the snow being dog urine because of common experience, and if it was, could it possibly have sperm or A antigen in it? Dogs do not recycle semen, but rather excrete it in urine, and they have the A antigen. So he and Merry decided to freeze human semen to see if it turned yellow. It stayed clear but it was not a precise test. Still, he raised the question of how, in this unpreserved scene, could one tell that it was not dog urine?

We heard from Penkala, who collected the sample, and Paynter, who analyzed it. It was human semen. To think that trained police officers would not recognize dog urine for what it was, is to take a jaundiced view of their powers of observation, and most striking of all was the fact that the sample had human pubic hair embedded in it.

Markesteyn, in any event, was asked by Williams if the forensic evidence excluded Milgaard. He could not say that.[233] Markesteyn had "grave doubts"[234] of the validity of the secretor test showing Milgaard to be a non-secretor. He discussed this with Asper, but declined to disclose his discussion, claiming privilege. He was not pressed.

In June 1990, Joyce and Asper discussed the need to confirm David Milgaard's secretor status[235] but it was not done. One and a half years later at the Supreme Court, David was shown to be a secretor, making the Ferris report irrelevant.

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|---|---|
| 227 | Docid 338018. |
| 228 | Docid 155505. |
| 229 | Docid 220901. |
| 230 | Docid 333393. |
| 231 | Docid 002510. |
| 232 | Docid 169913. |
| 233 | Docid 333433. |
| 234 | T33575. |
| 235 | Docid 337073 at 094. |

Asper appeared on television[236] claiming that Markesteyn had devalued the scientific evidence relied on in part by the Court of Appeal to support the conviction. Markesteyn says that he probably discussed this with Asper and told him that the substance might be dog urine and of no value as evidence. But he denies having any discussion with Asper such as that reflected in the latter's discussion on tape with Joyce Milgaard, to the effect that the Chief of Police would be ridiculed, and Tallis and Caldwell would be affected. In fact they were. The baseless suggestion of dog urine made the police and trial counsel appear to be incompetent. It was done deliberately, as Asper and Joyce Milgaard admit, for the sake of publicity. As well as damaging the public's faith in the administration of justice, it had a chilling effect upon the investigators, the police, and Saskatchewan Justice officials.

In Markesteyn's report, dated June 4, 1990[237] is the opinion that the rape and murder of Gail Miller could have been done in a very short period of time. He confirmed this, and said the temperature was of no concern. I accept this.

Emson told him that the frozen substance in the vials was semen but could not identify the origin of it. Markesteyn said that Paynter's notes were not available, but could not recall where he heard this. He said that had he known of Paynter's lab notes identifying human semen he would have accepted that.

Markesteyn could not recall if he was aware that human pubic hair was found frozen in the sample. Thinking about it later he concluded that it would be reasonable to assume that the hair and the substance belonged together, provided the sample was uncontaminated. In fact, he agreed in 1991 that the sample was more likely human semen.[238]

On June 5, 1990, Asper wrote to Williams[239] telling him that Markesteyn confirmed the Ferris report. So the letter was both unwise and misleading – unwise because if the substance was dog urine, Ferris' report was valueless and misleading because it said that Markesteyn supported Ferris on the vital point of exclusion, and he did not.

Equally misleading, was a StarPhoenix article of June 6, 1990, which proclaimed "Key evidence in conviction called flawed".[240] It was not key evidence in Milgaard's conviction. However, the story accurately reflected his views on likely contamination, said Markesteyn.

The Winnipeg Sun on June 6, 1990,[241] said that Markesteyn's report supported Ferris. That was so only to the extent that both reports failed to link Milgaard to the crime, not that both excluded him. Asper, appearing on the television show, "A Current Affair" said that the frozen samples were in fact "Fido's urine".[242] Markesteyn told us that his report did not say that. And an article in the StarPhoenix on June 7, 1990 stated that: "Like Ferris, Markesteyn says emphatically that semen found at the scene could not have been Milgaard's".[243] Again Markesteyn disagreed and he said he would not dispute the statement by Patricia Alain of June 12, 1990, that an experienced examiner would have no trouble distinguishing human and animal sperm.[244]

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|---|---|
| 236 | Docid 230098. |
| 237 | Docid 026321. |
| 238 | Docid 003688 at 704. |
| 239 | Docid 157075. |
| 240 | Docid 048870. |
| 241 | Docid 159851. |
| 242 | T33474. |
| 243 | Docid 220863. |
| 244 | Docid 185365. |

Williams' memorandum to file dated June 16, 1990 records a meeting he had with Markesteyn and Merry.[245] The consensus was that the scientific evidence was invalid and did not exonerate David Milgaard. Markesteyn said that the memorandum fairly states his conclusions. He found Williams to be firm and professional in his approach. Unlike Ferris and others who were interviewed by the Christian Science Monitor,[246] he found Williams to be objective.

Markesteyn denies saying that the samples were not semen at all, but dog urine, as published in the Western Report dated August 13, 1990.[247]

Markesteyn said that following dismissal of the first application in February 1991, the press tried repeatedly to get him to say that David Milgaard was innocent, but he refused comment. He also takes issue with Peter Edwards' assertion in a Toronto Star article of August 11, 1991, that dog urine was presented in court.[248]

Markesteyn says that he was misquoted by Joyce Milgaard in "A Mother's Story" when she claimed he said, "This semen cannot possibly be from Mr. Milgaard," and he did not say that the killer stayed at the scene for at least 15 minutes, stabbing the victim even after death.[249]

Markesteyn's dog urine speculation, I find, could have been avoided had he received an adequate evidentiary base to work from. He did not get closing arguments, original exhibits, preliminary inquiry evidence, or the Molchanko report of March 27, 1969[250] showing the presence of six human pubic hairs, or the Penkala report.[251]

Referring to Williams' memorandum to file on June 12, 1990, in which it is recorded that Ferris had not read certain key documents from the trial, Joyce Milgaard said that she left it up to her lawyer to decide what material was provided to Ferris. The fact that Ferris did not receive all he should have, I find, set in motion a long, unnecessary and inaccurate media campaign and investigation.

Markesteyn agreed that the uncontroverted trial evidence showed the sample to be human semen containing the type A antigen. Milgaard was thought to be a non-secretor. So the conclusion which Markesteyn stated in his report could have been drawn from the trial evidence. If the sample contained blood type A, that could account for the presence of A antigens, and if it were the semen donor's blood, he would not therefore be excluded even if a non-secretor. But the presence of blood in the semen was never established, so if anything, the evidence before the jury was exclusionary.

Markesteyn says that he was not given the part of the trial transcript where Molchanko was asked about the pubic hairs in the sample.[252] Had he seen them, his dog urine theory would have been weakened. And Penkala, at trial, said that the victim's flesh was frozen.[253] The semen in the snow would be frozen also so it would not likely be contaminated later by pubic hair. The hair must have been in the liquid semen. It was only speculative to suggest that the substance was dog urine, he conceded.

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| 245 | Docid 002507. |
| 246 | Docid 008469 at 471. |
| 247 | Docid 026530. |
| 248 | Docid 032096. |
| 249 | Docid 269317 at 482. |
| 250 | Docid 025562. |
| 251 | Docid 006262. |
| 252 | Docid 176606. |
| 253 | Docid 087460 at 504. |

The Markesteyn opinion about dog urine, as well, was rejected (again correctly) by Justice Canada so it should not have influenced the authorities. In Williams' memo to MacFarlane,[254] Ferris is recorded as saying that his report was not new evidence, but rather evidence which could raise a reasonable doubt. Ferris, at the Inquiry, agreed with this. I find that his report was a reinterpretation (and not a correct one) of the trial evidence which was before the jury, and that the Justice Canada investigators recognized it as such. It was, like Deborah Hall's evidence, not something that should have led to a reopening.

Ferris told Williams that the serological evidence did not link Milgaard to the offence, nor did it exclude him.[255] Joyce Milgaard could not recall being aware of this. She and her son continued to believe that the opinion exonerated him.

She was referred to an article dated August 13, 1990, in the Western Report. It is a melange of fact, half truths, and false information, more attention grabbing than insightful. An example is the unequivocal statement that Markesteyn "…has concluded that the Crown sample was not semen at all, but dog urine".[256] That is not so. Markesteyn held out the possibility and that is all.

Joyce Milgaard said that this is an example of how information became "escalated"[257] in the media. Distorted would be a better word and the effect upon police and officials was chilling, to say the least.

Retired haematopathologist Colin Merry was called to testify at the inquiry. He was asked by Markesteyn to evaluate a yellow liquid, frozen when found. This was from the vial of material found by Penkala at the crime scene, and found by Emson to contain human semen. Merry had no original lab reports from 1969. He read the trial transcript and concluded the substance could not be human semen because it was yellow. More likely it was urine of animal origin, contaminated with sperm. Merry said that differentiating human and animal sperm between species was difficult under the microscope because they look very similar so it could have been dog sperm. Merry lacked or overlooked information about two vital factors. First, whatever was in the vial did not contribute to Milgaard's conviction, because both the Crown and the Judge told the jury that evidence of type A blood in the sample would neither identify nor exclude him. Second, the human pubic hair had been imbedded in the sample. Merry admitted that this factor would have influenced his opinion, had he known about it.

Merry's opinion mattered at all only because in the reopening effort, the Milgaards alleged that the substance said to be frozen semen helped to convict Milgaard, and it was not even of human origin. I find that both allegations were false.

Merry testified at length at the Inquiry in a pedantic and condescending manner. His report to Asper on March 6, 1992 is a strongly worded document frequently re-enforced with exclamation marks, underlining and type emphasis, supporting the dog urine thesis.[258]

Questioned at the Inquiry about the dog urine issue, Asper said that the suggestions had great publicity value, and that they were at the point of discrediting everything. The whole issue, Asper said, became a circus, a side show and a distraction. The issue was put forward on the s. 690 application to lay blows on the Saskatoon Police and the RCMP.

254 Docid 004374.
255 Docid 002483 at 002485.
256 Docid 026530.
257 T30994.
258 Docid 155549.

I find that the dog urine speculation started by Markesteyn was unfortunate. It was seized upon by the Milgaard group for its publicity value, as they admit, and was eagerly published by the media where Markesteyn's qualifiers were usually omitted. His opinions were lifted from context to be read as unequivocal statements. I conclude that the extensive coverage of this spurious issue grew from a desire to make the police and prosecution look foolish. It did no credit to the Milgaard group's reopening effort. The testimony I have from police officers and Saskatchewan Crown officials demonstrates how infuriating they found the media coverage.

I have repeatedly heard it said that without the media, David Milgaard would not have been released. Even accepting that, I find that the publication of false and misleading material did nothing to advance the s. 690 applications and, in fact, was counter-productive to the reopening of the investigation into the death of Gail Miller.

### 7. Publication on July 17, 1990 of Dan Lett Article Regarding Ron Wilson's First 1969 Statement

Although mention has been previously made, the question of disclosure of Ron Wilson's first 1969 statement merits some repetition. On July 17, 1990, reporter Dan Lett of the Winnipeg Free Press reported a charge by "two lawyers close to the case" that a statement by a "star witness" that might have discredited his entire testimony appears to have been withheld from the defence.[259] This was false as a reading of the trial transcript should have told the two lawyers. The article is entitled "Witness statement withheld, lawyers say". It goes on to quote Ron Wilson as describing his trial testimony as "a bunch of crap" and he says that "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".[260]

The statement in question was that of Wilson given to Saskatoon Police on March 3, 1969.[261] The fact is that Tallis cross-examined on the statement and Caldwell referred to it in his address to the jury. David Asper, one of the lawyers in question, is reported to have said that Tallis made no reference to the statement at either the trial or the preliminary inquiry.[262] He spoke of serious concerns of non-disclosure: "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".[263] Wilson's then lawyer, Ken Watson, said he was shocked to learn of the first statement, and that it suggested a serious omission in information given to Tallis.

