

The Milgaard Inquiry: Power, discourse and public  
truth in a wrongful conviction

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**Abstract**

This thesis represents a qualitative content analysis of the final report of the *Commission of Inquiry into the Wrongful Conviction of David Milgaard*, also known as the Milgaard Inquiry. Influenced by Michel Foucault's concepts of power, truth, discourse, resistance and truth-telling, as well as Howard Becker's concept of a hierarchy of credibility, this thesis examines the political nature of the public inquiry process as a tool for producing truths and discourses about a wrongful conviction. I examine how multiple truth claims were gathered, assessed, and ordered to create official discourses about the case, how certain groups resisted exercises of power at the Inquiry, and how the Commission attempted to restore confidence and legitimacy to the criminal justice system in the wake of the miscarriage of justice.

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## Chapter 1: Introduction

On January 30, 1969, three teenagers left Regina looking to buy, use and sell drugs. Sixteen year old David Milgaard and his two friends, Ron Wilson and Nichol John, stopped in Saskatoon in the early hours of January 31, 1969 to pick up another acquaintance, Albert Cadrain. On their way to Cadrain's home, the trio became lost, and their car got stuck multiple times in the snowy streets of Saskatoon. They eventually arrived at Cadrain's home and left for Alberta that afternoon. They were unaware that around the same time they arrived in Saskatoon, a young nursing assistant, twenty year old Gail Miller, was being raped and murdered nearby. Her body was found with the murder weapon, a blood-stained knife, next to it.

Upon returning from Alberta, Cadrain was arrested on vagrancy charges and questioned by police about his knowledge of the murder. Cadrain said it was the first he had heard about the murder, but he raised concerns about Milgaard's behaviour on the morning of the murder, which led police to interrogate Milgaard in March, 1969. Nichol John and Ron Wilson were also questioned by police, and after several months, they began to incriminate Milgaard for the murder, with John alleging that she witnessed him stab Gail Miller. Milgaard was charged for the murder on May 30, 1969, and despite his pleas of innocence, he was convicted for the murder on January 31, 1970. He was sentenced to life in prison with no chance of parole for ten years.

Over the next ten years Milgaard's family hoped that David would be paroled. But as appeals failed and David refused to admit to the killing, his mother realized that her son was not likely to be granted parole. She eventually took matters into her own hands. She gathered a group of lawyers and supporters and with their help decided to try to prove her son's

innocence. From 1980 until 1992, the “Milgaard Group,” as they were referred to throughout the public inquiry, applied to have David’s case reviewed by the Minister of Justice, mobilized the media in an effort to create public awareness of his case, and insisted that the government and justice system were covering up the truth about Milgaard’s innocence. The case eventually made its way to the Supreme Court of Canada in 1992 where it was decided that based on the evidence presented, there was a possibility that the jury’s verdict could have been different. Upon recommendation from the Justices of the Supreme Court, a stay of proceedings was entered and Milgaard was freed from prison. Formal exoneration, however, did not come until 1997 when DNA testing proved that Milgaard was not the murderer. In 1999, Milgaard received \$10 million in compensation for his wrongful conviction and he was promised that a public inquiry would be held to determine what went wrong. The inquiry began in January of 2005, and the written report and recommendations were released in September of 2008.

David Milgaard’s wrongful conviction is not unlike other cases in Canada, such as Donald Marshall Jr., Guy Paul Morin, Thomas Sophonow, and James Driskell, to name a few. According to Leo (2005) academic interest about wrongful convictions indicates three different types of research. First are what he calls ‘big picture’ studies, which follow a familiar pattern of (a) discussing the ideology of the legal system, (b) pointing out procedural protections and due process measures that are supposed to safeguard the system’s ideology, (c) examining how and why wrongful convictions occur more often than we think, and (d) discussing reforms that should be implemented. Leo notes that ‘big picture’ studies are typically written by “journalists, lawyers and activists – not academic criminologists or social scientists” (p. 206). The second type of research that Leo discusses is ‘the specialized

literatures' which focus on the main causes of wrongful convictions. Again, Leo (2005) insists that sociologists and criminologists have been largely absent from these studies. He suggests that research should "go beyond the study of individual sources of error to understand how social forces, institutional logics, and erroneous human judgements and decisions come together to produce wrongful convictions" (p. 211). The focus, he says, should be on the "root social causes" of these miscarriages of justice, rather than individual mistakes and criminal justice failures. The third type of literature he terms 'true-crime' novels, typically written by journalists, activists, and the wrongfully convicted themselves. They often examine the most extreme cases, reach broad audiences, but their exposés lack any analysis of systemic factors.

My own survey of the literature supports Leo's argument; academics have focused too much on individual errors and failed to examine the social and root explanations of how and why wrongful convictions continue to occur. Indeed, my thesis addresses this concern in three major ways: (a) I offer a theoretically-informed analysis of wrongful convictions and public inquiries, (b) I evaluate the ways in which "official" truths and discourses were constructed about Milgaard's wrongful conviction, and (c) I analyze whether these "official" explanations were "personal," "legal," or "root causes." Although my analysis focuses on the inquiry process proper, I address current gaps in the study of wrongful convictions as well.

When a high-profile wrongful conviction case is uncovered, one response is to hold an inquiry to further investigate the issue. For the public, an inquiry explores the truth of a situation in an open forum. For those implementing an inquiry, it is often a desired format because it is characterized by flexibility and an educational approach to issues at hand, with the government able to set the terms of reference and choose the commissioner who will lead



the inquiry. As Gilligan and Pratt (2004) observe, public inquiries offer a “formal way of giving definition to the issues in hand” through the production of “official discourses” (p. 2). This can be a challenging task though, since the Commission not only has to define the issues under review, but they also have to resolve the ‘crisis of legitimacy’ – the damaged ideological views of “the politico-juridical structures of the state” – which emerged in the aftermath of the wrongful conviction (Burton & Carlen, 1979, p. 13).

Despite the literature about both wrongful convictions and public inquiries, there is little academic research that looks at the two issues together. My thesis addresses this shortcoming. It offers a new perspective about wrongful conviction public inquiries, exploring the ways in which truths are constructed and contested throughout the course of the *Commission of Inquiry into the Wrongful Conviction of David Milgaard* (henceforth, the Milgaard Inquiry). More specifically, I examine the ways in which the Inquiry defined Milgaard’s wrongful conviction and discuss the various truth-gathering techniques that were deployed by the Commission. I explore the following questions: (1) What role did power relations play in the Milgaard Inquiry? (2) Did hierarchies of credibility emerge at the Inquiry and with what effect? (3) How was knowledge, discourse, and truth produced, reproduced, and contested throughout the Inquiry? (4) Was power challenged within the Inquiry and with what effect?

My thesis fills in a gap in the criminological study of wrongful convictions. By examining the ways in which Milgaard’s wrongful conviction was defined by the Commission, I examine what causes and errors were presented as ‘official’ explanations for miscarriages of justice. In addition, by exploring in detail the truth-telling capacity of commissions of inquiry, my thesis adds to the debate about the efficacy of public inquiries,

especially as a response to high-profile wrongful convictions which have damaged public perceptions of the criminal justice system. Ultimately, my findings generate a greater understanding of the politics of the inquiry process and the paradoxes involved in balancing the search for truth, producing official discourses, and attempting to restore confidence and legitimacy to the criminal justice system.

### **Chapter Outlines**

The thesis is organized into six chapters. The next chapter provides a description of Milgaard's wrongful conviction. I examine the events that led to Milgaard's arrest and conviction, as well as the struggle by his supporters to establish that a miscarriage of justice had occurred. I provide a context for understanding the reasons behind the formation of the Milgaard Inquiry and I set the stage for the analysis of the Milgaard Inquiry proper.

The first part of Chapter 3 consists of a review of the literatures about wrongful convictions and commissions of inquiry. I provide an overview of the state of these literatures, offer my critiques, and address what is absent from the current studies about the topics. I explain how my thesis is situated within the literature, how I address current critiques, and how my thesis is unique in studying the relationship between public inquiries and wrongful convictions. The second part of Chapter 3 contains the theoretical framework that guides my thesis. Focusing on Michel Foucault's work on power, knowledge, discourse, regimes of truth, resistance and truth telling, as well as Howard Becker's work on hierarchies of credibility, I examine how these concepts come together to offer a way of seeing and understanding the texts of a public inquiry.

In Chapter 4, I discuss the methodology of my research. I highlight why I chose to conduct a case study and why I selected David Milgaard's case to analyze. I explain how I

made use of qualitative document and content analysis as a means of examining my data and I highlight how each step in the research process was important in my understanding of the data I collected. I expand on how I coded my data in order to answer my research questions and I address potential limitations of my methods.

Chapters 5 and 6 present my findings and analysis. First, I examine truth claims and the exercise of power at the Inquiry. The goal of the Milgaard Inquiry was to determine the truth around Milgaard's case, from investigation to exoneration, and to determine whether there was evidence which could have caused the police or Saskatchewan Justice to reopen the case. At bottom, the Commission was mandated to create an official truth about the case. The mechanism they used to determine the truth was characterized by three techniques. Chapter 5 examines the first two techniques: namely, that all interested parties should contribute to the production of narratives about the case. This technique ensured that the Commission was aware of multiple accounts that were different and dispersed. I examine four different ways in which power relations were decentered and how these confirm Foucault's conditions of power. The Commission was also tasked with determining which truths were credible. Thus, the second technique involved assessing and ordering truth claims based upon the authority of witnesses. I examine which parties and truth claims were presented as credible at the Inquiry, demonstrating how this fits with Becker's notion of a 'hierarchy of credibility.' My findings suggest that, for the most part, those who were in positions of power were said to have created the most credible truths whereas those in subordinate positions had their truth claims downplayed or dismissed.

In Chapter 6, I discuss the third technique used by the Commission: deploying truth claims to create "official discourses" about the case. Through a multi-step process, two

official discourses were advanced at the Inquiry. First was a discourse about the causes of the wrongful conviction, where issues were addressed, recommendations were made, and attitudinal changes were suggested. Second, a discourse of confidence restoration was produced through a combination of de-legitimizing alternate discourses, mostly advanced by the Milgaard Group, and victim-blaming. I examine the Milgaard Group's role in the contestation of truth and discuss how their discourse was received at the Inquiry. My findings demonstrate the political nature of the public inquiry process, which functions both pragmatically and ideologically. Next I examine the politics of the inquiry and discuss how its processes compared to other public inquiries. Finally, I end my thesis with an overview of the key points, a discussion of the limitations of my study, and suggestions for future research.

## **Chapter Two: The Wrongful Conviction of David Milgaard**

### **Introduction**

The purpose of this chapter is threefold: (1) to inform the reader of the context of Milgaard's wrongful conviction; (2) to situate the public inquiry in the aftermath of Milgaard's conviction; and (3) to prepare the reader for my analysis of the Milgaard Inquiry. The chapter is organized as follows: First, I explain the events of Gail Miller's murder, the police investigation, and how Milgaard became a suspect. Second, I discuss Milgaard's trial, the evidence put forth by the Crown and the defence, as well as the judge's charge to the jury. Third, I provide a discussion of the true murderer, Larry Fisher and his involvements with the criminal justice system. Fourth, I provide a brief introduction to Joyce Milgaard and her fight to prove that a miscarriage of justice had occurred to her son. The final two sections of the chapter examine the facts of the public inquiry and indicate how this chapter prefigures the rest of my thesis.

### **The Murder and the Investigation**

On January 31, 1969, the body of twenty year old Gail Miller was found in a snow bank in Saskatoon, Saskatchewan. She was the victim of rape and murder, having been stabbed twelve times in the back and chest (Collier, 2000; Karp & Rosner, 1998). The murder weapon, a paring knife, was found at the crime scene. The time of death was estimated between 6:45 and 7:30 a.m., when Miller usually walked to catch the 7:00 a.m. bus (Collier, 2000). The Saskatoon police suspected that this was not an isolated event; previous sexual assaults had occurred in the same area. However, they did not want to release this information to the public until they had evidence to prove their suspicions. Instead, they offered a \$2000 reward to anyone who might have information about Miller's murder.

On the same morning, sixteen year old David Milgaard, along with friends Ron Wilson and Nichol John, arrived by car in Saskatoon en route to Alberta. Their plan was to pick up another friend, Albert Cadrain, so he could join them and help pay for gasoline, alcohol and drugs. The trio were not sure how to get to Cadrain's house and they were soon lost. They pulled over and asked a woman for directions, but she could not help them.

Between 7:00 and 7:30 a.m. they stopped at the Trav-a-leer Motel, where David spoke with the manager, Robert Rasmussen, who gave him directions and a map (Karp & Rosner, 1998). They headed towards Cadrain's house, but along the way they stopped to help a man free his car from the snow and ice. Both cars got stuck and the man, Walter Danchuk, invited the trio into his home while they waited for a tow truck, which arrived just before 8:00 a.m.

Milgaard, Wilson and John finally made it to Cadrain's house around 9:00 a.m. They left for Alberta later that afternoon and returned to Saskatchewan on February 6, 1969 (Katz, 2011).

Shortly after returning, Cadrain was arrested on vagrancy charges in Regina. The Saskatoon police, meanwhile, had received a tip that a group of teenagers had left town on the same day that Miller was murdered. The Saskatoon police asked police in Regina to question Cadrain about the events of January 31. Cadrain had not heard anything about the murder and he was scared when the police started questioning him about the murder. The Regina police informed their colleagues in Saskatoon that they did not think Cadrain was a suspect. Upon returning home to Saskatoon, Cadrain spoke with his siblings and told them that he suspected that Milgaard was involved. They urged him to go to the police with this information, which he did on March 2, 1969. Cadrain said that when Milgaard arrived to pick him up on the morning of January 31, 1969, he had blood on his pants and had been eager to leave the city. Cadrain also claimed that Milgaard threw a woman's makeup case from the

car while they were driving, and said that he would get rid of Wilson and John since they knew too much (Karp & Rosner, 1998).

Over the next few days, the police (both Saskatoon police and the RCMP) interviewed Wilson, John and Milgaard, not one of whom supported Cadrain's story. Milgaard was cooperative throughout his interrogation and he voluntarily gave blood, saliva, semen and hair samples to the police. But Milgaard did have a troublesome past, which included: running away; experimenting with several different types of drugs; skipping school; setting fire to a rival gang's fort; breaking and entering; and taking a stolen truck for a joyride (Karp & Rosner, 1998; Katz, 2011; Milgaard & Edwards, 1999). As his mother put it, "I knew David was no angel, and that he had been in plenty of trouble, but nothing involving violence . . . even through this unsettled time, there were no charges related to violence in any way" (Milgaard & Edwards, 1999, p. 2-3). His criminal history and Cadrain's allegations made Milgaard a prime suspect for Miller's murder.

The police continued to interview Wilson, John and Milgaard until May, 1969. With the help of Art Roberts, a skilled polygraph examiner from the Calgary police, Wilson and John were again interviewed about the murder, this time with the intention of using a polygraph test to obtain the full story. Wilson was the first to respond to the new pressure. Roberts accused him of lying to cover up the truth and made him believe that he was a suspect. Wilson later admitted that this frightened him because he thought that the police were trying to accuse him of the murder (Karp & Rosner, 1998). Wilson told police that he had seen Milgaard with a paring knife in the car ride between Regina and Saskatoon. Wilson stated that they had asked a woman for directions when they were lost, but she could not help them which, he said, angered Milgaard. He said they then drove down the street, attempted a

U-turn but got stuck. Nichol John stayed with the car while he and Milgaard went in different directions. Wilson said that he returned to the car to find John hysterical, and that Milgaard returned out of breath, about five minutes later. Wilson also confirmed Cadrain's story, stating that Milgaard had blood on his clothing and that he had thrown a woman's cosmetic case from the car while they were driving to Alberta.

Nichol John was subject to the same police treatment as Wilson – they repeatedly questioned her and thought that she was covering up the truth. John admitted that she was afraid of Milgaard, especially when she refused to have sex with him. This made police believe for the first time that Milgaard might have been capable of committing the atrocious attack. When Roberts interviewed John he showed her Miller's coat and asked her how she would feel if it was her sister who was attacked. Eventually, John gave a statement to the police that implicated Milgaard. She confirmed that they asked a woman for directions and that Milgaard was angry when she could not help them. She told police that their car got stuck in the snow. She said that Wilson and Milgaard both went for help, and that Milgaard went in the direction of the woman to whom they had just spoken. John then told police that she saw Milgaard catch up with the woman, grab her purse twice, stab the girl with a knife held in his right hand, and drag her around the corner. John said that she then ran in the direction that Wilson had gone. She said she also remembered seeing Milgaard put a purse in the garbage and throw a cosmetic case from the car as they were driving. The police now had three witnesses in their case against Milgaard and on May 30, 1969, he was arrested and charged for the murder of Gail Miller (Karp & Rosner, 1998).



## **The Trial**

The trial began on January 19, 1970 (Katz, 2011). The Crown prosecutor, T.D.R. Caldwell, put forward the theory that the incident most likely began as a purse snatching but turned into rape and murder (Boyd & Rossmo, 2009). The trial lasted nine days, during which Caldwell called 45 witnesses. Among them were Ron Wilson, Albert Cadrain, and Nichol John. Ron Wilson's testimony followed the story that he had provided to police. One of the few issues with his testimony was that Wilson could not explain important facts, especially relating to having witnessed Milgaard with a knife during their trip (Karp & Rosner, 1998). Cadrain also repeated the story he told police. He spoke of how he saw blood on Milgaard's clothing and that he had thrown a cosmetic case from the car. Cadrain also testified that he and Milgaard had a conversation about getting rid of Wilson and John for knowing too much (Karp & Rosner, 1998). During the cross-examination, Milgaard's lawyer, Calvin Tallis, questioned Cadrain about why he did not tell police this story the first time they interrogated him.

Caldwell believed that Nichol John would be his star witness. The statement that she gave to the police, as well as the testimony she gave at the preliminary inquiry, implicated Milgaard for the murder and confirmed that he was capable of violent behaviour. At the trial however, John changed her story, stating that she could not remember what happened, and that she was not even sure if she had been on the trip at all (Karp & Rosner, 1998). Caldwell asked to have John declared a hostile witness, meaning that he could read her police statement in front of the court and cross-examine her about how her current testimony differed from the statement. As Joyce Milgaard recalled:

Caldwell pulled out the statement she had signed after her all-night ordeal in the police station and read from it: 'All I can recall is of him stabbing her with a knife.'

. . Caldwell pressed on, reading, ‘Dave reached into one of his pockets and pulled out a knife... I can’t remember which pocket. I don’t know if Dave had a hold of this girl or not. All I recall is of him stabbing her with a knife.’ By the time Caldwell was through, the jury heard every word of her eleven-page statement. Nichol was sobbing now, saying she couldn’t recall saying those words to police (Milgaard & Edwards, 1999, p. 38-39).

When it was Tallis’ turn to cross-examine Nichol John, he could not ask her questions related to her police statement since it was not direct evidence given on the stand. Had he been allowed to cross-examine John in the absence of the jury, he could have “aggressively questioned John about her dealings with the police without fear of an adverse answer from John being accepted by the jury” (*Milgaard Inquiry*, 2008, p. 405). Tallis also could have questioned Art Roberts about the details of his interrogation and Detective Sergeant Raymond Mackie about his taking of John’s statement on May 24, 1969 (*Milgaard Inquiry*, 2008).

Caldwell produced two more eyewitnesses, Craig Melnyk and George Lapchuk, to testify against Milgaard. The pair described an incident that took place at a motel-room party in the spring of 1969 where they said Milgaard had re-enacted Miller’s murder in front of those present. Melnyk testified that Milgaard was on his knees with a pillow between his legs, making stabbing motions and saying “I fixed her” (*Milgaard Inquiry*, 2008, p. 89). Lapchuk’s testimony was similar, except that he described Milgaard as “jumping off the bed, straddling a pillow and saying ‘Where is my paring knife?’ and then making stabbing motions and saying ‘yes I stabbed her, I killed her, I stabbed her 14 times and then she died’” (*Milgaard Inquiry*, 2008, p. 89). Deborah Hall and Ute Frank were also in the motel room during the alleged re-enactment, but they were not called to testify by either the Crown or the defence.

In addition to the eyewitnesses, the Crown put forth forensic evidence to support their case including hair and blood samples, as well as two frozen yellowish clumps of seminal fluid that were found at the crime scene three days after Miller's murder. The latter was analyzed by RCMP serologist Bruce Paynter, who determined that the semen "came from a type A secretor, [which is] a person with type A blood who secretes his blood type antigens into other bodily fluids, specifically, semen, urine and saliva" (Boyd & Rossmo, 2009, p. 187). David Milgaard has Type A blood, but tests revealed that he was not a secretor, meaning that his blood type antigens were not present in his semen. Nevertheless, the Crown argued that it was Milgaard's semen found at the crime scene because he fit the blood type. It is difficult to know whether the jury understood the information presented to them, or if they even considered it when judging Milgaard. However, the integrity of the evidence was never questioned, even though it was found three days after the murder at the scene which had been extensively searched and disturbed.

Milgaard's defense lawyer, Calvin Tallis, did not call any witnesses as he feared that they might bring up unsavoury evidence about Milgaard's character. In addition, Tallis advised Milgaard not to testify. He believed that his client's prior criminal record and past drug use might be used against him during a cross-examination. Tallis also wanted the advantage of being the last to address the jury. Ultimately the decision was left to Milgaard and his parents who followed their lawyer's advice.

Both lawyers took different approaches in their closing statement to the juries. As Karp and Rosner (1998) observe:

Caldwell was blunt. Milgaard's attack on Gail Miller began as a purse-snatching attempt, he said. When she resisted, Milgaard pulled a knife and ultimately stabbed her to death. Then, Caldwell suggested, he raped her. Caldwell's hypothesis was designed to fit the facts of the case. . . . By continuing to stress every possible link to

the accused, he hoped to paint a picture of guilt. It was all part of Caldwell's thorough approach, designed to eliminate any possible doubt the jury might have (p. 94).

Tallis, on the other hand, focused on two issues. First, he questioned the credibility of several of the key witnesses, including Wilson and Cadrain, showing how their stories changed during their initial police interrogations, at the preliminary inquiry and at the trial. He also highlighted testimony by Walter Danchuk (the man whose car was stuck) and Robert Rasmussen (the man working at the Trav-a-Leer Motel) who both denied seeing blood on Milgaard when they met him after he supposedly committed the murder. Tallis urged the jury to consider that Danchuk and Rasmussen were both credible witnesses who had no motivation to lie. Second, he raised questions about the timing of the murder. The time of death was estimated between 6:45 a.m. and 7:30 a.m., however, Miller was seen by one of her roommates at 6:45 a.m. not yet wearing her coat and boots in the hopes of catching the bus to work by 7:00 a.m. The trio of teenagers, however, had freed their car and were seen at the Trav-a-leer Motel around 7:10 a.m. So between 6:45 a.m. and 7:10 a.m., Milgaard would have had to do all of the following:

Cut his victim fifteen times in the neck, stab her twelve times, rape her, dispose of her boot, sweater, and purse, get his car unstuck, and travel more than a dozen blocks to the motel where he calmly walked in to ask for a map (Karp & Rosner, 1998, p. 93).

Tallis pleaded to the jury that this defied common sense!

The last step of the trial was for Justice Bence to deliver his instructions to the jury. In his review of the Crown's case, he pointed out issues that the jury should consider when making their decision. First, he noted the inconsistencies in Ron Wilson's testimonies at the preliminary inquiry and the trial. Next, Justice Bence warned the jury that they should ignore any statements that Nichol John made during her cross examination as these were used

simply to determine if she was a hostile witness. In terms of the physical evidence such as Miller's wallet being found in front of the Cadrain home or Milgaard throwing a cosmetic case out of the car, the judge suggested that these should best be considered coincidences and not necessarily indications of guilt. He also cautioned that if Miller's murderer had raped her after she was dead, the attacker most likely would have been covered in blood, which the Crown was not able to prove. Finally, the judge informed the jury that Melnyk and Lapchuk were both charged with crimes at the time, and may have had ulterior motives for testifying against Milgaard (Karp & Rosner, 1998). When Justice Bence concluded, the jury retired to make their decision. On January 31, 1970, they found David Milgaard guilty of Miller's murder and he was sentenced to life in prison with no chance for parole for ten years (Katz, 2011).

Milgaard's lawyer, Calvin Tallis, appealed the conviction to the Saskatchewan Court of Appeal, based on four grounds (*Milgaard Inquiry*, 2008, Appendix E). First, Tallis argued that the judge allowed evidence which was prejudiced towards the prosecution when he revealed Wilson's blood type. This evidence negated any argument Tallis might have made to argue that Wilson could have been responsible for the murder. Second, Tallis argued that Justice Bence misinterpreted Section 9(2) of the *Canada Evidence Act* (Department of Justice, 1985a) and failed to hold a *voir dire* about Nichol John's statement from May 1969. Third, as a result of this error and Caldwell's cross-examination of John, the jury heard incriminating statements which, despite the judge's warnings, could have swayed their verdict. Last, Tallis argued that the jury's decision was unsupported by the evidence that was presented by the Crown. On January 31, 1971, the Saskatchewan Court of Appeal rejected the appeal. The Court stated that "the jury had applied the proper principles of law to the

evidence before it, and was justified in finding the accused guilty on that evidence . . . the court could find no grounds to interfere with the jury's decision" (Karp & Rosner, 1998, p. 103-104). The Supreme Court of Canada also rejected Milgaard's attempt to appeal on November 15, 1971.

