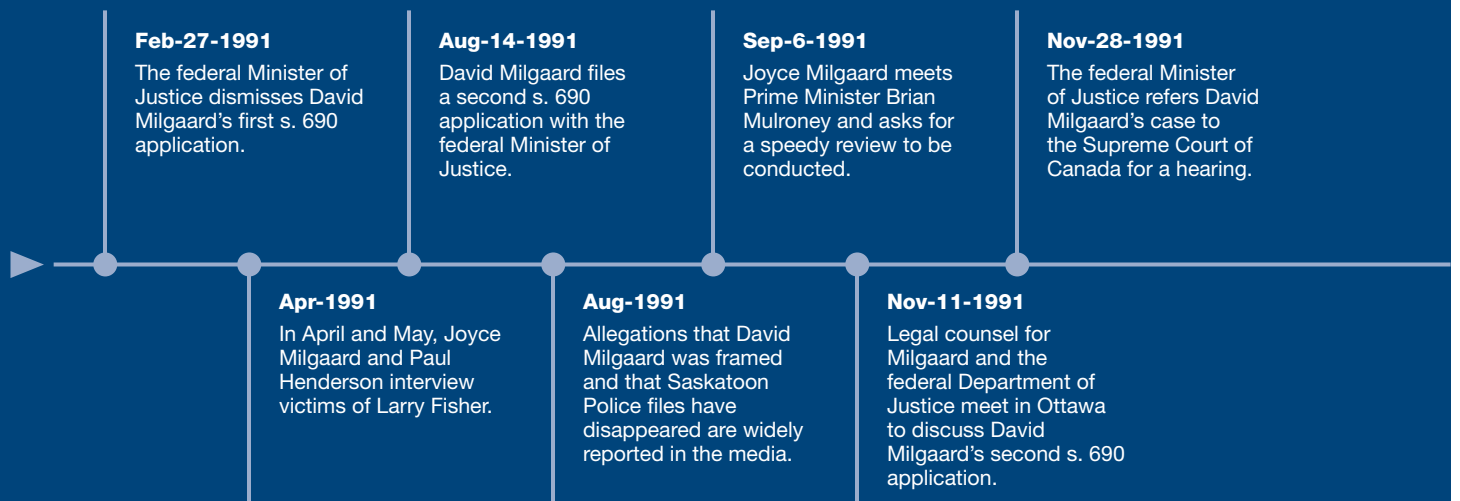


# Chapter 14

## Second s. 690 Application



## **1. Preparation of Second Application Under s. 690**

### **(a) Interviews of Sexual Assault Victims**

In the belief that Larry Fisher was a good suspect for the murder of Gail Miller, and that the similarity of his other rapes to the rape and murder of Miller would provide evidence of that, Joyce Milgaard and Paul Henderson interviewed some of Fisher's rape victims. Williams had seen no reason to do this prior to the second application having been filed in August 1991.

Something new was needed. Suspicion was not enough. So James McCloskey counselled the interview of rape victims, and she and Henderson did this with a view to creating an offender profile.

The results of the Joyce Milgaard/Henderson interviews were included in the second application as similar fact evidence of Fisher having committed the crime instead of Milgaard. When the matter was referred by the Minister of Justice to the Supreme Court of Canada, the Court regarded such evidence as something justifying a new trial.

Joyce Milgaard told the Inquiry that their aim was to enlist Larry Fisher's rape victims, asking each one to speak to a different reporter who would then have an exclusive story, motivating the reporter to expand his or her own searches.

**(b) Milgaard Interview of Victim 8**

The efforts made by Joyce Milgaard and Henderson in interviewing the rape victims were somewhat undercut, however, by including another complainant, Victim 8, in the report as a probable Fisher victim. Victim 8 had been the victim of a sexual assault in 1968 in a rural area some distance from Saskatoon. She thought that Milgaard might have been her attacker and wanted to visit him in person to see if she recognized him.

As discussed in more detail later in this chapter, Joyce Milgaard, with the help of Henderson, interviewed her. Henderson’s memorandum<sup>1</sup> of the Victim 8 meeting expresses his opinion that he and Joyce were able to convince Victim 8 that Fisher was a better suspect for her rape than Milgaard. According to Henderson,<sup>2</sup> Joyce Milgaard showed Victim 8 a picture of Larry Fisher instead of one of David Milgaard without identifying him. Victim 8’s only comment was “his hair was longer”, referring to her attacker. The memo shows that they tried to convince Victim 8 that Fisher was a better suspect than Milgaard, but Victim 8 still wanted to see Milgaard.

Henderson told us that he was sure that Joyce Milgaard wanted Victim 8 to identify Fisher as her assailant, and he expressed concerns about investigators trying to convince people of things which were not in their minds – a practice that is one of the main causes of wrongful convictions.

Centurion Ministries prepared a report which was included in the second application under s. 690. The report included the Victim 8 complaint as part of the chain of similar fact evidence, but one page had clearly been altered to read that when Larry Fisher’s picture was shown to Victim 8 she said it could be him.<sup>3</sup> Henderson disowned this page, and could not say who had substituted it for the first two pages of his report. I wish I knew because I regard it as a serious distortion of the facts forming part of the second s. 690 application. It caused Justice Canada to put Pearson on a lengthy investigation of the Victim 8 complaint in which she told the investigating officer that her attacker was a white man, whereas both Henderson’s real report and the version which was included in the application to the Minister referred to him as “part Indian, or native”.<sup>4</sup>

Again, Henderson could not explain, saying only that he did not deliberately misrepresent what Victim 8 told him. But he acknowledged that their purpose in interviewing her was to convince her that she had been attacked by Larry Fisher. Joyce Milgaard swore an affidavit for the Supreme Court Reference<sup>5</sup> in which she said at paragraph 16 that she showed Victim 8 photos of Fisher when she had asked to see one of David, because she did not trust Victim 8. Henderson told us that he did not think Joyce “was quite that devious”. When it was pointed out to him that Victim 8’s statement<sup>6</sup> said that she never saw the face of her attacker, he agreed that showing her a photo was a waste of time.

Clearly, when Victim 8 did not tell Henderson and Joyce Milgaard what they wanted to hear, someone altered her words for the purposes of the application to the Minister.

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1 Docid 054514.  
2 Docid 054514.  
3 Docid 000901 at 000920.  
4 Docid 009093 at 9101 and 9105.  
5 Docid 010127.  
6 Docid 009093 at 098.

**(c) Tom Vanin**

The Milgaard group was able to enlist a disaffected member of the Saskatoon Police force to their cause. He was Thomas Vanin, a retired Saskatoon Police officer who testified at the Inquiry. He claims to have had doubts about the correctness of the Milgaard conviction from the start, although he was not involved in the investigation.

In the 1980s, when he headed major crimes as a detective, Joyce Milgaard generated publicity about her son's case, and he began to get calls, including some from media. He says that he did not divulge confidential information which could get him into trouble under *The Police Act*. However, around 1991, according to his evidence, he agreed to give Hersh Wolch and David Asper confidential police information in exchange for their agreement to protect his disclosures as solicitor/client communications, as well as for their promise to defend him for no fee on any charges which might result from his disclosures. He said as well that they promised to pay him \$5,000 plus expenses, but never did.

Vanin met Joyce Milgaard and Paul Henderson in Saskatoon. He shared confidential information with Henderson, not with Joyce Milgaard, and never met or spoke to her again. Eventually Greg Rodin took over the file from Asper. After the initial call, says Vanin, he did not speak to Wolch, sharing confidential information with only Henderson, Rodin and Asper.

**2. August 8, 1991 Letter from Wolch to Saskatchewan Justice**

On August 8, 1991, Wolch dropped off a package of material to Saskatchewan's Director of Public Prosecutions, telling the media that he had done so. His accompanying letter<sup>7</sup> was an invitation for Saskatchewan Justice to support a reopening. The package contained copies of s. 690 application documents, and his actions demonstrating that information relevant to this Inquiry was coming to Saskatchewan Justice, not only through federal investigators but also through applicant's counsel.