Asked to comment upon these allegations, Caldwell said they were plain wrong. I agree. Coming as they did when the first s. 690 application was before the federal Minister of Justice, such reporting could hardly be expected to inspire cooperation from the authorities. Caldwell, however, did not respond publicly.

He could not answer every allegation that was being made, he said. It was his position then that Wilson's first statement was incorrect in many respects, and that the truth lay in his May 23, 1969, statement. He has no recall of Dan Lett calling him for his version of the facts.

259 Docid 004752.
260 Docid 004752.
261 Docid 006689 and 042086.
262 Docid 004752.
263 Docid 004752.

Wilson's first statement (which, of course, Tallis did receive) says that: "I am convinced that David Milgaard never left our company during the morning we were in Saskatoon".[264] But Tallis explained that his own client had told him that both he and Wilson had left the car. As a result, he could not challenge Wilson on the point of inconsistency between his first and later statements. I am not sure from his evidence that the critics understood Tallis' ethical position.

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 3, 1969, statement in his cross-examination. In his view, if pressed too far, Wilson was likely to have explained his March 3, 1969, statement as an effort to protect his friend. He tended to improve his evidence, not change it.

Interestingly, on July 18, 1990, Asper's own client, Joyce Milgaard, tried to convince him that Tallis had the statement in question[265] but Asper would not be persuaded. At the time he told Joyce Milgaard that if Tallis had the statement there were serious problems about the conduct of the defence, and that if he did not have it "then there's very, very, very grave problems with the prosecution".[266]

At the Inquiry, Asper, to his credit, described the newspaper story by Dan Lett, which was critical of Tallis and Caldwell regarding the Ron Wilson initial statement, as unfortunate, and he took responsibility for it. He now realizes that Tallis had the statement and understands why he did not raise it in cross-examination.

In a transcribed record of a conversation between journalist Dan Lett, and a daughter of Joyce Milgaard,[267] Lett reports interviewing Ron Wilson. He was going to compare what Wilson told him with the statement Henderson obtained. The intention was to publish the information and have people criticize Justice Canada for never having interviewed these people themselves. It is apparent that the strategy of trying the case in the media was being carried through. Unfortunately, the result was the publication of incorrect information relating to the production of the Ron Wilson statement. Such information not only should not have caused authorities to reopen the investigation into the death of Gail Miller, it was counter-productive.

### 8. Other Investigative Steps Taken by Williams and Pearson

At the Inquiry, the Milgaard group justified their press campaign by saying that they had no other choice. The Justice Canada investigator was dragging his heels and was uncooperative and incompetent. Much documentation was produced, and a great deal of testimony was heard relating to this issue, from which I conclude that despite the best efforts of Williams and Pearson they did not, nor should they have, produced information coming to the attention of the police or Saskatchewan Justice which should have caused them to reopen the investigation into the death of Gail Miller.

Some examples of investigative steps taken by Williams and Pearson will suffice to illustrate the direction and extent of their activities.

The Milgaards criticized the s. 690 investigation carried out by Pearson and Williams as being slanted towards support of the status quo, ie. Milgaard's guilt. They referred to Pearson's interest in such

264 Docid 042086.
265 Docid 336054 at 107 and following.
266 Docid 336054 at 336117.
267 Docid 334936.

things as Ken Cadrain's story, and reports of Peggy Miller saying that Gail Miller knew David Milgaard. But Pearson said that although his main focus was on finding evidence which inculpated Larry Fisher, he did not pass over evidence which involved Milgaard. That was only reasonable, I find, and I think that his chronology bears this out.[268] They had two suspects – Milgaard and Fisher – as his report to RCMP superiors dated August 28, 1990, clearly demonstrates. I am satisfied that Pearson had few means open to him to get the truth out of Fisher. One avenue was the polygraph, but this was frustrated by media publicity naming him as a suspect.

Williams prepared a chronology for the Inquiry illustrating the receipt of Milgaard materials in installments.[269] Draft reports were twice halted because of the receipt of new information. He said that his role was not that of adversary or enemy of the applicant, and he was disappointed to realize that the applicant was taking that approach. Williams and Pearson had to contend with unwanted publicity, repeated requests for a speedy conclusion to the investigation, and new allegations. I accept Williams' evidence that they were moving as quickly as they could.

In response to his invitation for further submissions, Asper wrote to him on April 2, 1990. Williams interpreted his letter as an attempt to reargue the case; to put things which might have been put at trial; to say that in his view the application was already so strong Williams need not look further.

On July 25, 1990, Dan Lett published Asper's description of federal investigators as the "three stooges", taking their time while his client rotted in jail.[270] This disappointed and angered Williams. They could not compel production, or interviews. While complaining of delay, Asper was blocking Williams' interview of Wilson, and causing more delay by demanding that Williams be replaced. The reader of the article would not know the background – the filing of an incomplete application in December 1988 and then grounds being advanced by installment. The continued correspondence between counsel, Pearson and Williams should have been enough to dispel the notion that investigators were tardy.

### (a) Informants

Williams was alerted to a jail house informant, John Patterson, and took his statement, but it failed to establish a link between Fisher and the crime.[271]

### (b) Tallis

Williams received information from Tallis on March 21, 1990, consistent with Tallis' testimony before the Inquiry.[272] Williams reported it to his superior on May 11, 1990,[273] and shared the fruits of the interview with Wolch,[274] giving notes of the interview to Tallis who then showed them to Wolch. Tallis asked for specific questions and was given them, as drafted by Williams.[275] The responses are recorded. They show that while Milgaard denied the killing to his lawyer, he admitted certain inculpatory matters, like throwing out a compact, and he did not deny others, like the motel re-enactment. And because Tallis' account did not support Hall's affidavit about the re-enactment, one had to conclude that Milgaard counsel had not

268 See Appendix O.
269 Docid 337474.
270 Docid 220989.
271 Docid 012681, 016762, 012669.
272 Docid 333322, 157030, 335388.
273 Docid 335386.
274 Docid 335401, 335402.
275 Docid 335388.

spoken to Tallis. As well, Tallis understood the secretor issue. The information he gave to Williams showed that Ferris had not read the trial evidence.

Williams, after speaking with Tallis, concluded that had David Milgaard taken the stand, the Crown's case would have been strengthened. The jury might have heard, for example about his interest in purse snatching.

### (c) DNA Testing

DNA typing, which had potential as determinative evidence, interested Williams because there were no eye witnesses, assuming Nichol John's memory could not be revived. He spoke to Gaudette of the RCMP lab on September 6, 1989, about DNA analysis. Gaudette thought that the technology might be available in a few years.[276] Gaudette told him that any attempt to apply conventional DNA analysis methodologies would likely preclude subsequent analysis because the sample would be used up. Williams relied on Ferris' sampling source on the panties as being the only one available, so Williams was able to do no more.

### (d) Missing Knife

Sometime after the murder, while police were still involved in scene investigation, one of them found a knife under snow on a fence. It was rusty but otherwise unstained and police saw no connection with the murder. It was kept for a time as possible evidence, but was not introduced at the preliminary inquiry or trial. Tallis knew about it but did not want it in evidence, lest it be linked to John's evidence that David Milgaard had a similar knife on the trip.

Joyce Milgaard publicized allegations that a knife found on a fence at the scene had mysteriously gone missing from a police officer's locker.[277] The idea, she admitted, figured prominently in her group's thinking over the years, and was based in the notion that the missing knife might have been the murder weapon, which would explain the fact that Linda Fisher's paring knife did not match the description of the murder weapon, a fact which tended to weaken Linda Fisher's perception of her husband as the murderer.

At the Inquiry Joyce Milgaard was unable to explain specific allegations made by her or others about the missing knife. She could point to no evidence showing that Caldwell got rid of it. Told that Tallis did not want it in evidence because it could have been linked to John's evidence that David Milgaard had such a knife on the trip, she replied that she and Asper thought Tallis was involved in setting up her son. I have no evidence that Asper shared so unworthy a belief about such a respected counsel. She now accepts that the allegation of misconduct by Caldwell relating to this knife has no substance.

Her book, "A Mother's Story", published in 1999, repeated accusations which she had made over the years. She admitted at the Inquiry that she had written and published this book without checking facts, and without noting in her book that a major investigation of her allegations of official wrongdoing had found no fault. She admitted that what she wrote about Caldwell and the knife was wrong and was an absolute lie.[278]

Williams said that the story of the missing knife was easily dealt with by reference to the trial transcript. The fact that Wolch and Asper publicized it as suspicious was treated by Williams as mere argument.

276 Docid 002479, 002480.
277 Docid 162186 at 162192.
278 T33140-T33141.

Even if Caldwell had hidden the knife, as suggested, it would only constitute a ground for relief if the knife could be linked to the crime.

### (e) Pambrun Statement

Clifford Pambrun's statement[279] also interested Williams because of the possible link between his own car and the one parked near Gail Miller's residence. It had been suggested that the sexual assault might have taken place in a car. Inquiry evidence demonstrated that no link could be established with Pambrun's vehicle.

### (f) Police and Prosecution

Williams said that he needed timelines from the police as well as their accounts of what happened in interviews to see how they compared to allegations of bad conduct. He noted that Melnyk and Lapchuk came to Wilson. Why would Wilson volunteer their stories to the police if they had coerced him into giving an incriminating statement? Wilson also agreed to take a polygraph test, and volunteered details like the elevator break-in to the officers who were driving him to Saskatoon for the test. He had already implicated Milgaard in Regina on May 22, 1969. After the Roberts polygraph session, Wilson gave sworn evidence before a Justice of the Peace, all of which makes improbable the continuous "sweat session" described by him in his June 4, 1990, recantation.

The allegation of manipulation of Wilson by Art Roberts started at this time,[280] so Williams called Roberts who denied the suggestion of manipulation, although he could not remember details and had no records.[281] John did not complain to Williams about her treatment by Roberts, and he would have expected her to complain had she been mistreated. The subject was canvassed at trial, and if something had been wrong, it should have come out then. I am satisfied that Williams did all he could to investigate this complaint.

### (g) Disclosure

The Milgaard group had not advanced lack of disclosure as a ground, although there were press articles. Investigators looked into the issue anyway and learned from Tallis that there was no problem.

It should be noted that at the time of trial, Fisher was not a suspect for either the rapes or the murder. Tallis was unaware of the rapes. The obligation of Caldwell to disclose the rapes would have depended upon, first, his knowledge of them, and secondly, making the possible connection between them and the murder. Neither condition was met.

### (h) Conspiracy

The first intimation of a conspiracy theory being advanced by Joyce Milgaard against the Saskatoon Police came to Williams through Pearson's report of March 15, 1990.[282] This obviously would suggest another ground of relief, when, at the same time, Wolch was asking when the investigation would be completed.[283] However, it could not be completed in the face of incremental grounds for relief being suggested.