### **The Turn Toward an Alternate Suspect**

The initial police investigation assumed that there might have been a connection between Miller's rape and murder and other attacks happening in the area. Police suspicions were reasonable, but finding the murder suspect in the Miller case was more crucial for them at that time. Larry Fisher, who lived in the basement apartment of the Cadrain home, was in fact responsible for at least seven sexual attacks taking place both before and after Milgaard was convicted.<sup>1</sup> During a September 19, 1970 attack in Winnipeg, Fisher was caught by the Winnipeg Police as he was trying to flee the scene. When questioned by police, Fisher eventually confessed to two of the Saskatoon attacks as well (*Milgaard Inquiry*, 2008). Winnipeg Police contacted the Saskatoon Police to interview Fisher about those attacks. There was no proof against Fisher in the Saskatoon attacks except his confession to police in the context of the Winnipeg assaults. As a result, police from both provinces made a deal with Fisher's lawyers and his guilty pleas were heard in Regina, as it was the most convenient location at the time (*Milgaard Inquiry*, 2008). Fisher was given a thirteen year sentence for the attacks. On January 6, 1980, he was released on parole after serving two-thirds of his sentence. He then went back to North Battleford, Saskatchewan to stay with his mother. By March, Fisher committed another sexual attack and attempted murder. The crime shocked the community and the police suspected Fisher almost immediately. Fisher's

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<sup>1</sup> There were four attacks in Saskatoon (October 21, 1968; November 13, 1968; November 29, 1968; and February 21, 1970), two in Winnipeg (August 1, 1970 and September 19, 1970) and one in North Battleford (March 31, 1980) (*Milgaard Inquiry*, 2008).

lawyers made a deal with the judge and the Crown. Fisher pled guilty to receive a ten year sentence, rather than a potential life sentence. However, he had to serve the remainder of his previous sentence before the current one would begin. He would be in prison until 1994 (Karp & Rosner, 1998).

Unlike his first conviction, which did not attract too much media attention, Fisher's 1980 attack and conviction did not go unreported. But, this attack took place in North Battleford, and most people did not link it to the earlier Saskatoon attacks or to Miller's murder except for his ex-wife, Linda. On the morning of Miller's murder, Larry had been out all night. Linda suspected that he was cheating on her and the next morning, the couple argued. Linda had learned of the Miller murder on the radio and she accused Larry:

‘My paring knife is missing. You're probably the one who's out stabbing that girl.’ Linda didn't really think it was true, and had just wanted to upset him, but she found his reaction chilling. ‘He looked at me like a guilty person who'd just been caught,’ Linda later recalled. ‘The colour drained from his face and he looked shocked and scared’ (Milgaard & Edwards, 1999, p. 24-25).

Linda Fisher went to the Saskatoon police where she spoke with the senior officer on duty, Inspector Kenneth Wagner. She told him about the argument she had with Larry on the morning of the murder and she said that Larry's previous convictions for sexual assaults also raised concerns that he may have killed Gail Miller (*Milgaard Inquiry*, 2008). Inspector Wagner found Linda's statement credible and forwarded the statement to the Investigation Division to be followed up. Linda believed that police had taken her seriously, but she never heard from them, nor was Larry Fisher interviewed about his ex-wife's accusations.

### **The Fight to Establish a Miscarriage of Justice**

David Milgaard's mother never believed that her son was capable of murdering and raping someone. She always insisted that he was innocent and this was reinforced for her in

August, 1980 when David was given a day pass from prison to attend his brother's birthday. While out of prison, he escaped, travelled to Toronto, adopted a false name, and worked for a few weeks. On November 8, 1980, police tracked him down after receiving an anonymous tip about Milgaard's whereabouts. He was chased by an officer who shot Milgaard from behind, hitting him in the lower back (Karp & Rosner, 1998). Even though Milgaard was unarmed at the time, the officer who shot him in the back was "cleared of any wrongdoing" (Karp & Rosner, 1998, p. 144). As Joyce Milgaard argued, "David was believed to be a wanton killer and had no public sympathy" (Milgaard & Edwards, 1999, p. 73-74). This incident proved to Joyce that she needed to fight for her son. In 1980, Joyce Milgaard hired lawyer Gary Young to help get David released on parole and to help prove his innocence. The Milgaard family offered a \$10,000 reward for anyone with information that would free David, and they plastered the city of Saskatoon with posters. The family also re-enacted the murder theory that was presented by the Crown at trial. As Joyce states:

I drove the car, pretending I was David, and my daughter-in-law, Kathy, was Gail Miller, walking from her boarding house to the bus stop. Chris [her other son] filmed the event. . . By the time I did my U-turn to circle back for Kathy, as the Crown said David had done, Kathy was already at the bus stop. We tried this several times, always with the same result. The Crown's theory simply didn't hold up (Milgaard & Edwards, 1999, p. 77).

Young reworked the case: he contacted Tallis to discuss Milgaard's file; obtained a copy of the trial transcript; requested that evidence not be destroyed; obtained a copy of Caldwell's file; and contacted the Saskatoon police for a copy of their file (Milgaard & Edwards, 1999). Young provided the Milgaard family with the information to have the case reviewed. In 1981, Joyce Milgaard terminated her services with Young and hired Anthony Merchant. The latter focused on getting Milgaard released on parole, but he also searched for "something dramatic" such as a recantation to get the case reopened because they could not



rely on evidence that was presented at trial (Milgaard & Edwards, 1999, p. 90). In 1984, Joyce Milgaard became suspicious of Merchant's motives and terminated his services.

Joyce Milgaard also attempted to track down trial witnesses, including Wilson, John and Cadrain. By 1986, she was running out of leads and money and decided to ask Winnipeg criminal lawyer, Hersh Wolch, for help. He agreed to read the trial transcripts, a task which he assigned to his co-worker, David Asper. After reading through the files, Asper thought that Milgaard was innocent, he met with Milgaard, and asked him point blank if he committed the murder to which Milgaard replied no! (Milgaard & Edwards, 1999). Asper also tested out the timing of the crime himself and produced the same incredulous results as Joyce's tests.

From 1980 until 1988, Joyce Milgaard had gathered a network of supporters. The group was composed of David and Joyce Milgaard, their lawyers, David Asper and Hersh Wolch, David's siblings, and other key members including Peter Carlyle Gordge,<sup>2</sup> Paul Henderson,<sup>3</sup> Dan Lett,<sup>4</sup> and Jim McCloskey.<sup>5</sup> Later called the "Milgaard Group," they all shared the belief that David Milgaard was innocent. Over the next two years, they gathered more evidence and launched a Section 690 application (now Section 696.1) to have the case reopened on the basis of a miscarriage of justice.

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<sup>2</sup> "Freelance journalist and writer. He worked as the Manitoba correspondent for Macleans Magazine between 1978 and 1983 and was actively involved in investigating David Milgaard's conviction" (*Milgaard Inquiry*, 2008, p. 21).

<sup>3</sup> "An investigator with Centurion Ministries Inc., a United States non-profit organization that investigates claims of wrongful conviction. He investigated David Milgaard's conviction and Larry Fisher's suspected involvement in Gail Miller's death" (*Milgaard Inquiry*, 2008, p. 24).

<sup>4</sup> "Journalist and reporter with the Winnipeg Free Press who wrote various newspaper articles on David Milgaard's efforts to obtain his release from prison" (*Milgaard Inquiry*, 2008, p. 25).

<sup>5</sup> "Founder of Centurion Ministries Inc. . . [who] made various public statements regarding David Milgaard's conviction, police conduct and Larry Fisher's responsibility for the Miller murder" (*Milgaard Inquiry*, 2008, p. 26).

They filed the application in December, 1988, with five pieces of evidence that they hoped would convince the Minister of Justice to review the case. First, they questioned the testimonies that were given by Melnyk and Lapchuk regarding the motel-room incident. David Asper contacted Deborah Hall, one of the women present during the alleged events. She confirmed that Milgaard pretended to re-enact the murder by stabbing a pillow, however she did not think that Milgaard was being serious. She interpreted the events as “completely innocent” and “crudely comical” (Karp & Rosner, 1998, p. 173). The Milgaard Group believed that Hall’s version of events called into question the evidence given by Melnyk and Lapchuk at trial.

Second, the Milgaard Group approached Dr. James Ferris, head of pathology at the University of British Columbia, requesting assistance regarding the forensic evidence. While Dr. Ferris was unable to perform DNA testing at the time, he did review the evidence used at trial. He questioned the integrity of the semen sample, noting that it was found three days after the murder. He also addressed the issue of blood secretion into the semen, arguing that the blood could have belonged to the victim and thus, there is no way to prove that the blood in the semen was Milgaard’s. Dr. Ferris concluded, “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” (Boyd & Rossmo, 2009, p. 195). The Milgaard Group considered Dr. Ferris’ report to be “a breakthrough in terms of new evidence” and that it proved Milgaard’s innocence (*Milgaard Inquiry*, 2008, p. 629).

Third, in February of 1983, the Milgaard Group learned that Fisher and his wife, Linda, lived in the basement apartment of the Cadrain home at the time of the Miller murder.

They knew that Larry was in prison, but they wanted to contact Linda to ask whether she had seen anything suspicious on the day of the murder. The Milgaard Group placed an advertisement in the *Saskatoon Star Phoenix* in March of 1983 and requested that Linda Fisher contact them. Both Linda and her new husband responded to the Group, but for reasons unknown to them, they did not hear back from the Milgaard Group. In February 1990, Larry Fisher was again brought to their attention when Hersh Wolch received an anonymous phone call saying that Larry Fisher was Miller's killer and that he was currently service a sentence for "rape or murder or both" (*Milgaard Inquiry*, 2008, p. 144). Although the Group had formally submitted their application in 1988, they forwarded this information to Justice Canada as they believed it raised questions about Fisher as a suspect in the case.

Fourth, Ron Wilson recanted some of his previous testimony from trial. In a written statement, Wilson said that he believed Milgaard was innocent and that he felt coerced by police. In an interview with Paul Henderson, the Milgaard Group's investigator, Wilson said that police drove past the crime scene, showed him knives and asked which one belonged to Milgaard. Wilson said he incorporated that "information into his story" (Karp & Rosner, 1998, p. 198). He was seventeen years old and did not know what to do except to go along with what the police wanted as he feared that if they did not charge Milgaard with murder, then they would try to blame him (Karp & Rosner, 1998; Milgaard & Edwards, 1999).

The final issue raised in the application dealt with the timeframe of the murder. The Crown's theory at trial had suggested that Milgaard had committed a murder and rape, disposed of Miller's belongings, returned to his friends and driven to a motel to ask for directions in the span of approximately twenty-five minutes. The Milgaard Group had

attempted to recreate events to test this theory, but their attempts were unsuccessful. This caused them to question the entire Crown theory, arguing that it defied logic.

It took a little over two years for the Minister of Justice to review Milgaard's application. During this time, the Milgaard Group became frustrated with delays and the lack of information being communicated to them. As I discuss in Chapter 6, they became suspicious that high-ranking members of the criminal justice system were conspiring to cover-up the truth about Milgaard. In February, 1991, Kim Campbell denied Milgaard's request to have his case reviewed. Her decision was influenced by several factors. First, Campbell did not think that Hall's interpretation of the events would have swayed the jury's decision (Campbell, 1996). Hall, unlike Melnyk and Lapchuk, had been using drugs at the hotel room party, which undermined her credibility. Second, Campbell argued that the jury was properly instructed regarding the forensic evidence and that the defense counsel made no objection to how the evidence was presented (Campbell, 1994). Campbell interviewed Dr. Ferris about his report and concluded that "the evidence neither inculpated nor exculpated David Milgaard." While there were issues with the method of testing for secretor status, they didn't seem that crucial to the case as Milgaard was never retested by Ferris (Campbell, 1994, p. 620). Third, Wilson's recantation was deemed "unreliable" and "unconvincing" (Campbell, 1996, p. 190). Fourth, Campbell argued that there was no evidence to directly link Fisher to the Miller murder. Finally, in relation to the timing of the crime, Campbell insisted that the issue had already been properly addressed by the counsel and judge at trial. Overall, Campbell (1994) argued "that none of the conclusions argued by the section 690 submissions was supported sufficiently by evidence obtained during the investigation to call the legitimacy of the verdict into question" (p. 619).

On August 16, 1991, Milgaard's lawyers filed a second application to the Minister of Justice (Katz, 2011). This time, Joyce Milgaard and private investigator Paul Henderson interviewed Fisher's victims for details on the attacks. They hoped to create a profile of Larry Fisher, highlighting all of the links between his previous attacks and Miller's murder. By now, the media was highly interested in Milgaard's story, especially because of other recent high profile wrongful conviction cases such as Donald Marshall Jr.,<sup>6</sup> Guy Paul Morin,<sup>7</sup> and Thomas Sophonow,<sup>8</sup> which had highlighted how the justice system failed them and miscarried justice.

In September, 1991, Joyce Milgaard met with Prime Minister Brian Mulroney. She spoke with him about David's struggles with mental illness in prison and the Prime Minister said that he would look into transferring Milgaard to a prison closer to his family (Mulroney, 2007). Mulroney also noted that David's second application had been received and that Justice Minister Kim Campbell was examining it as quickly as possible (Milgaard & Edwards, 1999; Mulroney, 2007). Campbell now focused on the new evidence about Fisher's profile (Campbell, 1996). She understood that these issues needed to be raised in a public forum in order to subdue growing public concerns about the administration of justice (Campbell, 1996). On November 29, 1991, she recommended that the case be heard in front of the Supreme Court of Canada.

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<sup>6</sup> Donald Marshall Jr. was charged in 1971 for the murder of Sandy Seale. On May 10, 1983 he was acquitted for the murder by the Supreme Court of Canada (Katz, 2011). A Royal Commission into his case began in the fall of 1987 and the report was released in 1989.

<sup>7</sup> Guy Paul Morin was convicted in 1991 of the 1984 murder of Christine Jessop. In 1992 he won an appeal and was granted bail. In 1995, DNA evidence proved his innocence and he was acquitted and exonerated (Katz, 2011).

<sup>8</sup> Thomas Sophonow was charged with the 1981 murder of Barbara Stoppel. His first trial in 1982 ended in a mistrial. During his second trial in 1983, he was found guilty and sentenced to 10 years in prison (Katz, 2011). This decision was successfully appealed and a third trial was ordered in 1985. It ended with a life sentence for Sophonow, which was then appealed and he was acquitted. Sophonow was not exonerated until 1999 when DNA proved his innocence (Katz, 2011).

The hearing took place between January 16 and April 6, 1992 and established three categories of miscarriages of justice and associated remedies. The first option was a pardon if there was enough evidence beyond a reasonable doubt to show that Milgaard was innocent. The second option was an acquittal that could be granted if Milgaard could prove that he was more likely innocent than guilty. The third option was a quashing of the original conviction and allowing a retrial if the evidence so warranted. On April 14, 1992, Milgaard's original conviction was quashed, leaving the Attorney General of Saskatchewan with the responsibility of pursuing a new trial. The Supreme Court argued:

While there is some evidence which implicated Milgaard in the murder of Gail Miller, the fresh evidence presented to us, particularly to the locations and the pattern of the sexual assaults committed by Fisher, could well affect a jury's assessment of the guilt or innocence of Milgaard. The continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider the fresh evidence (Boyd & Rossmo, 2009, p. 200).

The Attorney General, however, decided not to order a new trial, since the case was over twenty years old, and Milgaard had served almost his entire life sentence since he had violated his day parole by escaping. As a result of the Attorney General's decision, Milgaard was freed from prison, but he was not legally proven innocent and the province of Saskatchewan refused to compensate him or hold an inquiry.

For the next five years Milgaard was free but not innocent in the eyes of the law, a topic I examine fully in Chapter 6. Suffice it to say that the Milgaard Group believed that an inquiry was necessary to prove David's innocence but they also mobilized to demand DNA testing. The results of these tests produced two findings. First, Milgaard's DNA did not match the DNA from the sperm cells found on Miller's clothing. Second, the DNA did match that of Larry Fisher (Boyd & Rossmo, 2009). On July 18, 1997, Milgaard was finally proven to be legally innocent of the murder and rape of Gail Miller. Justice Minister Anne McLellan

issued a statement and apology, stating that “Milgaard had suffered a terrible wrong, and she extended her deepest sympathies and her regret” (Karp & Rosner, 1998, p. 310). One week later, on July 25, Fisher was arrested for the rape and murder of Miller. In May 1999, Milgaard was awarded \$10 million in compensation, \$4 million from the federal government and \$6 million from the Saskatchewan government. Milgaard was also promised a public inquiry once the proceedings against Fisher were completed.

Larry Fisher argued that his trial should be moved from Saskatoon to Yorkton in order to avoid any potential juror bias. This request was approved and his trial began in October, 1999. On November 22, 1999, he was found guilty of the rape and murder of Gail Miller and sentenced to life in prison (*Milgaard Inquiry*, 2008). Fisher appealed the verdict on the grounds that there were flaws in the admission of evidence and that the trial judge made biased comments about Milgaard that could have swayed the jury (Branch, 2004). The appeal was dismissed by both the Saskatchewan Court of Appeal and the Supreme Court of Canada. The long-awaited Milgaard Inquiry was now on track and it began in 2005.

### **The Public Inquiry**

Justice Edward McCallum of the Alberta Court of Queen’s bench was selected as the commissioner with the following mandate:

The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller. The Commission of Inquiry will also have the responsibility to seek to determine whether the investigation should have been reopened based on information subsequently received by the police and the Department of Justice. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province of Saskatchewan (*Milgaard Inquiry*, 2008, p. 6).

As we shall see in Chapters 5 and 6, the inquiry explored many different facets of the case in order to determine why Milgaard was wrongfully convicted and whether the investigation should have been reopened sooner. The Commission examined the investigation of the murder, including the original examination of the crime scene, police interaction with key witnesses, the autopsy and allegations of police misconduct. Next, the Commission explored the criminal proceedings, including the conduct of lawyers, the judge, and the trial process itself. They also examined the investigation and prosecution of Larry Fisher, including all the past conviction information received by the Justice Minister and Saskatchewan Justice. Based on his examination of these issues, Commissioner MacCallum made thirteen recommendations about wrongful convictions and the administration of criminal justice which I discuss in detail in Chapter 6.

This chapter has examined the wrongful conviction of David Milgaard and set the stage for my analysis of the public inquiry. In order to better understand the phenomena of wrongful convictions and the role of commissions of inquiry, the next chapter explores the literature on both of these topics and develops a theoretical framework to make sense of the parties, procedures and practices that put the Milgaard wrongful conviction into an official discourse.



## **Chapter 3: Literature Review and Theoretical Framework**

### **Introduction**

This chapter explores the current literature about wrongful convictions and commissions of inquiry and develops a theoretical framework for the thesis. I focus first on wrongful conviction literature including such topics as the causes, effects, and remedies to miscarriages of justice as well as critiques within the literature. Next, I focus on the literature on commissions of inquiry, including such topics as the role of the commissioner, the pros and cons of public inquiries, and the struggle between truth and justice in inquiries. I explore critiques of the literature and discuss theoretical issues that arise from my review. Then I explain why issues of power, truth, discourse and knowledge are important to a theoretically informed approach to both wrongful convictions and public inquiries. Guided by the work of Michel Foucault and Howard Becker, I discuss different types of power and show how power has the ability to produce knowledge, discourses and truths. I examine the various conditions of power and adopt the concept of a “hierarchy of credibility” to help conceptualize the complex connections around power and truth. I also explore the role of resistance in relation to official discourses and public inquiries.

### **Wrongful Conviction Literature**

A wrongful conviction, also referred to as a miscarriage of justice, occurs when an individual is investigated, arrested, convicted and imprisoned for a crime he or she did not commit. Research, including studies conducted in both Canada (Bell et al., 2008; Denov & Campbell, 2005; Kennedy, 2004; and Scullion, 2004) and the United States (Gross & O'Brien, 2008; Huff, 2002; Huff et al., 1986; Loewy, 2007; Ramsey & Frank, 2007; Rattner, 1988; and Zalman, 2006) has explored many facets of wrongful convictions. Some have

studies wrongful convictions broadly, examining cases and attempting to explain the major errors in these convictions (Colvin, 2009; Denov & Campbell, 2005; Huff et al., 1986; Rattner, 1988). Others have focused more specifically on topics, such as knowledge of wrongful convictions, in the hope that increased awareness will help prevent future cases (Bell et al, 2008). Still other have examined legal issues such as Section 696.1 of the *Criminal Code*, which allows those convicted of a crime to apply to the Minister of Justice to have their case reviewed on the basis of a potential miscarriage of justice (Scullion, 2004). Although there are disparities among the findings, similar themes have emerged from the research – the causes, effects, and remedies to wrongful conviction.

### ***The Causes of Wrongful Convictions***

The police investigation is arguably the most important process in criminal procedure that contributes to wrongful convictions. For example, Ramsey and Frank (2007) argue that “police officers or detectives are often the first members of the criminal justice system to intervene in a criminal case and become involved in a very critical time – the beginning” (p. 445). If there is an error early on in the investigation, it may be difficult to discover the truth or to remedy mistakes as the case progresses. According to the literature, the most commonly identified problems include: eyewitness errors, such as misidentification due to stress (Huff, 2002) and failures of line-up and photo identification techniques (Gross & O’Brien, 2008); forensic science errors, such as testing mistakes, lack of proper equipment or poor training (Denov & Campbell, 2005; Gross & O’Brien, 2008; Huff, 2002; Loewy, 2007); false confessions where individuals admit to crimes they did not commit (Leo, 2009); the use of jailhouse informants who misrepresent the truth for their own gain (Huff, 2002; Kennedy, 2004; Loewy, 2007); professional misconduct by police including false accusations and bias;

professional misconduct by lawyers, including withholding evidence, overzealousness to the point of willful blindness, an over-exaggerated importance on ‘winning’ trials; incompetence and the resort to plea-bargaining to ‘do justice’ (Huff, 2002; Ramsey & Frank, 2007); and racial and class bias on the part of criminal justice system professionals where those ‘known to the police’ are unfairly targeted and prosecuted (Denov & Campbell, 2005; Huff et al., 1986). Of course, it is rarely one cause, but rather a combination of several errors that lead to wrongful convictions (Denov & Campbell, 2005; Huff et al., 1986).

### *The Effects of Wrongful Convictions*

Many wrongful conviction victims face the same serious social effects as those who are rightfully imprisoned (Campbell & Denov, 2004; Grounds, 2004; Huff, 2002). Victims experience a sense of physical and psychological loss. For example, inmates often lose their families and some lose their children to social services (Denov & Campbell, 2005; Grounds, 2004; Huff, 2002; Ricciardelli & Clow, 2012; Westervelt & Cook, 2010). Denov & Campbell (2005) note that wrongful imprisonment gives “rise to their loss of freedom, dignity, and most important, their credibility” (p. 234). For those who are wrongfully convicted, however, parole is much more difficult to receive. Despite claims that emotions do not play a role in criminal proceedings, a great amount of emphasis is placed on remorse (Weisman, 2008). Individuals who have been wrongfully convicted are unlikely to show remorse. As a result, “if the wrongfully convicted maintain their innocence, they are likely to be . . . subjected to the same deprivations as others who have been designated as lacking remorse” (Weisman, 2008, p. 239). Ironically, wrongfully convicted individuals who do not show remorse are unlikely to receive parole, while those who do admit their guilt to receive

parole are likely to have a more difficult time proving their innocence later, as is also the case with those who falsely confess.

Wrongful conviction victims also experience effects similar to other inmates upon release from prison. For example, there may be a continued sense of “imprisonment upon release” (Denov & Campbell, 2005), and the wrongfully convicted often have difficulty reintegrating into society (Grounds, 2004; Huff, 2002; Westervelt & Cook, 2010).

Challenges for them include: learning to live without the routine and structure of prison life, finding meaningful employment in the labour market, constantly feeling the need to have an alibi at all times, and coping with the social stigma associated with having been in prison (Huff, 2002; Ricciardelli & Clow, 2012; Westervelt & Cook, 2010).

In addition to the social effects of being wrongfully convicted and imprisoned, victims of a miscarriage of justice must also organize and mobilize considerable resources to prove their innocence. Within the Canadian criminal justice system, appeals may be attempted at both the provincial and federal level and victims may turn to the Association in Defense of the Wrongly Convicted (AIDWYC) for assistance. This association is “a non-profit organization dedicated to identifying, advocating for, and exonerating individuals convicted of a crime that they did not commit and to preventing such injustices in the future through education and reform” (AIDWYC website). Often, the AIDWYC helps victims apply for ministerial review under Section 696.1 of the *Criminal Code* (previously Section 690):

An application for ministerial review on the grounds of a miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with

respect to the conviction or finding have been exhausted (Department of Justice, 1985b, s. 696.1(1)).