Saskatchewan's reaction appears in a memo<sup>8</sup> from the Saskatchewan Deputy Minister of Justice to his Minister. It explains the jurisdictional situation between Saskatchewan and Canada in respect to s. 690 applications. In short, Saskatchewan had no say in the matter, and could take no position.

At the same time, the memo reveals the confidence the Department felt in Minister Campbell's rejection of the first application based, in part, upon advice received from William McIntyre. The memo reflects the doubt felt by departmental officials concerning evidence provided by Wolch and Asper, as well as about the substance of their renewed application.

Nevertheless, Murray Brown of Saskatchewan Justice gathered files<sup>9</sup> in anticipation of something being done in Ottawa. Meanwhile, the press was publishing accusations of police misconduct, citing McCloskey,<sup>10</sup> which had no credibility, according to Brown.

Brown dealt with Wolch's letter of August 8, 1991, and his marginal endorsements reveal his lack of agreement with the similarity of the Fisher rapes to the murder. One could not charge Fisher based on such evidence alone. Similar fact evidence is highly prejudicial because it shows propensity, and it must be counter-balanced by a high degree of probative value – something that reveals the accused's

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7 Docid 010080.  
8 Docid 027207.  
9 Docid 151817 and 010028.  
10 Docid 004626.

signature – the use of a knife or hiding one’s face does not do it. Such elements are common in stranger rapes. Fisher living in the same house visited by Milgaard in the area of the murder appeared coincidental. The level of violence in the Miller murder far exceeded anything he had read about in the other rapes. Fisher Victim 7’s case was more similar to the murder, but it followed the 10 years Fisher spent in prison. Similar fact evidence, he thought, was unlikely to count for much.

Brown commented that although the standard required for the defence to raise similar acts as reasonable doubt is less strict than the onus on the Crown using them to show guilt, he doubted that such evidence would have made a difference at trial in view of the testimony of John, Melnyk and Lapchuk.

The DNA evidence, when it came, did not change Brown’s view on the similar fact evidence. In 1991, he did not know with certainty who killed Gail Miller. On the one hand there was a conviction, which appeared safe, based upon proof beyond a reasonable doubt. On the other hand were some rapes in an area of substantial crime. To him, Fisher, although a person of interest in the Miller killing, was of less importance because of the conviction of Milgaard.

I find that with the filing of the second application for mercy on August 14, 1991, information still had not come to the attention of Saskatchewan on the basis of which they should have reopened the investigation into the death of Gail Miller.

**3. Second Application to the Minister of Justice**

**(a) The Application**

The second application was filed on August 14, 1991<sup>11</sup> and it contained a statement from the family of Gail Miller, 1969 newspaper clippings, a summary of Centurion Ministries’ investigation into the crimes of Larry Fisher, and a synopsis of interviews with eight victims of sexual assault.

**(b) Centurion Ministries Report**

The Centurion Ministries report was submitted as part of the second application in August 1991. It contained information implicating Fisher in the Gail Miller murder through similar fact evidence. Whereas the reference to the Supreme Court of Canada was made by the Minister as a means of stemming the public outcry, the recommendation for a new trial from the Supreme Court of Canada came partly because of new similar fact evidence.

Victim 8 headed the list of victims in the application.<sup>12</sup> The first narrative page dealing with her complaint is typed in a different font than that which follows, and says that when shown a picture of Fisher, Victim 8 said that he could be her attacker. Henderson, who was there, testified that Victim 8 had not identified Fisher.

**(c) Media Campaign Regarding Filing**

The application was accompanied by a publicity campaign organized, says Asper, by himself, Wolch, Joyce Milgaard and Centurion Ministries, in consultation with senior members of the Wolch firm. They decided to bring maximum pressure upon the Minister. That much is evident from a press

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conference featuring James McCloskey of Centurion who alleged that Milgaard was framed, and that the Saskatoon police covered-up Fisher's tracks.

Asper testified that this view was stronger than his own. He did not personally say that there was a frame or a cover-up (for lack of evidence) but he justified the allegations because he believed in Milgaard's innocence, and because of their sensational nature they would bring pressure on the Minister.

McCloskey's press conference was on August 16, 1991.<sup>13</sup> The idea was to get the message out to the country, said Joyce Milgaard. She and Asper were interviewed by the CBC,<sup>14</sup> naming Larry Fisher as the murderer. Asked for physical evidence, Asper said that it was not their job to convict Fisher but rather to raise a reasonable doubt for Milgaard, and he cited the "very experienced" Centurion Ministries as saying that everything pointed to a frame and cover-up.

In another interview,<sup>15</sup> Joyce Milgaard said that many powerful people did not want the case reopened. McCloskey is seen telling the interviewer, with more confidence than accuracy, that the Miller attack and other Fisher sexual assaults were indistinguishable, seamless; that the Crown's theory could be seen as ludicrous upon even a casual reading of the transcript. When it was pointed out to him that both the Minister and a former Supreme Court judge both said that a new trial was not justified, McCloskey replied that he was not sure of the judge's objectivity. These interviews were played and transcribed during our hearings and appear at pages 31206 to 31224 of the transcript.

McCloskey was quoted by a StarPhoenix reporter on August 16, 1991 as saying that David Milgaard was framed. The police needed a scapegoat, he said. Joyce Milgaard said that she agreed with his position at the time, although the word "framed" was his. She did not think that the police deliberately charged an innocent man. McCloskey could not have made himself clearer<sup>16</sup> when he said, "The Saskatoon Police literally manufactured a case against David Milgaard out of thin air... This Milgaard conviction is a classic frame". Strong words, said Joyce Milgaard, but she believed them. And she shared the view that, "Saskatoon police bullied and terrorized vulnerable teenaged witnesses into manufacturing evidence against Milgaard".

McCloskey spoke of "sustained terrorism by police" even though he had not spoken to any witnesses or police officers. When interviewed by the RCMP in 1993,<sup>17</sup> he adopted his use of the word "framed" as it appeared in the Saskatoon StarPhoenix article of August 17, 1991.<sup>18</sup>

McCloskey alleged that Saskatoon police ignored evidence that Fisher killed Miller because it would have humiliated them so "they covered up their tracks and covered up the crime."<sup>19</sup> The report goes on to say "Earlier, Centurion Ministries investigations revealed that key witnesses in the case against Milgaard had been coerced into testifying and were fed police evidence to solidify the case against him." It is hard to think of a graver, or more presumptuous accusation. Equally without foundation was another broadside reported in the Saskatoon StarPhoenix on August 17, 1991,<sup>20</sup> "McCloskey concludes Saskatoon Police framed Milgaard."

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13	Docid 212289.
14	Docid 230034.
15	Docid 230173.
16	Docid 218798.
17	Docid 064970.
18	Docid 064970 at 989.
19	Docid 227035.
20	Docid 325145.

The Globe and Mail reported the media blitz on August 17, 1991. Joyce Milgaard suggested that the Saskatoon Police had hushed up news of Fisher's capture "fearing they would be accused of wrongfully convicting Mr. Milgaard".

McCloskey, for his part, was not content with mere suggestion. In the August 18, 1991, edition of the Winnipeg Sun he is reported as saying, "...Saskatoon Police have covered up [Fisher's] guilt to hide their 'frame up' of Milgaard for the crime" and "I'm sure some of the officers had real grave concerns they got the wrong guy. But nobody had the guts to stand up".<sup>21</sup> Joyce Milgaard said that she shared that view "absolutely", and conceded that she was publicly saying that powerful people were covering up their mistakes.

In a discussion Joyce had with Dave Roberts of the Globe and Mail<sup>22</sup> she speaks of having discovered a link between Roy Romanow and her lawyer Tony Merchant. The former was Attorney General when Milgaard was prosecuted and Merchant was his friend. She blamed Romanow, I gather, for the conviction and that would explain Merchant's failure to get results for her, so she fired him. Joyce told us that she gave the reporter these thoughts to follow up.