279 Docid 012090.
280 Docid 002108.
281 Docid 002109.
282 Docid 056743 at 750.
283 Docid 332053.

The depth of suspicion felt by the Milgaards against anybody in authority is illustrated by the fact that apparently at one time they suspected that Tallis and Caldwell were in cahoots because Tallis was up for a judgeship.[284] Just how his chances would have been advanced by participation in a scheme with Crown counsel to convict his own client was not explained.

### 9. Allegations of Conflict Against Caldwell

Asper wrote directly to Kim Campbell on August 14, 1990,[285] saying that Justice Canada was wrong in allowing Caldwell (now working for them) to be involved in the investigation because his former standing as prosecutor created a conflict.

When Williams began gathering information for his s. 690 investigation, he used Caldwell as a resource person resulting in the accusation by the Milgaard group that Caldwell was in a conflict of interest. Around September 1989, Williams contacted him (Caldwell was then with the federal Department of Justice in Saskatoon), asking him to search his Milgaard file for the name of Fisher. Williams' memo to file dated October 23, 1989,[286] records other requests for information from Caldwell. Caldwell went to the Provincial Crown office and found the Fisher reference in McCorriston's report. He responded on other matters, on October 25, 1989.[287] Caldwell says that he helped Williams and Pearson with names and addresses of witnesses but did not try to influence their investigation. I accept that. It would be unreasonable for the investigation not to consult so obvious a source as Caldwell for general information. But he is adamant in saying that he did not take part in Justice Department deliberations on the applications.

On October 31, 1989, Caldwell sent additional material to Williams. As we see in Williams' memo to file of February 28, 1990, David Asper said to him (apparently having heard it from Joyce Milgaard) that, "Linda Fisher was interviewed by T.D.R. Caldwell about this matter at or shortly after the event in 1969".[288] Caldwell told us he has no reason to think that this is true. And he is sure that he did not interview Larry Fisher.

On April 10, 1991, Wolch wrote to Legal Aid Manitoba complaining about the rejection of his s. 690 application brought in 1988, and about the way in which the investigation was done by Justice Canada.[289] He said, "The original prosecutor in the Milgaard case is now employed by the Department of Justice in Saskatoon. We understand that he was used in some respect as part of the investigating team in spite of the obvious conflict of interest".[290] Caldwell rejects this saying that all he did was gather information. He did no interviews, and tried to stay at arms length. There is no indication that he did not. Saskatchewan Justice noted on October 23, 1989, that Caldwell had reviewed the file and provided some information.[291]

Caldwell wrote to Williams on October 31, 1989, observing that Joyce Milgaard's view of the case as expressed in a book, "Winnipeg 8: The Ice-Cold Hothouse", did not resemble his own.[292] He admits that it was a mistake in judgment for him to say so. I accept that. It was not appropriate for him to be expressing

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|---|---|
| 284 | T29695. |
| 285 | Docid 157100. |
| 286 | Docid 016105. |
| 287 | Docid 150975. |
| 288 | Docid 112584. |
| 289 | Docid 164582. |
| 290 | Docid 164582. |
| 291 | Docid 027172. |
| 292 | Docid 150983. |

opinions to Williams at that time because it might have affected the latter's objectivity. The lapse was a minor one, however, and I find that it was not typical of his involvement which was, in general, merely helpful to Williams in the information gathering task he faced.

As for Caldwell's contribution to the first application, Williams says that he opened some doors. Williams had no power to compel production, and Caldwell was well known and respected. As well, he was able to answer questions about the Crown's position on the case. Williams said that he did not give Caldwell his views on the applicant's grounds, nor ask him to take part in deliberations.

When he got Caldwell's closing address, which he needed, he realized that the Crown had not put forward the semen in the snow as being either inculpatory or exculpatory.

Williams had no compunction in getting information from Caldwell. He was an officer of the court, not giving evidence and there was no indication of wrongdoing on his part. Caldwell seemed open, sharing and trustful to an extent unusual for the time. I accept that.

He had hoped to get from Caldwell a synopsis of the case, and the Crown's theory. He was sent copies of Caldwell's letters to the Parole Board which stated, as fact, unadopted statements of Nichol John.[293] But Williams says that he did not think this important. It was useful as Caldwell's perception of the case, and he did not rely on it, because by then he had the trial transcript. Williams thanked him for the concise synopsis of the facts and disclosure of the Crown's theory. What Williams was getting, I find, were not the facts of the matter so much as the facts according to Caldwell. Had he relied upon them, as opposed to his own reading of the trial record, he would have been misled as to the strength of the Crown's case.

Asper was later highly critical of Williams for asking Caldwell for information, yet he himself wanted information from the Minister on August 29, 1989, from Caldwell's file. Williams had no concerns about asking Caldwell for it. Where else would he get it? On September 26, 1989,[294] Wolch's office asked Williams to ask Caldwell about news clippings on his file.

Joyce Milgaard apologized to Caldwell for accusing the prosecution of deliberately not calling Deborah Hall, when in reality she had left the province at the time of the trial.

She wrote in her book that Deborah Hall had given a statement to the Saskatoon Police which "totally contradicted" Melnyk and Lapchuk's evidence.[295] This was not so. It has not been corrected in the second edition (2000) of her book.

Apart from the Parole Board affair, she could point to no evidence giving substance to the allegations against Caldwell that she has made over the years.

She admits that Caldwell kept in his file whatever information he had about sexual assaults and willingly turned it over to Justice Canada in 1989. To me, this fact is persuasive in negating any cover-up by Caldwell. Had he wanted to cover-up, he could easily have culled his file of embarrassing material. Moreover, as the evidence shows, he made his file an open book to Young, to Carlyle-Gordge and to the CBC, long before 1989.

293 Docid 006824, 332500 and 332496.
294 Docid 332490.
295 Docid 269317 at 447.

Asked if it ever occurred to her to be sure of the facts before she made accusations across the land, Joyce said no – she was so obsessed with freeing her son that she would do (and did), just about anything.

### 10. Williams' Report to Minister

The issue of Fisher as the killer of Gail Miller had been raised on February 28, 1990. On March 18, 1990, Justice Canada asked for final submissions and Asper replied on April 2, 1990, arguing the forensic evidence, and Fisher as the true killer. But the April 7, 1990 departmental draft of the report to the Minister was abandoned because the applicant had retained Markesteyn for a second opinion. Asked if this should not have delayed the application so Markesteyn's evidence could be considered, Asper said that enough was enough and that the Fisher evidence sufficed. I find that illogical. If Fisher sufficed, why try to shore up Ferris? If Justice Canada had proceeded without the Markesteyn report, would not the applicant have objected?

Williams reported to MacFarlane on May 11, 1990, about his meeting with Tallis.[296] This memorandum serves as a companion to the Tallis testimony on the subject of David Milgaard not testifying.

Williams, despite having an uneasy feeling about Fisher, was left to conclude that he had neither evidence nor reason to believe that Larry Fisher participated in the death of Gail Miller.[297] That was a reasonable conclusion, I find, in view of the evidence at the time. Events were to prove just how wrong the conclusion was, but it took a trial with DNA evidence seven years later to show that.

Just what Williams recommended to the Minister in submitting the first application for her consideration is unknown on the basis of direct evidence, because Justice Canada refuses to disclose this sort of communication. From Brown's evidence, we know that he deferred to the Justice Canada investigation, relied on it, and understood from information that he was getting, that the application was unlikely to succeed. The Larry Fisher information had been placed before the Minister by the Milgaard group as evidence of Milgaard's innocence, and Ron Wilson's recantation had been added to the grounds originally relied upon. It is easy to infer from the evidence I have heard that Williams would not have recommended to the Minister of Justice that a remedy was justified on the basis of the Ferris report, the Hall affidavit, the similar fact evidence or the Wilson retraction. To the extent that these matters came before the attention of Saskatchewan Justice, its officials did not consider it worthy of independent action.

### 11. October 1, 1990 Meeting with Wolch and Asper

Justice Canada requested that Wolch summarize his final position on the s. 690 application and he complied on September 10, 1990.[298] The Assistant Deputy Attorney General of Canada, Bruce MacFarlane, agreed at Wolch's request, to meet for a discussion of the applicant's position on October 1, 1990.[299]

Asper said that they met for about six hours, and that there was disagreement on many issues, with Justice Canada taking an adverse position wherever possible. He recalled it as a heated meeting where they went through documents in which the frailties of the Ferris report and the Hall affidavit were pointed out to them, including the fact that Hall in some ways corroborated Melnyk and Lapchuk's evidence.

296 Docid 335386.
297 Docid 338056 at 058.
298 Docid 004394.
299 Docid 157117.

Wolch reported to his client, saying that the "situation regarding Larry Fisher was examined fully".[300]

### 12. Engagement of William McIntyre by Federal Justice

The Minister engaged retired Supreme Court Justice William McIntyre to advise her in 1990. His advice is particularly relevant to us because Saskatchewan Justice relied upon it as justification for not reopening the investigation into the death of Gail Miller. We have been denied access to McIntyre's report to the Minister because of Justice Canada's assertion that it is constitutionally protected.

Wolch protested that resort to McIntyre by the Minister was unfair to the applicant for two reasons: first, that applicant's counsel was not invited to participate in the McIntyre sessions; and secondly, that McIntyre's opinion was not made public. As to the first, Williams testified that the Minister had the prerogative to take private advice, and that Wolch was given full opportunity to make representations on his case on October 1, 1990 when he and Justice officials met. That, I accept.

On the second point, however, Wolch's concern has merit. In his letter to the Minister of April 25, 1991, he complained that the Minister sought advice from McIntyre but would not share it, and the applicant had no idea of what materials went to him.[301] In my opinion, the furor caused by the non-release of the McIntyre opinion stemmed from the Minister justifying her opinion by reference to it. She was entitled to take legal advice and equally entitled to rely upon it without more. But referring to her reliance on it without producing it to explain her reasons caused suspicion and resentment in the Milgaard group.

Justice Canada officials, however, communicated the substance, if not the report itself, to Saskatchewan Justice officials who relied upon it in not reopening the investigation. We heard from Brown of Saskatchewan Justice on the subject, and I accept what he said. He testified that Williams told him that McIntyre had been given everything that Justice Canada had, and was invited to suggest any remedy. Later on, at the reference, Brown saw the substance of the McIntyre opinion which was that neither miscarriage of justice nor any basis for a remedy had been shown.

In the result, we have legitimately heard from a reliable source that which Justice Canada refused to reveal; that the Minister's decision relied at least to some extent on the advice of eminent counsel – a retired Judge of the Supreme Court of Canada. Brown says that this influenced his decision to do nothing. Had McIntyre counselled a remedy, he likely would have reopened, based on his tremendous respect for the man.

On the non-disclosure of the McIntyre report, Brown agreed that it was not shared because of policy – advice to the Minister never was. But as well, there could have been a reluctance to expose McIntyre to attack from the Milgaard group.

### 13. Media Campaign

The media campaign carried on by the Milgaard group during the currency of the first s. 690 application did not produce any information which should have caused the police or Saskatchewan Justice to reopen the investigation into the death of Gail Miller. On the contrary, it was counter-productive.

From 1980 onwards, Joyce Milgaard was a central figure in the effort to have her son's case reopened. Essentially, that amounted to a reinvestigation of the death of Gail Miller, and so the quality of the

300 Docid 162374.
301 Docid 212782.

information she generated which came to the attention of the police and the Saskatchewan Justice is a subject squarely within our Terms of Reference.