Applications are sent to the Minister of Justice. Typically, the applicant must provide new and significant information not previously used at a trial or appeal. If evidence suggests that an individual may have been wrongfully convicted, and as we have seen, several options are available including: “ordering a new trial; ordering a new hearing for a person who was found to be a dangerous offender or a long term offender; or referring a case to the Court of Appeal of a province or territory to be dealt with as if it were an appeal” (Scullion, 2004, p. 190). However, few applicants meet the criteria required to petition the Minister of Justice, and even fewer are successful in their attempts at appeals. The need for new evidence is not always an option available to those who are wrongfully convicted, thus limiting those who are able to have their cases reviewed. There is also a tendency for criminal justice system professionals not to want to have their decisions inspected or overturned.

### ***The Remedies of Wrongful Convictions***

For those victims of wrongful convictions who are successful in proving their innocence through a section 696.1 application, the next stage is release and exoneration. Many individuals seek compensation for the wrong that has been done to them. “The awarding of financial compensation is an attempt by the government to rectify a miscarriage of justice, but such awards are a small consolation for the devastation to family, credibility, livelihood, and mental health that a wrongful conviction entails” (Denov & Campbell, 2005, p. 244). Indeed, compensation is sometimes only awarded after a long and difficult fight by the victims, who must prove that they deserve to be recompensed for their mistreatment. The wrongfully convicted must once again become involved with the criminal justice system that was responsible for their initial victimization (Westervelt & Cook, 2010). In Canada, the

amount of financial compensation has ranged from \$36,000 to \$13.1 million with an average award of approximately \$2.9 million (Katz, 2011, p.206-207).

Once a victim has received compensation and they attempt to return to a life prior to their wrongful conviction, we rarely hear about them. Sometimes, victims will bring legal actions against those who were responsible for their wrongful conviction. However, it is very rare that a member of the criminal justice system will be held responsible for an error that led to a wrongful conviction (Huff, 2002). In some cases, however, commissions of inquiry have been held to determine what led to a wrongful conviction in hopes of preventing future miscarriages of justice. Apart from compensation and a possible public inquiry, there is very little recourse available for wrongful conviction victims. It would seem that wrongful convictions are not common enough to warrant special programs and alternate remedies to costly lawsuits or public inquiries.

#### ***Critiques and Theoretical Problems within the Wrongful Conviction Literature***

Although the literature about wrongful convictions addresses several aspects of miscarriages of justice, there is still much research that is missing. Leo (2005) argues that much of the current research has been done by journalists, psychologists and lawyers, and has taken one of three forms: (1) the 'big picture' studies which follow a 'familiar plot' of discussing the justice system's ideologies, the high number of wrongful convictions, and the causes and reforms for reducing their occurrence; (2) the 'specialized literature' studies which focus on individual causes of wrongful convictions; and (3) the 'true crime' stories which describe the most outrageous cases but lack any academic analysis or reference to the literature. Based on the state of the literature, Leo (2005) identifies two gaps in the literature. First, he argues that criminologists and sociologists have been relatively absent from the field

of wrongful conviction research. Second, he suggests that there is a lack of theorizing about the deeper causes of these injustices.

Norris and Bonventre (2013) agree and they argue that “miscarriages of justice are the production of a complex criminal justice system often based upon the decision made by actors within the system” (Norris & Bonventre, 2013, p. 5). They suggest five theoretical perspectives for examining wrongful convictions. First, they refer to “forced reaction theory” which argues that the criminal justice system is made up of “well-intentioned, rational decision makers” who attempt to ensure “the safety of society” (Norris & Bonventre, 2013, p. 7). From this point of view, wrongful convictions are defined as an “unfortunate outcome” of trying to control crime (Norris & Bonventre, 2013, p. 7). Researchers could use this perspective to examine decision-making practices with the understanding that errors are not born out of malice or misconduct, but rather “are rational attempts to achieve the systemic goals of crime control and efficient processing” (Norris & Bonventre, 2013, p. 7-8). Second, the authors examine Herbert Packer’s crime control and due process models. Crime control values emphasize the “suppression of crime” whereas due process values attempt to protect individuals from “unjust state actions” (Norris & Bonventre, p. 10). The authors suggest that wrongful convictions should be analyzed by considering the roles that these values and models play within the justice system. Third, Norris and Bonventre (2013) argue that the justice system is “contingent on the political climate of a particular period, to be used as a means of gaining political capital” (p. 11). Social scientists, they argue, should consider decision-making of criminal justice system actors as well as policy reforms, but within a political context. Fourth, the authors argue that crime is socially constructed and that the justice system responds to this by expanding its practices in order to remain legitimate.

Norris and Bonventre (2013) believe that wrongful conviction should be analyzed as a “byproduct” of the increasing size and power of the criminal justice system (p. 13). Fifth, Norris & Bonventre (2013) advocate for a critical criminological approach to the justice system, arguing that those who are socially marginalized and disadvantaged “have been oppressed through the state’s excessive, and sometimes unjust, use of its policing powers” (p. 14). They argue that since most people involved with the justice system are marginalized, we can assume this is also true for the wrongfully convicted.

In addition to Leo’s and Norris and Bonventre’s work, my review of the literature discovered only three other theoretically informed studies. Huff et al. (1996) and Huff (2001), for example, make use of Herbert Packer’s work on crime control and due process to theorize wrongful convictions. They argue that certain crime control practices, such as plea bargaining are ironic and can actually contribute to wrongful convictions. Subsequently, when errors are made during the investigation, they are more difficult to detect at the trial stage, thus affecting an individual’s right to due process. So the very practices of crime control and due process that are put in place to ensure that the guilty are convicted are paradoxical and may result in the conviction of innocent persons. Lofquist (2001) offers a second theoretical based on organizational wrongdoing. He says there are two lines of argument. The first explanation is based on rational choice theory and argues that “wrongful convictions are produced in a linear fashion by a series of police and prosecutorial decisions likely colored by racial bias, low regard for the targeted suspect, or public or political pressures” (Lofquist, 2001, p. 175-176). In other words, criminal justice personnel pursue the wrong suspect as a response to a negative or undesirable quality possessed by that



individual. The second line of argument emphasizes structural factors in wrongful convictions. In this view:

Wrongful convictions are organizational outcomes linked to premature commitment to a particular suspect, inattention to alternative scenarios due to the operation of ‘normal science’ among investigators, the organizational and legal structures of the criminal justice system, and the lack of resources available to the defense (Lofquist, 2001, p. 176).

Investigation issues, tunnel vision, and systemic bias within the criminal justice system act in concert to enable wrongful convictions.

Despite these attempts, little work has been done to further theorize wrongful convictions, or to supplement what has already been done by Huff, Lofquist, Leo, and Norris and Bonventre. Because much research has been conducted by journalists, psychologists, and lawyers, current knowledge of wrongful convictions is focused on legal causes rather than “root causes” (Leo, 2005, p. 213). Leo (2005) elaborates:

Sociologically, they need to study how the institutions of criminal justice (police, prosecutors, defense attorneys, judges and juries) are structured and how the decision making, actions and ideologies of these social actors are patterned in the production of both accurate and erroneous outcomes. . . Criminologists need to better understand sociologically how the various legal actors promote certain perspectives and ideologies about justice and how, in fact, they deliver justice (p. 215-216).

My thesis has been influenced by Leo’s and Norris and Bonventre’s suggestions in two ways. First, I study an area of the wrongful conviction process that has been neglected within the literature: the role of the commission of inquiry as a response to a miscarriage of justice. Secondly, I attempt to theorize the wrongful conviction inquiry process from a criminological/sociological perspective, influenced by the work of Michel Foucault on power, truth, discourse and resistance, as well as Howard Becker’s work on the ‘hierarchy of credibility.’ As will become apparent, these theories offer a solid framework for analyzing an

inquiry and its relationship with wrongful convictions. I explore the texts and narratives of criminal justice system actors throughout the inquiry process as a means of learning how “truth” was constructed and contested in the conviction of David Milgaard.

### **Commission of Inquiry Literature**

In Canada, commissions of inquiry (also known as royal commissions or public inquiries), have been in use since Confederation, exploring numerous topics such as banking; Aboriginal affairs; disasters or accidents; natural resources; gambling; transportation; penitentiaries; immigration; and even war (Courtney, 1969, p. 201). But what exactly is a commission of inquiry and what purpose does it serve? In terms of public inquiries related to the criminal justice system, the most relevant definition comes from Justice Hickman, a retired Supreme Court judge, who led the Royal Commission on the Donald Marshall Jr. case:

The primary function of a commission of inquiry is, as its name suggests, to inquire. It is not a court, and it is not charged with establishing guilt or legal fault. Given a specific mandate through its terms of reference, it investigates, assesses, and makes findings. If requested, it may make recommendations directed at preventing or correcting the situation that led to its creation (Hickman, 2004, p. 185).

In relation to wrongful convictions, commissions of inquiry determine what led to the investigation, conviction, and incarceration of an innocent person, and make recommendations regarding the prevention of future miscarriages of justice. In Canada, there have been seven wrongful conviction commissions of inquiry: the Marshall Inquiry (Donald Marshall Jr.); the Kaufman Inquiry (Guy Paul Morin); the Sophonow Inquiry (Thomas Sophonow); the Milgaard Inquiry (David Milgaard); the Lamer Inquiry (Ronald Dalton, Greg Parsons, and Randy Druken); the LeSage Commission (James Driskell); and the Goudge Inquiry, which explores the role of pathology in the criminal justice system as a

result of numerous wrongful convictions at the hand of former pathologist Charles Smith (Katz, 2011).

The decision as to whether or not to hold an inquiry is based solely on the discretion of the Federal and Provincial governments (Centa & Macklem, 2001; D’Ombain, 1997). The *Inquiries Act* outlines that the government can suggest an inquiry “concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof” (Department of Justice, 1985c). D’Ombain (1997) observes:

The most important moments in the life of a public inquiry occur right at the beginning with the decision to establish an inquiry, the selection of its members and the drafting of its terms of reference. Once these executive acts have taken place, there is no going back. . . These formative decisions are critical, and getting them right has a lot to do with the success of an inquiry and the relevance and potential application of its recommendations (p. 92-93).

Typically, the government sets out the terms of reference which dictate such things as what the commission will investigate, the timeline of the inquiry, and usually the allocated budget (Centa & Macklem, 2001). The drafting of the terms of reference are normally the government’s last involvement with the inquiry prior to turning it over to the commissioner.

### ***The Role of the Commissioner***

The role of the commissioner at an inquiry is to hear all of the facts being presented, decide what types of questions will be asked, prepare the report, and write the recommendations (Schwartz, 1997). The commissioner has the discretion to decide what evidence will be used and what witnesses will testify, without the worry about such issues as disclosure or accountability often associated with the criminal trial process (Scruton, 2004). The commissioner must be able to navigate the terms of reference and determine how best to approach the subject matter in order to address the government’s guidelines. When the terms

of reference are narrow, the commissioner faces the challenges of making recommendations that are most likely to get implemented (Gilligan, 2002).

The role of the commissioner is often filled by a judge, who is believed to be impartial and objective, experienced at resolving conflicts, capable of assessing the credibility of witnesses, and knowledgeable of the subject matter of the inquiry (Courtney, 1969; Gilligan, 2002, 2004; Winterton, 1987). However, several criticisms have arisen surrounding the selection of judges as commissioners. Skeptics are concerned whether judges are truly detached from political parties and the government; whether judges maintain their neutrality during the course of the inquiry (Courtney, 1969; Prasser, 1985); and whether judges are ideologically and politically compromised by their civil servant duties (Gilligan, 2004). Winterton (1987) argues that judges should only act as commissioners for certain public inquiries, especially those that revolve around the legal system and the administration of justice. He also argues that by appointing retired judges, it is possible to reap “the benefits of long judicial experience and recognized impartiality but also, presumably, an assured absence of ambition for promotion” (Winterton, 1987, p. 113).

### ***Pros and Cons of Commissions of Inquiry***

One of the main themes of the literature about inquiries deals with evaluating their pros and cons. Some authors have criticized public inquiries suggesting: that inquiries direct attention away from government controversies during times of political unrest (Courtney, 1969; D’Ombrain, 1997); that inquiries are too costly, too time consuming, and result in a loss of public support (D’Ombrain, 1997); that inquiries are not independent from the governments that created them (Centa & Macklem, 2001); and that inquiries “do little else but gather dust in archives and act as fodder for social scientists” (Courtney, 1969, p. 201).

Other authors have also questioned the ways in which witnesses are questioned at inquiries, arguing that “public inquiries can roam about freely, compelling witnesses to disclose personal or embarrassing information and opinions . . . a witness is relatively free to trash the reputation of others” (Schwartz, 1997, p. 73-74).

The positives of public inquiries include: their flexibility in regard to procedures, their scope in regard to who appears before them to testify, and their ability to raise public awareness about the issues under investigation (Centa & Maklem, 2001; D’Ombrain, 1997; Gilligan, 2004; Iacobucci, 1989). Authorities embrace public inquiries because they collect facts, correct errors, educate the public and restore normalcy to institutions under review. As Justice Peter Cory suggests:

One of the primary functions of public inquiries is fact-finding. They are often convened in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover ‘the truth.’ Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislature to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfill an important function in Canadian society. In times of public questioning, stress and concern, they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing helps to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public (*Phillips v. Nova Scotia*, 1995, para. 62).

Burton and Carlen (1979) insist that incidents such as wrongful convictions constitute a ‘crisis of legitimacy’ because it damages those “ideological social relations that reproduce dominant conceptions of the essentially just nature of the politico-judicial structures of the

state” (p. 13). In this view, public inquiries help to repair these legitimation problems through the production of ‘official discourses.’ Burton and Carlen (1979) elaborate:

One established and routine political tactic used in the reparation of fractured images of justice is to hold an ‘impartial’ inquiry to ascertain the facts of the problem, allocate a quasi-judicial form of culpability and to recommend any institutional reforms that will inhibit future occurrences . . . The function of official statements is primarily to allay, suspend and close off popular doubt through an ideal and discursive appropriation of a material problem (p. 13-14).

Thus, despite some of their negative features, public inquiries have the positive ability to restore public faith in the criminal justice system.

### *Truth vs. Justice*

Another aspect of commissions of inquiry highlighted in the literature is the constant struggle between truth and justice. Public inquiries are capable of uncovering the truth but it is often at a cost. Those who are responsible for a wrongdoing are rarely held accountable by the courts (Gilligan & Pratt 2004; Scraton, 1999). In his article on the 1989 disaster at Hillsborough soccer stadium in Sheffield, UK, Scraton suggests that the stadium was not meant to hold the volume of fans who attended the match. A barrier collapsed leading to a catastrophe which resulted in the death of ninety-six individuals (Scraton, 1999, p. 273). Chief Superintendent Duckenfield, who had given the order for extra people to be allowed into the pen where the accident occurred, changed his story to divert blame; Duckenfield told Football Association officials that ticketless fans had rushed the gates and forced their entry into the stadium (Scraton, 1999, p. 283). Immediately, the discourse surrounding the accident shifted from one of sadness for the lives lost, to anger that alcohol was the cause of the unruly fans rushing into the stadium. “The vilification of those who died and survived became cemented in the public’s consciousness. Among the bereaved, the survivors, and their families it caused outrage, but also deep pain and suffering” (Scraton, 1999, p. 285).

A public inquiry, headed by Lord Justice Taylor, was guided by the following terms of reference: “To inquire into the events at Sheffield Wednesday Football Ground on 15 April 1989 and to make recommendations about the needs of crowd control and safety at sporting events” (Scraton, 2004, p.55). In his final report, Lord Justice Taylor determined that the main cause of the Hillsborough disaster was overcrowding and he criticized the stadium owners and safety engineers for failing to maintain and enforce safety standards of the stadium. That being said, Taylor argued that the main reason for the overcrowding was “failure of police control” (Scraton, 2004, p. 55) and he condemned senior officers for “their incompetence on the day and their evasiveness at the Inquiry” (Scraton, 2004, p. 56). In 1997, following allegations that there had been a police cover-up, Jack Straw, Labour Home Secretary, set up a judicial scrutiny of the inquiry, however, no new conclusions were reached:

Despite making a major contribution to stadium safety and crowd management, the Taylor inquiry was found wanting by those most closely associated with the disaster. Taylor denied that the slow arrival of ambulances, inadequate medical equipment and lack of triage had contributed to the high loss of life. He paid minimal attention to the chaos in the gymnasium. He failed to consider the appropriateness of the decision to designate the gymnasium a temporary mortuary, to take blood alcohol levels from the deceased or to present the dead in body-bags to waiting relatives. . . [the] Judicial Scrutiny failed to resolve the unanswered questions or to deal with the wider issues. It was a device derived in political expediency rather than evidence of a commitment to truth” (Scraton, 2004, p. 57-58).

The South Yorkshire Police still held all of their ‘files’ and notes about the Hillsborough disaster, and the bereaved family members continued to be left in the dark as to the truth of what happened. Eight years after the incident, family members were finally allowed access to “the ‘body files’ on their loved ones; each containing the pathological evidence, a ‘continuity chart’ of locations, photographs, and witness statements” (Scraton, 1999, p. 296). In 2009,

the Hillsborough Family Support Group submitted a request to the Home Secretary for “full disclosure of documents generated by all inquiries and investigations” (Scraton, 2013, p. 17). An independent panel was set up to examine these documents, and found that previous investigations had failed to identify “the full extent of the stadium’s structural deficiencies and the institutional complacency and negligence in managing and policing the venue” (Scraton, 2013, p. 22). Upon release of these findings, Prime Minister David Cameron apologized to the families for the injustices they had faced, but no one was ever held accountable for the harms caused or the cover-ups.

Contrarily, Popkin and Roht-Arriaza (1995) argue that knowing the truth can be enough for the victims to heal and come to justice in their own terms. In their discussion of Latin American truth and reconciliation commissions, they suggest that forgiveness is an alternative to justice as a means of redress. The authors suggest that “forgiveness requires knowledge of what is to be forgiven, which has deep roots in morality and religion” (Popkin & Roht-Arriaza, 1995, p. 99). They argue that those seeking justice will be impacted by how the findings are presented and whether they are implemented. For the families of the Hillsborough victims, seeing those who were responsible come to justice would have been the ideal outcome. Even though their loved ones were eventually cleared of blame, and the truth was finally publicized, it absented responsibility or justice.

### ***Critique and Problems within the Inquiry Literature***

Based on my survey of the literature on commissions of inquiry, there are two issues to address. First, there is very little work that has assessed the value and function of inquiries and their results in relation to society as a whole. The exceptions to this are Burton & Carlen (1979) and Gilligan & Pratt (2004) who believe that inquiries offer an additional means



through which the public can learn about the justice system. They argue that information produced through these inquiries help to produce ‘official discourses’ about the issues at hand. These ‘official discourses’ “provide an official, objective truth about crime” and provide “*the truth*” about the matters which are being assessed before the commission (Gilligan & Pratt, 2004, p. 2, authors’ italics). In my thesis I build on some of the ideas that Burton and Carlen (1979) and Gilligan and Pratt (2004) offer and connect them to Michel Foucault’s work on truth, power, knowledge and discourse in order to offer a more comprehensive theorization of public inquiries as they relate to miscarriage of justice. In Chapter 6, I expand upon the discussion of official discourses in detail.

Second, public inquiries are often used as a response to wrongful convictions, yet few studies examine the two issues together. As such, I have turned to public inquiries on other topics for inspiration. One such example is McMullan’s (2007) article on the 1992 Westray mining disaster where he explores the relationship between official inquiries and the production of truth, focusing on medical discourse within the trial and the public inquiry. In the immediate aftermath of the mining disaster in Pictou County, NS, the bodies that were recovered were examined by medical examiners to determine the causes of death, thus creating a discourse of the body. The initial autopsies produced a discourse of accidental death, where the miners died from carbon monoxide poisoning. One of the families requested an independent forensic examination, where the pathologist determined that there were injuries consistent with blast injury, yet the death was still classified as accidental. The medical discourse of ‘accidental death’ helped ensure that suspicions about mine conditions and organization were dismissed.

In 1995, a criminal trial was held to inquire into allegations that the mining managers were operating an unsafe work environment. Medical testimony at trial was given by nurses and laboratory analysts, doctors, and the chief medical examiner. Among these testimonies, a sort of hierarchy emerged, where more emphasis was placed on the opinions of individuals at the top rather than the bottom. As McMullan (2007) argues: “[The lawyers] downplayed the accounts of other medical experts and at the trial endorsed only the chief medical examiner’s texts as truthful” (p. 33). Any suggestions that went against the ‘official’ medical discourse were shut down by lawyers. The criminal proceedings ended in a mistrial, and all charges were stayed. A public inquiry was held between 1995 and 1997. For the first time, the accounts of the surviving miners and bereaved family members were finally heard, thus creating a new discourse surrounding the mining disaster:

For them, the Westray story contained abundant earlier evidence of illegal mining practices, including unauthorized tunneling in the dangerous gaseous coal seam in Pictou County, a culture of laissez-faire coal production where the existing inspectorate did not enforce occupational health and safety laws at the mine site, and a system of government collusion with the mine owner involving widespread political favouritism, guaranteed public loans, subsidies, tax incentives and infrastructure grants, and a protected coal market at three times the market value to broker the mine into existence. For the miners and their families, this created a climate of high risk extraction and low duty of care (McMullan, 2007, p. 35-36).

What we see here is a battle between the ‘accidental discourse’ put forth by medical and legal institutions, and the ‘workplace violence discourse’ that was produced by the surviving miners and their families. In this sense, it was the duty of the commissioner to determine which discourse was more credible and which formed the truth surrounding the Westray disaster. The commissioner sided with the miners’ accounts, and subsequently criticized the government and the mining company. The truth of the disaster, however, came at a price. Those who were responsible were never held accountable, and there was no justice for the

bereaved. Rather, the inquiry tried to ensure that faith in the state and the mining industry were renewed. McMullan's article illustrates how discourses can be constructed, reconstructed, and refuted throughout the inquiry process, especially in relation to the criminal trial. It demonstrates the role of power in relation to discourses and truth, especially in relation to the hierarchical presentation of information and testimonies, something that I examine regarding the Milgaard case.

My research project travels where few have gone before and examines the relationship between commissions of inquiry and wrongful convictions. It is guided by the argument that a wrongful conviction commission of inquiry is able to produce an official discourse about that case, and possibly even about wrongful convictions as a whole. I explore the ways in which truths are contested and how they change throughout the course of the inquiry. I examine how power and resistance play a role, how discourses are produced and reproduced during the inquiry, and what factors lead to the creation of an official discourse about Milgaard's wrongful conviction.

### **Theoretical Framework**

This thesis is guided by the theoretical work of Michel Foucault and Howard Becker. I describe Foucault's work on power, knowledge, discourses, regimes of truth, truth telling, and resistance, and show how they come together to offer a way of seeing and knowing the texts of a public inquiry. Although Becker does not specifically theorize power, I examine his work on the 'hierarchy of credibility' and argue that it is useful in understanding the credibility of truth claims at the Milgaard Inquiry.

*Conditions of Power, Discourse and Truth*

Perhaps the easiest way to begin a discussion of Foucault's ideas of power is to examine what power is not. For Foucault, power is not an entity that is wielded in a top-down manner by one party over another. Power is not something we should speak of negatively. Foucault (1977) notes: "We must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses,' it 'censors,' it 'abstracts,' it 'masks,' it 'conceals' (p. 194). Power is much more than domination by one group over another; it is omnipresent and can be found in most social interactions. In other words, "power is 'always already there'" and "one is never 'outside' it" (Foucault, 1980, p. 141). In order to explain this further, Foucault offer five conditions of power (Foucault, 1978, 1980; Lynch, 2011). To begin, power is not something that is owned, but exercised (Lynch, 2011). As Hoy (1986) argues:

Power is not simply what the dominant class has and the oppressed lack . . . [it] is a strategy, and the dominated are as much a part of the network of power relations and the particular social matrix as the dominating (p. 134).

Power, then, is characterised more by a series of relations and techniques, and these according to the second condition, "are not exterior to other relations" such as kinship, family, economic, political or sexual relationships (Lynch, 2011, p. 22). Third, power relations cannot be lessened to a binary relationship based on domination. Power comes from below and is exercised in a variety of "overlapping and intertwined relationship" (Lynch, 2011, p. 22). Opponents do not face off and battle for a thing called power. Rather, power relations are deeply rooted in the social networks of our society and are dependent upon such factors as time and space. Power, then, is always in play, however, who is best able to exercise it is dependent upon a number of factors, such as context, timing and other actors

and activities in a strategic set of social networks. The fourth condition of power is that its relations are “intentional and non-subjective” (Lynch, 2011, p. 22). That is, there are no exercises of power without “a series of aims and objectives” that are free of emotion and personal bias. The last condition is that power is always accompanied by resistance. Without resistance, power would become domination. As Lynch (2011) suggests, there needs to be “two bodies (or minds) pushing and pulling against each other” otherwise power relations would be exercised in the form of domination where the person who is subject to power would be unable to resist oppression (p. 24). Resistance, then, is characterized by its own techniques and mechanisms which attempt to change the ways in which truths are produced.