Joyce Milgaard left no stone unturned, even calling Premier Grant Devine's office in October 1991<sup>23</sup> to say that it might help his election chances if he showed support for her. She told his office that Kujawa knew about the Fisher connection to the Miller death. She added that she would not say this publicly because "I don't do...saying things that I can't back up 100 percent...". She told us that she thought that Devine's support "might hurt Kujawa more than anything else".<sup>24</sup> The premier's office did not oblige.

The Milgaard group persevered with their media campaign after the Mulroney meeting,<sup>25</sup> Asper saying to the television audience, on the Shirley Show on September 17, 1991, that Deborah Hall said that there had been no motel room re-enactment. His words were, "She said that the people who said that Milgaard re-enacted the crime were liars. She said there was no re-enactment".

By then, Asper had a report of Williams' interview of Hall, so he knew that she described a re-enactment but thought it was a joke. Asked why he could say what he did on the "Shirley Show", Asper seemed to equate the interpretation with the event. In other words, we cannot say that a re-enactment occurred, (even if the words were said and the actions were performed) if the words and actions were taken by Hall as a joke. Further, he explained, Hall's description was still different than that of Melnyk and Lapchuk. To address that point first, I find that the difference was that Hall's description of the words and actions was even more vivid and damaging to David Milgaard than the descriptions of Melnyk and Lapchuk. As to his first point, he made no attempt to say on the Shirley Show that Hall described the purported re-enactment as a joke. He simply said that there was no re-enactment, according to her. That is just not so. As well, Melynck and Lapchuk had not testified as to their interpretation of the event. They simply told what they saw. How, then, could Hall say they were liars for describing what she herself saw? I found that Asper clung to the version of Hall's story that he had obtained, despite the much different and later version that Williams heard.

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21	Docid 160000.
22	Docid 336584 at 586.
23	Docid 336658 at 683.
24	Docid 336658 at 734.
25	Docid 335020 at 029.

A taped conversation between Asper and Joyce Milgaard on September 9, 1991,<sup>26</sup> displays their anxiety to keep ahead of Justice Canada in the gathering of evidence. They wanted to interview pathologist Harry Emson before Justice Canada, because he had apparently made a favourable statement to Neil Boyd about forensic evidence. Asper was frank in admitting that, at the time, they were still seeking publicity in preference to disclosure to Justice Canada.

Asper told us that he regrets “the circus that had to be unleashed”,<sup>27</sup> and what happened to some people as a result. He acknowledges that some comments he made resulted in unfair newspaper commentary. When they began with publicity, he said, they knew it would “get ugly for some people”.<sup>28</sup> But they had no choice. Their client was wrongfully convicted and in jail.

Like McCloskey, Henderson was critical of what he saw in Canada, and that was “a cover-up”. The “justice people” are “acting like small town prosecutors in Texas”. He suspected Karst’s visit to Winnipeg with morality officers, without bothering to ask Karst why this was done. His conclusion of a cover-up was unjustified, nor did he have any reason to label the Justice Canada review as a “sham”,<sup>29</sup> as he admitted to us in evidence.

Henderson told us that based on insights he obtained from Saskatoon Police officer Tom Vanin and other sources, he saw the situation as a cover-up – a deliberate attempt by the Saskatoon Police to hide the fact of Fisher’s confessions for rape, for the purpose of preventing negative publicity as the result of having arrested the wrong person for murder. The only thing Vanin gave him, as far as I can determine, was information that the rape files were missing, and that they had disappeared many years earlier.

Henderson said that on August 12, 1991, there was overwhelming circumstantial evidence that Fisher was the killer. In a newspaper article of that date entitled “Mom alleges cop coverup”<sup>30</sup> he is quoted as saying that he had never had such a strong case. That was pure hyperbole. There was no case to bring to trial, as I have found from the evidence of Pearson and others.

Henderson claims that some of the facts attributed to him are inaccurate. He says that he was misquoted in saying that three rapes had occurred within a block of where Gail Miller lived, nor could he say where he heard that one of the rapes Fisher confessed to involved a victim who worked with Gail Miller.

By the time Henderson left the stand at the Inquiry for the last time, however, he had modified his earlier views. Without question, he said, Fisher was being tried in the press and this was not Centurion’s practice. He admitted that he said some things about the police that he now wishes he had given more thought to. He never had a problem with Caldwell. That is difficult to accept in view of his testimony<sup>31</sup> where he said that he remained convinced of an egregious cover-up by police and Justice. He was referred to his appearance on “The Shirley Show”, on September 17, 1991,<sup>32</sup> where he said that bringing in Craig Melnyk and George Lapchuk during the trial to testify about the motel re-enactment was nothing but “a prosecution ploy”. Henderson could not remember saying this and was sorry about it, his comments having been prompted by Asper. Henderson was unaware of the real circumstances leading

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26	Docid 335968.
27	T27268.
28	T27271.
29	Docid 327590.
30	Docid 160020.
31	T22915.
32	Docid 335020.



to the testimony of Melnyk and Lapchuk,<sup>33</sup> or the reason why Ute Frank was not called.<sup>34</sup> Full reasons for calling these witnesses were on Caldwell's file<sup>35</sup> had anybody bothered to check. Had he known, said Henderson, it might have tempered what he said on the "Shirley Show", and he apologized for any unwarranted inferences he made about Caldwell.

Joyce Milgaard agreed that the allegations garnered more media attention than the application itself. In her book, "A Mother's Story",<sup>36</sup> she recounts a conversation with Paul Henderson (in 1991, she tells us) indicating that they were looking for evidence of corruption in the Saskatoon Police, even if unrelated to the Milgaard case. She says, "If we can come up with a dirty police department right now, that would be a great advantage."

The effect of Centurion's activities, as well as publicity generated by the Milgaard group in general was explained by Brown of Saskatchewan Justice. He was aware of the allegations of a frame, made between the first and second applications. He said that the Milgaard group's anger at the dismissal of the first application intensified their publicity, which became nasty. Saskatchewan believed none of it. Had there been any substance, they would have acted. They did not bother responding to Henderson's accusation of a "deliberate cover-up" by Saskatoon police<sup>37</sup> or to the Toronto Star<sup>38</sup> or the Winnipeg Free Press<sup>39</sup> articles because, although the allegations of irregular police and prosecutorial conduct were of concern, if true, they knew that Justice Canada was going to do something about a remedy, so these matters could be dealt with by them.

**(d) Victim 12**

Added to the second application was the August 29, 1991, Victim 12 statement which Wolch regarded to be of "extreme importance".<sup>40</sup> In it, Victim 12 tells of her January 31, 1969, assault by Larry Fisher, whose picture she had recently seen in the newspaper. She "estimates" that she "normally" left her home at 331 Avenue H South around 6:45 a.m. to 6:50 a.m. to catch the bus, but this morning she left a little earlier, between 6:40 a.m. to 6:45 a.m. The walk to the bus stop would be five blocks or so, and took her about 10 minutes. To Williams, the location of the assault and the level of violence did not indicate that the person who indecently assaulted her also murdered Gail Miller.

Joyce Milgaard said that the Victim 12 assault report<sup>41</sup> came as good news to her. Victim 12, she said, told her that she believed for 20 years that the killer of Gail Miller had assaulted her. Police at the time thought them unrelated, and a later witness, Murray Brown of Saskatchewan Justice, did not think them related and gave no weight to Victim 12's identification of Fisher after 20 years.

When she made her report to police on January 31, 1969,<sup>42</sup> her account of the assault was precise as to time (7:07 a.m.). Brown points out that if she was correct about the time and the identity of the attacker, Larry Fisher would have an alibi for the murder, which took place about seven blocks away and at around the same time.

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33	Docid 007069.
34	Docid 006298.
35	Docid 007070, 006886.
36	Docid 269317 at 519.
37	Docid 004625.
38	Docid 032096.
39	Docid 160026.
40	Docid 333582.
41	Docid 054479.
42	Docid 006404.