As I have found, the information she produced was not seen as credible by police or Crown officials, and it is incumbent upon me to ask why. Should they have acted earlier upon information she provided?

Joyce Milgaard was able to attract great media and public attention. Her television appearances between March 15, 1990, and July 18, 1997, were frequent and comprise over fifty hours of tape. Five and one half hours of those recordings were played at the inquiry hearing. The familiar themes of police pressure, obstruction and cover-up are prominent.

The first Milgaard s. 690 application was filed on December 28, 1988. The media campaign started the same day with Asper writing to the CBC to book time on "The Fifth Estate". The Milgaard group was anxious to have the case featured on The Fifth Estate, but were disappointed on March 8, 1989, when the producers informed Asper that they found the genetic tests inconclusive and Ferris' opinion arguable, so they would not go to air.[302]

Milgaard was unsuccessful in having it aired but Caldwell and his Regina superior consented to a filmed interview in his Saskatoon office, and allowed the producer, Sandra Bartlett, to look through his file – information which she passed to Asper,[303] according to Caldwell.

Joyce Milgaard testified that she was furious when The Fifth Estate declined the feature for lack of strong evidence of innocence. Her group suspected ulterior motives and discussed alternative means of going public which they did, primarily through the printed media.

Caldwell said, and I accept, that he was alarmed by the accusations being made against him in the press emanating from Joyce Milgaard. For example, she is quoted in the Saskatoon StarPhoenix, October 20, 1989, as saying that Albert Cadrain was induced to testify against her son for a $2,000 reward.[304] Caldwell knew this to be incorrect – that Albert had applied for the reward only after the trial, and then only at the urging of Father Murphy.

According to Asper, either David or Joyce Milgaard contacted Dan Lett of the Winnipeg Free Press, sending him a copy of the application. On August 5, 1989, he published the first story on the case. Lett speaks of "…the extraordinary but plodding process"[305] of investigation by Justice Canada. Asper is quoted as saying that "the Crown's theory is preposterous".[306]

The assertion received national coverage. The purpose, says Asper, was to sway public opinion, to get his client acquitted, at least, if not shown to be innocent. He admitted, however, that the effect on federal Justice officials would not be very positive, but anytime you involve the media you lose control and take a risk.

Asper wrote to Southam News Service on September 6, 1989, sending a copy of the application and of the Winnipeg Free Press article of August 5, 1989.[307]

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| 302 | Docid 218743. |
| 303 | Docid 010056. |
| 304 | Docid 001542. |
| 305 | Docid 025909. |
| 306 | Docid 025909. |
| 307 | Docid 163065. |

They had made the decision to rely on the media, he said, and September of 1989 marked the build-up to hostilities. They were in the dark, and in an adversarial process.

Asper wrote to Carlyle-Gordge on October 2, 1989, to report that in December 1988, they had filed an application for review of the case.[308] He reported that Justice Canada was investigating, and detailed the progress he was making with the media. He invited Carlyle-Gordge to publish his version of the case. He said that the Department of Justice had been "utterly mute and had not responded to any of his correspondence", in particular, his request for disclosure of all the information they had "received from prosecution in Saskatchewan".[309] In fact, the Milgaards had obtained information years before.

A juror at the Milgaard trial, Fernley Cooney, contacted Asper to say that he had been mentally unfit at the trial but did not want to talk about jury deliberations.[310] Asper told Dan Lett, who wrote an article on October 18, 1989, which quotes Asper as commenting that this is "just the latest in a series of bizarre disclosures".[311] He could not recall saying that, nor could he recall Cooney telling him that he had caved in to his peers. The media descended on Cooney.[312]

Material gathered by the Milgaard group often went first to Lett, in preference to Justice Canada. In one instance, Carlyle-Gordge's interviews of 1981 and 1983 went to Lett and not to Justice Canada at all.

According to Williams, he became less communicative with Milgaard counsel after having sent a statement to them for the purpose of the application, which they passed onto the press without his authorization.

Joyce Milgaard testified that she got Frank's statement, and perhaps Hall's name from Tallis' file.[313] Asper could not recall getting this from her. Williams sent it to him on October 2, 1989,[314] only to see it released to Dan Lett, prompting the article published on October 22, 1989, which suggests that the statement was withheld for 20 years, and that it directly refuted the testimony of Melnyk and Lapchuk.[315] This could only have been counter-productive to Williams' efforts to get at the truth, and would ultimately affect the attitude of Saskatchewan officials. Why should they believe any information publicized by the Milgaard group?

In fact, the statement had not been withheld. Tallis saw it before trial. Nor did it contradict what Melnyk and Lapchuk had said. Quite the reverse. Tallis told us that he was not interested in Frank as a witness.[316] Lett wrote that it "directly refuted damning testimony given at the 1969 murder trial…".[317] It did no such thing, and Williams knew it. In his words, it was another "brick in a mounting series of statements or misstatements".[318] It amounted to pressure on the Minister to act on information which was not true, but which Williams could not publicly correct.

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|---|---|
| 308 | Docid 156668. |
| 309 | Docid 156668. |
| 310 | Docid 010054. |
| 311 | Docid 159886. |
| 312 | Docid 165287. |
| 313 | T29881. |
| 314 | Docid 157019. |
| 315 | Docid 220222. |
| 316 | T24508. |
| 317 | Docid 220222. |
| 318 | T32595. |

The article also implied that the Department sat on the statement for 20 years whereas, in fact, the Department had had it for only a short time. It also does not mention that defence counsel had it at trial and had interviewed the affiant. The applicant's cause was ill served by the publication of misinformation, which simply alienated the authorities who knew the facts.

Williams, however, had to avoid a media trial of the issue, and so could not call Lett to correct him. He said he was disappointed in Asper for passing along Frank's name to Lett. Williams had gotten her name from the Provincial Attorney General and passed it to Asper only for the purposes of the application. The experience, he said, caused him to adjust the timing of information delivery to Wolch and Asper. Thereafter he held off until the investigation was complete, releasing the information in October 1990. Apart from this, the lack of communication between Williams and the Milgaard group was, in part, a function of how the s. 690 investigation was designed to work. The investigator was counsel to the Minister and reported to her, not to the applicant.

As Williams was to testify, he felt he could not respond to one-sided stories without leaving the impression that he was prejudging issues, when his proper function was only to investigate and recommend to the Minister. Brown of Saskatchewan Justice, on the other hand, said that the public did not distinguish between federal and provincial Justice officials, and so the latter had to suffer the same opprobrium. Timely response should have been made, he believed.

In Brown's view, Dan Lett and Dave Roberts saw themselves as part of the Milgaard team, and he did not eschew colourful analogy in describing the manner in which Dan Lett's talents were put to use. In Brown's view, the press believed what they were being fed and Justice did not respond. For him, the problem lay not with factual reporting but with the corruption and misconduct spin. I would express the problem as erroneously reporting facts, such that corruption and misconduct could be inferred. I agree with Brown that the reporting actually impeded the orderly investigation of the Milgaard wrongful conviction.

Williams testified that as time went on, and further attacks on his work were made, a need to respond was seen, but was constrained by *Privacy Act* considerations. Furthermore, story lines did not reflect what federal Justice did tell the media, but it would have been presumptuous for him to tell them that information given to them by Wolch or Asper or Milgaard was wrong. Even though the public's view was being shaped by articles which did not reflect the facts as he knew them, Williams could not comment or state findings until the case was decided.

Asper's resort to the media to pressure Williams into action actually slowed him down, he said. Without it, he would have finished his investigation sooner. I accept that.

Asper appeared on a newscast on January 22, 1990, stating that the semen in the snow evidence was used to convict Milgaard, whereas evidence now showed that it excluded him. He was wrong on both counts.

Joyce Milgaard told us that she was not prepared to wait and wanted to fight back, to go public and to force the Minister to do something. In the spring of 1990 Asper urged Joyce Milgaard to return to Saskatoon to "stir up a hornet's nest".[319] She approved of his strategy - "let's let the dogs loose everywhere".[320]

319 T30865.
320 T30867 and Docid 336950.

Dan Lett suspected there were sources within the provincial government who were "going to rat on Caldwell".[321] Joyce Milgaard said that she certainly did not discourage this. Asper spoke of an anticipated Lett article "burning" Caldwell.[322] Nothing in the documents I have seen, or in the testimony I have heard shows Caldwell to have acted improperly while prosecuting the case. Even his subsequent letters to the Parole Board were written in good faith, and in what he perceived to be the public interest.

Joyce Milgaard's media campaign increased in intensity and she was much concerned with what she saw as inaction by the authorities with regard to the Ferris report and Larry Fisher as the murder suspect. Although, on March 16, 1990, Wolch wrote to Williams promising full co-operation,[323] Joyce Milgaard said that she had absolutely lost faith in the justice system. She told the Inquiry that they were taking a calculated risk in publicly criticizing Justice Canada and the Minister while their application was under review. There can be no doubt from the evidence of police and both federal and provincial Crown officials that they came to mistrust anything she said.

Justice Canada's understanding of the accusation of delay being voiced by Asper is described in a memorandum from William Corbett, Senior Counsel, to John Maddigan of the Minister's office. Corbett attributed delays to Wolch's accusation of a third party murderer, which required investigation. Where you have an applicant feeding you information by installments, delays result. And we know, from Asper's evidence, Wolch had advocated, and persuaded other people in his office, to adopt such a policy.

So the Milgaard group, while complaining in the press about lack of progress, was at the same time busily digging up "more data to bolster Milgaard request".[324] Asper and Joyce Milgaard are pictured on the Court House steps taking a break from examining the evidence.

Williams observed that when they attempted to explain delays as being due to new grounds advanced, Asper and the press would say that it was ridiculous that David Milgaard should be prejudiced by putting forward new grounds. The short answer to that complaint, I think, is that he was not being prejudiced. He was being given more time to be heard.

On April 20, 1990, Asper called Williams[325] to say that Joyce Milgaard had told the press of Fisher's involvement, and to ask for a progress report. Williams, knowing that such conversations were usually followed by a critical press item, said that they were diligently pursuing inquiries.

Then came a deadline – May 7, 1990 – to come to a decision or they would go public about Fisher.[326] Joyce Milgaard wanted to interview Fisher in prison but that would set them back said Williams by frightening Fisher into silence. He understood that Wolch shared her view that Fisher might respond to a mother's plea. Neither the warden nor Williams did. Expertise was needed to question a hardened convict.

After the CBC identified Fisher, tension was created because of his concerns for his own safety, and the chances of a meaningful polygraph exam were impacted, said Williams. A cardinal rule in the penitentiary is that you do not let someone else do your time. Breaking the rule could be fatal.

321 Docid 334970 at 982.
322 T27066.
323 Docid 155610.
324 Docid 229635.
325 Docid 333384.
326 Docid 112912.

Fisher's lawyer wanted until the end of May to consider the request for an interview. Williams had to wait because to cut off the investigation without an interview would invite criticism. The deadline imposed by Joyce Milgaard caused Pearson to visit Fisher over his lawyer's objections.[327]

Dan Lett reported that Joyce Milgaard had tracked down the new suspect, doing Justice's job for them.[328] Williams' response is that the Minister's role is to review the application on the basis of the grounds advanced. Had Larry Fisher, as a suspect, been put forward as a ground for relief, Williams would have been looking into it with help from someone like Pearson early in 1989 – provided, of course, a factual basis had been laid.