Foucault spent much of his work describing the relationship between power and knowledge (*pouvoir/savoir*). As Feder (2011) notes, although Foucault’s term ‘*pouvoir/savoir*’ is often translated as ‘power/knowledge,’ we must also consider alternate translations for ‘*pouvoir*,’ including “to be able to” or “can” (p. 55). So we must understand power (*pouvoir*) in a dual sense: “as both ‘power’ as English speakers generally take it. . . but also as a kind of potentiality, capability or capacity” (Feder, 2011, p. 55-56). When we take these secondary definitions into consideration, it becomes easier to understand the relationship between power and knowledge: “power produces; it produces reality; it produces domains of objects and rituals of truth” (Foucault, 1977, p. 194). In other words, power generates discourses or bodies of knowledge, and these bodies of knowledge are classified into different disciplines. Discourses, Foucault says, are composed of four different components: *objects* or what is studied or produced; *operations* or the ways of treating these objects; *concepts* or the terms, ideas and language found within a discourse; and *theoretical options* or assumptions, theories and hypotheses about knowledge (McHoul & Grace, 1998,

p. 44). Discourses, then, are bodies of knowledge that define the ways in which we understand, think about and speak about objects and practices. These discourses, which are produced through power, contribute to what society deems to be acceptable and what they consider to be true and false. In other words, they create a 'regime of truth.' Foucault (1980) explains:

Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value and the acquisition of truth; the status of those who are charged with saying what counts as true (p. 131).

It is important to note that discourses and truths may be discontinuous; over time they change and overlap. The beginning of a new discourse does not necessarily mean that another one has ended. Discourses can co-exist. Foucault uses the examples of madness and criminality to demonstrate this idea. For example, medical doctors explain madness and criminality in relation to physical symptoms, whereas psychiatrists are likely to cite social and psychological reasons to theorize criminal conduct and those suffering from mental illnesses. Different disciplines offer different discourses, both of which may be accepted as a regime of truth, or a way of understanding the "truth" of madness or criminality. In addition, Foucault (1984) insists that there is no such thing as an absolute truth, but rather, several discourses and versions of the truth may be in competition with each other. As he argues, "'Truth' is centered on the form of scientific discourse and the institutions which produce it; it is subject to constant economic and political incitement" (1984, p. 73). Truth and power, then, are related in a circular relationship: power produces discourses and truths, and regimes of truth help to establish who can define a situation. As McHoul and Grace (1998) suggest: "...there can sometimes be many [truths], each with its own rationality. But the question is:

which of these, at any given period, comes to predominate and how?” (p. 19). As McMullan (2005) notes:

Because discourses govern the construction of objects – such as how criminality is an object of medical expertise, or how sexual deviance is an object of psychiatric discourse – they are potentially subversive. Those in power seek to exercise control over discourses that they consider threatening because they have ‘real effects’ and produce the ‘conditions of possibility’ of resistance and replacement (p. 18-19).

How do those in positions of power deal with competing knowledges and discourses? One technique is to turn these competing discourses into ‘subjugated knowledges.’ In other words, mask, bury or disqualify these rival knowledges, and present them as being “naïve,” “hierarchically inferior” or “below the required level of erudition or scientificity” (Foucault, 2004, p. 7). As we shall see, the Commission sought to control the various discourses and truths about Milgaard’s case in order to present an ‘official’ version of the truth to define his wrongful conviction. The techniques that they used were part of their ‘regime of truth’ and characterized the means by which they defined what could count as true about the case. One such technique that was practiced at the Inquiry was to order truth claims based upon credibility. Competing versions of the truth may be subject to what Becker (1967) calls a ‘hierarchy of credibility.’ Becker examines the idea that all sociologists, knowingly and/or unknowingly take sides in their research. For instance, if a researcher decides to tell a story from the point of view of a deviant, this gives the idea that deviants “have as much right to be heard” as those in authority and that their claims have “a right to be investigated” (Becker, 1967, p. 241). Becker claims, however, that siding with deviants creates such an outcry because it goes against the ‘hierarchy of credibility.’ This notion is based on the assumption that ‘superordinates,’ are alleged to have a more complete view of issues and so have the right to define social situations. In contrast, those at the bottom, the ‘subordinates,’ are said

to suffer from “partial and distorted” views of reality, and as such cannot explain or define things in the same way as those at the top (Becker, 1967, p. 241). Statements, then, are more likely to be believed based on who said them and what social positions are held by those individuals. Becker argues that whether or not we agree with hierarchies of credibility, they are a feature of our society. He illustrates this notion with the following example:

‘Everyone knows’ that responsible professionals know more about things than laymen, that police are more respectable and their words ought to be taken more seriously than those of the deviants and criminals with whom they deal. By refusing to accept the hierarchy of credibility, we express disrespect for the entire established order (Becker, 1967, p. 242).

Therefore, because social perceptions deem the voices of those in positions of authority to be more credible, sociologists face criticism for favouring the “wrong side” and questioning the ordering of credibility. As Becker (1967) argues, “an account of an institution’s operation from the point of view of subordinates therefore casts doubt on the official line and may possibly expose it as a lie” (p. 243). At bottom, to sympathize with those in subordinate positions means that one is “flying in the face of what ‘everyone knows’” (Becker, 1967, p. 243).

Burton and Carlen (1979), Gilligan and Pratt (2004), McMullan (2007) and Scraton (2004; 2013), among others, support the notion of a hierarchy of credibility, arguing that those who are most credible are likely to be the ones defining and enabling official discourses. These official discourses are defined by Gilligan and Pratt (2004) as “the formal way of giving definition to the issue in hand . . . official discourse provides an objective truth – the *truth* – on the matters they are reflecting or adjudicating on [*sic*]” (p. 2). Indeed, my thesis examines the relationship between who are deemed credible sources of truth and how this influences the production of official discourses.



*Power, Freedom, Resistance and Contestation*

While power is characterized by a series of relations and is dispersed and centralized, it is important to note who Foucault believes is capable of being subjected to power relations.

He suggests:

Power is exercised only over free subjects, and only insofar as they are ‘free.’ By this we mean individual or collective subjects who are faced with a field of possibilities in which several kinds of conduct, several ways of reacting and modes of behaviour are available. Where the determining factors are exhaustive, there is no relationship of power: slavery is not a power relationship when a man is in chains, only when he has some possible mobility, even a chance of escape. . . . Consequently, there is not a face-to-face confrontation of power and freedom as mutually exclusive facts (freedom disappearing everywhere power is exercised) but a much more complicated interplay. In this game, freedom may well appear as the condition for the exercise of power (Foucault, 2003, p. 139).

For Foucault, the relationship between power and freedom takes the form of a “game,” where there needs to be a certain amount of freedom in play in order for power to be exercised which raises the previously mentioned issue of resistance (Foucault, 1978, 1984, 2003, 2004; McHoul & Grace, 1998; McMullan, 2005; Nealon, 2008; Ritzer, 1997). Digeser (1992) believes that resistance “implies that we are not predesigned to be rational, responsible, self-disciplined individuals” (p. 985). In other words, we tend to fight back against power, often in the form of different discourses and truths. As McHoul and Grace (1998) suggest:

For Foucault, resistance is more effective when it is directed at a ‘technique’ of power rather than at ‘power’ in general. It is techniques which allow for the exercise of power and the production of knowledge; resistance consists of ‘refusing’ these techniques (p. 86).

Therefore, resistance is an attempt to change the ways in which a situation is defined as true and false.

For Foucault (2003) there are several different types of resistance, including those against forms of domination, those against exploitation, and those against subjection and

submission (p. 130). Resistance against forms of domination is characterized by countering ethnic, social or religious domination. Those who resist domination refuse to be treated in a certain way, based on their race, religion, gender, class or other beliefs or attributes that characterise them. Resistance in this sense means that the individual refuses to be treated or told to act in a certain way. This is probably the most common form of resistance within society. Resistance against exploitation is characteristic of Foucault's notion of bio-power. Individuals were subject to disciplinary action which helped make them more productive and efficient workers. Production was more concerned with quantity rather than quality, no matter how hard the employees had to work to achieve results. Resistance in this case came in the form of unions that protected the rights of workers and ensured that they were treated as human beings, rather than machines. Resistance against subjection and submission is probably the type of resistance related most to techniques of power. It is evinced by those who refuse to be oppressed and who speak out against the majority, even if it comes with a risk such as ridicule or loss of rights. An example of resistance against subjection and submission are truth-tellers, or *parrhesiastes*, who are willing to speak up against those in power to ensure that what is true and right will prevail. When a dominated group chooses to resist those who exercise power, they are fighting for a chance to contest truths and discourses through public rituals such as judicial inquiries.

Through acts of resistances, new truths can be produced. Rather than being generated by expert opinions and official knowledge, these truths are the result of personal experiences and counter-memories. McMullan (2007) examines the production of truths about the Westray mining disaster and argues that counter-truths can be "realized in challenging experiences where individuals are forced to question their values, beliefs, and perceptions

that they had once accepted without hesitation” (p. 22). As a result of loss, betrayal or trauma, individuals may re-assess “who and what they are and value” and adopt new ways of knowing and understanding how and why the world “operates the way it does” (McMullan, 2007, p. 27). Truth then can be based on counter-memories and experiences from below rather than on only “power-produced” claims and ideas from above (McMullan, 2007, p. 27).

The medico-legal discourse of the Westray mining explosion was one of “accidental death” and was framed as “unpredictable and unintentional” (McMullan, 2007, p. 32). For the surviving miners and bereaved family members though, the truth of the explosion was much different. As McMullan (2007) argues, their discourse “was wrenched from painful experience in which cognitive changes ‘happened’ as the shock wore off and the re-examination of events commenced” (p. 35). The miners and family members took several steps to question the ‘public truth’ that was being advanced by medical and legal experts. They tried to see things in a different light; they tried understanding how certain institutions let them down; they questioned the evidence being put forth by medical, legal and judicial experts; they “expressed memories of their own culpability underground;” and they stood up for those who had died (McMullan, 2007, p. 38). The result was that they produced a discourse of workplace violence, based on their counter-memories and experiences, thus challenging and resisting official explanations. This helps demonstrate how resistance to exercises of power has the ability to produce alternate discourses and truths, even if the person who is resisting is in a position exterior to power.

### ***“Parrhesia” and Truth-telling***

In his examination of truth, Foucault makes use of the Greek term *parrhesia* or “free speech” (Besley & Peters, 2007; Foucault, 2001). A *parrhesiastes* is the term used to describe

a person who speaks the truth to those in a powerful position. According to Foucault, the practice of truth telling is characterised by five traits (Besley & Peters, 2007). First, *parrhesia* is associated with frankness. Unlike rhetoric, where the speaker tries to persuade an audience to believe in what he is saying even if he doesn't believe it is true, the *parrhesiastes* speaks an opinion, only articulating what he believes to be true. As Stone (2011) elaborates,

Because they worry too much about offending, most people often do not tell the truth; instead, they tell half-truths or flat-out lies. Frankness, however, shows the audience a couple of things: (i) that the speaker really believes what she is saying, and (ii) that the speaker believes in what she is saying enough that it should be said as if it were directly from her mind, unmediated by language (p. 149).

Second, the speaker must have the moral qualities required to know the truth and to share it with others. The speaker recognizes the overall benefits of speaking the truth, focusing less on self-interest and more about how truth-telling can help people or improve situations. As Stone (2011) argues, “there is no conflict between the mind of the *parrhesiastes* and her heart: she believes in the truth that she knows, believes in her knowledge of the truth, and knows that her beliefs are true” (p.149). Third, truth-telling is linked with courage, as there may be danger in speaking the truth. This danger might include the risk of punishment for speaking against the powerful, or it might simply be the risk of losing a friend by speaking up when they do something wrong (Foucault, 2001, p. 16). Either way, the truth-teller has something to lose by telling the truth (Stone, 2011). Fourth, *parrhesia* is a form of criticism, “directed either towards oneself or another, where the speaker is always in a less powerful position than the interlocutor” (Besley & Peters, 2007, p. 93). Stone (2011) believes that “the truth told by the truth-teller must force, even if just for a moment, the interlocutor to examine himself” (p. 151). While most people would fear the danger of offering a critique,

the truth-teller embraces it. Finally, the *parrhesiastes* has a duty to tell the truth even though they are in a subordinate or subaltern position. No one forces truth tellers to speak the truth, but rather, they believe there is a civic duty to do so. For instance, truth-tellers cannot keep the truth to themselves; “*Parrhesia* understood this way is a truth that cannot be hidden” (Stone, 2011, p. 151-152). This notion of truth-telling, of course, is not free of power relations. While Foucault would never characterize their truth as either “right” or “wrong,” the truth spoken by a truth teller represents an “other” knowledge that challenges what is spoken by those in authority. Foucault (2001) suggests that there are four questions that relate to truth telling: “who is able to tell the truth, about what, with what consequences, and with what relation to power” (p. 169-170). These question are applied throughout my analysis to help determine who speaks what truths at the Milgaard Inquiry and with what effect.

### ***Foucault, Public Inquiries and Wrongful Convictions***

So how is Foucault’s theoretical framework relevant to the study of wrongful conviction public inquiries? There are power relations between those who work within the criminal justice system and those who become entangled within the system. For example, police officers and prosecutors are more likely to exercise power over offenders than vice versa. But what if these power relations are exploited and police or prosecutors use their power in inappropriate ways? This can result in a wrongful conviction, and often, commissions of inquiry are necessary to determine what went wrong and to rebalance the power relations between criminal justice system officials and offenders. Indeed, the inquiry itself exercises power in several ways: it can garner public and media attention; it can raise awareness about the topic of inquiry; it can decide what discourses and truths are important

and which ones should be ‘official’; it can create new policies or change old ones; and it can restore faith in social institutions such as the criminal justice system.

My thesis explores the ways in which power plays a role in Milgaard’s public inquiry and I ask: (1) What role did power relations play in Milgaard’s inquiry? Power relations and truth work together in a circular relationship, always influencing each other. Those in positions of power and authority often create the most relevant, credible truths. Indeed, there were many parties who contributed their truths to the Commission, each of whom had a stake to claim in the production of truth. Public inquiries help to evince ironies, contradictions and differences associated with power and truth. I ask: (2) Did hierarchies of credibility emerge at the Inquiry and with what effect?

Foucault defines discourses as bodies of knowledge which help to define the ways in which we understand, think, and speak about objects and practices and what we consider to be true and false. Burton and Carlen (1979) refer to ‘official discourses,’ as “the systematisation of modes of argument that proclaim the state’s legal and administrative rationality” (p. 48). In other words, official discourses trump all other competing explanations of an object, practice, or event. They attempt to legitimize “what happened” and restore credibility to the state and the justice system. The use of experts helps to reassure the public that a criminal justice system can still perform its duties competently and confidently (Scruton, 2004). I ask: (3) How was knowledge, discourse, and truth produced, reproduced, and contested throughout the Inquiry? For Foucault, wherever there is power, there is resistance. Members of the criminal justice system were investigated for errors that were made on their watch, and their actions were scrutinized at the Inquiry. Victims whose voices

were previously unheard or disavowed were often given the chance to contribute their version of the truth. I ask: Was power challenged within the Inquiry and with what effect?

### **Conclusion and Implications**

This chapter reviewed the literature on wrongful convictions and public inquiries and outlined how I deployed Foucault's concepts of power, discourse, truth and resistance, and Becker's work on hierarchies of credibility to study the Milgaard Inquiry. In order to answer my questions, I conducted a qualitative document analysis of the final report of the Milgaard Inquiry. The next chapter discusses my methodological approach, and explains how I code the data to make sense of the operation of power, discourse, truth and resistance in the Milgaard Inquiry.

## Chapter 4: Methodology

### Introduction

In this chapter I discuss the methods used in my thesis. First, I explain the value of case studies and discuss their worth for my research. Then, I explain my choice of the David Milgaard case for my thesis, arguing that his case is useful in exploring the role of power, discourse, truth and resistance within a wrongful conviction public inquiry. Next, I discuss my data collection methods and explain how I acquired my data, and how and why I made use of qualitative document and content analysis. Lastly, I explain how I coded for themes in the inquiry data and I discuss the questions I asked in order to analyze my findings.

### The Case Study

My research of the Milgaard Inquiry is based on a case study design. Berg (2009) defines a case study as “a method involving systematically gathering enough information about a particular person, social setting, event or group to permit the researcher to effectively understand how the subject operates or functions” (p. 317). Yin (2009) adds that a case study is more than just a means of collecting data; it is an all-encompassing method that covers the design of a study, the data collection, and the “specific approaches to data analysis” (p. 18). The data, he says, can come from a variety of sources including documents, interviews, observations, archival records, and field notes. Indeed, there are several types of case studies. Stake (1995, 2008) identifies three categories: intrinsic case studies, instrumental case studies, and collective case studies. Intrinsic case studies are used when the researcher has an interest in better understanding a particular case, even if that case does not display a specific problem or trait. These case studies rarely seek to build theory, but instead focus on the case itself. True crime novels, such as Karp and Rosner’s (1998) *When Justice Fails*, examine and



narrate the key aspects of a case but make no attempt to connect their work to theory or other academic analyses of wrongful convictions. Instrumental case studies are used to provide insight into an issue or problem. The case is of secondary interest and is used to facilitate an understanding of a broader object of study. For example, Scraton (1999; 2004; 2013) studied the Hillsborough soccer tragedy to unpack the various discourses produced about the stadium accident and its aftermath; and McMullan (2007) studied the Westray mining explosion to facilitate a wider discussion of the controversial production of truths and official discourses about the media. With collective case studies more than one case is used to “investigate a phenomenon, population, or general condition” (Stake, 2008, p. 123). It is believed that a larger number of cases will produce a better understanding and a better theorization of the issues. Thus, Burton and Carlen (1979) and Gilligan and Pratt (2004) deployed multiple cases and examples to expand discussion on official discourses, ideology and the state, and official inquiry, truth and justice, respectively.

My case study is an example of the instrumental type. The wrongful conviction case, while important in its own right, is also used as a means of understanding and analyzing the role of the public inquiry. Flyvbjerg (2006) suggests that selecting a case to study is not straightforward and the researcher often has to decide between an extreme case and a critical case. He argues: “The extreme case can be well-suited for getting a point across in an especially dramatic way. . . In contrast, a critical case can be defined as having strategic importance in relation to the general problem” (p. 229). In Canada, there have been seven wrongful conviction public inquiries from which to choose. I eliminated the Lamer Inquiry (Dalton, Druken, and Parsons) and the Goudge Inquiry (Charles Smith victims) as they looked at multiple cases that generated too much data to analyze for a project of this size. Of

the remaining five Inquiries (Driskell, Marshall, Milgaard, Morin, and Soponow), each had well-rounded, critical inquiries, but I was the most familiar with the Marshall, Milgaard and Morin's cases. Based on my general interest in the case itself, I narrowed my choice down to two: Milgaard and Morin. Ultimately, I chose to study the Milgaard case since it had received much media attention and academic coverage (Boyd & Rossmo, 2009; Karp & Rosner, 1998; Milgaard & Edwards, 1999). Milgaard was one of Canada's longest serving inmates for a crime he did not commit and thus seemed to best fit the goal of using a critical case to analyze a general problem.

Case study research has been the subject of criticism, namely that it lacks scientific rigor, objectivity, and reliability (Kohlbacher, 2006; Yin, 2009). Researchers have been accused of "arbitrarily interjecting personal opinion, being sloppy about data collection, [and] using evidence selectively to support personal prejudices" (Kraska & Neuman, 2008, p. 149). Becker (1967) agrees that it is difficult for case study researchers to avoid these issues because the nature of their research often puts them at risk of having their feelings distort their findings. But he offers two solutions for ensuring that case study researchers do not fall prey to bias. First, he says we must consider both sides of the topic we are studying. For me, this means putting aside the compassion I feel for Milgaard and the distrust of the criminal justice system from previous research on miscarriages of justice, and considering the inquiry objectively, as if I were presiding over it. Secondly, Becker says that we should acknowledge and address the limitations of a study. In his words: "We can, I think, satisfy the demands of our science by always making clear the limits of what we have studied, marking the boundaries beyond which our findings cannot be safely applied" (p. 247). This means addressing the limitations of my methods and my data, while demonstrating how the

advantages outweigh the limitations. The most common criticism of case studies, however, is that their results cannot be generalized (Bryman & Teevan, 2005; Flyvbjerg, 2006; Stake, 1995, 2008; Yin 2009). Critics say that case studies focus too much on the ‘intensiveness’ of a single case, rather than on the ‘extensiveness’ of a large number of cases (Thomas, 2011). They argue that if you cannot generalize the results of a case study, then the knowledge produced cannot contribute to scientific development (Flyvbjerg, 2006).

Proponents of case study research have challenged this criticism with three different arguments. First, formal generalizations are not the only ways that people gain knowledge (Flyvbjerg, 2006; Stake, 1995). Readers of a case study may make “naturalistic” generalizations, or “conclusions arrived at through personal engagement in life’s affairs or by various experience so well constructed that the person feels as if it happened to themselves” (Stake, 1995, p. 85). They form their generalizations based on their own interests and previous experiences. For example, my thesis readers who have experience with public inquiries may make different generalizations than those who are familiar with wrongful convictions. Formal generalizations do not need to be made in order to contribute knowledge to a field of study. Second, case study researchers argue that analytic generalizations are just as important as statistical generalizations (Bryman & Teevan, 2005; Kohlbacher, 2006; Plano Clark et al., 2008; Ruddin, 2006; Thomas 2011; Yin, 2009). The ability to contribute to theoretical knowledge about a topic is an important asset of qualitative research. As Yin (2009) argues, an important research goal is to “expand and generalize theories (analytic generalization) and not to enumerate frequencies (statistical generalization)” (p. 15). While my results may not be generalizable to other wrongful conviction public inquiries, they will contribute to the theorization of public inquiries, and they can be used as a basis for

designing future projects that examine wrongful conviction inquiries. Third, proponents of case study research valorize unique cases in themselves. Unlike quantitative researchers who see the unique case as a statistical instance or anomaly, qualitative researchers embrace the case for its characteristics (Stake, 1995). As Ruddin (2006) notes: “What is required of case study researchers is not that they provide generalizations but rather, that they illustrate the case they have studied properly, in a way that captures its unique features” (p. 804). This is especially true in relation to cases of wrongful conviction, where each miscarriage of justice is rather distinct and different. Medwed (2006) observes:

Personal accounts of wrongful conviction are equally compelling, serving as a reminder that each case represents an individual tragedy, a collision at the intersection of human error and chance. And each one must be thoroughly evaluated in order to further the scholarly debate on the topic of wrongful convictions (p. 339).

In addition, public inquiries each have their own mandates, terms of reference, commissioners, and sets of recommendations. As such, each wrongful conviction commission of inquiry is unique and produces different results about the reasons behind the cases.

The importance of my case study was not to generalize my results to other cases of wrongful conviction and their inquiries. Rather, my research is important for two other reasons: first, I highlighted the unique features of Milgaard’s wrongful conviction and second, I theorized wrongful conviction inquiries in relation to power, discourse, truth and resistance, contributing to an understudied area of wrongful conviction research. The reader will be able to make his/her own naturalistic generalizations in response to my analysis. Ultimately, the strength of this type of research is its ability to provide greater understanding of a case by discovering patterns and meanings, drawing conclusions and building theory. For my thesis this means examining how official discourses were produced, explaining what

roles truth and power played within the inquiry process, and exploring if conflict, contestation, and resistance were present within the inquiry and with what effects.

### **Data Collection and Analysis**

My primary source of data was the published version of the Final Report of the Milgaard Inquiry. Although I wanted to analyze the transcripts from the inquiry interviews and hearings, I decided against this because they included more than 40,000 pages of data which I could not realistically analyze in the context of an M.A. thesis. However, public inquiries are a means of relaying “official” discourses and knowledge to the public, similar to the media (Gilligan & Pratt, 2004). So by examining the *published* report, I analyzed the record that was advanced as official discourses, which was part of the focus of my thesis. Because I was interested in the inquiry process more so than the wrongful conviction itself, I chose to eliminate ‘Appendix D’ of the report, which was a copy of the original trial transcript. This eliminated close to 1,000 pages of data, and brought the size of the document I examined to approximately 1,800 pages. Based on a cursory review of the larger transcript record, I was confident that the report was a reasonable representation of the 40,000 pages of data that were collected and used to write the report. Indeed, if something in the published report was incomplete, missing, or unclear I consulted relevant sections of the inquiry transcripts. For instance, the Commission often quoted key phrases and passages from witness testimonies and if I wanted to know more about what questions were asked or the tone of the interviews, I referenced the transcript to fill in the data. I also made use of secondary sources about the case including newspaper articles and secondary literature such as Joyce Milgaard’s book, *A Mother’s Story*, as a means of better understanding all sides of

the case. These sources were identified throughout the Inquiry Report and thus I felt would help put my analysis of the Report into perspective.

I used qualitative document analysis and qualitative content analysis in my thesis (Altheide, 1996; Hesse-Biber & Leavy, 2008; Hsieh & Shannon, 2005; Kraska & Neuman, 2008; Mason, 2002). Typically, documents are defined as “any symbolic representation that can be recorded and retrieved for description and analysis” (Altheide et al., 2008, p. 127). This includes texts, letters, photos, biographies, interview transcripts, statistical data, media accounts, personal journals, government publications and parliamentary debates (Altheide et al., 2008; Prior, 2008; Rapley 2007; Schwandt, 2007). Altheide (1996) argues that the study of documents is important because it enables us to:

- (a) place symbolic meaning in context, (b) track the process of its creation and influence on social definitions, (c) let our understanding emerge through detailed investigation, and (d) if we desire, use our understanding from the study of documents to change some social activities, including the production of certain documents (p. 12).