As earlier noted, although Victim 12's original statement was filed on the Miller file because she declined to lay a complaint. Someone had endorsed it "indecent assault – not related". One cannot criticize that conclusion, I think, nor Williams' view of the incident 20 years later.

Its potential usefulness to the Milgaard defence would depend upon some evidence that the Victim 12 attacker and the Miller murderer were the same person, not Milgaard. There was some evidence that Milgaard was at the Trav-a-Leer Motel around the time that Victim 12 was assaulted, so if the jury thought that the murderer of Gail Miller and the groper of Victim 12 might be the same person, there could be a reasonable doubt that that person was Milgaard. But the view of the police and Caldwell was that the indecent assault and the murder were unrelated, so Caldwell did not disclose the statement to Tallis. On the facts, the circumstance of the two incidents were so different that Caldwell's decision was reasonable and did not offend the standards of disclosure of the day.

#### **4. Federal Justice Investigation of 2nd Application**

We turn now to a consideration of the activities of Justice Canada officials during the investigation of the second Milgaard application under s. 690.

Williams said that he did not have enough evidence of similarity on the first application to constitute a ground. Bearing in mind my comments earlier, the evidence required to constitute a ground based on a claim of innocence would need to justify a charge against Fisher. This would establish a link and would not be evidence merely capable of raising a reasonable doubt.

Evaluation of the information contained in the second s. 690 application by Saskatchewan as opposed to Justice Canada, is of direct relevance to our Terms of Reference. If the information should have prompted Saskatchewan to reopen the investigation into the death of Gail Miller, irrespective of what use was made of it by Justice Canada, I should say so. But Brown, who provided the bulk of Saskatchewan Crown evidence on the point, testified that, in his view, the second application would not have succeeded, but for the public uproar generated by the Milgaard group. He went even further – neither would the Supreme Court of Canada have granted a remedy, in his opinion. At minimum, that view is reasonable and supportable by the evidence I have heard. The Saskatchewan Crown was not in receipt of information from either the first or second s. 690 application which should have caused them to reopen the investigation into the death of Gail Miller.

Eugene Williams reported to William Corbett on August 20, 1991, summarizing his knowledge of the application at the time. He asked Murray Brown of Saskatchewan Justice<sup>43</sup> and Sergeant Rick Pearson of the RCMP, to look for files relating to the Saskatoon offences, and the unsolved sexual assault on Victim 8 referred to in the application. He also called for a review of the departmental file relating to Larry Fisher and invited submissions in relation to the application, in contrast to the first application. If a Court of Appeal reference or a new trial were to be ordered, Saskatchewan Justice would be directly involved.

This suggests to me not so much a new found spirit of openness by Justice Canada, as a decision that a remedy of some kind had to be granted.

The suggestion of a cover-up then gained currency. The missing rape files were reported in the *Globe and Mail* on August 29, 1991.<sup>44</sup> Williams said that he found one file and saw nothing sinister about the fact that the other three could not be found.

Williams prepared a chronology of events,<sup>45</sup> and I am satisfied as to its accuracy. It briefly describes Departmental involvement in the two applications up to September 11, 1991, and effectively rebuts accusations that Justice Canada “sat on its hands for two years”.

On September 11, 1991, Wolch wrote to Bruce MacFarlane with a rather useful review of the subject of similar fact evidence – especially by the defence<sup>46</sup> – to raise a reasonable doubt.

On September 20, 1991, counsel for Fisher informed Williams that his client would not give further interviews or submit to a polygraph.

Williams explained the similarities and differences between the material in support of the first and second applications, and provided a memorandum of new evidence for the second application.<sup>47</sup>

Except for Victim 8, Fisher was the known attacker of the victims listed in the second application, so the similarity of the attacks was not invoked to show identity, but rather the “signature” of the attacker said to be seen in both the sexual assaults and the Miller murder. The Milgaard group saw great similarity, but Williams saw similarities which were common in many rapes: the use of force including a knife; removal of clothing; threats; and some attempt at concealment. He did not find an obvious link. Remembering that he could not be content with evidence which might raise a reasonable doubt, William’s assessment was a reasonable one, given the lack of precision inherent in such analysis. As well, he had advice from the RCMP analytical unit<sup>48</sup> – an objective outline of the modus operandi of the various offences from which readers were invited to draw their own conclusions. Williams also had Pearson obtain statistics on sexual assaults occurring in Saskatoon from 1968 – 1970, from the Saskatoon Police.

Commenting on the similar fact ground, Brown said that the inclusion of the Victim 8 complaint told him that the applicant was willing to grasp at anything, but despite that, Justice Canada concentrated on the rest of the complaints.

Victim 8 was an example of a major difference in describing the attacker. To police, he was six feet and white. To Centurion Ministries, he was five feet, five inches and native.<sup>49</sup> Williams said that Victim 8 did not fit the profiles submitted by Centurion Ministries. What she told Pearson contradicted what was in the application.

Pearson was still actively investigating on November 20, 1991.<sup>50</sup> It seems that both Pearson and Williams were concerned about a bias in the second application information, because of the Victim 8 interview and its inclusion as part of the similar fact chain. On November 29, 1991, Williams asked Pearson to interview Fisher’s victims.

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45	Docid 114815.
46	Docid 004421.
47	Docid 114920.
48	Docid 009033.
49	Docid 321731.
50	Docid 334078.

His experience told him to be very careful with assertions of fact in applications. The inclusion of the Victim 8 case reflected on the accuracy of the particulars given for the other seven assaults. He thought that literary license had been used in the descriptive language.

**(a) Pearson Investigation of Victim 8 Allegation**

We have spoken above of the Victim 8 complaint, but because it took so much investigative time in connection with the second application, and because it figured so prominently in it, more detail on the matter should be recorded.

Included in the materials in support of the second application in 1991 were details of attacks attributed to Larry Fisher which were said to resemble that perpetrated upon Gail Miller, the first was Victim 8's complaint. This woman had been attacked in 1968. A newspaper circulated in Whitewood and Esterhazy in May 1968, reported the suspect as a six foot tall white man.<sup>51</sup> Part of the second application was a report by Centurion Ministries, and it is a study in contrast,<sup>52</sup> containing much more detail and relating that Fisher's picture was shown to Victim 8 who said "his hair was longer". She supposedly said that the authorities told her after Milgaard's arrest for the murder of Gail Miller that he had attacked her. In her statement taken by Pearson on October 24, 1991,<sup>53</sup> Victim 8 describes a rape, for the first time it appears, and was left with the impression that Milgaard was responsible for assaulting her, but she was not sure where she heard this.

Hearing about Milgaard in the news, she had her friend call Milgaard's lawyer and then called Joyce Milgaard herself to set up a meeting in Regina. Joyce Milgaard and Henderson met her at the bus depot. According to Victim 8, she asked Joyce Milgaard for a picture of her son and a photo was shown to her. Victim 8 said that it was not him. Henderson said, "Yes, I think she recognized him" and Joyce said, "Yes, this is the man who attacked you", and that he was a serial rapist and that he had admitted to attacking other women and killing Gail Miller. The photograph was that of Larry Fisher.

Victim 8 told Pearson that Joyce Milgaard would not let her see her son, nor did she show her a picture of David as she had promised. She had the impression that Joyce Milgaard wanted her to agree with everything she said. Victim 8 said that the person who attacked her was fine featured, something like Milgaard, and had a voice which resembled his, she having heard it on the "Shirley Show". Pearson said he had gone to her thinking that Fisher was a suspect in her assault, but she never confirmed this. Rather, she said many times after this that she believed Milgaard was her attacker.

Pearson said that Victim 8 was extremely upset by the way in which she was approached by Joyce Milgaard and Paul Henderson. Her wish had been to see if Milgaard was her attacker, but instead she was shown a photo of someone else and told he was a native. Pearson was concerned by what he saw as manipulation of a witness. In the result, the first offence relied upon by the Milgaard group as a comparator to the murder, was not committed by Fisher, according to the victim. Nobody was even charged.