We know that near the end of the first application, Asper and Joyce Milgaard had decided to carry their fight through the media. Williams commented that when you politicize a judicial proceeding, you risk harming the administration of justice, by giving currency to the idea that the way out of jail lies in politicizing and publicizing. It is indeed arguable that what got David Milgaard out of jail was counter-productive to a full reopening of his case. The reason for that was that what the media was reporting was often wrong, an example being the fact that although Hall's observations mirrored those of the trial witnesses, the media reported the opposite.

As well, the Ferris report continued to be vaunted as proving innocence, when Williams knew that it did not. He was constrained in disputing what he read, and when he did offer explanations, these were commented upon out of context.

Until he saw a review of Markesteyn's opinion, Williams said he had no intention of interviewing Ferris. "Ottawa" and the "Department of Justice" were accused of dodging questions, and of being lazy.[329] The criticism became personal, and reflected on Justice Canada as a whole. The easiest way to deal with the ridicule and criticism would have been to grant the application. Williams perceived that this was the Milgaard strategy, but he did not let it guide his activities.

Williams said, and I accept, that he had no personal stake in the outcome, despite the comments of Asper and Harvard about reluctance to admit mistakes. It was not a question about mistakes, but one of evidence.

The perception invited by articles such as the one appearing in the Saskatoon StarPhoenix on May 14, 1990, was that Justice Canada had information on Fisher for 10 years but had not acted. In the article, Joyce Milgaard complains that Justice Canada did not want her to be involved in the investigation. "What investigation? They have had this information since 1980!"[330] What she was talking about was the Linda Fisher report to Saskatoon Police in 1980 which Justice Canada only learned about on February 28, 1990.

Joyce Milgaard's encounter with the Minister on May 15, 1990,[331] brought national media attention but did not spur Williams on because he was already going as quickly as he could. It just meant more briefing notes.

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| 327 | Docid 056743 at 771. |
| 328 | Docid 159870. |
| 329 | Docid 025918. |
| 330 | Docid 057611. |
| 331 | Docid 159860. |

In June 1990, Asper voiced his suspicion that Justice Canada was just a large group of prosecutors, and asserted that major careers were on the line. At the time, Penkala was the Saskatoon Chief of Police, Tallis was on the Court of Appeal and Caldwell was with Justice Canada.

The media message was that proven science established innocence beyond any doubt[332] and Asper was quoted as saying that bodily fluids removed from the victim were used by Ferris.[333] This was wrong and Justice Canada was concerned. Williams wondered if reporters even read the Ferris report, or if they did, if they understood it.

On June 5, 1990, Asper sent Williams the Markesteyn Report[334] saying that it confirmed the Ferris report, and that assertion found its way into the media. But, says Williams, the Markesteyn report confirmed only aspects of the Ferris report but not that forensics excluded David Milgaard.

In suggesting that the sample might be dog urine, the Milgaard group was abandoning the argument that the sample excluded David Milgaard. So the spin, according to Williams, was that the Crown relied on dog urine, overlooking the fact that the Crown in fact did not rely on forensics to link David Milgaard to the crime. As Williams correctly notes, the episode cast aspersions on the competence of the Crown, and police – another example, I find, of alienating the very people who could reopen the case. But Williams, meanwhile, could not publicly respond, and the media never pointed out that the dog urine idea effectively destroyed the Ferris opinion.

Asper told us that the possibility of the sample being dog urine was sensational and would suggest that the police work was shoddy, thus putting pressure on the Minister. Joyce Milgaard said much the same.

For Williams, Markesteyn's theory was neutral and did not affect his understanding of the trial evidence. But having been outmanoeuvred in the media, investigators had to examine submissions more carefully for misleading or incomplete material.

On June 11, 1990, Williams interviewed Ferris.[335] The basic problem was that Ferris believed that the Crown had linked Milgaard to the scene through frozen semen, whereas the argument turned on whether it was exculpatory. The memorandum is a good statement of the factual weakness of the Ferris report.

Williams said that after speaking to Ferris, he and all experts were in agreement. What was attributed to his report in the media was untrue. It continued to be published, but Williams did not bother to debate the matter publicly or ask for a correction.

Williams also met with Markesteyn and Merry,[336] having received Merry's report in June 1990.[337] He concluded from the evidence of the three pathologists – Ferris, Markesteyn and Merry – that forensic evidence did not exonerate Milgaard. That was a reasonable conclusion, and one which indirectly reached Saskatchewan Justice through the Minister's decision. The latter provided no basis for Saskatchewan to reopen.

Milgaard supporter Peter Carlyle-Gordge broke a long silence on August 1, 1990, to pronounce in the Winnipeg Free Press, that:

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| 332 | Docid 333400 at 403. |
| 333 | Docid 025918. |
| 334 | Docid 157075. |
| 335 | Docid 002483. |
| 336 | Docid 002507. |
| 337 | Docid 333458, 106948. |

- Milgaard was innocent beyond any reasonable doubt;
- the Saskatoon police contacted all the chief witnesses in the early 1980s advising them not to talk to Joyce Milgaard, himself, or anyone else; and
- "…more than sheer incompetence is involved. Police threats against Ron Wilson unless he told them exactly what they wanted to hear (true or not), borders on deliberate perversion of the court of justice and are frankly evil".[338]

On August 31, 1990, Asper is seen repeating the familiar canard, that the Crown used two frozen lumps of semen to convict Milgaard when, in reality, the lumps were dog urine.

At this time, David Asper and Joyce Milgaard were on the talk show circuit, criticizing Justice Canada's investigation, and the frailty of the trial evidence. At one point, Joyce Milgaard urged viewers with information to contact Asper, not the Saskatoon police, whose investigation was "pretty fishy". Joyce Milgaard said that they sat back patiently waiting for the Ministers of Justice to do something, and if they had done so, she would not have had to do a parallel investigation.

Wolch reported to his client, David Milgaard, on October 3, 1990,[339] on the progress of the federal review of his application. His letter was hopeful in tone and free from the negative impressions reflected in Asper's testimony at the inquiry. David Milgaard followed this with a news release on October 9, 1990, challenging Eugene Williams for his inaction on the case.[340]

In a December 3, 1990 article entitled "Feud blamed for stalling Milgaard's bid for a new trial", Dan Lett wrote that there was "infighting at the highest level of the Federal Justice Department"[341] with senior Justice officials trying to rewrite Williams' report, believing that he had mishandled the investigation. Asper, prominent as usual in Lett's articles, accused Williams of "completely misconstruing evidence" and being biased.

Asper took credit for inspiring 99 per cent of the information provided to Asper and Wolch by Williams during their meeting in October 1990, and the Milgaards' parliamentary champion, John Harvard, opined that the Minister was being "fed a line"[342] by her Justice advisors.

Campbell was reportedly furious at the "extraordinarily unprofessional approach that is being taken by some people",[343] and defended her department. Undaunted, Asper described her explanations as "absurd".[344]

As to the suggestion that the Milgaards had recourse to the media because they had no place else to turn, Williams noted that on the very day their application was filed, December 28, 1988, a letter went to the media.[345] Even before that Wolch was hoping for a "TV show".[346] The media campaign he said, and I agree, was not born out of frustration with him, but was a separate venture. It continued[347] into January

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| 338 | Docid 159819. |
| 339 | Docid 162374. |
| 340 | Docid 222477. |
| 341 | Docid 217222. |
| 342 | Docid 217222. |
| 343 | Docid 159802. |
| 344 | Docid 159802. |
| 345 | Docid 163061. |
| 346 | Docid 182097. |
| 347 | Docid 182100. |

1989 while the application remained incomplete,[348] well in advance of any complaint being made about Williams.

I find that police and Saskatchewan Crown officials were appalled by the media coverage. Even Asper admitted that it became a "circus".[349]

Asper was a panelist at a 2005 conference in which he said that the Milgaard group resorted to extraordinary measures with the media, lobbying reporter Dan Lett of the Winnipeg Free Press.[350] At the conference, Asper stated that not one media story about the Milgaard matter was wrong. He now concedes (reluctantly) that some were.

Members of the media who figured prominently in the coverage given to the Milgaard affair over the years were offered the chance to testify at the Inquiry, but declined.

The Milgaard publicity campaign, as mentioned, produced a great deal of information which came to the attention of Justice Canada, Saskatchewan Justice and the police, but my finding is that none of it gave reason to reopen the investigation into the death of Gail Miller.

### 14. Centurion Report

Joyce Milgaard devised "a political ploy",[351] to use her words, to get Members of Parliament to influence the Minister. On December 14, 1990, Joyce traveled to Ottawa to meet with Members of Parliament and the press for the purpose of getting attention for her son's plight, and pushing Justice Canada into action.[352] As well, she gave Members of Parliament and the Minister a report compiled by Centurion Ministries – not previously provided to Justice Canada – to ensure that the Minister was getting accurate information. The report contained the allegation (which I find to be false), that the Saskatoon Police interfered with witnesses, telling them not to speak to Joyce Milgaard.

James McCloskey of Centurion Ministries prepared the December 1990 report[353] for members of Parliament. It is factual for part of the first page but soon lapses into accusations of police interference. It reviews the Crown's case against Milgaard, misstating: the role John played in the trial; the use of forensic evidence; the records of Melnyk and Lapchuk; the circumstances of Cadrain's revelation to police and his subsequent treatment; and the circumstances surrounding the calling of Deborah Hall and another unnamed person to testify. McCloskey concludes, "When one considers the new evidence in light of the undisputed facts at the trial, one is led to the inescapable conclusion that David Milgaard is absolutely innocent…The time has long since passed for the Minister of Justice to intervene and take all steps necessary to see that justice is done".[354]

That Centurion Ministries was on the right track in 1990 cannot be denied in hindsight, but their report was weak, inaccurate and featured the type of advocacy which officials had come to expect from the Milgaard group as inspiring skepticism: "Through the efforts of Centurion Ministries, based in Princeton, New Jersey, as well as the Milgaard family and counsel, there is now no doubt as to the innocence of David Milgaard".

348 Docid 182102, 163025, 333285, 004868.
349 T27268.
350 Docid 338632.
351 T31064.
352 Docid 159801.
353 Docid 044769.
354 Docid 044769.

Under the heading "Forensic Evidence" the report says, "… the evidence was worthless except for the fact that it was most confusing and placed before the jury in a most prejudicial way".[355] This was not so. It was explained to the jury that the evidence neither implicated nor excluded Milgaard. Tallis argued that it was essentially exculpatory. Forensic reports obtained from Doctors Ferris and Markesteyn long after the trial were relied upon by Centurion Ministries as evidence of Milgaard's non-involvement. They were prepared in the belief that Milgaard was a non-secretor which later turned out to be untrue, thus invalidating their opinions, but even when written, the reports were ill considered.

As to the re-enactment, the report says that Deborah Hall gave affidavit evidence to David Asper and to Justice Canada to the effect that the re-enactment did not occur. That is not so. Her various reports are considered elsewhere. But her evidence to Williams and at this Inquiry related a more lurid re-enactment than other witnesses described.

The report is loaded with hyperbole, for example, "…one is led to the inescapable conclusion that David Milgaard is absolutely innocent".[356] It is also inaccurate in many respects saying, for example, that Nichol John, at the trial, attempted to recant her damning evidence. That is not so. She testified that she could not remember. "It would appear" says the report, "that certain visions led Cadrain to implicate Milgaard."[357] I have heard no such evidence, and I do not know where Centurion Ministries got this.