The aim is to enter into conversations with documents, asking questions and searching for answers to help determine their meanings and cultural and social significance (Kraska & Neuman, 2008).

Methods for analyzing documents include content analysis, ethnography, grounded theory, phenomenology, narrative research and historical research (Creswell, 2007; Hsieh & Shannon, 2005). According to Schwandt (2007) methods vary along a continuum anchored on one end by those that “emphasize content or *what* was said” and on the other end by those that “emphasize form or *how* something was said” (p. 290). In terms of content analysis, the end points are characterized by quantitative content analysis and qualitative content analysis respectively. With quantitative content analysis, objective and systematic counting and

recording are used “to produce a numerical description of the content in a text” (Neuman, 2011, p. 361). The goal is to count the frequency of pre-established codes as a means of analyzing a text in order to reveal the numerical relationships between variables.

Qualitative content analysis, on the other hand, eschews statistical reasoning and counting in favour of focusing on how something was said, the context in which it was said, and the significance of what was said. The goal of qualitative content analysis is to describe the patterns that exist within the data as well as to interpret why such patterns exist (Morgan, 1993). In most cases, qualitative researchers will allow their codes and categories to emerge from the data, rather than searching for pre-determined codes. They use existing literature, research and theory to help contextualize their readings of the data (Krippendorff, 2004). Qualitative researchers are also mindful of competing voices, alternative ideological perspectives, critiques, and previous studies, and take each of these into account when reading their data (Krippendorff, 2004). Once findings are gathered, they are presented as a means of validating, questioning, or extending existing theoretical frameworks (Hsieh & Shannon, 2005). For instance, my thesis findings were analyzed using my theoretical framework and I was able to show examples which confirmed and questioned Becker’s and Foucault’s ideas. Qualitative researchers who make use of content analysis also offer suggestions for refining, extending and enriching current knowledge about the topic. With my thesis, as we shall see, my findings explained how public inquiries functioned to produce truth, how power was exercised and how discourses were created about Milgaard’s wrongful conviction. I discuss what this means for wrongful conviction research and suggest how future studies could move the topic forward.

As with any method of analysis, there are limitations to content analysis. Documents may be biased by the writer. They may be missing information, contain errors, or the information that they produce may be taken out of context. I dealt with these limitations by relying on documents that were produced in the context of a judicial review where the search for bias and missing information was actively sought out and settled. I also examined the events that led to the establishment of the inquiry in order to have a better understanding of the context in which it was produced (see Chapter 2). Indeed, there are several advantages to studying documents through content analysis. Documents may reveal more credible information than that achieved through interviewing (Caulley, 1983). Interview participants may be unwilling to participate, they may not always understand the questions being asked, and their answers may be unrelated to the information that the researcher is seeking. Documents, especially government produced ones, are often made available to the public and are thus more convenient and easily accessible when compared to ethnographies or interviews (Rapley, 2007). Documents are in effect “containers of content” which give the researcher access to an abundance of data (Prior, 2008).

In terms of my own research, I decided that studying the inquiry report was crucial. Of course, I could have studied newspaper coverage of the inquiry, but I could have run into the problem of not being able to gain access to the databases to find articles written about the case or worse, not being able to get a first-hand view of the inquiry process, structure and findings. Interviewing those involved in the inquiry would have been interesting in uncovering more information about the production of the truth on Milgaard’s case, but that would have been costly and time-consuming and I am not sure that those involved would want to speak again about the case. In any event, the published inquiry report was a



comprehensive, informative, official, public document that evinced what Prior (2008) calls an “abundance of data” about the politics of truth surrounding this miscarriage of justice.

### **Coding the Data**

Coding is a process of organizing raw data into categories, themes and concepts based on a theoretical framework (Neuman, 2011). It enables the researcher to take large bodies of text and reduce them to more manageable pieces of information. David and Sutton (2004) note “by flagging up those chunks of text where key themes seem to recur, the researchers are able to narrow their focus of attention from the whole of a text to just those areas they feel are significant” (p. 203). Research questions guide the process of determining the categories for coding, but the researcher may raise new questions in the data coding process.

Typically, there are three different stages to the coding process: open coding, axial coding, and selective coding (Neuman, 2011). Open coding involves reading through the data and identifying preliminary categories and themes. As Neuman (2011) suggests, these themes “are at a low level of abstraction and come from your initial research question, concepts in the literature, terms used by members in the social setting, or new thoughts stimulated by an immersion in the data” (p. 511). Based on my readings of Foucault and Becker, I identified five preliminary concepts: power, discourse, truth, resistance and hierarchy of credibility. During my first reading of the Milgaard Inquiry Report, I identified even more themes, including information about: injustice, wrongful convictions, the administration of justice, legitimation, the need for an “official discourse,” the media, forensic evidence, and several key parties and players.

Axial coding encourages the researcher to find links between themes, codes and concepts and raises new questions from these linkages. Neuman (2011) asserts that this stage of coding “reinforces connections between evidence and concepts” and the researcher considers “dropping some themes or examining others in more depth” (p. 514). My second reading of the data was twofold. First, I searched for additional information to support themes that I may have missed during my first reading. Second, I tried to determine whether themes were linked together or whether they could be divided into sub-categories or required new questions to be asked. For instance, I considered how power relations were structured among the various individuals and groups who played predominant roles at the Inquiry. I questioned whether issues of injustice, the administration of justice, or the legitimation of the justice system were relevant for an official discourse. I sought to find connections between my theoretical framework and the key themes that were emerging from my data.

The final stage, selective coding, involves “looking selectively for cases that illustrate themes and making comparisons after most or all data collection has been completed” (Neuman, 2011, p. 514). This was an ongoing process for me as I sought to present my findings and answer my research questions. In terms of findings, I consistently examined the coded material and relevant sections of my data to determine which information would be most useful for making my main arguments. I wanted examples that could clearly demonstrate the points I was making and that would help answer each of my four research questions. What follows is an explanation of how I approached my data in an attempt to answer these research questions:

1. *What role did power relations play in the Milgaard Inquiry?*

As discussed in Chapter 3, power can be present within an inquiry in several ways. To answer this question, I looked for instances that showed power relations being deployed within the inquiry. For instance, was power exercised in different ways by the various groups that were involved in the inquiry? Was there a centralization of power or was it dispersed among the various groups? Overall, this question was concerned with how the different groups were presented at the inquiry and whether certain groups were more likely to step in to a powerful position than others when exploring the events surrounding Milgaard's wrongful conviction.

2. *Did hierarchies of credibility emerge at the inquiry and with what effect?*

I wanted to uncover how power relations affected the inquiry and the knowledge it produced. Whose testimonies were given preference and what groups were represented most often in the inquiry? For instance, did the Commissioner place more emphasis on the testimony of lawyers compared to police? How did the inquiry deal with competing versions of the truth? Ultimately, the goal was to see whose versions of the truth were being promoted via this public inquiry.

3. *How was knowledge, discourse, and truth produced, reproduced, and contested throughout the inquiry?*

I wanted to understand the techniques and mechanisms used for producing truths and official discourses. I began by asking questions such as: What truths were revealed at the inquiry? Did they change throughout the inquiry and how? Ultimately, I wanted to know what issues were explored throughout the Milgaard Inquiry and how this information was presented in a public document. I hoped to better understand how the wrongful conviction was being explained and whether the Commission was trying to improve the criminal justice

system. Ultimately, I wanted to uncover what was said about wrongful convictions at the inquiry and what accounts were considered “official” or not, and why?

4. *How was power challenged or resisted within the inquiry and with what effect?*

I wanted to explore if and how power relations were resisted. For instance, did the Milgaard Group challenge discourses about the wrongful conviction? What sorts of discourses were they producing about the justice system or about the conviction proper? When I read the data for the first time, I was surprised at the role Joyce Milgaard played in the Inquiry. I examined how the Inquiry addressed her actions and whether she was praised or condemned. I also questioned whether Joyce Milgaard and the Milgaard Group could be considered truth-tellers? Ultimately, I examined the interaction and resistance between the different groups at the Inquiry and how power relations were constituted and challenged.

**Conclusion**

This chapter highlighted the methodological framework that guided my analysis. I explained my reasons for conducting a qualitative, instrumental case study of the public inquiry into Milgaard’s wrongful conviction. My analysis of the data was initially guided by my theoretical framework, but I also allowed key themes and categories to emerge from the data. After coding the Inquiry Report, I had forty pages of notes and examples to guide the answers to my research questions. My findings and analysis are intertwined and presented in two stages. The next chapter presents my findings and analyses relating to truth claims, exercises of power, and credibility. The final chapter explores how power, truth, and credibility helped influence the production of official discourses about Milgaard’s wrongful conviction and how they were met with resistance.

## **Chapter 5: Truth Claims, Credibility and the Exercise of Power**

### **The Problem of Power and Truth**

Truth and power were fundamental to the Milgaard Inquiry. The goal of the Inquiry was to determine the truth narratives around the investigation, prosecution and exoneration of David Milgaard, determine whether the investigation should have been reopened sooner, and make recommendations about the administration of criminal justice in Saskatchewan. For Foucault (1980) truth is always related to power and it is “linked in a circular relationship with systems of power” (p. 133). He notes “we are subject to the production of truth through power and we cannot exercise power except through the production of truth” (p. 93). Indeed, power-knowledge relations may result in the formation of “regimes of truth” – the mechanisms or techniques that are employed to determine how the truth of an event is defined and circulated. The Commissioner used several techniques to frame narratives about Milgaard’s wrongful conviction. These include the strategies of power that the Commission used to gather, assess, and order truth claims as well as the mechanisms they used to create “official discourses” about the case.

In this chapter I discuss the organization of the Inquiry. I examine how the Inquiry was created, who its members were and what tasks they performed. Next, I discuss the techniques they employed to determine the truth of Milgaard’s case. The first technique was the dispersal of power and I highlight four ways in which power relations were deployed at the Inquiry. The second technique was concerned with the ordering of truth, specifically how those in authoritative positions sorted and designated credible truth claims. The third technique involved the production of official discourses. It will be discussed in greater detail in the next chapter.

### **Power, the Organization of the Inquiry and Truth Telling**

An investigative commission of inquiry is usually established in the wake of a crisis that has shaken public confidence in a government institution. The goal for a commission of inquiry is to explore questions and produce truths about what happened or was supposed to happen. Justice Edward MacCallum, judge of the Court of Queen's Bench of Alberta, was appointed to oversee the Milgaard Inquiry (Anderson & Anderson, 2009). It is not uncommon for judges to lead a commission of inquiry. As Gilligan (2002) explains, "this may be attributed largely to the acknowledged ability of experienced legal practitioners 'to get to the point' and a widespread assumption that they bring impartiality and independence to an inquiry" (p. 295). The commissioner is responsible for leading the inquiry, summoning witnesses to testify, presiding over the public hearings, and making a report of findings and recommendations. The commissioner does not work alone and in the Milgaard case four lawyers from the law firm of MacPherson Leslie and Tyerman LLP were selected as members of Commission Counsel (*Milgaard Inquiry*, 2008, p. 7). They had several duties: representing the public interest, locating and organizing all relevant evidence to be presented to the Commissioner and the public, and determining who will testify at the public hearings. Other commission staff included an executive director, a document manager, office staff, a clerk to the commission, a taxing officer, court reporters, a commission investigator, security officers, an audio technician, and a consultant on matters related to document management (*Milgaard Inquiry*, 2008). As D'Ombain (1997) observes, the selection of commission members is fundamental to the success of an inquiry.

From the outset, Commissioner MacCallum and the commission members faced several issues. First, they were presented with 341,634 pages of material which needed to be

organized and prepared for the public hearings which commenced in January of 2005 (*Milgaard Inquiry*, 2008, p. xxi). In addition, the Inquiry was established in the context of strong negative emotions. As Commissioner MacCallum explained:

The Commission began its work against a background of ill will between the Milgaard Group on the one hand and police and government agencies on the other. Resentful of, as they saw it, being left out of previous investigations and doubting official conclusions as being too narrow, misguided, lacking in transparency, biased or simply wrong, the Milgaard Group mounted an attack through the media prior to the Inquiry and continued it during the Inquiry. With little agreement on relevant facts between the Milgaard Group and the authorities, the Commission was obliged to rehear evidence (*Milgaard Inquiry*, 2008, p. 35-36).

The Milgaard Group was not alone in their mistrust of the criminal justice system; public confidence in the administration of justice was also at a low point. So it was important for the Commission to consider these concerns as it searched for the truth. As Maclean (2001) notes, it is important for inquiries to be transparent and to reassure the public that their concerns are being addressed, especially since the inquiry may bring “closure for those intimately affected, and enable them to move on” (Maclean, 2001, p. 593).

It is easy to see, then, why power may be concentrated around Commission Counsel and the Commissioner since they are tasked with the production of official truths about Milgaard’s conviction and the administration of justice. The first technique they deployed was to encourage all interested parties to provide their accounts of what happened. Those who felt wronged as a result of Milgaard’s wrongful conviction and its aftermath were invited to contribute to the production of truth. I examine this in greater detail in the next section of this chapter. While some key actors were deceased at the time of the Inquiry, including Albert Cadrain, Art Roberts and Justice Alfred Bence, the Commission heard from groups such as Milgaard’s supporters, lawyers, police, government officials, and original trial witnesses, to name a few. The second technique involved determining who was charged with

speaking the truth. By assessing and ordering truth claims, members of the Commission determined whose narratives were the most relevant in explaining Milgaard's wrongful conviction. Becker (1967) argues that those who are in positions of power are best able to produce the truth because they have a comprehensive understanding of the issue at hand. So ranking truth statements was crucial in producing an official truth about Milgaard's case, and the Commission needed to find a balance between gathering knowledge and exercising power relations in order to generate official discourses.

### **Truth and the Dispersal of Power at the Inquiry**

Power, for Foucault, is dispersed and no one is outside of its purview. The dispersal of power occurred at two levels at the Inquiry: first as part of the function of the Inquiry and second as a solution to be pursued outside of the Inquiry. At the Inquiry, the Commission ensured that no one was outside of power or the production of the truth. All interested parties were able to contribute at the Inquiry with the aim of producing a public truth about Milgaard's wrongful conviction.

#### ***Truth Claims and Conflicts at the Inquiry***

More than one hundred witnesses were interviewed. Some took on more prominent roles because they were given standing at the Inquiry. Standing was granted to individuals or groups who:

- (a) are directly and substantially affected by the Inquiry; or
- (b) represent clearly ascertainable interests and perspectives that are essential to the Commission's mandate; or
- (c) [have] special experience or expertise with respect to matters within the Commission's terms of reference (Government of Saskatchewan, 2008b, p. 2-3)

Those granted standing included: The Association in Defence of the Wrongly Convicted (AIDWYC), David Asper (Milgaard's lawyer), T.D.R. Caldwell (Crown prosecutor at the



original trial), Larry Fisher (Gail Miller's actual murderer), the Government of Saskatchewan, Eddie Karst (detective with the Saskatoon Police who played an active role in the Miller investigation), Serge Kujawa (Director of Public Prosecutions for the Attorney General of Saskatchewan), David Milgaard, Joyce Milgaard, the Minister of Justice, the RCMP, the Saskatoon Police Service, Calvin Tallis (Milgaard's defense lawyer at the original trial), and Eugene Williams (lawyer for the Department of Justice). Not surprisingly, competing truth claims emerged, especially around the police investigation and the mistreatment of witnesses, the post-conviction aftermath, and the timing of the reopening of the investigation.

The Milgaard Group consistently argued that witnesses such as Ron Wilson, Nichol John and Albert Cadrain were abused by police in the course of the original investigation.

According to the Inquiry Report:

Wilson had little negative to say about the police questioning other than about the lie detector test. . . [He] said the police never threatened him, nor told him what to say. He commented that he was pressured a bit but not to the point that he would convict Milgaard (*Milgaard Inquiry*, 2008, p. 113).

But in 1990, Wilson was interviewed by Paul Henderson, the Milgaard Group's private investigator. Wilson recanted his trial evidence, "claiming that police manipulated, coerced and brainwashed him to lie at trial" (*Milgaard Inquiry*, 2008, p. 160). Later in 1990, when interviewed by Eugene Williams, Wilson reiterated his original story that there was no misconduct on the part of the police. His constant wavering caused the Commission to conclude that Wilson's testimony was given freely and his claims of police mistreatment were not credible.

Similarly, Nichol John was thought by the Milgaard Group to have been mistreated by the police, which ultimately led to her statement implicating Milgaard in the murder

(*Milgaard Inquiry*, 2008). But when interviewed by Joyce Milgaard in 1981, John did not remember being mistreated by the police: “John told her that she did not think she had been frightened by police, who treated her very well” (*Milgaard Inquiry*, 2008, p. 114). In her 1989 interview with Eugene Williams, John again reported no negative perceptions of the police:

Williams questioned her about her dealings with the police, but she had no recall of her May 23, 1969 interview with Roberts or of her statement to Mackie the next day. Williams asked whether there was any pressure brought to bear on her to tailor her recollections one way or another. She remembered the police saying ‘take your time, we don’t wanna, we don’t wanna put words in your mouth’ and she said there was no pressure (*Milgaard Inquiry*, 2008, p. 142).

Ultimately, Commissioner MacCallum concluded that if John had been coerced by police, it would have been detected at trial:

Had John been coerced by Mackie (which she denies), she could have told the prosecutor or the court at the preliminary inquiry, or the court at the trial, instead of saying she could not remember. And to this day she persists in saying that she cannot remember, whereas had she been coerced by police, it would lift a great weight of criticism from her shoulders to say so (*Milgaard Inquiry*, 2008, p. 491).

Albert Cadrain was also thought to have been mistreated by the police. It was alleged by the Milgaard Group that police interrogations put pressure on Cadrain to incriminate Milgaard. Apparently this was not the case. According to the Inquiry Report:

[Detective] Karst had approximately 10 conversations with Cadrain, in which the latter maintained his story about seeing blood on Milgaard. Far from exerting pressure on Cadrain to implicate Milgaard, as later implied in media reports, Karst was concerned with the truth of Cadrain’s statement, and after repeated testing he came to trust Cadrain (*Milgaard Inquiry*, 2008, p. 468).

But, the Milgaard Group, along with their investigators Peter Carlyle-Gordge and Paul Henderson, were not inclined to this viewpoint. While Cadrain often denied being mistreated by police he acknowledged the following to Henderson:

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. . . 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' (*Milgaard Inquiry*, 2008, p. 165).

This was the first time that Cadrain made allegations of police misconduct and the RCMP conducted an independent investigation into these allegations against the Saskatoon Police.

Corporal Jim Templeton of the RCMP interviewed Cadrain about his new set of allegations:

[Cadrain] said that the police did not try to make him say untrue things. They did not trick him, but just tried to get the truth. He was not on drugs at the time. . . Cadrain told Templeton if anyone was trying to get him to change his story, it was Henderson, not the police. So just to get Milgaard off, 'I changed the bloody thing. He had done his time.' Cadrain added, 'I gave him what he wanted to hear just to get him off my ass, for one thing' (*Milgaard Inquiry*, 2008, p. 798).

Henderson later admitted that he had treated his interviews with Wilson and Cadrain in much the same way. He was convinced that they had lied in their police interviews in 1969 and he tried to get them to admit police misconduct, even if there were few facts to support the accusation. So several parties contributed their own narratives on the events, and the issue of the abuse of witnesses was highly contested at the Inquiry. The Commission, however, found no evidence to support claims of witness mistreatment (*Milgaard Inquiry*, 2008).

There were also competing truth claims regarding the post-conviction events, specifically the Milgaard Group's s.690 applications to Justice Canada to have Milgaard's case reviewed on the basis of a miscarriage of justice. As discussed in Chapter 2, the first application offered five arguments that Milgaard was wrongfully convicted. At the Inquiry, alternate explanations of these issues and events were explored as a means of clarifying why the first s.690 application was denied. For the first time, Eugene Williams, the federal Justice Department's investigator, explained his review of the grounds in the application process.

First, he said that he interviewed Deborah Hall about her sworn affidavit regarding the motel room incident. Williams told the Inquiry that he found discrepancies in what was in the affidavit and how Hall spoke of the events. This led Williams to conclude that Hall's evidence could not be considered new and that her "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" (*Milgaard Inquiry*, 2008, p. 642). As such, Williams insisted that Hall's information could not be used when considering whether Milgaard had been wrongfully convicted.

Second, the Commission addressed the forensic opinion of Dr. James Ferris. At the time of Milgaard's conviction, it was not the practice to make "verbatim records of addresses by counsel" (*Milgaard Inquiry*, 2008, p. 644). So Dr. Ferris did not have the closing submissions when he was judging how the evidence was presented at trial. As a result, he made the same argument as Calvin Tallis: there was no way to prove that the blood in the semen sample belonged to Milgaard and not the victim. Dr. Ferris told the Inquiry that "had he seen the addresses of counsel to the jury, he could have reworded his opinion as 'simply confirming what was effectively presented in court as evidence'" (*Milgaard Inquiry*, 2008, p. 129). Williams explained before the Inquiry that he looked to the RCMP's chief scientist of serology, Patricia Alain, for guidance. She confirmed that "the Ferris report was of no value in Milgaard's application due to faulty assumptions and flawed analysis" (*Milgaard Inquiry*, 2008, p. 138). Williams thus concurred that the evidence was not new or significant to the application.

Third, the Commission investigated the Milgaard Group's early suspicions of Larry Fisher. As noted, Linda Fisher visited the police in 1980 with her suspicions about her ex-

husband. For reasons unknown, Linda Fisher did not hear back from the police.

Commissioner MacCallum concluded that this “was a mistake” (*Milgaard Inquiry*, 2008, p. 104):

Although the Linda Fisher report to police in 1980 predated by many years any possible recourse to DNA typing, it might have led to Fisher as a serious suspect in 1980 had it been followed up. The report was received, filed, referred, and possibly evaluated on a cursory basis within the Saskatoon Police, but went no further. It should have (*Milgaard Inquiry*, 2008, p. 305).

In addition, Williams explained that he also turned to the RCMP for assistance in investigating Linda Fisher’s allegations, claiming that he needed credible evidence such as a witness, a confession or physical evidence to prove that Fisher killed Miller. The RCMP found no hard evidence which to Williams meant that this ground for reopening the case had no merit (*Milgaard Inquiry*, 2008).

Fourth, the Commission examined how Wilson’s recantation was addressed. As noted, Wilson’s version of events was ever-changing, and Williams did not consider his recantation to be credible. The Commission also addressed the fifth issue regarding the timing of the murder. As noted, the Milgaard Group believed that the timetable of events was unrealistic. Commission MacCallum did not dwell on this issue. He supported Justice Minister Kim Campbell’s decision: the issue was already addressed in detail by counsel and the judge at the original trial so it was neither new nor novel and therefore not pertinent to reopening the case.

The Inquiry also examined the competing truth claims regarding the second s.690 application. Here the Milgaard Group laid out the similarities between Fisher’s rape convictions and the Miller murder. When they went to the police to access Fisher’s files, they discovered that some files could not be located. To their mind, this raised suspicions that the

police and justice officials were covering-up Fisher's involvement "to avoid the embarrassment of having convicted the wrong man for Miller's murder" (*Milgaard Inquiry*, 2008, p. 580). The police and justice officials denied these allegations but Commissioner MacCallum concluded that the missing files were suspicious. Nevertheless, as we shall see, he condemned the Milgaard Group's allegations of a cover-up and argued that their actions were inflammatory and inaccurate (*Milgaard Inquiry*, 2008).

Saskatchewan Justice, the RCMP and the Saskatoon police did not reopen the investigation into the death of Gail Miller until 1997 when DNA evidence proved Milgaard's innocence. Justice officials defended this decision at the Inquiry and Commissioner MacCallum supported their thinking. However, he believed that Linda Fisher's 1980 statement to police should have caused them to at least consider interviewing Larry Fisher:

Linda Fisher's 1980 statement to the Saskatoon Police did not receive the attention it deserved. The investigation into the death of Gail Miller should have been reopened in 1980 at least to the extent of questioning Larry Fisher and verifying his movements on January 31, 1969 (*Milgaard Inquiry*, 2008, p. 407).

The dispersal of power allowed interested parties to contribute to the production of the truth. Most groups were willing to participate at the Inquiry, but Justice Canada, a federal institution, argued that they were outside of the provincial authority exercised by the Commission.

### ***The Question of Jurisdictional Authority***

The establishment of a commission of inquiry is based on rules outlined in the *Inquiries Act*. An inquiry is guided by the Terms of Reference, which are usually established by a province's Attorney General. In most cases, an inquiry is supposed to assess and investigate information on a provincial level and not enter into federal matters.