Pearson received a call from Victim 8 in October 1991. She had seen Milgaard on television and believed strongly that he was her attacker. Fisher, whose photo was shown to her by Joyce Milgaard, was not the culprit. Pearson said that this brought into question the accuracy of the material in the application.

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51 Docid 056537 and 056538.  
52 Docid 008400 and 222196.  
53 Docid 012058.

It certainly must have. Pearson regarded Joyce Milgaard's approach as biased and wondered whether she had used it with other victims. He was anxious to interview them to make sure they were repeating what they had said in the past, and that Centurion was putting the correct version in the s. 690 application.

Because Victim 8 had been put forward by the Milgaards in the s. 690 application as a Fisher victim, only to have her name Milgaard instead, Pearson had to investigate Milgaard's whereabouts in 1968. A memo to file by Williams dated November 1, 1991,<sup>54</sup> succinctly describes the problem created by Joyce Milgaard's approach to Victim 8, and the inclusion of the latter's complaint in the s. 690 application.

**(b) Nichol John Hypnosis**

Williams' interest in Nichol John continued, because he was convinced that she had seen something relevant to the Miller killing. He thought hypnosis might help.<sup>55</sup> He arranged for a session with Vancouver psychologist, Lee Pulos.<sup>56</sup> The session was disappointing, so another was arranged with Martin Orne. John was also assessed by Dr. Russel Fleming, but in the end, they decided that she had not provided additional information.

An indication of Williams' objectivity lies in the fact that Pulos perceived that John had identified David Milgaard as the killer,<sup>57</sup> but having seen the tape, Williams saw the need for a second opinion.

The documents relating to the Nichol John psychological investigation in November 1991 are 002192, 333960, 031179 and 031224. The last is Fleming's report of November 18, 1991. It is essential reading for anyone trying to fathom the loss of memory which has so contributed to the uncertainty about the events of January 31, 1969. The report traces Nichol John's troubled youth, her abusive home life, association with out of control teenagers, reported rape by Milgaard shortly before the events of January 31, 1969, and heavy drug use, including LSD, between that time and the preliminary inquiry. Fleming postulated several reasons for her loss of memory or purported loss of memory at the preliminary inquiry and trial, including the May 24, 1969, statement being untruthful; a conscious refusal to adopt it at trial because of a close relationship with Milgaard or fear of him, and finally, memory repression of certain events for psychological reasons. The last was favoured by Fleming who said, "...I would not say that Ms. Demyen is suffering from any significant emotional or psychiatric disorder now, but what she seems to have experienced in the weeks and months following January 31, 1969 is explainable on the basis of powerful psychological defence mechanisms which operate to some extent in all of us and that these mechanisms, now firmly in place, and reinforced by the passage of considerable time continue to protect her although perhaps incompletely from the memory of whatever she may have witnessed on the occasion in question".<sup>58</sup> To Fleming, the March 24, 1969, statement "seems to provide the best recollection and the most detail which she has been able to provide either before or since".

As to John's stay in the police station, Fleming understood from her that it was "less than a perfect arrangement", but that she seemed to have no other impression of it. His observation is apposite for both barristers and judges, "What also comes through in the transcript is that she was not handled in a

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54	Docid 012073.
55	Docid 333657.
56	Docid 333667 and 002779.
57	Docid 002779.
58	Docid 031228-031229 of 031224.

particularly sensitive manner by the prosecution or more significantly the trial judge and so the fact that she might have a very legitimate loss of memory did not seem to occur to anyone”.<sup>59</sup>

I have remarked earlier that, in my view, the trial judge’s persistent interventions, clearly impatient and stern in tone (the transcript shows it, and witnesses have verified it), effectively destroyed, or were apt to destroy, the witnesses’ credibility on her professed loss of memory relating to the incriminating parts of her statement. In the result, it would be difficult for the jury not to conclude that the truth lay in her statement.

Fleming discusses the possible explanations for John’s stated loss of memory, and favours the one of repression of memory of certain events for psychological reasons. Williams says he did not ask Fleming to test various explanations. He simply offered them of his own accord.

In my view, had Tallis been give the chance (as he should have) to examine in the absence of the jury the circumstances under which the statement was given, we would all be better off. He could have canvassed, in detail, John’s handling by the police. Perhaps the witness was not truly hostile; perhaps she genuinely could not remember because of psychological factors; or fear of someone; or she could recall but was concealing something . The trial judge had a discretion to exercise as to whether he would allow cross examination on the statement at large, and he should only have exercised it on an informed view of the facts.

Williams, from his perspective which concerned the possible innocence of Milgaard, was troubled by the question of why she would have flashbacks if she had seen nothing.

Williams’ memo to file<sup>60</sup> of November 22, 1991, addresses the so called impossibility of Nichol John’s statement. It was not impossible, he explained.

The applicant faced an interesting challenge. Although, legally speaking, the most incriminating parts of the May 24, 1969, statement of Nichol John were not before the jury for proof of contents, and therefore did not play a part in Milgaard’s conviction, John’s May 24, 1969, sworn statement was before the Minister under s. 690, so the applicant still had to throw some doubt on it, and he chose to do so by trying to show that it was impossible.

Left to speak for itself, the sworn statement of May 24, 1969, was evidence of Milgaard’s guilt. It was before the Minister on the first application having been notified to the then Minister Doug Lewis on May 8, 1989,<sup>61</sup> and raised again by Wolch and Asper with Justice Canada officials on October 1, 1990.<sup>62</sup> But even after the meeting, it appears that Bruce McFarlane, the Assistant Deputy Attorney General of Canada, did not know what use was made of Nichol John’s statement at trial because he had asked Williams whether the statement went to the jury as a full exhibit.<sup>63</sup> Williams reported to him that the statement had been marked for identification only.

Minister Campbell did not refer to the Nichol John statement in her reasons for decision rejecting the first application. I see no reason why it could not have been taken into account. Although the most incriminating parts were not in evidence at trial, John did not recant them, and has not done so to this day. It has not been argued before me that it would have been improper for the Minister to take account

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59	Docid 031227.
60	Docid 334136.
61	Docid 032905.
62	Docid 162374.
63	Docid 333512.

of the Nichol John statement of May 24, 1969, in either the first or second application. In either case, though, the statement would not be in the category of information coming to the attention of the police or Saskatchewan Justice which should have caused them to reopen sooner. Quite the reverse. Unless somehow nullified, the May 24, 1969, statement would provide reason for not reopening the investigation.

Williams helped to prepare for the reference, a task which included getting Martin Orne to examine John under hypnosis.<sup>64</sup> That was done, without success, but Justice officials were more satisfied with his examination than that of Pulos.

Williams interviewed Ute Frank on December 19, 1991.<sup>65</sup> She painted a highly unflattering picture of David Milgaard and gave an account of the motel re-enactment which supported what Melnyk, Lapchuk, and Hall had said. In fact, it went further. She did not take it as a joke, but as a confession of murder.

I find that, far from being prejudiced by the Crown's failure at trial to call Hall and Frank, the defence was fortunate that the former was unavailable, and that the latter refused to testify.

In terms of the reopening, what they might have said at trial would not have been a reason for Williams recommending a remedy, and would not have been a reason for Saskatchewan Justice or the police to reopen earlier than they did.

**(c) Pearson's Continued Investigation of Larry Fisher**

As we have seen, Williams was able to enlist the highly skilled and thorough Rick Pearson of the RCMP to help him investigate the allegation that Fisher was responsible for Gail Miller's murder.

Nobody with whom Pearson dealt accused him of partiality, and I find that he kept an open mind throughout. He faced certain frustrations. The first of these was the independent investigation being conducted by Joyce Milgaard.

At paragraph 271 of his report<sup>66</sup> we read, "Indications are that Fisher and his current wife are fed up with the publicity and the hounding by the media".

Secondly, Fisher had not responded well to a polygraph exam and, by April 1991, Pearson was losing hope for a second one.<sup>67</sup> The idea was finally abandoned on orders from his superiors on September 20, 1991. As well, Williams refused permission during the first application for the interview of Fisher's victims.