The report comments on the stories of Deborah Hall and Ute Frank who had different versions of the re-enactment but who were not called. One had given a statement to police. That, we know, was Ute Frank. She refused to testify. The other, Deborah Hall, was out of the province at the time of the trial.

It is also said that Saskatoon Police interfered with Joyce Milgaard's efforts to contact witnesses in the early and mid 1980s. I have seen no evidence of this. When asked for addresses of witnesses by the Milgaard group, the police sought permission from the persons in question, who refused. This was the message conveyed to the Milgaards. All police and Crown witnesses, I have heard, have denied telling anyone not to speak to Joyce Milgaard.

The report spoke of two witnesses, Melnyk and Lapchuk, who "only presented themselves one week before the trial."[358] In fact, they did not come forward to police. They told their story to Ron Wilson, who told police, who then went to Melnyk and Lapchuk.

The Centurion report was unpersuasive for the Minister and it did not, I find, contain information which should have caused Saskatchewan Justice or police to reopen the investigation into the death of Gail Miller.

Clearly, the Minister of Justice was being baited. As Williams was to say at the Inquiry, the strategy seemed to be to make things so difficult for Justice Canada that the easiest thing would be to simply grant the application. If that was so, it failed.

### 15. Role of Saskatchewan Justice on First Application

In his Inquiry evidence, Murray Brown of Saskatchewan Justice was asked to evaluate the materials submitted on the first s. 690 application in terms of what Saskatchewan would have done with it had it

355 Docid 044769.
356 Docid 044769.
357 Docid 044769.
358 Docid 044769.

come to them. He said that he would have sent the Ferris report to the police for investigation, except for those parts which drew inferences which were left for the jury to decide. An example would be the lack of time to commit the offence argument. Complaints based merely upon dissatisfaction with the verdict do not entitle the convict to another try, unless allegations of an incompetent defence are made.

Lack of disclosure and forensic issues, said Brown, merit investigation, and would be looked into. Thus they would have had the victim's clothing tested if the RCMP said it was feasible. Suggestions of another perpetrator would have gone to the police – the RCMP – if complicity was charged against the Saskatoon Police.

But, and I find this important, allegations of conflict of interest, without more, would not disqualify Saskatoon Police from investigating. Brown says that in 32 years in Justice, he has never seen a police officer who would leave a person in prison to cover-up a mistake. And here, Caldwell and the police would be aware that if they had the wrong man, the perpetrator would be on the street. He would have confidence in them to look into the matter seriously and report back.

If something pointed to a miscarriage of justice, he would speak to Justice Canada and recommend that the matter be returned to court. At present, an s. 696 application is not needed to cause a Justice Saskatchewan investigation, but there is no automatic review of convictions by their office. If one were shown to be needed the test applied by him would be to ask:

- was the conviction obtained fairly?; and
- what, if any, was the new evidence. Would it merit consideration by a judge or a jury?

A "bombshell" is not needed to start an investigation but Saskatchewan Justice needs substantial reason to reopen a case.

According to Brown, Saskatchewan deferred to Justice Canada investigators during the first application because they had confidence in them. However, had there been no s. 690 application they would have wanted the RCMP to look into Ferris' opinions as well as the Hall affidavit, had the material come to them.

I find that Saskatchewan Justice was right in not doing an independent inquiry. It was unnecessary and could have interfered with the efforts of federal investigators.

In fact, Saskatchewan received information about the Ferris report that told them that it was overreaching and incomplete, and that the frozen semen did not exonerate Milgaard. News articles[359] probably came to their attention, but concerned matters with which Justice Canada was dealing.

Williams did not share advice with Brown or say what his Minister might decide. But he told him or other provincial officials, from time to time, what he had discussed. Based on that, they were fairly sure that the first application would be rejected, so I find that they received no information up to that time which should have caused them to reopen.

Brown became aware of the Sidney Wilson tip through the press, by which time Pearson was investigating for Justice Canada. Saskatchewan was not consulted on the Fisher investigations, and never gave direction to Pearson.

359 Docid 025909, 004715, 227221.

In Brown's view, Saskatchewan should have commented upon matters within its own jurisdiction. For example, they were assured from the start that the Saskatoon police would cooperate so articles like "Mother fears coverup by Saskatoon Police",[360] required action. Caldwell, Penkala and Scott were offering "no comment" to certain allegations,[361] citing the federal investigation. Brown remarked that a strict policy of "no comment" engenders mistrust, so his department has moved away from it. There are, he said, always ways of responding without compromising a trial.

Williams sent the Markesteyn report to Brown,[362] and they knew of Merry's thoughts.[363] In Brown's view, Tallis had dealt with the frozen semen issue at trial so none of this supplied a reason to reopen. As for the dog urine suggestion, he realized that it undermined the Ferris opinion, so Saskatchewan Justice was not concerned.

Neither the Milgaard group nor Justice Canada was routinely sending material to Saskatchewan, so Brown said he probably heard of Wilson's recantation in the press.[364] But once the material from the Supreme Court reference was in their hands, the recantation supplied no reason to reopen. They did not believe it.

In commenting upon jurisdiction, Brown explained that the Province prosecutes and has jurisdiction over the investigation of crime, but does not direct the police. The provincial Minister of Justice cannot set aside a wrongful conviction. If he saw grounds to do so, he would go to the federal Minister.

Although Saskatchewan had jurisdictional responsibility for murder investigations, they knew that Justice Canada was doing a proper investigation of Larry Fisher in this light, as an incident of the s. 690 application. Almost every application of this kind involves an applicant's claim that someone else was the perpetrator, so investigation of that claim is necessarily called for by Justice Canada. In this case, Saskatchewan Justice was confident that their federal counterparts would share what they had found in good time. What they heard did not impel them to action, and they relied on the federal Minister's February 27, 1991, rejection of the first application and did not reopen.

In his experience, said Brown, when good counsel have something substantial, they bring it to Justice directly – to the people who can do something about it. But here they did not, and he was suspicious. Media reports were attributing things to Joyce Milgaard and to Asper, with no evidence of investigative work. Why go to the media and have them trickle out the information?

By the time the allegations were put before the Supreme Court, the Milgaard group, he says, did not have much credibility with Saskatchewan Justice. Brown did not mince words, saying that Saskatchewan was influenced by the Supreme Court opinion, not by the nonsense which came out of the media campaign during the applications. When people choose to argue their case through the media, they do not gain the confidence of Justice officials. In this case, it probably prejudiced their views.

Dan Lett and some other reporters had joined the Milgaard camp, said Brown, and simply reported what Asper and Joyce Milgaard told them without evaluation. I agree. I also agree that most of the media reporting was more misleading than informative.

360 Docid 039010.
361 Docid 004732.
362 Docid 002510 and 333434.
363 Docid 106948.
364 See 004783.

Both the time being taken with the investigation and adverse reporting on the subject[365] affected provincial interests, according to Brown.

Saskatchewan had Fisher's name before the rejection of the first application, and were gathering information. They spoke to Caldwell whose reaction was "who is this Larry Fisher?" – a good indication of Caldwell not having made a connection between Fisher and the Gail Miller murder.

Brown does not recall the similar fact issue being played out in the media. It did appear there, as we have seen, but in the context of the s. 690 application, so the Province would not feel the need for independent action on their part. Brown read the June 26, 1990, Winnipeg Free Press article by Dan Lett entitled "Milgaard witness says detectives 'tortured' him"[366] about Albert Cadrain's statement to Paul Henderson, but did not believe it. In the first place, the Saskatoon police did not operate that way. Secondly, Cadrain had gone voluntarily to the police. There was certainly no reason here, he said, to reopen. In his view, the news story called the whole investigation into question and affected the public's perception of the administration of justice. But Justice Canada, upon whom Saskatchewan relied, was dealing with it.

Because of Lett's article of July 17, 1990, entitled "Witness statement withheld, lawyers say"[367] about the Wilson statement being withheld, and the highly critical comments by Asper and Watson, Brown looked into it. The allegation was one of Crown failure to disclose, but at this pre-*Stinchcombe* time, some prosecutors did not disclose witness statements. So, even if it were not disclosed it probably would not have been "serious misconduct"[368] as alleged.

To Brown, non-disclosure did not typify dealings between Caldwell and Tallis. He knew that Caldwell used an open file system with trusted counsel. But they looked into the matter[369] and found nothing amiss – as was proven by a letter from Caldwell to Tallis[370] in which he enclosed the statement in question on August 15, 1969. Having deferred to Justice Canada, they did not complain to the media, although concerned about the public perception left by the misinformation.

Brown was aware of the conflict of interest allegation made against Caldwell by Wolch and Asper in the Lett article of August 29, 1990, entitled "Ex-prosecutor helping probe Milgaard case"[371] and thought it rather foolish. All Caldwell did was to provide information and had not the federal investigators gone to him, they could have been accused of not doing their job. "Just seemed to be more of the nonsense coming out of the Milgaard camp" said Brown, never lacking in candour. Such expressions from this witness, although betraying no desire for diplomacy, were never misplaced. He regarded the conflict of interest claim as one of the more transparent in the media campaign.

### 16. Federal Minister's Decision of February 27, 1991

The business of this Inquiry, in its closing phases, was to determine whether the investigation into the death of Gail Miller should have been reopened sooner as a result of information which came to the attention of the police and Saskatchewan Justice. The answer to that question has involved lengthy

365 Docid 004759.
366 Docid 039118.
367 Docid 027179.
368 Docid 027179.
369 Docid 327652, 113514, 027176.
370 Docid 007042.
371 Docid 004745.

and intense scrutiny of the actions of public officials, both provincial and federal as well as the actions of private individuals who worked for the reopening of the Milgaard case.

An important component of information coming to police and the Crown, relative to reopening of the case, was that generated by Justice Canada officials and agents in the course of the s. 690 inquiries. In order to address the reopening question, it was necessary to evaluate such information, an exercise which inevitably required scrutiny of the actions of federal officials, including lawyers, who dealt with the Milgaard s. 690 applications. But therein lies a problem posed by jurisdictional limits and solicitor/client privilege. The former are non-negotiable, but not easily discerned. The latter may be waived, but where properly asserted, must be respected by me without comment.

The exclusive jurisdiction to deal with applications for mercy under s. 690 rests with the federal Crown, but the prosecuting authority, in this case Saskatchewan Justice, must live with the consequences of the federal decisions if they involve reference back to the Saskatchewan courts. Even in the case of refusals at the federal level, the Province is held to account because, as Brown pointed out, the public makes no distinction between federal and provincial Justice Departments.

In Brown's opinion, refusal to disclose the McIntyre opinion undermined the Minister's decision. In his view, even outrageous allegations gain public support unless answered. Asper was allowed to speculate that McIntyre's opinion must not have supported rejection of the application, but Saskatchewan knew better. The complaint then expanded to include the charge that the Milgaard group was not given a chance to participate in the investigation – not a usual thing, in any case, said Brown.

Questioning of Williams at the Inquiry as to the reasons behind the ministerial decision on the first application was not allowed, following the Saskatchewan Queen's Bench judgment on judicial review. Milgaard counsel found such secrecy objectionable. When a Minister appeals to advice from learned counsel to justify her decision, she should not refuse to say what the advice was. I find merit in that argument because what the Minister did in part was to justify her reasons by reference to the quality of advice she received, whereas the reasons should stand or fall on their own merits.

Williams could tell us only that he took instructions from MacFarlane and Rutherford of Justice Canada, and provided materials to McIntyre, but that McIntyre gave his opinion directly to the Minister.