Commissioner MacCallum was asked to examine all aspects of the murder investigation and

criminal proceedings against Milgaard, determine if the police investigation should have been reopened sooner, and make recommendations to improve the administration of criminal justice in Saskatchewan. However, the Commissioner argued that to fully understand Milgaard's wrongful conviction and make provincial recommendations he needed to examine every stage of the case from conviction to exoneration:

In order for the Commission to perform its work and fulfill its mandate, it was necessary to obtain a complete factual record. A significant part of the record in Milgaard's case relates to the two applications for mercy filed with the federal Minister. The s.690 proceedings figured prominently in decisions made by the police and Saskatchewan Justice on whether, and when, to reopen the murder investigation. The federal Minister's handling of the s.690 applications, and the subsequent decisions of the Attorney General of Saskatchewan and the police on reopening the investigation into Gail Miller's death were inextricably linked. Furthermore, having investigated and prosecuted Milgaard, Saskatchewan Justice has a valid interest in the detection and remedying of his wrongful conviction as a matter relating to the administration of criminal justice. His wrongful conviction cast a shadow over the administration of criminal justice in the province for many years. Recommendations relating to the administration of criminal justice in the province can only be made in the context of a full factual record (*Milgaard Inquiry*, 2008, p. 340).

Indeed, Commissioner MacCallum insisted that investigating Milgaard's s.690 applications were essential to the operation of the Inquiry:

Information was gathered in the course of the s.690 proceedings that is helpful to the Commission in evaluating the propriety of the original police investigation and prosecution of David Milgaard. As well, information gathered through the s.690 proceedings is important in assessing whether the Miller murder investigation should have been reopened by police or Saskatchewan Justice prior to 1997 (*Milgaard Inquiry*, 2008, p. 343).

Commissioner MacCallum wanted the legal opinions presented by Justice William McIntyre<sup>9</sup> to Kim Campbell to help him understand why she rejected Milgaard's first s.690 application. Justice Canada, however, argued that the Inquiry did not have the authority to inquire into

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<sup>9</sup> "Former Justice of the Supreme Court of Canada. Mr. McIntyre was retained by the federal Department of Justice to provide his opinion respecting David Milgaard's first application for mercy under s.690 of the Criminal Code and consulted by the federal Department of Justice with respect to David Milgaard's second s.690 application" (*Milgaard Inquiry*, 2008, p. 26).

federal matters and insisted that what “federal officials did was irrelevant” to the Inquiry (*Milgaard Inquiry*, 2008, p. 349). They insisted that the report given to Minister Campbell was constitutionally protected. Commissioner MacCallum disagreed:

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 (*Milgaard Inquiry*, 2008, p. 719).

When assessing whether the Inquiry should be allowed to review the federal information in Milgaard’s case, Commissioner MacCallum looked to similar cases to support his reasoning. First, he looked to the *Keable* case,<sup>10</sup> which arose out of the 1977 Inquiry on illegal police activities in Quebec stemming from incidents in the early 1970s involving municipal, provincial and federal police officers (Belanger, 2000). During the Keable Inquiry, a subpoena was issued requesting files and documents from federal agencies, including the RCMP. In 1978, the Quebec Court of Appeal ruled that the inquiry’s demand was unconstitutional because it did not have the right to force the Federal government or the Solicitor General to turn over documents (Belanger, 2000). The final ruling at *Keable* was that the provincial inquiry could not have access to the federal documents, but the inquiry could report on changes that it believed would be beneficial for federal laws, especially if they would improve a province’s administration of justice (*Keable*, 1979). Second, Commissioner MacCallum looked at the case of *MacKeigan v. Hickman* which arose during the Royal Commission about the Donald Marshall Jr. prosecution. At the Marshall Inquiry, the Commission attempted to compel federal justices to testify. The justices, however, argued

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<sup>10</sup> *Keable* is an abbreviated name for the case of *Attorney General of Quebec & John Keable v. Attorney General of Canada, the RCMP, and the Attorneys General of ON, MB, NB, BC, SK, & AB*.



that the Commission did not have authority to dictate whether they should testify. The matter was assessed in front of the Supreme Court of Canada, who concluded that although the Commission could inquire into decisions made at the federal level, they could only do so with the information they had before them, and not by requesting testimony from the federal officials (*MacKeigan v. Hickman*, 1989).

Based on these court decisions, Commissioner MacCallum insisted that Milgaard's inquiry had the following jurisdictional authority:

Saskatchewan has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of David Milgaard, as matters pertaining to the administration of justice within the province, subject to the caveat expressed in *Keable*. Just as the Marshall Commission could inquire into a reference of Marshall's case to the Court of Appeal by the federal Minister under s. 617(b), this Commission can inquire into Milgaard's s. 690 applications and the reference of his case by the federal Minister to the Supreme Court of Canada (*Milgaard Inquiry*, 2008, p. 345).

Commissioner MacCallum prevailed in his position:

On May 23, 2006, the Commission received a written submission from the federal Minister. The federal Minister stated that it did not object to federal Justice witnesses testifying, subject to appropriate constitutional boundaries. It was submitted that those boundaries, set by the Supreme Court in *Keable*, prevented the Commission from inquiring into communications which were appropriately characterized as advice (*Milgaard Inquiry*, 2008, p. 349).

Justice Canada's refusal to allow their role to be fully scrutinized created the impression that they were not interested in contributing to the truth about Milgaard's wrongful conviction. As I discuss below, regardless of who willingly participated at the Inquiry, the Commission expressed opinions about how power should be responsabilized and dispersed outside of the Inquiry.

***Dispersed Responsibility and the Operationalization of Power at the Inquiry***

By allowing all interested parties to contribute, the Commission gathered multiple truth claims regarding Milgaard's wrongful conviction. These competing truth claims and the manner in which they were gathered raised two key issues: responsibility for the wrongful conviction and the place for remedy and reform.

***Distributed responsibility and the diffusion of causality.***

The literature about wrongful convictions analyzes the causes of wrongful convictions on an individual basis. For instance, there have been several studies that have examined the role of eyewitnesses (Bell et al., 2008; Huff, 2002; Huff et al., 1986), the (mis)use of police interrogation techniques (Castelle & Loftus, 2001; Huff, 2002; Ramsey & Frank, 2007), and forensic science errors (Denov & Campbell, 2005; Gross & O'Brien, 2008; Huff, 2002; Loewy, 2007), yet wrongful convictions are often the result of several errors rather than one. Young (2011) notes:

Wrongful convictions are not typically the result of a single error committed by an individual criminal justice official. They can only occur when a number of things go wrong. . . The prosecution process, even when it is functioning correctly, involves the production of knowledges by one professional discipline which are then transferred and fed into the activities of other groups of professionals (p. 233-234).

Indeed when truths are produced at one stage of the investigation or conviction they are subsequently used again and again throughout the process so that "the truth produced at one stage is not challenged but rather *reinforced* at subsequent stages" (Young, 2011, p. 234, author's italics). Castelle and Loftus (2001) refer to this as "the cross-contamination of evidence" (p. 18). They elaborate:

Undeniably, something else comes into play when an initial piece of evidence is mistaken: that mistake causes other things to happen. When communicated to people who have knowledge of the case, the mistake appears to transform something

in their thoughts, their memories, and their approach to potentially every other piece of evidence in the case (Castelle & Loftus, 2001, p. 19).

Thus, it becomes difficult for one person or group to be held accountable for a wrongful conviction. What emerges is a “distributed responsibility” approach to miscarriages of justice. With Milgaard’s conviction, no one was held accountable for the wrongful conviction. As we shall see in an upcoming section, the actions of some parties were questioned and errors were identified, but no individual was blamed. Instead, all members of the justice system shared in the responsibility for the miscarriage of justice. This notion of distributed responsibility in the Milgaard case is similar to the findings on the Westray mining explosion. Justice Richard explains:

Anyone who hopes to find this Report a simple and conclusive answer as to how this tragedy happened will be disappointed. Anyone who expects that this Report will single out one or two persons and assess total blame for the tragedy will be similarly disappointed. The *Westray Story* is a complex mosaic of actions, omissions, mistakes, incompetence, apathy, cynicism, stupidity, and neglect . . . It was clear from the outset that the loss of 26 lives at Plymouth, Pictou County, in the early morning hours of 9 May 1992 was not the result of a single definable event or misstep (Richard, 1997, p. viii).

The same distributed responsibility argument is voiced in other wrongful conviction public inquiries. Donald Marshall Jr. was wrongfully convicted because of a combination of factors including coerced witnesses, police misconduct, tunnel vision, and systemic racism (Nova Scotia Department of Justice, 1989). Guy Paul Morin’s wrongful conviction was the result of poor forensic evidence, the abuse of police informants, and misconduct on the part of the police (Government of Ontario, 1997). Thomas Sophonow was wrongfully convicted because of eyewitness misidentification, tunnel vision, evidence issues, and the misuse of jailhouse informants (Government of Manitoba, 2001). James Driskell’s wrongful conviction was caused by issues of improper disclosure, unsavoury witnesses, police misconduct and

forensic mistakes (Government of Manitoba, 2007). In each of these cases, power was dispersed among all members of the criminal justice system whose decisions were reinforced at each stage of the criminal process. These examples demonstrate how multiple parties came together in an inquiry setting to learn from past errors, make improvements, and reform the system.

***Decentering the state and promoting autonomy.***

The Commission advocated for power to be dispersed outside of the Inquiry as well. They argued that the current system of reviewing wrongful convictions had its faults. First, the Commission argued that the applicant should not have the onus of collecting evidence to prove that a miscarriage of justice occurred. Milgaard's family, they said, should not have had to discover evidence to exonerate David Milgaard for the purpose of submitting applications to Justice Canada. As Commissioner MacCallum observed:

Joyce Milgaard's early reopening efforts illustrate the difficulty faced at the time by an applicant seeking to right a wrongful conviction. An imprisoned convict was in no position to gather evidence himself. Members of his family or other supporters were typically unsuited to the task of winning the confidence of reluctant witnesses and conducting effective interviews. Police and authorities, although not unhelpful if approached in the right way, had confidence in the regularity of the conviction, and were mistrusted by family and supporters for having achieved the conviction in the first place (*Milgaard Inquiry*, 2008, p. 614).

Second, the Commission argued that the review process must be autonomous from the government and free from the accusations of cover-up that plagued the Milgaard case and shook public confidence in the criminal justice system. In Commissioner MacCallum's words:

So long as the responsibility for conviction review remains with the federal Minister of Justice, an elected politician, there will be potential for political pressure to play a role in the decision making process, or at the very least, for the perception to exist that the decision was influenced by political pressure. The conviction review system

must not only be truly independent, it must be seen to be independent (*Milgaard Inquiry*, 2008, p. 390).

The Commission concluded that Canada should create an independent body similar to the United Kingdom's Criminal Cases Review Commission (CCRC):

It is my recommendation that the investigation of claims of wrongful conviction should be done by a review agency, independent of the government, established along the model of the English Criminal Cases Review Commission. Applications would no longer be made to the federal Minister of Justice under s. 696.1 of the Criminal Code. The agency would refer worthy cases to a Court of Appeal where the successful applicant would argue his case as though it were an appeal from conviction at trial (*Milgaard Inquiry*, 2008, p. 393).

The CCRC was created in 1997 as a result of several miscarriages of justice in the U.K., including the Birmingham Six, the Guildford Four, Judith Ward, the Maguire Seven, Stefan Kiszko, and the Bridgewater Four. The 1991 U.K. Royal Commission on Criminal Justice examined the justice system "from the start of a police investigation through the point when convicted persons have exhausted their rights of appeal" (Kyle, 2004, p. 660). They noted that the Home Secretary (similar to the Minister of Justice) had the power to refer cases back to the Court of Appeal, and they expressed two major concerns about the Home Secretary's involvement in miscarriages of justice. First, examinations made by the Home Secretary were reactive, only taking place after a miscarriage of justice claim had been advanced by the victim. Second, the Home Secretary was responsible for both the administration of criminal justice and overseeing the police. The role of the Home Secretary was perceived to be in a conflict of interest. In examining whether or not a miscarriage of justice had occurred, the Home Secretary had to inquire into the roles played by police and members of the justice system. If the Home Secretary were to find that a miscarriage of justice was the result of an error by police, then this would reflect badly on the Home Secretary since he/she was responsible for overseeing the administration of the police.

So, the Royal Commission recommended the establishment of an independent review body to investigate potential miscarriages of justice (Kyle, 2004). Members of the CCRC were to be recommended by the Prime Minister and appointed by the Queen (Kyle, 2004). At least one third of the CCRC members were to have legal qualifications (i.e. lawyers), one third of members were to have some experience or knowledge of the criminal justice system, and one third should be lay persons and represent the voice of the public. If the CCRC members believe that a miscarriage of justice has occurred, they recommend those cases to the Court of Appeal. The CCRC does not have the authority to overturn conviction. As Kyle (2004) observes, it is “the gateway through which applicants must pass if they are to gain further recourse to the courts once their ordinary rights of appeal have been exhausted” (p. 664). The Milgaard Commission argued that a Canadian CCRC would be better able to search for the appropriate evidence and would do so more efficiently and without bias or emotions. Furthermore, a CCRC-type agency would help to ensure independence from the government and remove the sole discretion of whether a case gets reopened from the Minister of Justice.

The Milgaard Inquiry was not the first to recommend an independent review agency in the wake of a wrongful conviction. In 1989, Commissioner Hickman made a similar recommendation at the Donald Marshall Jr. Inquiry:

We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism – an individual or a body – to facilitate the reinvestigation of alleged cases of wrongful conviction . . . [and] we recommend that this review body have investigative power so it may have complete and full access to any and all documents and materials required in any particular case, and that it have coercive power so witnesses can be compelled to provide information (Nova Scotia Department of Justice, 1989, p. 25).

Then in 1997 Commissioner Kaufman again recommended an independent board during the Morin Inquiry:

The Government of Canada should study the advisability of the creation, by statute, of a criminal case review board to replace or supplement those powers currently exercised by the federal Minister of Justice pursuant to section 690 of the Criminal Code (Government of Ontario, 1997, p. 40).

Four years later Commissioner Cory addressed this issue during the Sophonow Inquiry:

I recommend that, in the future, there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged. In the United Kingdom, an excellent model exists for such an institution. I hope that steps are taken to consider the establishment of a similar institution in Canada (Government of Manitoba, 2001).

Lastly in 2007 at the Driskell Inquiry, Commission LeSage raised the argument for the establishment of an independent review agency for a fourth time:

If there was an independent inquisitor body, as in the U.K., it could, after having been satisfied that a threshold, not necessarily a high threshold, has been met, commence the section [696.1] process of its own initiative. In this way, information that is unavailable to the applicant because of their inability to compel disclosure would be available to the independent agency to allow them to make a better determination of whether a miscarriage of justice occurred (Government of Manitoba, 2007, p. 121-122).

Despite the fact that all five of these wrongful conviction public inquiries recommended a CCRC-type agency, the federal government has not made these changes. They claim that a further level of bureaucracy is “not needed to replace Justice Canada acting under s.696.1, especially one which might be seen as a further level of appeal” (*Milgaard Inquiry*, 2008, p. 322). In 1998 the Department of Justice did release a consultation paper. They recommended a Criminal Cases Review Group (CCRG) made up of lawyers who had both Crown and Defense experience to investigate applications in a timely manner and report cases to the Minister of Justice. They also recommended educational reforms that better outlined the documents, guidelines, and processes needed to apply for a section 690 review

and they established a needed summary of facts required to prove a possible miscarriage of justice (*Department of Justice*, 1998). In 2002, Part XXI.1 of the *Criminal Code* was updated to reflect these changes (*Parliament of Canada*, 2001). While they were made prior to the Driskell and Milgaard Inquiries, these inquiry commissioners still recommended independent review systems. Indeed, Walker and Campbell (2010) argue that the changes made in 2002 were a compromise between the CCRC model and the one Canada already had in place:

Essentially, the Minister of Justice continues to maintain the power to revisit convictions, but there are now guidelines as to when a person is eligible for review, as well as criteria for when a remedy can be granted and the inclusion of summary convictions in the types of convictions eligible for review. Under these amendments, the members of the CCRG and other agents investigating on behalf of the minister were granted the power to compel the production of documents and appearances of witnesses. Other non-legislative changes were also included to increase the appearance of a distance from the Department of Justice, including moving the CCRG to a separate facility and the appointment of a special advisor to oversee the review process and advise the Minister (Walker and Campbell, 2010, p. 199).

In short, the reforms were mostly cosmetic. They appeared to offer improvements, but the more things changed the more they seemed to have remained the same.

### ***The Dispersal of Power Revisited***

According to Foucault, there are at least five conditions associated with the concept of power. First, “Power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away; power is exercised” (Foucault, 1978, p. 94). Second, power relations are “not in a position of exteriority with respect to other types of relationships” such as economic, family, sexual and political interests (Foucault, 1978, p. 94). Power relations form the internal structure of these relationships, which serve a productive purpose. Third, “power comes from below;” it is fluid and exercised in a variety of intertwined and overlapping relationships at all levels of society (Foucault, 1978, p. 94). Fourth, “power relations are both intentional and nonsubjective” (Foucault, 1978, p. 94).



They are exercised with a series of aims and objectives and do not result from the choices or decisions of individuals. My findings support these conditions of power. First, I discuss the first and third conditions followed by the second and fourth points. Foucault's fifth condition of power, which states that power is always accompanied by resistance, is discussed in the next chapter.

To begin, relations of power within the criminal justice system were fluid and exercised by a variety of individuals. Unlike sovereign times when a king or queen would dictate guilt and punishment, the current system of justice involved a network of parties working together to determine innocence and guilt. At each stage of the criminal process, from investigation to conviction to exoneration, multiple parties had duties and responsibilities. This was also the case at the Milgaard Inquiry; power was dispersed. The Commission insisted on creating an environment where power was exercised in a bottom-up, decentralized manner, characterized by multiple intertwined and overlapping relationships. All interested parties were encouraged to contribute their version of events regarding aspects of Milgaard's case, such as the treatment of witnesses, the key points of Milgaard's s.690 application and the reopening of the murder investigation. By allowing multiple narratives to be heard, the Inquiry promoted "discussion rather than confrontation" (Maclean, 2001, p. 595) and learning rather than blaming. This was a unique exercise for the criminal justice system, whose processes are normally invisible to the public (Young, 2011).

The Commission also examined the findings of other wrongful conviction public inquiries as sources of knowledge. In each of these cases, power was dispersed among several parties, each of whom played a role in the conviction process. As Young (2011) explains, "Actors in the prosecution process generally see themselves as part of a larger

machinery; each is a particular kind of expert . . . working within a system” (p. 229). Thus, if one part of the machine breaks down, the entire machine ceases to function. As a result, no one’s actions were cited as causing the wrongful conviction; responsibility was shared among different members of the justice system who, in the opinion of the Inquiry, worked together in securing the conviction against Milgaard. No single agency wielded power over another.

Foucault (1978) insists that all social relationships are characterized by exercises of power because power is embedded everywhere and can be exercised at many sites in a society. This was true for relations at the Inquiry. The relationship between Justice Canada and the Commission is especially revealing. In its quest to understand Milgaard’s wrongful conviction, the Commission wanted all relevant information regarding the case, including documents and decisions relevant to the ministerial reviews. Justice Canada refused. Both groups were adamant in their positions, but neither “possessed” power over the other. Instead, there was a give and take from both Justice Canada and the Commission, and they negotiated in order to come to an agreement where each group was able to exercise power and contribute to the production of truth about Milgaard’s conviction.

Foucault argues that while there are aims, objectives and logics behind relations of power, no single person dictates how power is exercised. In their analysis, the Commission found that the current system for reviewing suspected cases was too centralized around the office of the Minister of Justice, who could dictate whether a case should be reviewed. The Commission argued that the current system was top heavy, biased and secretive. In advocating for an independent review agency, the Commission supported the notion that

truth should come from multiple sources and points of information, rather than from a single state department.

My findings indicate, then, that power was dispersed and exercised by a variety of sources within the Inquiry and outside of it as well. This type of power was important not only for generating information about Milgaard's wrongful conviction, but also for advocating for changes outside of the Inquiry. Although there were some struggles and some negotiated exercises of power, no single party "wielded" power over another or solely dictated the truth of the case. Yet something else was also at play at the Inquiry. A second type of power was present and it was related to the ordering of the various truth claims. Power in this instance was also centralized and hierarchical.

### **The Ordering of Truth at the Inquiry**

The Commission's goal throughout the Inquiry was to create and reproduce an 'official' truth about Milgaard's case. The second technique employed by the Commission determined who was capable of producing acceptable truths. The Commission needed to assess and order the various narratives in order to determine which were the most credible. As we shall see, the mechanisms and strategies they deployed are akin to Becker's (1967) notion of a 'hierarchy of credibility' where truth is informed by power. In what follows, I examine the Milgaard case chronologically, identifying how the various groups and parties created and acquired credibility at the Inquiry. Then, I discuss what determined whether a group was considered credible and how this influenced the Commission's regime of truth. I critique Becker's ideas about power and "hierarchies of credibility" as they relate to my findings before concluding with a discussion of how power and truth were exercised at the Inquiry.

### *The Police Investigation of 1969*

When a crime occurs, the police are typically the first members of the justice system to respond and as Ramsey and Frank (2007) note, they “become involved in a very critical time – the beginning” (p. 445). When the police produce information which they believe to be the facts of a case, that information is subsequently used by the prosecution to build their case for trial. It was several months after Gail Miller was murdered before the police laid charges. They had a blood-stained paring knife, forensic evidence from the autopsy and gathered at the scene, but no eyewitnesses. Furthermore, there was also the possibility that other sexual assaults in the vicinity were committed by the same person who had murdered Gail Miller. When the police interviewed Albert Cadrain, they were eventually presented with a potential suspect. Repeated interviewing of Wilson produced a potential murder weapon and a likelihood of violent behaviour on the part of their suspect. Consistent questioning of John eventually produced an eyewitness account of the murder. The combination of this evidence caused them to charged Milgaard with murder on May 30, 1969.

Overall, the police investigation was considered credible by the public inquiry. The exception was the polygraph examination and interrogations conducted by Art Roberts. As noted, he failed to record his interrogations of the teenagers and he did not write a formal report on his actions. This became an important issue once Nichol John claimed that she had witnessed Milgaard stabbing a woman. Commissioner MacCallum questioned Roberts’ conduct and downplayed his credibility as an expert. The Commissioner did not say that Roberts coerced Wilson and John, but the lack of record about the interrogations was suspicious to him. Commissioner MacCallum opined:

The Commission lacks evidence to conclude that Art Roberts resorted to outright coercion during his interview with Ron Wilson, but whatever he said to him did not produce the truth. In the course of the polygraph examination and interview, Roberts somehow caused Wilson to tell him what Roberts thought to be the truth (*Milgaard Inquiry*, 2008, p. 400).

Roberts somehow pressured John into telling him what he thought to be the truth. There is a clear distinction to be made between coercing evidence from a witness in the sense of compelling assent in belief and using persuasive techniques such as repetitive questioning and suggestion (*Milgaard Inquiry*, 2008, p. 401).

While the misguided actions by the polygraph expert were questioned by Commissioner MacCallum, the police were not found to have caused Milgaard's wrongful conviction.

### ***The Trial and the Appeals: 1970-1971***

David Milgaard's jury trial for murder began on January 19, 1970 and was presided over by Chief Justice Alfred Bence. On January 31, 1970, Milgaard was found guilty by the jury and sentenced to life in prison with no chance of parole for ten years. Knowing that Milgaard was indeed innocent, the Commission needed to examine the trial in detail. Their focus was on the role played by both lawyers and the trial judge. When Nichol John failed to repeat crucial evidence that she supposedly witnessed the stabbing of Gail Miller, Crown Prosecutor Caldwell requested that she be declared a hostile witness. This meant that he could read John's previous statement to the police into trial testimony and be allowed to question her about it (*Milgaard Inquiry*, 2008). This protocol is usually performed away from the jury in order to ensure that they do not hear statements which could affect their decision. But Justice Bence allowed Caldwell to read John's police statement in front of the jury. The defence lawyer, Calvin Tallis, was then limited in his questioning of John as a result of this decision. At the Inquiry, Tallis defended his actions and decisions at trial and Commissioner MacCallum praised the lawyering. The Commissioner argued that "Tallis offered a skilled, thorough, nuanced and ethical defence" (*Milgaard Inquiry*, 2008, p. 301). The Commission

dismissed any argument that Tallis was responsible for Milgaard's wrongful conviction or that he was involved in covering up Milgaard's innocence. The Commission also evaluated the role of the prosecutor. Commissioner MacCallum claimed that Caldwell acted in good faith. In his words: "Caldwell offered evidence which he believed to be credible and relevant, and did so in a spirit of cooperation with defence counsel" (*Milgaard Inquiry*, 2008, p. 301). Overall the lawyers at Milgaard's trial were praised for their actions and their credibility was valorized at the Inquiry.

The same cannot be said for the trial judge, Justice Bence. The Commission identified three issues that called credibility into question. First, the Inquiry found that the judge undermined Nichol John as a witness:

A perusal of the trial record illustrates how the trial judge managed to destroy the credibility of John's examination-in-chief to the effect that she could not remember the incriminating parts of her statement, while at the same time those parts which she continued to say she did not remember were being read line by line in front of the jury (*Milgaard Inquiry*, 2008, p. 84).

The judge's conduct left the "impression that John's failure to recall was not genuine. As a result, the jury was likely to conclude that the truth lay in her May 24 statement" which was subsequently discovered to be false (*Milgaard Inquiry*, 2008, p. 405). Second, the Commission questioned Bence's demeanor in court. The judge it seems was often frustrated. This was likely a result of John's inability to remember events and her frequent emotional outburst on the stand. But in Commissioner MacCallum's view, Justice Bence should have been impartial and not impugned her character. Finally, the Commission questioned Justice Bence's understanding of the *Canada Evidence Act*. According to the Inquiry, Nichol John was cross-examined about statements she had not adopted in her original testimony. This

allowed the jury to hear improper information which may have influenced their verdict.