Throughout, Pearson did not lose sight of Fisher as a suspect (paragraph 232), although he never did think there were grounds to charge him.

Fisher, through his lawyer, denied knowledge of Victim 8 or Victim 12. Pearson's first report on the second application was on September 23, 1991.<sup>68</sup> He interviewed Parker, who told him that there were indications of moccasin tracks around Miller's body. As he knew, Milgaard was seen at the Trav-A-Leer Motel in stocking feet.

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64	Docid 334274.
65	Docid 326514.
66	Docid 056743.
67	Docid 008400.
68	Docid 011848.

Parker also told him that he saw signs of a car stuck in the snow east of the T-intersection of the alley. This would tend to support what John and Wilson said at trial, but Parker did not relate these things in evidence at the trial.

From the Inquiry perspective, the effect on Pearson's mind is the relevant thing. Although he was searching for evidence which implicated Fisher, he could not ignore evidence which implicated Milgaard.

Pearson was able to consult with the Saskatoon Police Commission about the missing files and got part of the Fisher Victim 4 file from microfiche. The fact that this file was copied by the Saskatoon Police appears to show that the others were missing by chance and not by design. If the intent was to destroy or conceal them, why not this as well?

With the cooperation of Saskatoon Police, Williams and Pearson obtained an analysis of sex crimes in Saskatoon between 1968 and 1970.<sup>69</sup> The following cases were examined:

- 1968 – 10 rapes – 28 sexual assaults
- 1969 – 9 rapes – 29 sexual assaults
- 1970 – 12 rapes – 18 sexual assaults

In four of the cases, a weapon was seen by the victim. Three were missing from the microfiche. The analyst saw no “clear trend or method of attack evident in the files examined”. This was in August 1991, about 22 years after the murder. Pearson said that a lot of the people in the Saskatoon Police were unfamiliar with the Milgaard case by this time, and I conclude that they would have no reason to hide anything. I recall the great emphasis placed by Joyce Milgaard's counsel on the “serial rapist” events of 1968 which he said must have been at the centre of every police officer's attention. The statistics put the matter in perspective. The Fisher sexual assaults (two rapes, one attempt) in 1968 were three amongst thirty-eight. The Fisher assault and rape in 1970 was one amongst thirty, demonstrating, in my view, that contrary to the Milgaard argument, the rapes would not have been the center of every police officer's attention. Like some other matters in this case, hindsight has given exaggerated importance to the Fisher rapes. They were not so noteworthy in 1969.

Pearson wondered at the fact that only three of 38 sexual assault files from 1968 were missing, but nothing relating to a cover-up came to his attention, and he thought the cause could have been administrative. Suspecting that the unnamed Milgaard source inside the Saskatoon Police might be responsible for the missing rape files, Pearson sought the name of this individual from Asper, but he would not disclose it.

The similar fact comparison was being pushed ahead.<sup>70</sup> Pearson was not looking for opinions, just the facts to present to those qualified to decide if it was evidence (paragraph 290 of 056743). This illustrates the much more conservative approach taken by federal Justice investigators as opposed to Centurion Ministries. The latter were more advocates than investigators. Pearson sent a fact analysis to Williams on October 10, 1991.<sup>71</sup> Victim 8 was not included because they had no suspects for her attack. The writers of the report cited some glaring differences between what victims reported at the times of the incidents, and what they told Centurion Ministries. In some cases, police reports were no longer available and they were hampered by an inability to interview victims themselves.

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69  
70  
71

Docid 012700.  
Docid 056743 at paragraph 384.  
Docid 009033.



Pearson said that Williams was reluctant to allow victim interviews by the analysts, unless there was some association between the Miller murder and the Fisher crimes. That begs the question. The very purpose of the interviews would be to discover an association.<sup>72</sup> They spoke of the need to interview the Saskatoon victims because of Joyce Milgaard's biased approach.<sup>73</sup> In fact, the subject was raised four times by Pearson because he doubted the accuracy of the facts elicited by Centurion Ministries and Joyce Milgaard. But Williams delayed. In my view, Pearson had just cause for concern based on the answers we see recorded in the Centurion Ministries/Joyce Milgaard interviews as opposed to the police reports.<sup>74</sup> There are some major discrepancies. In the case of Fisher Victim 3, there is no police report, but the Centurion Ministries report is internally inconsistent, speaking once of no knife and again of one "like a paring knife". In the Fisher Victim 5 case, the Centurion Ministries report mentions a knife, the police report does not.

Pearson examined Fisher's prison records in Stoney Mountain Institution and found no evidence that he had been involved in a murder. The Fisher Victim 7 attack raised suspicion, because murder was attempted.

A former living unit officer, Ben Dozenko, had been quoted in a book as saying that David Milgaard admitted to him three or four times that he had killed Gail Miller. Pearson says that the Dozenko reports were investigated but they could never conclude that Dozenko had recorded the confessions on his file, as he claimed. Had it been recorded, it would have been of major importance. Conversely, investigators heard reports of Fisher confessions to the murder and reported them, as well. Pearson tried to follow up<sup>75</sup> by arranging for interviews of Dozenko and others.

It occurred to Pearson that charging Fisher on the Victim 12 matter<sup>76</sup> could possibly connect him to the murder, but Victim 12 did not want it. She was already upset that her report to Asper had been passed on to the media.

**(d) Allegations of Missing Police Files**

Following rejection of their first application in February 1991, the Milgaard group, as well as federal investigators, intensified their efforts towards Larry Fisher as a suspect, only to find that police files relating to some of his Saskatoon sexual offences could not be found.

This led to allegations from the Milgaard group that files had been destroyed in order to cover-up his crimes, lest they be linked to Milgaard's wrongful conviction.

Asper enlisted Tom Vanin's help in locating Fisher rape files, giving him the names of the victims. He says, and this much I can accept, that the information he gave to the Wolch firm was confidential within the Saskatoon Police Service.

Vanin had the central records clerks search for him, but after three or four weeks they could not report any finds. This tends to show that the Fisher files were missing in the late 1980s, contrary to an assertion made later by Asper that they went missing after August 16, 1991, when McCloskey made his accusations of frame and cover-up.

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72	Docid 058291.
73	Docid 058291.
74	Docid 009033.
75	Docid 008646.
76	Docid 056743 at 836.

Central records did find an index card of Larry Fisher with five or six names on it and one page of an investigation report of a rape, Vanin reported to Asper. He did not use the same central record clerks every time for his searches for fear of drawing attention to himself.

Asper referred Vanin to Paul Henderson, and Vanin assumed that solicitor/client privilege would apply to communications between them. Vanin says that he met Henderson once, and knew him as a private detective working for Centurion Ministries and the Milgaard family. He showed Henderson photocopies of the index card and first page of a police report referred above. He denies that he gave Henderson the Fisher Victim 4 file to look at, as Henderson alleged. In fact, says Vanin, he never saw it himself and believed, when he spoke to Henderson, that none of those files could be found. The fact that the Fisher Victim 4 file<sup>77</sup> survived is significant. Had there been a cover-up and deliberate destruction of files, why were these documents spared?

The RCMP were also looking for the missing files and had been doing so since 1990.<sup>78</sup>

They knew on August 21, 1991, that Centurion Ministries was getting information from an anonymous source in the Saskatoon Police Service.<sup>79</sup> Wolch, in fact, filed a report from Centurion Ministries with the Minister of Justice on August 14, 1991,<sup>80</sup> with Vanin's name blocked out. That is not surprising in view of the fact that his office had made an arrangement with Vanin whereby the latter accessed information from police files.

The Globe and Mail published Vanin's "revelations" on August 29, 1991.<sup>81</sup> Vanin's efforts seem to have produced little of value, but did inject an air of mystery into the official investigation, distracting the RCMP and Williams with the spectre of an anonymous tipster, whom they wanted to interview, but whose identity was kept from them by Asper and Wolch.