We turn next to the dismissal of the first s. 690 application and the reaction of various parties to that dismissal, which occurred on February 27, 1991.[372] Some of the Minister's reasons for dismissal are reviewed here for the sake of emphasis.

In her letter Minister Campbell explained that the s. 690 remedy was an extraordinary one and that it was not the function of the Minister of Justice to retry the case; that the Minister could direct a new trial if the circumstances justified one; or she could refer the case to an appellate court for hearing. She said, "The purpose of this procedure is to permit a review of cases where new evidence or information raising doubts concerning the correctness of a conviction has arisen after the full judicial process, including appeals, has been exhausted".[373] Where matters are raised in support of an application that were before the jury, Ministers have declined to act. But they have acted where there was a reasonable basis for concluding that a miscarriage of justice likely occurred. The Minister says that the Department has a duty

372 Docid 001529.
373 Docid 001529.

to conduct a full and impartial inquiry into the case and "to consider fairly the arguments"[374] of counsel for the applicant. In view of Wolch's report to his client concerning his meeting with Justice Canada officials which I referred to earlier, it cannot be said that they did not listen carefully to the applicant's arguments.

The Minister noted that over three dozen interviews were done by officials, including one of defence counsel for Milgaard. Reports on forensic evidence were discussed with the authors and evaluated by scientists.

The Minister recited the substance of the evidence before the jury (except for Wilson's) and concluded that a conviction registered on those facts would "not signal that a miscarriage of justice has likely occurred".[375] With respect, I agree. Asper took issue with the Minister's conclusion that the forensic evidence at trial proved nothing. But I find her treatment of the subject persuasive, and the evidence I have heard in the Inquiry supports what she said.

It was the Minister's responsibility to evaluate the recantation of Wilson. She did not believe it, and neither do I for the reasons she gave, as well as from my observations of him at the Inquiry, the form and content of the statement itself, and my assessment of Henderson as an interviewer.

Campbell observed that the jury had convicted on circumstantial evidence; the Saskatchewan Court of Appeal had found no reversible error; the Supreme Court of Canada refused leave to appeal; and the accused did not testify at trial.

She then stated her reasons for refusing to order a new trial or review by a trial court, saying that, "There is, in my view, no body of new evidence or information capable of demonstrating that a miscarriage of justice has likely occurred in this case".[376] Her conclusion, with respect, was a reasonable one in light of the "new evidence or information" known at the time.

Campbell remarked, after reviewing the evidence,

> The above facts do not incorporate significant portions of the trial evidence of Ron Wilson, which I will later discuss in greater detail. A conviction registered on the above facts, alone, would not signal that a miscarriage of justice has likely occurred.[377]

This conclusion, I think, is consistent with the supportable view that a jury, properly instructed, could reasonably have returned a verdict of guilty.

The Minister considered the new evidence of Hall and Frank. She noted that Hall confirmed the "re-enactment" but regarded it as a joke. Frank's statement was disclosed to Milgaard's counsel but he did not call her. In the Minister's view, the statements of Hall and Frank would not have detracted from what Melnyk and Lapchuk had to say.

The subject of forensic evidence was also discussed and the Minister noted that the RCMP forensic analyst told the Court that blood typing from the semen found in the snow neither inculpated nor exculpated Milgaard; and that the evidence, as presented, favoured Milgaard's position in that he was a presumed non-secretor. She concluded, therefore, that the forensic evidence would not tend to exculpate

374 Docid 001529.
375 Docid 001529.
376 Docid 001529 at 531.
377 Docid 001529 at 533.

the accused, even with the benefit of more advanced scientific knowledge. That assessment, I think, is correct on the basis of what was presented at trial and what was known at the time of review.

The new evidence of Wilson was then considered. The Minister noted his recantation of parts of his May 23, 1969, statement and his trial evidence. She noted, as well, that in June 1990, he stated that he began to implicate Milgaard after lengthy interviews by police. But in July 1990 (the Williams' interview), it had been pointed out to him that he had begun to implicate Milgaard before leaving Regina. He said that he had forgotten this. This, said the Minister, was, "…very important in assessing the allegations of the police coercion and manipulation that he advanced to explain his incriminating statement of May 1969, and his trial testimony".[378] Indeed, it was very important to the Inquiry where Wilson was confronted with the fact and had no explanation.[379]

The Minister stated that she had given careful consideration to Wilson's allegations of undue police pressure in Saskatoon, and concluded that he had grossly exaggerated.

She concluded, in part, "Mr. Wilson's present recollection of the events in question is palpably unreliable".[380]

The Minister noted that little weight could be given to suggestions that Cadrain's evidence was unreliable. His personal and emotional difficulties after the trial did not demonstrate unreliability in his evidence at trial.

As to Fisher's possible involvement, we must be careful not to attribute to the Minister what we now know. In 1991, the Minister was correct to observe that "However serious Mr. Fisher's criminal record may be, the entire record at trial and in this application reveals no evidence to connect him with the killing of Gail Miller".[381] We know that investigators suspected Fisher but could find no evidence linking him to the killing.

A further argument in the application was based on the "impossibility theory", that David Milgaard could not have done the murder. She reviewed this theory and the evidence surrounding it and remarked:

> It is important to remember that the jury heard the witnesses, Counsel's addresses, and a proper charge on this aspect of the case before they reached their conclusion. Indeed, this was one of the primary defences raised at trial. There is no new evidence to suggest that their conclusion was probably wrong.[382]

The Minister's rejection letter was not followed by further commentary from Justice Canada, but at this Inquiry, Pearson was asked to comment on the matter. In general, he did not disagree with the contents of the Minister's letter except for her statement that "no guilt or suspicion of guilt can be attributed to Fisher in the absence of some form of evidence linking him to the crime". There was, said Pearson, reason to suspect Fisher.

Williams was asked about the rejection of the application and, in his view, insufficient attention had been paid to the reasons given. Instead, headlines shouted that witnesses had lied and that forensic evidence

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| 378 | Docid 001529 at 536. |
| 379 | Docid 001529 at 536. |
| 380 | Docid 001529 at 540. |
| 381 | Docid 001529 at 539. |
| 382 | Docid 001529 at 538. |

exonerated Milgaard. Personally, he found no facts to support the allegations made but declined to discuss any recommendation made to the Minister.

## 17. Reaction to Federal Minister's Decision

### (a) Milgaard Reaction and Media Coverage

On January 11, 1991, David Milgaard wrote to Williams of Justice Canada saying, "I feel you have failed me and my family",[383] and his supporters reacted with outrage to the decision of the Minister rejecting the first application. Asper testified at length at the Inquiry on this subject and, in general, did not resile from the critical comments he made publicly at the time. It is worth going through some of them as well as his comments at the Inquiry because they illustrate the extent to which the media campaign had shaken public confidence in the administration of justice.

The Milgaard group had both general and specific criticisms of the federal Justice investigation which we may now examine. Asper said that the Milgaard group had done all the work, that the Justice Department had failed in its duty by not doing a full investigation, and that officials were not impartial. I reject all three contentions. It is abundantly clear from the evidence of Williams and Pearson that they were impartial, thorough and skilled in the performance of their investigative duties.

Asper drafted a letter to the Minister from the Milgaard family[384] alleging lack of objectivity, gross miscarriage of justice, and bias on the part of Justice officials. It is unsparing in its critique of the decision. It states, "We fully stand by our assertion that your Department set out from the very beginning to defeat this application".[385]

Nor did he disclaim the following statements attributed to him:

- March 12, 1991 – the Milgaard group officially declared war on the Minister of Justice, Kim Campbell and her department[386]
- March 13, 1991 - "Her [Campbell's] decision is an outrage". She could be "an active co-conspirator in this injustice",[387]
- March 1991.- "…the officials in the Department of Justice were caught red-handed acting in a biased and non-impartial way".[388] In this instance, Asper says he was referring to Corbett.

Asper decried the unfair process which Joyce Milgaard described as a political decision and a cover-up. He charged "federal bungling" of David Milgaard's 22 year old bid for freedom.[389]

The Minister had explained, at some length, her reason for finding Wilson's retraction to be unconvincing – reasons which remain valid, in my view, even after all I have heard. But Asper thought that she was biased because, he said, she was prepared to accept his lies at trial but not his recantation. That does not bear logical scrutiny. That Wilson lied at trial is a conclusion derived from hindsight. It was by no means self-evident to the Minister. But in any event, it was for the jury and not her to weigh the trial evidence.

383 Docid 222478.
384 Docid 157818.
385 Docid 157819 and following.
386 Docid 162441.
387 Docid 026541.
388 Docid 009443.
389 Docid 025967.

Asper said that it should have been sufficient for Milgaard's success on the application to show a reasonable doubt. But that surely was not a determination to be made under s. 690 by the Minister whose function was not to retry the case. That is the function of a court. He also testified that he thought that without political intervention, the Minister might have continued in her belief that the evidence fell short, even on the second application. He could be right. The weight of the evidence before me is that the Supreme Court Reference was ordered in response to the public outcry, not new evidence.

Wolch, along with other members of the Milgaard group, took great exception to the rejection of the first application by the Minister. On August 21, 1991, the StarPhoenix reported him as saying in a letter to Minister of Justice, Kim Campbell, "A member of your department implied to us that they [two key witnesses] were paid".[390] The article went on to name Melnyk and Lapchuk as the witnesses. Everyone, by this time, would know that Caldwell was the prosecutor so the suggestion was clear that he had paid for testimony. But Caldwell told us that all of his dealings with Melnyk and Lapchuk were on the file. Asper and Wolch needed only to ask for it. He had, as noted earlier, already shown it to Joyce Milgaard's agent Carlyle-Gordge, her lawyer Young, and a CBC Journalist (although she apparently helped herself). Caldwell rightly says that a prosecutor could hardly face a worse accusation than that of buying testimony. The article absolutely shocked him. I find that the accusation was false.

### (b) Response by Saskatchewan Justice

As earlier remarked, the federal efforts under Milgaard's s. 690 applications are relevant to us because they produced evidence which came to the attention of the police and Saskatchewan Justice.

Donald Murray Brown, then Director of Public Prosecutions in Saskatchewan, told us that during the course of the s. 690 applications, information gathered by federal investigators came to Saskatchewan's attention; they relied upon it; and that as a result of this reliance, Saskatchewan saw no need to reopen. This applied to rejection of the first application, acceptance of the second application, and to the opinion offered by the Supreme Court of Canada following the Reference Case in 1992.

Of particular concern to Justice Canada, it seems, was advice it received from former Supreme Court of Canada Justice McIntyre which was communicated to Saskatchewan in an October 2, 1991, memorandum by Rutherford.[391] Brown relied upon this memorandum which said no more in essence than that McIntyre found that the s. 690 application revealed "still no reasonable basis"[392] to conclude that a miscarriage of justice may have occurred. Justice Canada has taken the position that not only should I not receive a copy of the McIntyre opinion for consideration but that I should eschew any mention of it. I must agree with the first part of that position because the Courts have said that advice passing between officials in the Minister's office is constitutionally protected. But the idea that this Inquiry cannot even examine the effect of such advice upon Saskatchewan officials, which is something squarely within our Terms of Reference, is untenable to everyone except, it seems, somebody in Justice Canada for reasons best known to him.

Brown's evidence was credible and unchallenged. A career prosecutor since 1975, he taught at the Saskatchewan Police College. He was in a position to have known intimately the workings of the Regina Attorney General's office and had wide experience as appellate counsel.