Commissioner MacCallum put it as follows:

The inconsistent statements might never have gotten before the jury but for a procedural error in the application of s.9(2) of the Canada Evidence Act. In deference to the trial judge, this section was new and he made a reasoned effort to apply its provisions. Nevertheless, the combination of legal error and impatience probably contributed to the wrongful conviction (*Milgaard Inquiry*, 2008, p. 576).

Unfortunately, Justice Bence passed away in 1977 and could not clarify his conduct or provide further arguments at the Milgaard Inquiry.

The issue of Bence's misunderstanding of s.9 of the *Canada Evidence Act* was the basis of Milgaard's appeal to the Saskatchewan Court of Appeal. Milgaard's lawyer repeated his argument before the Inquiry:

The initial cross-examination by Caldwell on the statement should have been conducted in the absence of the jury and the trial judge 'should have permitted counsel for the defence to question the witness concerning the circumstances under which the statement was obtained and adduce evidence in this connection, before making a ruling as to whether or not the witness was adverse.' By permitting cross-examination of John by Caldwell in the presence of the jury before any declaration was made as to her being adverse Milgaard was so prejudiced that the jury would have been adversely influenced in arriving at their verdict (*Milgaard Inquiry*, 2008, p. 98).

The Court of Appeal agreed that Nichol John should have been examined away from the jury, but they did not believe that these actions caused prejudice against Milgaard's

innocence. The Commission questioned the Court of Appeal's decision:

The Saskatchewan Court of Appeal was wrong in reaching this conclusion. Evidence at the Inquiry established that the defence was prejudiced by this error. Allowing the jury to hear John's statement was a turning point in the trial and instrumental in Milgaard's conviction. Had Calvin Tallis been allowed to cross-examine John, Art Roberts and Raymond Mackie in the absence of the jury, he might have revealed circumstances in John's handling by Saskatoon Police and by Roberts which might have convinced the judge to withhold the out of court statement from the jury. What happened instead was disastrous for the defence (*Milgaard Inquiry*, 2008, p. 406).

Not surprisingly, Milgaard was denied the opportunity to appeal his case to the Supreme Court of Canada in November, 1971 (*Milgaard Inquiry*, 2008).

***The s.690 Applications and the Fight to Prove Innocence: 1980-1991***

From 1980 onward, the Milgaard Group fought to prove Milgaard's innocence. As we will see in greater detail in the next chapter, they gathered evidence and mobilized the media in the hope that public pressure would speed up the review process. Their counter-investigation also led them to believe that a cover-up was at play. Suffice it to say that, at the Inquiry, the Milgaard Group faced criticism for their actions, claims, and use of the media. Commissioner MacCallum insisted that Minister Campbell was forced to take the second s.690 application to the Supreme Court because the media campaign caused a moral panic about the administration of criminal justice in Canada. He implied that if the Milgaard Group had stayed out of the media and allowed Justice Canada officials to do their job, Milgaard would have been released from prison sooner. But if the Milgaard Group had not mobilized a public outcry, then there would not have been a Supreme Court reference in the first place. Indeed, without the Supreme Court reference, which drew attention to Fisher as a possible suspect and initiated a new DNA testing process, Milgaard would not have been found wrongfully convicted and the public inquiry would not have been mandated.

***The 1992 Supreme Court Reference, Formal Exoneration and the Public Inquiry***

In any event, Justice Minister Kim Campbell referred Milgaard's second s.690 application to the Supreme Court of Canada. The Court prides itself on the following qualities:

The independence of the Court, the quality of its work and the esteem in which it is held both in Canada and abroad contribute significantly as foundations for a secure, strong and democratic country founded on the Rule of Law. . . The Supreme Court



of Canada is an important national institution that is positioned at the pinnacle of the judicial branch of Canada's government (Role of the Court).

The Court examined the evidence presented to them, chiefly that Fisher's past rapes were similar to Miller's murder. The Court concluded that "the continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider the fresh evidence" (Boyd & Rossmo, 2009, p. 200). Commissioner MacCallum did not question this decision at the Inquiry. He wrote: "Many issues arise, including the fairness of the trial, and I neither question nor endorse the assessment of the Supreme Court" (*Milgaard Inquiry*, 2008, p. 300). The decisions of the Supreme Court were thought to be highly credible. In Becker's words, they were at the "top of the hierarchy of credibility" with the most complete view of justice available. To question the opinion of the Supreme Court of Canada might very well have been detrimental to the Inquiry's goal of restoring confidence to the criminal justice system.

After the 1992 Supreme Court Reference, Milgaard was freed from prison. But the decision was left with Saskatchewan Justice to retry the case or not. The latter concluded that Milgaard had spent enough time in prison and they entered a stay of proceedings. Milgaard, however, was not formally declared innocent. This decision occurred in 1997 when DNA evidence exonerated him. Once proceedings against Fisher were complete and all appeals were exhausted, the public inquiry was held. It began in January, 2005 and the Commissioner released his findings in September, 2008.

### ***A Hierarchy of Credibility Revisited***

Becker (1967) insists that there are usually two sides to a socio-legal situation. He argues that you either concur with the superordinates in a social conflict and accept that "responsible professionals know more about things than laymen," or you support the

subordinates and subsequently call into question what “everyone knows” (Becker, 1967, p. 242). For Becker, a person’s social status affects their truth-telling capacity. He argues that those who are in positions of authority often produce more acceptable versions of the truth. For him, power is very much a structured practice and truth claims mirror this ladder-like concept of power. This notion of power was also supported by my findings. Although the Commission did not dictate whose side it was on or express conclusions about criminal or civil blame, they endorsed truth claims emanating from authoritative sources including the Supreme Court of Canada, Justice Canada, Saskatchewan Justice, the lawyers and the police. These sources framed the issues regarding witnesses, evidence and criminal procedure. For the most part, errors they made were recorded as minor and the Commission found no evidence to support serious claims of misconduct or wrongdoing.

These criminal justice system actors were experts in their respective fields. Their positions at the top of the ladder of credibility afforded them with the most information and so their opinions were deemed to be the most credible. For instance, these actors defined the truth at each stage of the conviction process and ensured that they solved the murder and upheld public safety. Becker (1967) supports this notion, arguing:

They have been entrusted with the care and operation of one or another of our important institutions. . . They are the ones who, by virtue of their official positions and the authority that goes with it, are in a position to ‘do something’ (p. 242).

In other words, because members of the justice system are tasked with ensuring social order and justice, we must trust their authority in regards to legal and criminal matters, because they have been designated as being the most credible. What good would it be to have a criminal justice system responsible for upholding justice if none of its members were considered experts capable of being taken seriously?

Interestingly, the Commission questioned Joyce Milgaard's parallel investigation of trial witnesses and Larry Fisher, arguing that it was out of her purview. As they argued, "she believed that as a 'mom' she could get Fisher to confess more readily than could trained RCMP investigators and could obtain better information from witnesses than either police or the authorities" (*Milgaard Inquiry*, 2008, p. 146). From the Commission's point of view, Joyce Milgaard lacked expertise and full insight into these matters, causing them to question her credibility. Her social status as a mother of a convicted criminal affected her credibility at the Inquiry. In other words, Joyce Milgaard as a "non-expert" could not possibly succeed in the expert tasks usually performed by members of the justice system.

Although multiple narratives were gathered regarding issues at the Inquiry, the Commission ordered these claims in a hierarchical manner. They determined whose statements were credible and authoritative, and whose were subordinate. As we will see in the next chapter, credible truth claims were used to create official discourses, and discourses based on the narratives of non-experts were decried. Overall, my findings evince how superordinate groups were more likely to contribute to the production of truth claims even though power was exercised and dispersed at the Inquiry.

My findings also revealed instances which questioned Becker's model. Some superordinate parties were not awarded corresponding amounts of credibility for their truth claims. First, the polygraph expert Art Roberts' credibility was downplayed and despite the fact that Roberts was deceased at the time of the Inquiry, the Commission criticized his actions and his impact on the case. At the Inquiry, the police sought to defend its reputation within the criminal justice system despite Roberts' actions. They argued that they had no reason to be suspicious of the polygraph expert's methods and that they themselves had

undergone several reviews, none of which suggested misconduct of their part (*Milgaard Inquiry*, 2008). They police refused to let Roberts' "mistakes" sully their overall credibility at the Inquiry.

Second, Justice Bence's conduct was said to be one of the factors leading to Milgaard's wrongful conviction. He was portrayed as lacking credibility. But he died before the Inquiry was called and could not explain, contextualize or defend his decisions and actions. One might wonder whether he would have faced the same judgement had he been alive to contribute to the Inquiry's production of the truth. It is difficult to know whether his justifications for his actions would have convinced the Commission that there was no misconduct on his part. Would his actions still have been defined as non-credible?

Finally, the Milgaard Group was a counter point to Becker's model of power and credibility. Despite their acumen, getting Milgaard out of jail, proving his innocence, obtaining compensations and helping to establish an Inquiry, the Milgaard Group's narratives were disavowed. The Commission could not silence their voices but, as we shall see, they sought to discredit them. The Milgaard Group's narratives were akin to what Foucault (2004) calls "subjugated knowledges" and, not surprisingly, their accounts were defined as "nonconceptual," "naïve," and "hierarchically inferior" (p. 7). I discuss this in the next chapter.

By arguing that Becker's model of power and credibility was evident at the Inquiry, my findings question some of Foucault's ideas of power. While Foucault argues that power is exercised and comes from below, my findings also indicate that power was possessed and wielded in a top-down manner. The Commission's goal, as we shall see, was to produce official discourses about Milgaard's wrongful conviction. Furthermore, Foucault suggests

that power is both intentional and non-subjective, meaning that there is no group or mastermind directing these relations of power. Although this was to a large degree true, the Commission also had control over the production and circulation of truth and their actions were quite subjective. The portrayal of Joyce Milgaard was very much intentional and personal, and it resulted from the Commission's frustrations with her allegations and actions before and at the Inquiry.

There were, then, two faces of power at the Inquiry. On the one hand, power was decentralized. It was exercised by multiple parties in a series of overlapping and intertwined relationships. It was not exterior of other social relationships, and it was accompanied by resistance. The dispersal of power was imperative for gathering multiple truth claims for the purpose of producing official, public truths about Milgaard's wrongful conviction. Discussion was encouraged, responsibility for the miscarriage of justice was shared and the Commission advocated for the dispersal of power to be exercised outside of the Inquiry in the form of autonomous bodies and independent processes. On the other hand, power was centralized. The Commission ordered truth claims in a manner akin to Becker's notion of a hierarchy of credibility, deciding which narratives were the most authoritative. Those lacking in credibility were disavowed by the Commission. Ultimately, the Commission sought to close off any doubt about the legitimacy of the justice system. Those whose voices were presented as credible sources at the Inquiry were member of the criminal justice system – those whose very actions were under review by the Inquiry. But not all parties fit with the model, including the polygraph expert, the trial judge, and the Milgaard Group.

Both faces of power were embedded into the structure of the Inquiry for the purpose of determining who was “able to tell the truth, about what, with what consequences, and with

what relation to power” (Foucault, 2001, p. 169-170). Both types of power had specific functions that were necessary for producing truths about the case. Neither type of power was capable of functioning on its own. The two faces of power delicately balanced the need for a discussion about the case as well as the desire to close off doubt about the legitimacy of the justice system, which will be discussed in greater detail in the next chapter. The result of these deployments of power was that criminal justice system parties were able to define the truth about their involvement with Milgaard’s case. In most cases, these parties were placed outside of blame, criticism and de-legitimization.

### **Conclusion**

This chapter has examined how power was exercised at the Inquiry in two different manners: dispersed, de-centralized and fluid, and centralized, hierarchical and top-down. Both of these techniques of power were part of the Commission’s truth-telling mission. In the next chapter, I highlight how the Commission created “official discourses” about the Milgaard conviction. These exercises of power, however, were not without resistance, and so I also examine the Milgaard Group’s truth-telling and subaltern discourse. I then examine how the Commission responded to the actions and narratives of the Group and how this affected the production of official discourses. I highlight the political nature of the Inquiry in the Milgaard’s case by explaining how the Commission’s discourses influenced the way we speak, think about, and remedy wrongful convictions.

## **Chapter 6: Official Discourses, Resistance, and the Politics of the Milgaard Inquiry**

### **Introduction**

In the previous chapter, I discussed how the Commission collected narratives from all interested parties and assessed the credibility of those who spoke at the Inquiry. In this chapter, I discuss a third technique used to produce an official discourse about Milgaard's wrongful conviction and to repair the "fractured images of justice" (Burton & Carlen, 1979, p. 13). I argue that the discourses they produced attempted to normalize wrongful convictions by defining what can be said about them, by whom and with what relation to power. Yet as Foucault (1978) argues, "where there is power, there is also resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power" (p. 95). In his view, resistance is often aimed at the techniques of power in an attempt to produce different discourses and truths. Thus in this chapter I also examine how the Milgaard Group created a critical resistance discourse to constitute their understanding of the truth of Milgaard's case. This resistance discourse, however, did not go unanswered. I argue that the commission of inquiry responded with criticism against those who questioned the integrity of the criminal justice process. These competing discourses invite a discussion of the politics of the Inquiry process, and I examine the pros and cons of public inquiries as a tool for producing truths and official discourses. This chapter concludes with a summary of my key findings, a discussion of the limitations of my thesis, and a set of suggestions for future research.

### **The Official Discourse of Unpredictable and Unpreventable Error and Reform**

Foucault (1977, 1991) argues that power has the positive ability to create knowledge and discourses. These discourses are bodies of knowledge which guide our understanding of

an object or practice, as well as the language we use to speak about that object or practice. Discourses, according to Foucault, may be discontinuous and overlapping, and are subject to transformation over time. At the Milgaard Inquiry, though, the Commission wanted to close off any suspicions about what caused Milgaard's wrongful conviction by creating what Burton & Carlen (1979) call an "official discourse." That is, the Commission sought to produce a discourse which "will both pre-empt and foreclose any theory within which questions could be posed which might destroy the pre-givens of that discourse" (Burton & Carlen, 1979, p. 95). In this section, I examine how the Commission created an official discourse about how Milgaard's wrongful conviction occurred and how it can be understood in the context of the justice system as a whole.

Responsibility for Milgaard's wrongful conviction was distributed among several parties. The consensus at the Inquiry was that the conviction was the result of unpredictable and unpreventable errors. The Commission argued that no one in the justice system could have predicted that Milgaard was innocent. While there were minor flaws, there was no malicious conduct on the part of justice system officials. To that end, Commission MacCallum made thirteen recommendations to improve the justice system, targeting the police, forensic evidence, post-conviction events, and wrongful conviction-specific issues.

### ***Police Errors and Reform***

The Saskatchewan Police were responsible for investigating the Miller murder and ultimately for building a case to charge Milgaard. The Commission found no issue with their decision to pursue him as a suspect, arguing that the police were "justified in concluding from the evidence of [Wilson and John] that they and Milgaard were in the area of the crime at relevant times" (*Milgaard Inquiry*, 2008, p. 56). In pursuing Milgaard as a suspect, the



police abandoned their ‘single-perpetrator theory’ which suggested that one person was responsible for the Miller murder and the sexual assaults in the fall of 1968. Had the police continued to believe in this theory, Milgaard would have been excluded as a murder suspect because he was not in the city in the fall of 1968. Commissioner MacCallum supported the police department’s decision to abandon the theory in favour of solving the murder, arguing that their investigation was “thorough and appropriate” (*Milgaard Inquiry*, 2008, p. 399).

Milgaard, Wilson, John and Cadrain were all teenagers when they were involved with the Miller murder investigation. The Milgaard Group alleged that these witnesses were mistreated and coerced because of their vulnerability. But the Commission insisted that officers were “conscious of their youth and treated them with kid gloves as a result” (*Milgaard Inquiry*, 2008, p. 92). One issue was Art Roberts’ interrogations of Wilson & John, which produced statements that were later proven untrue. But the Commission could not conclude whether John lied, whether Roberts “induced her to lie” or some combination of the two (*Milgaard Inquiry*, 2008, p. 303). As such, the Commission recommended that “police should ensure that every statement taken from a young person in a major case whether as a witness or as a suspect, is both audio recorded and video recorded” (*Milgaard Inquiry*, 2008, p. 413).

Linda Fisher’s 1980 statement to the police and their decision not to follow up was questioned by the Commission. But the latter did not fault it:

The decision by the Saskatoon Police not to follow up on Linda Fisher’s report was not reasonable. There was no policy in place at the time to deal with such matters, but there should be henceforth (*Milgaard Inquiry*, 2008, p. 606).

As a result, Commissioner MacCallum recommended that “every complaint to police calling into question the safety of a conviction should be referred to the Director of Public

Prosecutors” (*Milgaard Inquiry*, 2008, p. 413). His reasoning for this was that any decision to re-open the case should have been at the discretion of Saskatoon Justice officials and not the police.

Throughout their investigations, the Saskatoon Police relied on other police forces, including the RCMP. When it was discovered that several police files on Fisher’s previous sexual attacks were missing, concerns were raised about the sharing of evidence and files between collaborating police forces. Although the absent Fisher files were later attributed to human error and coincidence, Commissioner MacCallum made recommendations to ensure that future cases would not be subject to the same outcome. He argued that “there should be mandatory sharing of investigation reports between all police forces assisting in major cases. The reports should be directed to the file manager to become part of the major case management files” (*Milgaard Inquiry*, 2008, p. 413). The Commissioner also recommended that “Municipal police forces within the province who ask for assistance from the RCMP should ensure that they have in place a written agreement describing the terms, conditions and responsibilities of inter-agency relationships” (*Milgaard Inquiry*, 2008, p. 413).

Finally, the Commission recommended that: “Victims of crimes should be informed of the resolution of their cases” (*Milgaard Inquiry*, 2008, p. 414). This was addressed because some of Fisher’s victims were never notified that he had been charged, convicted and sent to prison (*Milgaard Inquiry*, 2008, p. 330-331). At bottom, the Commission argued that there was no proof of police misconduct: “We have deliberately thrown the door open to any and all evidence tending to show that the police were guilty of misconduct during the investigation, and a case for it simply has not been made” (*Milgaard Inquiry*, 2008, p. 575).

### ***Forensic Errors and Medical Reform***

When Milgaard was convicted in 1970, the extent of the forensic evidence was rather limited. Forensic analysts collected blood and semen samples but very little analysis was done with this evidence. Questions about the evidence were not raised until years after the trial and DNA testing eventually proved Milgaard's innocence. While the medical field advanced significantly since Milgaard's conviction, Commissioner MacCallum argued that forensic analysis and medical examinations must be better regulated and monitored, especially in regards to "the taking and analysis of body tissue and fluid samples" (*Milgaard Inquiry*, 2008, p. 325). The Commission argued that: "Dedicated medical examiner's facilities should be established in one or more major centres where all autopsies deemed necessary in cases of sudden death would be performed by qualified forensic pathologists in the service of the province" (*Milgaard Inquiry*, 2008, p. 413).

### ***Post-Conviction Errors and Procedural Reform***

Milgaard was fortunate that the Group's lawyer, Gary Young, contacted parties about preserving evidence and files from the case. Often, trial exhibits are destroyed after appeal attempts have been exhausted. Had this been done, the clothing used to gather a DNA sample would have been destroyed and ruined his chance of proving that he was "factually innocent." As such, Commissioner MacCallum offered three recommendations to ensure evidence does not get destroyed without consent. First, he suggested:

In all homicide cases, all trial exhibits capable of yielding forensic samples should be preserved for a minimum of 10 years. Convicted persons should be given notice after 10 years of the impending destruction of exhibits relating to their trials, allowing applications for extensions (*Milgaard Inquiry*, 2008, p. 413).

Second, he argued that "in all indictable offence cases, documentary exhibits should be scanned and stored electronically, unless a court orders otherwise" (*Milgaard Inquiry*, 2008,

p. 413). Third, he advocated that “All prosecution and police files, including police notebooks, relating to indictable offences should be retained in their original form for a year, then scanned and entered into a database where a permanent, secure electronic record can be kept” (*Milgaard Inquiry*, 2008, p. 414).

David Milgaard faced several complications in his request for parole. The parole board had difficulty accepting Milgaard’s claims of innocence. In their view, Milgaard failed to show remorse for the crime for which he was convicted, and so they would not release him (Milgaard & Edwards, 1999). Indeed, Crown prosecutor Caldwell lobbied the board and “made it his business to see that Milgaard stayed in custody” (*Milgaard Inquiry*, 2008, p. 597). In his letters to the parole board, Caldwell claimed that Milgaard would “return to a life of crime if released” and this would result in “another senseless and brutal killing” (*Milgaard Inquiry*, 2008, p. 596). Milgaard, in his view, was “an extremely dangerous and unpredictable person” (*Milgaard Inquiry*, 2008, p. 596-597). Commissioner MacCallum questioned Caldwell about these letters, yet concluded that there was “no evidence of personal animus” or “misconduct” (*Milgaard Inquiry*, 2008, p. 597). However, the Commissioner recommended that:

. . . Prosecutors desist from unsolicited contact with the National Parole Board. If asked, they should confine recitation of the facts of a case to those found by the court as expressed in the reasons of a judge sitting alone, or in a jury trial to those cited by the judge in reasons on sentencing. Prosecutors should avoid leaving the impression that they are heavily invested in a case on a personal level (*Milgaard Inquiry*, 2008, p. 413).

### ***Wrongful Conviction and Legal Reform***

Stays of proceedings and factual innocence were two issues discussed in detail at the Milgaard Inquiry. When a stay of proceedings is entered, the charges are basically suspended or stopped, but they may be reactivated within one year. If not acted upon, “they are treated

as if they never commenced” (Brockman & Rose, 2011, p. 76). When Milgaard was released from prison in 1992, he did not receive formal acquittal in the eyes of the law since the courts did not quash his original conviction. According to the Inquiry Report: “In the public eye, there is a terrible disconnect, a moral chasm, between ‘legal’ and ‘factual’ innocence, between a finding of ‘not guilty’ and a declaration of ‘wrongly convicted’” (*Milgaard Inquiry*, 2008, p. 370). For five years Milgaard lived in legal limbo. He was no longer in prison for murder, but neither was he officially wrongfully convicted. Factual innocence did not occur until 1997 when DNA results proved that Milgaard was indeed innocent. Along with formal exoneration, the government eventually compensated Milgaard for the years he spent in prison.

Commissioner MacCallum took issue with the compensation process. He argued that those who are wrongfully convicted and imprisoned should “regain their freedom” (*Milgaard Inquiry*, 2008, p. 369). In his view, the Executive branch of the government should be responsible for determining if compensation should be paid and in what amount. The Commission also examined whether factual innocence should be considered in the formula for determining the payment of compensation and concluded that it should not. They argued that:

Factual innocence as the sole criterion for paying compensation is unduly restrictive. Where a miscarriage of justice has resulted from an obvious breach of good faith in the application of standards expected of police, prosecution, or the court, the door to compensation should not be closed for lack of proof of factual innocence (*Milgaard Inquiry*, 2008, p. 414).

Indeed the Commission advocated for an independent review agency for miscarriages of justice. As Commissioner MacCallum put it:

The investigation of claims of wrongful conviction should be done by a review agency independent of government, established along the model of the English

Criminal Cases Review Commission, replacing ministerial review under s.696.1 of the *Criminal Code*. The review agency would report directly to the Court of Appeal of the province or territory which registered the conviction (*Milgaard Inquiry*, 2008, p. 414).

### ***Exoneration and Normalization***

As Foucault argues, discourses serve a number of functions. They are bodies of knowledge that help to define how we think about, discuss, and understand a concept or idea. They define what “utterances” are circulated and among which groups, as well as who has access to them (Foucault, 1978). At the Inquiry, the Commission used expert opinions and authoritative truth claims to circulate a public discourse. This discourse helped to “allay, suspend and close off popular doubt” about the role of the criminal justice system in Milgaard’s wrongful conviction (Burton & Carlen, 1979, p. 13). Essentially, the Inquiry initiated an exoneration process for members of the criminal justice system. Their actions were akin to Cohen’s (2001) concepts of “interpretive” and “implicatory” denial. Through interpretive denial, officials “admit the raw facts . . . but deny the interpretive framework placed on these events” (Cohen, 2001, p. 105-106). Through counter-claims and reinterpretations, the harm that has been done is minimized. With implicatory denial, harms caused are justified by officials who highlight the necessity of one’s actions, deny a victim, or re-contextualize the circumstances of the event (Cohen, 2001).