A Canadian Press wire story<sup>82</sup> cites Milgaard supporters as claiming that Fisher's case was covered up to cloak faulty police work. Vanin says that he was not the source of the report. He never heard of a cover-up from Saskatoon Police Service officers, nor heard that some of them thought Milgaard was innocent. To the contrary, they thought him guilty. Vanin said that his information was that Gus Weir had looked for the files years before and could not find them. That fits with the findings of the Saskatchewan Police Commission, and I accept the evidence.

Asper is quoted in the article of August 30, 1991,<sup>83</sup> as saying that the files going missing after August 16, 1991, was "unbelievable". Indeed it was, but not for the reason he thought. The files were in fact long gone by then for reasons which had nothing to do with McCloskey's extravagant accusation of cover-up.

Media attention continued<sup>84</sup> with Peter Edwards of the Toronto Star reporting on September 1, 1991, that according to Joyce Milgaard the metro woman's [Victim 12] file was missing, citing police sources. This was not so. We know that a Victim 12 file was not opened because she did not proceed with a complaint. Her report of the incident went on the Gail Miller file. Vanin said that he was not the police source named in the story.

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77	Docid 261590.
78	Docid 056743 at 784 and 787.
79	Docid 056743 at 796.
80	Docid 000184.
81	Docid 057451.
82	Docid 324934.
83	Docid 220383, 004592.
84	Docid 220387.

Joseph Penkala's evidence as to the office procedures and file management within the Saskatoon Police was important inasmuch as the Milgaard group have alleged that there was a cover-up by police of evidence relating to Fisher.

Files resulting in criminal charges would go to the Attorney General for verification, then to the case preparation section where, in consultation with the Attorney General's Department, they were prepared for court. After disposition the result would be filed in Ottawa. Four copies of police reports were made and the extent to which they were circulated makes it highly unlikely that any attempt to cover-up would succeed.

The Saskatchewan Police Commission was asked to investigate the matter of the Fisher sexual assault files which could not be found. A review of the Police Commission's work shows that files were sometimes removed from Central Records when they should not have been and were not always returned. Moreover, some files were missing from the microfilm records so it is not surprising that some files were missed in the microfilming process. As well, the move of all the files between the old and new police buildings could have led to the loss of files. But why these particular files?

Penkala told the Commission that there was an unjust attack on his administration. Accusations of cover-up and sabotage of files was "so much garbage".<sup>85</sup> To us, he confirmed this assessment and still feels that the Saskatoon Police acted correctly.

The Police Commission investigator, speaking of the Fisher statements taken by Karst and Nordstrum in Winnipeg, said<sup>86</sup> in his report that, "There was a good likelihood that all the 1968 investigator files were destroyed by the time Nordstrum, Karst and Corey needed a working copy in 1971. They then would have booked out the Central Records copy. That copy may never have found its way back to Central Records".

And later in the report, W.G. Graham, Executive Director of the Commission says, "When one reads the evidence that convicted David Milgaard plus the inadmissible information that police have in these matters it's more than reasonable that there would be no reason to be still looking for another suspect in the Miller murder. There is no inference that these files were intentionally destroyed and they definitely have not been in existence since 1981 and more likely disappeared between 1971 and 1976".

Vanin did not go to the Police Commission for help in locating records because he feared demotion, and because Asper did not suggest it. He did not disagree with the Police Commission's findings that the files could have been lost in the move to the new building.

In a Globe and Mail article dated December 7, 1991, by Dave Roberts and Timothy Appleby, "police sources" are quoted as saying that it would be "highly unusual" for Karst to have been sent to Winnipeg to interview Fisher. Vanin now says that he does not think he said that. I have no evidence that Roberts and Appleby invented the statement, so Vanin was likely its source. According to his present testimony, it would not have been unusual for Karst to have been sent to Winnipeg to interview Fisher, given Karst's reputation and skills.

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85 Docid 042831 at 905.  
86 Docid 042831 at 914.

It is clear from the documents that Asper was withholding Vanin's name from Pearson<sup>87</sup> who thought that the anonymous informant might be responsible for the files being missing. This was a distraction, at least, for the Justice Canada investigation.

Vanin acknowledged that the manner of dealing with the Fisher Saskatoon rapes had now been explained to his satisfaction, and that the files must have gone missing in the 1970s as said in the Laing report.<sup>88</sup>

Asper proclaimed in August 1991 that the files had gone missing just a few weeks after James McCloskey of Centurion Ministries had charged a frame and cover-up. Instead, it appears certain that the files had been missing since at least 1981.

The files for the four Fisher sexual assaults were apparently in the possession of the Saskatoon Police on March 17, 1971, when details of them were sent to Regina.<sup>89</sup>

Williams told us that he and Pearson looked more than once in the Saskatoon Police file area. For the first application he had the 1970 Fisher Victim 4 file and on September 9, 1991, the Saskatoon Police located part of the Fisher Victim 1 file.<sup>90</sup> Evidently a thorough, and partially successful, search was being done. Where was the cover-up?

To recap the missing files issue, it was precipitated by McCloskey's allegations of cover-up reported by the Globe and Mail in August 1991. The chairman of the Saskatoon Police Commission asked the Saskatchewan Police Commission to inquire into the file tampering allegations on September 13, 1991.<sup>91</sup> The Laing report of November 29, 1991,<sup>92</sup> found that of the four files, part of the Fisher Victim 1 file and all of the Fisher Victim 4 file were found on microfilm,<sup>93</sup> but not the others. Thirty-eight files were missing in total. Laboratory examination was done of four microfilm tapes where the assault files should have appeared. The tapes had not been tampered with. The Police Commission concluded that the policy of keeping one complete file copy at Central Registry had not been complied with. Also, there had been a move to new premises. These factors accounted for missing files not being microfilmed.

It is worth noting that on September 6, 1991,<sup>94</sup> Williams reported "exceptional hospitality" and "full cooperation" from the Saskatoon Police when he asked for access to their files. Throughout the course of this long Inquiry, I have not heard any evidence that the Saskatoon Police tampered with files. John Quinn, formerly of the Saskatoon Police, denied any cover-up and said that his investigations gave him no reason to suspect tampering. He was a reliable and helpful witness whose testimony I accept.

#### (e) Boyd/Rossmo Report

In 1991, two British Columbia criminologists, Neil Boyd and Kim Rossmo, prepared a report on the Milgaard case. Their intention initially was to work from academic interest and independently, but Joyce Milgaard made an early effort to co-opt their work. They both testified at the Inquiry.

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87	Docid 057204, 056743 at 845 and 877.
88	Docid 000263 at 274.
89	Docid 261053.
90	Docid 016097 and 321950.
91	Docid 004368.
92	Docid 000263.
93	Docid 000263 at 276.
94	Docid 333600.

Boyd is a professor of criminology at Simon Fraser University, as well as an author and consultant.<sup>95</sup> He and a student, Rossmo, did a study on the Milgaard case starting in May 1991. They wanted to be independent, he says, but rather quickly became the object of Joyce Milgaard's attention.<sup>96</sup> She arranged a media event, greeting Boyd at the Winnipeg airport as described in a Winnipeg Sun article dated July 10, 1991.<sup>97</sup> Boyd was surprised, he says, and Joyce took him away to meet her son and his lawyer David Asper. With the cameras rolling, this performance must, I think, have branded him as a Milgaard advocate, although he explained to the media that he approached his task with an open mind.<sup>98</sup> At the same time, he told the reporter there was substantial doubt of guilt, without yet having spoken to David Milgaard or having read transcripts.

Boyd was referred to the s. 690 proceeding and the Minister's reporting letter of February 27, 1991, to Wolch,<sup>99</sup> in which she stated, "Ministers of Justice have in the past intervened and referred the case to the Courts where it can be demonstrated that a reasonable basis exists to conclude that a miscarriage of justice has likely occurred". In contrast, says Boyd, their study focused on the claim of innocence. They interviewed Ron Wilson, Linda Fisher, David Milgaard, Eddie Karst, and others, mostly in September and October 1991. They visited the scene, and viewed the exhibits. Nichol John refused to speak to them, but in Boyd's opinion, she had a critical role in the conviction and it appeared to him that she was protecting Milgaard.