390 Docid 057439.
391 Docid 152028.
392 Docid 152028 at 029.

He was asked to look at the s. 690 file soon after Milgaard's December 1988 application was filed and deferred to Justice Canada until after the Minister's decision of February 1991. But following filing of the second application, it became more and more apparent to Brown that something needed to be done with the file by way of reference or inquiry. His office, the Director of Public Prosecutions, was responsible for deciding whether the investigation should be reopened, and officials relied heavily on his advice.

The Terms of Reference invite me to make recommendations for the better administration of justice in the Province of Saskatchewan. A repetition of the sort of media campaign launched in the Milgaard case would not be a desirable thing. Members of the Milgaard group themselves admitted that it was unfortunate, but necessary. Without agreeing with that, I can say that without limiting freedom of expression, some way should be found to at least lessen recourse to sensational publicity as a means of getting a remedy under s. 690 of the *Criminal Code*. One solution which holds promise is the replacement of the federal Minister in such applications with an independent review commission, of which more will be said later.

Asked to comment on the provincial position, Brown said that the media campaign gave a black eye to the whole administration of justice. I accept that.

The Saskatchewan Minister's assessment of the situation in March 1991 is reflected in a letter drafted by Brown.[393] The federal investigation amounted to almost a complete reinvestigation of the crime.

The personal attacks on the Minister, remarked Brown, such as "co-conspirator"[394] and "set herself up as judge and jury",[395] diminished the credibility of the critique and reflected badly on the administration of justice. The province relied confidently on the federal investigation but found it difficult, in the face of such coverage, to explain its position.

In one particular area, Brown was in sympathy with the Milgaard family. Their letter to the Minister,[396] which received wide publicity[397] showed concern about lack of information exchange in the process. Brown could understand why they would want to see McIntyre's opinion and when it was denied to them, it made it harder for them to accept the Minister's decision.

As I have said before, the Milgaard group's demands for collaboration were unrealistic, particularly when they demanded the right to make representations themselves to McIntyre, from whom the Minister had sought advice. The Minister was and remains entitled to seek confidential legal advice and to hold it in confidence if she wishes. The difficulty lay in publicly relying on the advice without saying what it was, so that the applicant could properly evaluate her reasons for decision.

In addition to the comments recorded above, Brown testified that he regarded complaints about Williams and other federal officials as mere hype. Repetition by the Milgaard group of charges of incompetence and stupidity could be made only so often without affecting his view of those making them.

By February 1991, Saskatchewan officials were already satisfied with the thoroughness of the federal investigation, but it was important for them to know the scope of the s. 690 review. Brown commented

393 Docid 026675.
394 Docid 026541.
395 Docid 026541.
396 Docid 165532.
397 Docid 004681.

that the boxes of material he later received from Justice Canada spoke to the thoroughness of their review and, based on all he knew at the time, there were no grounds to reopen.

Brown's briefing note of March 20, 1991, reflects the information that they had.[398] He had no doubt that on such a complicated matter, the Minister would follow the advice of her officials, and his department, in turn, relied on the Minister's ruling in not reopening. One can see, therefore, the necessary link between the s. 690 applications and Saskatchewan's decision, or lack thereof, in regard to reopening. It is, I think, a one so obvious that I am left to wonder at the reason for the belated attempts by Justice Canada to show that s. 690 matters were irrelevant to this inquiry.

Brown said that they did not reopen, relying upon the Minister's decision, the McIntyre finding and the RCMP findings about Fisher. They disbelieved much of what had been reported. I find, therefore, that the Milgaard campaign yielded no information which should have caused Saskatchewan Justice or the police to reopen the case earlier than February of 1991. That finding, as will be seen, will extend to July, 1997 for reasons which will appear, but which do not alter my findings with respect to the failure of the Saskatoon Police to act on the Linda Fisher complaint of August 1980.

Brown said that during the course of the s. 690 applications, Ellen Gunn of his office had frequent discussions with Justice Canada officials, from which I conclude that information gathered by Justice Canada under s. 690 was being communicated to a meaningful extent to Saskatchewan. Brown explained that Saskatchewan was not impeded by the Minister's decision from reopening, rather the decision gave them no reason to do so.

A careful explanation couched in layman's terms was given to a concerned citizen by the Saskatchewan Minister of Justice who stated, in part, "I regret that a good deal of the coverage given in this matter by the news media has focused more on being sensational than on being accurate and complete".[399]

Saskatchewan agreed that there was no basis for charging Fisher. The Minister's conclusion that the jury's verdict was fair and justified effectively cleared for the public the allegations of wrongdoing by the Crown and the police. But the Milgaard camp, Brown says, mounted such a strong media campaign that even Justice Canada agreed that something needed to be done. The complaint was that the process had failed through corruption or error and had produced a bad result. The public did not understand the process, thanks to Justice Canada secrecy, and a public airing was needed to restore confidence. It came at the Supreme Court a year later.

Brown testified that today a public relations campaign would have been planned in advance of the release of the opinion. Substantial information should have been released about the terms of the investigation. Justice Canada's refusal to release the contents of their report invited articles like the one published in the August 24, 1991, Globe and Mail, casting the process in a sinister light.[400] The public does not distinguish between the federal and provincial Justice departments, said Brown, so the whole system gets a black eye. It was their view that secrecy plus publicity was eroding public confidence in the administration of justice.[401] The Milgaard family did not receive materials, causing them to speculate that justice was not done, and the province received none either so they had no way to counter the speculation. In the result,

398 Docid 004351.
399 Docid 026681.
400 Docid 004601.
401 Docid 004322.

there "was a clear problem with confidence by the public in the administration of justice in this province and in Canada",[402] as Brown confirmed in his testimony before the Inquiry.

A decision by the federal Minister to send the matter back to the province for a new trial, or to the Court of Appeal means that the province has to expend time and money in implementing the federal decision. It is unfair, I believe, for the Minister and Justice Canada officials to be secretive about their reasons for taking a decision which they expect somebody else to implement. But Justice Canada's response, as seen in this Inquiry, is that they are constitutionally blocked from sharing advice or reasons for their officials' actions. Accepting that that is so, it constitutes a compelling reason to remove wrongful conviction applications from the Minister's purview, and have them considered by an independent commission which can be truly transparent.

Brown concluded that although they had a good sense of the information which was going to Minister Campbell, they were not privy to the advice she was getting, and they wanted that. He agreed that federal departmental secrecy had fuelled public suspicion.[403]

The allegations of corruption and cover-up which followed rejection of the first application achieved their most extreme expression through McCloskey and Centurion Ministries. But the Milgaard group as a whole were certainly proponents of the same view, and persisted in it right up to the time of this Inquiry. Brown made the good point that Wolch had cause to ask why Fisher's guilty pleas were received in Regina, why Karst was sent to Winnipeg to take statements from Fisher, why files went missing, why rape victims were not notified and why material relating to the Fisher Victim 1 complaint was found on the Miller file. But he went too far, citing these things as proof of corruption.

In my view, some members of the Milgaard group reached premature conclusions about corruption and cover-up, conclusions which Asper and Joyce Milgaard, at least, have apparently rethought in the face of evidence heard at this Inquiry. If one can judge from Wolch's examination of witnesses, he too has softened his former stance on deliberate wrongdoing by police and Crown officials. Because he placed himself beyond reach as a witness by choosing to act as counsel for David Milgaard in the Inquiry, I conclude that he had no evidence to offer in support of his earlier held opinions on cover-up and corruption.

The reaction of police to the media campaign was explained by former Chief Penkala, who said that a media frenzy had developed by 1990. Reporters were aggressive and insensitive, and sometimes misleading.[404] Responses only brought more pressure and more misleading comment. Penkala said that he did not regard the media allegations as genuine. He thought Milgaard was guilty.

After he retired, Penkala spoke to a group about the Milgaard controversy. He was very critical of the media for what he regarded as their one-sided coverage of the affair. He explained that the only obligation of the police force was to accuse Milgaard on reasonable and probable grounds. He said, "I am personally convinced that Milgaard committed the murder and has been carefully and rightfully convicted". He thinks to this day that the Saskatoon Police did nothing wrong, so why apologize?

402 T37448.
403 Docid 004588, 016091.
404 Docid 004764.

### 18. Official Wrongdoing

The possible connection between the Fisher rapes and the Gail Miller murder was considered, as we have seen, early in the murder investigation. But at that time it was only a possibility. Fisher was unknown to the police, who had no suspect for the rapes for which he was ultimately held responsible. When Milgaard, with no apparent connection to the rapes, became a suspect for the murder, the rapes simply ceased to have any interest to the police in the murder investigation.

During the investigation into the first application under s. 690, the emphasis of the Milgaard group shifted from forensic evidence at trial as well as the re-enactment evidence, to Fisher as killer and police and Crown failure to make the connection between Fisher's rapes and the murder of Gail Miller. But the allegations went much further: not only should the connection have been made, it was made, at least after the conviction of Milgaard, and officials covered it up.

All now agree that the sensational publicity which accompanied the allegations of police and other official misconduct effectively led to Milgaard's release from custody. That happened, I find, at considerable cost to the public's faith in the administration of justice.

In now conceding that the police and the Crown honestly believed in her son's guilt and were not engaged in deliberate wrongdoing, Joyce Milgaard has undergone a considerable change of attitude, but she still believes that police and the Crown had tunnel vision. That expression, denoting a fixation with one conclusion to the exclusion of evidence to the contrary, is not apt as a description of official action in the investigation of Gail Miller's death or the prosecution of David Milgaard.

I do not find as a fact that the police or the Crown should necessarily have made the Fisher connection with the Milgaard murder during the investigation and prosecution. The argument that the connection must have been obvious to anyone depends on hindsight.

### 19. Conclusions

No information came to the attention of the Saskatchewan Justice or the police from the first s. 690 application which should have caused them to reopen the case.

Williams, I find, became the scapegoat for the dissatisfaction of the Milgaard group relating to the s. 690 application. Lack of progress was blamed on him, whereas it stemmed from an incomplete application followed by the incremental disclosure of grounds for relief. He said that David Milgaard did not understand his role, seeming to think that Williams was working for him, whereas he was counsel to the Minister. He could not effectively reply to accusations that he was doing nothing.

Having listened to Williams' extensive evidence and having read the relevant documents, I find that he approached the task assigned to him not as an advocate, but as one who needed to test a convicted person's claim of innocence. He was open-minded and fair in his dealings with witnesses. He was prepared to be forthcoming with counsel, as well, until Asper passed on a document to the press which Williams had sent him, not for publication, but for the purposes of the inquiry. Thereafter, he became cautious and uncommunicative with counsel concerning his work product and the view of departmental officials. In so doing he was, I find, merely acting with a mandarin's reserve and caution. But the Milgaard group wanted him to be a partner in their cause. They had no right to expect that, given their own lack of openness. His duty was owed to the Minister and I find that he performed it expertly, thoroughly and in an upright manner – characteristics he carried forward into this Inquiry. I found him to be a credible and helpful witness.

The media campaign carried on by the Milgaard group during the currency of the first s. 690 application did not produce any information which should have caused the police or Saskatchewan Justice to reopen the investigation into the death of Gail Miller. On the contrary, it was counter-productive.

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

It is my finding that nothing in the first s. 690 application which came to the attention of the police or Saskatchewan Justice should have caused them to reopen the investigation into the death of Gail Miller.