Curiously, although Boyd had the statements given to Paul Henderson, he did not have those of the motel room re-enactment witnesses, saying that it was a red herring blown out of all proportion. I do not understand how the re-enactment evidence, which might have been a confession depending upon its interpretation, could be described as a red herring.

Boyd described Karst as open, friendly and accessible. Although seemingly not hiding anything, he could not help them. They made no attempt to speak to Tallis. They spoke to, and believed, Linda Fisher. Boyd called, but did not meet with Caldwell, nor did he meet with Kujawa or anyone from Saskatchewan Justice or Justice Canada.

Boyd appeared with Asper, David and Joyce Milgaard and Paul Henderson on the Shirley Show on September 17, 1991.<sup>100</sup> In discussing the motel room incident, Asper emphasized that David Milgaard had given his sworn word to the Department of Justice, by way of affidavit, that he did not re-enact the murder. David Milgaard added, "The event never took place really. I was there. The event never took place". That is not what he told Tallis in 1969. Boyd commented on the Wilson recantation without having met Wilson, but he emphasized that there were many unanswered questions.

Boyd said earlier that his focus was on Milgaard's innocence. Then he changed to the view that the key was, "was there proof beyond a reasonable doubt?"

On September 21, 1991, a story by Peter Edwards quoted Boyd's study as saying that Milgaard was probably innocent. Boyd was said by Edwards to have harshly criticized Campbell's reasons for turning down the first s. 690 application, and added that Wilson's recantation should be taken very seriously. In fact, it had been, but was found to be unreliable.

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95	Docid 337462.
96	Docid 159891.
97	Docid 004633.
98	Docid 159895.
99	Docid 001529.
100	Docid 335020.

Boyd interviewed Wilson on October 7, 1991,<sup>101</sup> having read transcripts and the Henderson interview. Boyd taped the interview, and a transcription sent to Wilson and to the Milgaard lawyers, but not to the federal Department of Justice. Boyd said that he did not find Wilson credible on details, but believed him where he recanted on critical issues. They were concerned about Henderson's lack of objectivity, but saw no reason to doubt the recantation. At the same time, Boyd observed that Wilson was a weak person who would respond to suggestions.

Boyd said that he had no evidence that the police went beyond persistent questioning with Wilson, in distinction to the manipulation and pressure recorded by Henderson. In his view, Wilson, to a significant extent, was a person who told people what they wanted to hear. Still, he believed the recantation.

In their report, Boyd and Rossmo described Larry Fisher as a good suspect as Gail Miller's killer, but observed that this did not amount to proof, adding that evidence against Fisher did not prove Milgaard's innocence.

Boyd said that Wolch and Asper asked for their report but he did not know that they would send it to Justice Canada as they did on October 24, 1991.<sup>102</sup>

On November 19, 1991, Asper wrote to Justice Canada<sup>103</sup> telling them that he could not give them a copy of the Wilson interview by Rossmo and Boyd because it was done solely for the Boyd report. Boyd disagreed.

Rossmo and Boyd continued their interest in the case after the Supreme Court Reference, meeting Milgaard after his release and writing a magazine article.

Boyd's co-author, Rossmo, testified at the Inquiry as well. A Ph.D in criminology, and a former police officer, he now consults in criminal investigations, specializing in profiling.<sup>104</sup>

Rossmo became interested in the case from a CBC Fifth Estate feature, and thought that there might have been a third party involved in the murder.

Rossmo concluded that the Crown's theory of the crime was impossible based on a time/distance/speed analysis which he made after visiting the scene. However, he also asserted that the jury could not disregard what Nichol John said in her May 24th statement, although instructed to do so. He offered no evidence in support, but his view was shared by other experienced jury watchers such as Tallis and Brown and laymen such as Yanko of the media.

Rossmo continued to provide services to the Milgaard group, including help with what he called a forensic video dramatization, intended to show that events described in the statements of John and Wilson were physically impossible.<sup>105</sup> For reasons earlier stated, this video was not, in my view, information which should have caused the case to be reopened sooner.<sup>106</sup>

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101	Docid 154640.
102	Docid 157128.
103	Docid 333998.
104	Docid 337453.
105	Docid 009936, 078511.
106	Docid 337447.

Wolch, for David Milgaard, suggested to Rossmo that the Mackie Summary<sup>107</sup> was the foundation for the Wilson and John statements of May 23 and May 24, 1969. But Rossmo said that the suggestions in the summary seemed appropriate. It was clear that Mackie doubted the stories which had been given thus far.

Although the Boyd/Rossmo report came to the attention of the Province and the police, it did not, in my opinion constitute information which should have caused an earlier reopening.

**(f) Federal Justice Consultation with William McIntyre**

We know from a memo of federal Justice official Douglas Rutherford to his Deputy Minister dated October 2, 1991,<sup>108</sup> which came to the Inquiry through Saskatchewan Justice, that he, McFarlane and Williams of Justice Canada met with their advisor William McIntyre in Vancouver on September 30, 1991 to discuss the second s. 690 application. They discussed, amongst other things, the Nichol John statement to police of May 24, 1969. We do not know what use they made of the Nichol John statement, there being no mention of this in the memorandum, and whatever McIntyre's advice on that subject was, Justice Canada has taken steps through judicial review to keep it from us. The memo speaks for itself, however, as to the overall position, which was that McIntyre concluded that there was "still no reasonable basis to conclude that a miscarriage of justice may have occurred". The memorandum closes by saying that detailed discussions with Saskatchewan officials should follow. We know that they did from the evidence of Brown, and that he relied upon McIntyre's advice in not reopening at that point.

At the close of the Inquiry, counsel for Justice Canada argued that we cannot inquire into advice, so it follows that we cannot consider the evidence of such advice. I disagree. In the circumstances of this case, because the Rutherford memo was given to Saskatchewan Justice and relied upon by them and made available to us by Saskatchewan, as far as I am concerned, it was put into the public domain. We have neither asked for the original advice in the form of McIntyre's report, nor seen it.

We know that McIntyre was consulted on the first application as well, and that his advice was considered by the Minister in rejecting it. Brown testified that he relied both on the federal investigation and upon McIntyre's opinion and saw no reason for Saskatchewan to reopen. I accept his evidence and repeat my finding that information reaching Saskatchewan Justice and the police through the s. 690 investigations should not have caused Saskatchewan to reopen the case earlier.

In view of what I have said, my provisional ruling that the Rutherford memo<sup>109</sup> not be published pending argument is no longer in effect. The memo was relied upon by Saskatchewan and it speaks for itself. The document will be published on the website as part of this report.

**5. Decision to Refer to the Supreme Court of Canada**

In August of 1991, Williams and Brown discussed what could be done to air the matter publicly. The Saskatchewan Court of Appeal was not the appropriate forum because some of its judges had been involved in the case as lawyers. The Campbell decision was not enough, said Brown, to satisfy the public because she did not explain fully enough how she arrived at it. His office heard from Justice Canada officials that something was going to happen in the way of a hearing. I find, therefore, that the information coming to Saskatchewan Justice from Justice Canada through both s. 690 applications was instrumental

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107 Docid 006799 at 803.  
108 Docid 114906.  
109 Docid 152028.

in their thinking about reopening. No substantial justification for it appeared before August 1991, and then a pragmatic reason for granting an s. 690 remedy was settled upon – to give the case a public airing.

The matter was ordered to the Supreme Court on November 28, 1991.<sup>110</sup> Saskatchewan thought that the questions asked should be as wide as possible so that the Court could deal with allegations of miscarriage of justice.

As I have commented before, and I so find, the decision to grant a remedy was based on the need to air the issues, given the public outcry, and not on a reasonable basis for finding that justice had miscarried.<sup>111</sup> 334170 is a transcript of the Minister's press conference announcing the reference to the Supreme Court. The court was to be asked if, in its opinion, the continued conviction of David Milgaard constituted a miscarriage of justice.

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Docid 157840.  
Docid 333970.