The Commission addressed minor flaws and errors, but no parties were faulted for the wrongful conviction. The actions of justice system members were interpreted as “normal procedures” to solve a murder. By contextualizing the necessity of solving the murder, the focus shifts from the harm done to Milgaard to the idea of public safety. They argued that the evidence pointed them to Milgaard as a suspect, and had they not followed this evidence, they may not have solved the murder. No one set out to harm Milgaard or purposely put him

in jail even though he was innocent. Rather, members of the criminal justice system were trying to ensure that no more attacks or murders would occur. The Commission normalized wrongful convictions in two ways. First, criminal justice system actors underwent an exoneration process. In a public forum, they discussed their actions, admitted their errors and contributed to reforming the system. All issues were examined individually, rather in unison, which, as we shall see, helped protect the view of the criminal justice system and its legitimacy. Second, wrongful convictions were framed as “inevitable rather than exceptional” (*Milgaard Inquiry*, 2008, p. 388). The Commission argued that if the public stops treating wrongful convictions as such exceptional incidents, the likelihood of moral panics and crises of legitimacy like those that plagued the Milgaard case would be lessened. Furthermore, if wrongful convictions are seen as inevitable and there is “openness in admitting them,” then perhaps the criminal justice system would develop a systematized way of responding to wrongful convictions (*Milgaard Inquiry*, 2008, p. 388).

Thus, the Commission valorized that members of the justice system are the ones who predominantly define how everyone else understands wrongful convictions. The public truths of these miscarriages of justice are created from expert, authoritative opinions on the subject. But, such a discourse, as Foucault (1978) suggests, becomes “a point of resistance and a starting point for an opposing strategy” (p. 101). This resistance discourse, as I discuss in the next section, is not based on expert truth claims. Rather, it is born out of a first-hand experience with a wrongful conviction and frustrations with the justice system proper.

### **Resistance and the Discourse of Innocence Delayed and Justice Denied**

There is no doubt that Joyce Milgaard believed in her son’s innocence. She described the courtroom as “intimidating” and she says that the family placed their hopes and trust in a

lawyer who was the ‘expert’ (Milgaard & Edwards, 1999, p. 33). She remembers being “full of hope” that the judge’s charge to the jury would return a ‘not guilty’ verdict (Milgaard & Edwards, 1999, p. 44). When David was found guilty, she discovered new fears. Prison “frightened” her (Milgaard & Edwards, 1999, p. 50). She learned that inmates believed David’s pleas of innocence. She realized that her son was “getting a fairer hearing from prisoners than from the justice system” (Milgaard & Edwards, 1999, p. 55). Despite rejected appeals, suicide attempts, and an escape from prison, she still had faith in the system: “We believed that David would be paroled” (Milgaard & Edwards, 1999, p. 68). However, when David was shot in the back by police after he escaped, the family “stopped placing hope in appeals or parole or politicians or any part of the system” that had already failed them so badly (Milgaard & Edwards, 1999, p. 74). Joyce’s understanding of justice was increasingly based on her experiences with the justice system. She claimed that her family was regarded as “second-class” citizens by members of the justice system and the public (Milgaard & Edwards, 1999, p. 62). She felt the need to speak her truth to the justice system. The Milgaard Group sought to transform current discourses on Milgaard’s wrongful conviction. From their point of view, official expert explanations did not fit with their own experiences of “justice.”

Their subsequent actions were akin to Foucault’s (2001) ideas about *parrhesia* or ‘free speech.’ The Milgaard Group’s early efforts at truth telling were twofold and, as we shall see, were characterized by truth, frankness, courage, danger and duty. As truth-tellers, they spoke the truth in a very sincere manner, explaining the events as they saw and understood them, even if there were risks in doing so. First, as discussed, they gathered evidence to file a s.690 application to have Milgaard’s case reviewed by the federal Minister



of Justice. Second, they proactively spread their understanding of the truth about Milgaard's wrongful conviction. The main goal for their involvement with the media was to frame and circulate an alternate story about Milgaard's conviction. As Joyce Milgaard explained:

I had learned a long time ago that, as a family member of a convicted murderer, my voice didn't count for much. What I needed was the voices of other Canadians, and the way to get to them was through the media (Milgaard & Edwards, 1999, p. 170).

The Milgaard Group plastered the city of Saskatoon with posters claiming Milgaard's innocence. In Manitoba, they mobilized the *Winnipeg Free Press* to get their story out (Milgaard & Edwards, 1999). The Group was interviewed by CBC's *The Fifth Estate* who ran a nation-wide story in the fall of 1990 about the suspected wrongful conviction. The documentary framed Milgaard as "a frightened teenager" who had "grown up behind bars" as a result of being "a victim of circumstance and a small town that was demanding a conviction" (CBC's *The Fifth Estate*, 1990). The show recreated events and interviewed key parties, including Milgaard, the Danchuks (who waited for a tow-truck with the group on the morning of the murder), Albert Cadrain, Deborah Hall, and Linda and Larry Fisher. The program laid out the suspicions against Fisher and the options Kim Campbell faced as Justice Minister. It concluded that even though "the odds" were against him, Milgaard continued to hope for a positive outcome. In Joyce's words, "it helped our credibility enormously" (Milgaard & Edwards, 1999, p. 136). The Group also received media support from the *Toronto Star*, the *Globe and Mail*, and CBC radio and hoped that widespread knowledge of the issues would encourage the federal government to review the case. The Milgaard Group insisted that the s.690 process was "political and public" and that it was "necessary and important to publicly influence the Minister" (*Milgaard Inquiry*, 2008, p. 134). Their media

campaign was “a deliberate strategy designed to seek public support” (*Milgaard Inquiry*, 2008, p. 134).

Initially, the Milgaard Group’s tactics were constrained. But in the spring of 1990, Kim Campbell appeared in Winnipeg on government business. Joyce Milgaard informed the media that she would attend the event to present Campbell with a copy of Dr. Ferris’ report. In front of television cameras, Campbell reproached Joyce Milgaard stating: “Madam, if you wish to have your son’s case dealt with fairly, please do not approach me” (Campbell, 1996, p. 180; Milgaard & Edwards, 1999, p. 152). Campbell claimed that the encounter put her in a difficult position:

My reaction was characterized by many as heartless. I was torn between my normal instinct to reach out and listen to someone in distress, and my deep sense that it was entirely inappropriate to personalize my function in this matter (Campbell, 1996, p. 180).

Media headlines, however, described the incident as a “shun” by the Minister and implied that Milgaard received a “cold reception” (*Milgaard Inquiry*, 2008, p. 193). As Joyce Milgaard noted:

The encounter with Campbell was perhaps the turning point in the case. She had provided an image for television that didn’t need words or an explanation. She became the embodiment of faceless, uncaring big government, and it galvanized our support across the country. David Asper knew the importance of this, because people could easily grasp a good-versus-evil story, and Campbell, by her actions, gave everyone a dose of evil on national television (Milgaard & Edwards, 1999, p. 153).

Several months later, the Milgaard Group directly criticized the Crown and the forensic evidence used at trial. In May 1990, they approached Dr. Peter Markesteyn chief medical examiner for the Manitoba Department of Justice for a second forensic opinion. They reasoned that “if the federal Justice Department wasn’t going to respond to the Ferris report, we would give them another forensic expert” (Milgaard & Edwards, 1999, p. 157).

Dr. Markesteyn released his findings in June, 1990. He concurred with Ferris' finding that the evidence "failed to link" Milgaard with the semen evidence that was found at the crime scene (Milgaard & Edwards, 1999, p. 158). Markesteyn questioned the manner in which the evidence was gathered, and wondered whether tests had been conducted to ensure that the sample was actually semen and not "dog urine" (Milgaard & Edwards, 1999, p. 158). The media reported on the findings of Dr. Markesteyn's report and suggested that Milgaard was unfairly convicted. One news account reported that the evidence was "insufficiently analyzed" even though "the technology was available in 1969 to conclusively analyze" it (*Milgaard Inquiry*, 2008, p. 190-191). Another concluded that the "key piece of evidence used to convict David Milgaard of murder was likely worthless" (*Milgaard Inquiry*, 2008, p. 191). Other stories also criticized the Justice Department's review of Milgaard's application, calling it a "sloppy probe" that was "wasting another two years in the life of Canada's longest serving prisoner" (*Milgaard Inquiry*, 2008, p. 195).

The Milgaard Group's public frustrations with the justice system came to a head in 1991 when Kim Campbell denied Milgaard's application. The Group "officially declared war on the Minister of Injustice" (*Milgaard Inquiry*, 2008, p. 211). The tone of their remarks was increasingly emotive. Campbell's decision, they said, was "an outrage . . . either she got bad advice and didn't exercise due diligence, or she is an active co-conspirator in this injustice" (*Milgaard Inquiry*, 2008, p. 211). They insisted that the review was an "unfair assessment," that it was "grossly wrong," that the analysis of the forensic evidence was "intellectual dishonesty," and that the Minister "completely missed the point" in her decision (*Milgaard Inquiry*, 2008, p. 212). The Milgaard Group were now in a "war of liberation" with "the

people who imprisoned David, and the people who had the power to free him” (*Milgaard Inquiry*, 2008, p. 625).

The Group took to the offensive. They filed a second s.690 application on August 14, 1991 and called a press conference featuring Joyce Milgaard and Jim McCloskey of Centurion Ministries. McCloskey publicly claimed that there was a “cover-up” at play and alleged that the Saskatoon Police, Saskatchewan Justice officials, Crown attorney Caldwell, and then-Premier Roy Romanow had prior knowledge that Larry Fisher killed Gail Miller. The Milgaard Group insisted that officials were covering up their tracks to “avoid the public embarrassment of having made a mistake in convicting the innocent Milgaard” (*Milgaard Inquiry*, 2008, p. 100). Indeed, McCloskey asserted that “the police needed a scapegoat,” so they manufactured a case against Milgaard “out of thin air,” and they “bullied and terrorized vulnerable teenaged witnesses into manufacturing evidence” (*Milgaard Inquiry*, 2008, p. 731). McCloskey called these actions “sustained terrorism” against David Milgaard leading to undue delays and obstacles in the pursuit of justice (*Milgaard Inquiry*, 2008, p. 731).

When truth-tellers criticize those to whom they speak the truth, there is an element of danger involved. In Joyce Milgaard’s words, we were “taking a calculated risk in publicly criticizing Justice Canada and the Minister while their application was under review” (*Milgaard Inquiry*, 2008, p. 706). The Milgaard Group feared that Campbell might “get so mad she would turn down the application” (*Milgaard Inquiry*, 2008, p. 311) and they knew that “once the media were engaged, they were difficult to control” (*Milgaard Inquiry*, 2008, p. 134). Nevertheless, the Milgaard Group claimed that it was their duty to speak the truth to power. First, Joyce Milgaard argued that it was her duty as a mother to fight to prove her son’s innocence. She told the Inquiry “she needed to do it herself to have David see that she

was ‘out there fighting for him’” (*Milgaard Inquiry*, 2008, p. 107). She wanted to “fight back, to go public and to force the Minister to do something” (*Milgaard Inquiry*, 2008, p. 705). To that end, she gathered her own network of actors to help speak the truth of his wrongful conviction. Second, the Milgaard Group felt that they had a wider moral mandate to offer other victims of wrongful convictions a safeguard against future wrongdoings. There were several other cases of wrongful conviction in the limelight. Donald Marshall Jr. was acquitted in 1983 for the murder of Sandy Seale. The result of the Royal Commission found that Marshall was the victim of systemic racism (Anderson & Anderson, 2009; Nova Scotia Department of Justice, 1989). Guy Paul Morin was acquitted in 1995 for the 1984 murder of Christine Jessop. An inquiry in 1997 found that Morin was the victim of system failures regarding forensic evidence and procedures, the misuse of informants, poor police and prosecutorial protocols, and incompetent disclosure (Government of Ontario, 1997; Katz, 2011). Third, the Milgaard Group expressed a duty of care to the public. For them, this meant exposing the justice system to public scrutiny. As Young (2011) notes, the trial is normally the “public face of criminal justice: while investigations, interrogations, and forensic analyses, remain hidden from public view” (p. 231). The Milgaard Group pried open the procedures, actions, evidence and experts to public accountability. David Asper explained: “When they began with publicity” they knew it would “get ugly for some people” (*Milgaard Inquiry*, 2008, p. 733). But their client was wrongfully convicted and in jail. They had little choice but to battle for the public truth of justice gone wrong.

The Group created and circulated a discourse of justice denied. The flaws were threefold. First were the appeal and parole processes. Joyce Milgaard firmly believed that the appeal process would prove the truth of her son’s innocence. But the process to detect errors

did not support David Milgaard's claims that justice had been miscarried. His lawyer pointed out the trial judge's error in law, but the Saskatchewan Court of Appeal still upheld the conviction and then Milgaard was denied an initial appeal to the Supreme Court of Canada. Joyce Milgaard believed that her son would be granted parole. But Milgaard refused to show remorse for a crime he did not commit. His mother put it as follows: "However much he hated prison, he refused to lie and say that he repented the murder" (Milgaard & Edwards, 1999, p. 68). Joyce Milgaard persevered with the parole process insisting that "David had already served more than twenty years, and there wasn't a scrap of paper anywhere in the prison system that suggested he was a danger to anyone except himself" (Milgaard & Edwards, 1999, p. 135). Nevertheless, the parole board rejected Milgaard's request for day parole in 1983. On the one hand, they acknowledged that Milgaard was "an intelligent and bright individual" who has "recently accepted his sentence" (Milgaard & Edwards, 1999, p. 109). On the other hand, they noted that "he continues to feel that he is innocent of the crime for which he has been convicted" (Milgaard & Edwards, 1999, p. 109).

The Milgaard Group insisted that there was always something missing from the review: not enough evidence, not enough expertise, and not enough information. They were left in legal limbo and had to guess about who was reviewing the application and how long it would take before answers were forthcoming. The Milgaard Group wrote letters to Eugene William and Kim Campbell to express their concerns. Wolch insisted that "it is not our task to solve the crime 21 years later" and argued that "the matter becomes more frustrating as days go on" (*Milgaard Inquiry*, 2008, p. 150). In his words, it is "very difficult to maintain faith in a justice system" that has continually let them down (*Milgaard Inquiry*, 2008, p. 150). Asper wrote that "this is not a frivolous application" and it "demands immediate

attention” (*Milgaard Inquiry*, 2008, p. 189). Joyce Milgaard corroborated these sentiments in a letter to the Justice Minister:

The officials in your department who are handling this case have not given me the slightest glimmer of hope. It has been over a year now since my son’s application was filed and there has been no indication or communication as to what has been done. I will not stand by in the hope that the system which condemned my son will secretly help to free him. I am afraid I have lost faith in the justice system (*Milgaard Inquiry*, 2008, p. 150).

She argued further:

The current system of having to appeal for Crown mercy is far too slow, too secretive and has failed too many times . . . I decry justice behind closed doors. Why must an application like the one prepared for David have to pass over the desk of so many bureaucrats? Couldn’t important new evidence simply go before a judge, as it does in the U.S.? (*Milgaard & Edwards*, 1999, p. 255).

Thus, from their point of view, there was too much secrecy and too many obstacles associated with the “doing” of justice.

The third flaw was the politics of criminal justice. In Joyce Milgaard’s words, “we knew we were up against a system that just doesn’t want to admit it had made a mistake. It wasn’t justice. It was politics” (*Milgaard and Edwards*, 1999, p. 186). The Group claimed that they never expected the justice system to admit its errors immediately. However, they wanted another trial or an appeal to a higher court to prove Milgaard’s innocence. When Milgaard was released on a stay of proceedings, they obtained further insight into the politics of the justice system. Joyce Milgaard put it as follows:

The Supreme Court made clear from the outset that the system was not on trial. It was never the intention of the top court to hear evidence about the conduct of police or prosecutors. The high court exonerated everyone who put David behind bars, as if no one or nothing was to blame. No fault was found with police or the prosecution. Kim Campbell now seemed to be claiming victory, saying the decision showed that the system works. She didn’t mention that it had cost us all the family assets and that our lawyers worked years for free. No mention was made that David lost almost twenty-three years of his life behind bars before the system finally worked. No mention was made of the things we had to deny our other children so that we could

channel more money and time towards freeing David. There was also no mention that a real killer had been allowed to roam free while David rotted at taxpayers' expense. No mention was made of the memory of Gail Miller . . . If David's case was a victory for the system, I shudder to think of a failure (Milgaard & Edwards, 1999, p. 238-239).

From the Milgaard Group's perspective, justice was blind and deaf because it was inward-looking and self-protective and because it was not primarily interested in ensuring that innocent people were not convicted.

Much of the Milgaard Group's discourse was generated in the public domain, but it also resurfaced in their testimony before the Commission. The Milgaard Group defended their actions at the Inquiry and argued that radical means were necessary to set the truth free. Prior to the Inquiry, their truth telling was a battle between innocence and guilt. The justice system refused to listen to their claim that David Milgaard was innocent even though they found evidence to support their arguments. At the Inquiry the purpose of their truth-telling changed. The Commission argued that members of the criminal justice system were in a position to define the wrongful conviction but instead they framed it as unpredictable and unpreventable errors. But for the Milgaard Group, this was not an accurate depiction of their or David Milgaard's experiences with the justice system. From their perspective, the police had pressured witnesses to lie, the forensic evidence was unreliable, and a cover-up was at play by high-ranking members of the justice system. While there were flaws with the appeal, parole and conviction review processes, the system itself was secretive, political and self-serving. The Group decried the suggestion that Milgaard's wrongful conviction was "inevitable." They could not allow this to be the official discourse circulated by the Commission. If anything, their experiences with the criminal justice system led them to believe that the conviction was malicious and deliberate.



### **The Official Discourse of Confidence Restoration**

When the Commission set out to investigate Milgaard's wrongful conviction it is unlikely that they expected an alternate discourse to emerge. The Commission seemed greatly opposed to this truth-telling despite having created a forum where all interested parties could contribute. The Commission responded to this discourse of justice denied directly; they framed their own criticisms and challenged the Milgaard Group's discourse. They emphasized that there was very little wrong with the justice system and that the Milgaard Group was wrong in its assertions. Thus, the Commission mobilized confidence for the criminal justice system; it could be saved by deflecting blame and reforming minor issues.

#### ***Blaming the Victim and Saving the System***

The Commission framed Milgaard as the architect of his own misfortune. Indeed, while travelling to Saskatoon, Milgaard, Wilson, and John stole a car battery to get their car started and they broke into a grain elevator. They discussed "rolling people and purse snatching as a means of funding the trip" (*Milgaard Inquiry*, 2008, p. 41). The Commission interviewed several of the police officers involved in the case, and the consensus was that Milgaard was "vague and evasive" in his demeanor (*Milgaard Inquiry*, 2008, p. 47). He did not give specific answers about his whereabouts in Saskatoon and did not know the times he arrived in the city nor at the Cadrain home. The police assumed that his evasiveness was due to his "hippie lifestyle," which they characterized as travelling on the "spur of the moment," staying at known "hippie houses," and engaging in "public acts of sexuality" (*Milgaard Inquiry*, 2008, p. 92). While the police were suspicious of "hippies" and their looks and

conduct in 1969, the Commission found that there was “no evidence that any policemen who dealt with Milgaard allowed it to influence their actions” (*Milgaard Inquiry*, 2008, p. 92).

Perhaps societal bias may have contributed to his wrongful conviction? Calvin Tallis had to consider how societal perceptions might affect his case. Milgaard told Tallis of incidents that the latter did not want the police or prosecution to know about. Milgaard admitted that when they stopped a woman to ask for assistance, he considered stealing her purse (*Milgaard Inquiry*, 2008, p. 41). He confirmed that he had been in the motel room with Lapchuk, Melnyk, Frank and Hall, but he could not remember whether the alleged re-enactment of the crime had occurred. For Tallis, there were high risks in having Milgaard testify which were acknowledged by the Commission of Inquiry:

The accepted wisdom is that in a case tried by a jury, its members want to hear from the accused that he did not do it. On the other hand, accused who testify before a jury frequently condemn themselves out of their own mouths. Younger ones tend to put their own character in issues, inviting close cross examinations and leaving a poor impression with the jury (*Milgaard Inquiry*, 2008, p. 90).

Because Milgaard was a drug-user with a deviant lifestyle, Tallis had to “shield his client from the real possibility that he would be viewed as a degenerate by the jury under cross-examination, should he testify” (*Milgaard Inquiry*, 2008, p. 92). In the end, the Commission could not conclude whether Milgaard’s character influenced the jury’s decision especially without the viewpoint of members of the jury, but they allowed negative perceptions about his personality to linger and fester.

Milgaard was a wayward individual. He was said to have been “misdiagnosed with problems,” sent to “mental institutions,” and taken medication which “clouded his mind” (*Milgaard Inquiry*, 2008, p. 243). He was stubborn and had a poor recollection of events. His testimony at the Inquiry was brief, reluctant, and not especially illuminating. His voice is

silent on key matters pertaining to his case. He did not embrace the protocols of the Inquiry. On the one hand, he was reluctant to testify given the hardships he had faced. On the other hand, he was unable to defend himself against the Commission who used his character as a scapegoat to explain why he came to the attention of the police in the first place. By portraying Milgaard as partly culpable for what happened to him, the Commission helped to deflect and minimize the errors made by members of the justice system. The criminal justice system, they argued, cannot be blamed for Milgaard's dubious character, or for how he was viewed by the jury at this trial. In that sense he was the architect of his own misfortune!

***Condemning the Condemners and Renewing Legitimacy***

In addition to producing and circulating victim narratives, the Commission responded to the Milgaard Group's discourse about justice denied by "condemning the condemners" (Cohen, 2001). This condemnation focused on the "wrongfulness" of the Milgaard Group's tactics and strategies that were dismissed as partial and interfering. In setting "the record straight," the Commission presented the Milgaard Group as incredulous and emotional (*Milgaard Inquiry*, 2008, p. 135). The Commission questioned the Milgaard Group's understanding of the case. They argued that the Group made "bald assertions" (*Milgaard Inquiry*, 2008, p. 222) and that their mindset was divisive: "for them to be right, everyone else had to be wrong" (*Milgaard Inquiry*, 2008, p. 627). According to the Commission, the Group prematurely concluded that corruption and cover-up were at play and this "constant theme of official wrongdoing caused officials to mistrust all information emanating from the group" (*Milgaard Inquiry*, 2008, p. 36). They were said to be preoccupied with proving innocence. As Commissioner MacCallum argues, "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” (*Milgaard Inquiry*, 2008, p. 636).

The Commission directly condemned Joyce Milgaard and personalized her advocacy for her son. They argued that she was “suspicious from the outset and her inherent distrust of those involved in the investigation and prosecution of her son caused her to reach premature and incorrect conclusions” (*Milgaard Inquiry*, 2008, p. 108). The Commission stated that she “lacked objectivity,” (*Milgaard Inquiry*, 2008, p. 107) “alienated witnesses,” (p. 306) and was “antagonistic” towards anyone who opposed her views (p. 366). While the Commission acknowledged a measure of sympathy for the hardships she faced, they dismissed her claims and denounced her tactics. In the Commission’s words, “She can justly take credit for her epic struggle to free her son, but must also accept responsibility for the way she carried it out” (*Milgaard Inquiry*, 2008, p. 611).

The Commission condemned the Milgaard Group’s use of the media. They argued that the media campaign “weakened confidence in the administration of justice and hurt the reputation of many individuals involved in the investigation, trial, and review of Milgaard’s conviction” (*Milgaard Inquiry*, 2008, p. 135). The Commission claimed that news stories were “often incorrect and misleading” and “a rather one sided story emerged” (*Milgaard Inquiry*, 2008, p. 134). They asserted that “what the Milgaards gained in publicity they lost in credibility not only with [Eugene] Williams but with the RCMP, the Saskatoon Police and Saskatchewan Justice, who were targets of unfounded ridicule” (*Milgaard Inquiry*, 2008, p. 192). At bottom, Commissioner MacCallum maintained that “a repetition of the sorts of media campaign launched in the Milgaard case” was undesirable and should be avoided at all costs in the future (*Milgaard Inquiry*, 2008, p. 720).

### ***Restoring Confidence***

Clearly the Inquiry went to some length to trump the discourse of justice denied. On the one hand, they were direct and challenging. They confronted and sought to suppress the resistance discourse of the Milgaard Group. On the other hand, they were subtle in their efforts to review the legitimacy of the criminal justice system and to “repair the state’s fractured image of administrative rationality and democratic legality” (Burton & Carlen, 1979, p. 51). Woven throughout the Inquiry Report was a cunning denial of the Group’s actions. Anytime criminal justice system errors or flaws were highlighted, the role of the Milgaard Group or others lacking in credibility were mentioned. For instance, the polygraph expert’s methods were questioned, but the Commission argued that Nichol John must have been confused about what she witnessed. In another instance, the police were said to have made a mistake by not investigating Linda Fisher’s 1980 statement, but the Commission opined that the Milgaard Group had contact information for Linda Fisher as early as 1983 yet did not make use of it until 1990. Throughout the Report there was a subtle “us vs. them” mentality and both sides struggled to exercise power in order to produce truths and discourses about the wrongful conviction and its aftermath. Ultimately the Commission normalized Milgaard’s wrongful conviction, dismissed alternate versions of what went wrong and why and produced a “discourse of confidence” where the state’s rationality was “reaffirmed” (Burton & Carlen, 1979, p. 51).

### **The Politics of the Milgaard Inquiry**

The Milgaard Inquiry functioned pragmatically to probe the issues of the wrongful conviction, and ideologically as a “technique of governance” to manage a system crisis (Gilligan, 2004, p. 15). They produced official discourses which, to their mind, constituted

credible truths based on expert opinions, which were then circulated to a wider public audience. But this was not the only power/truth/discourse arrangement that emerged at the Milgaard Inquiry. A second type of truth, generated by trauma, emotion and experience was articulated by the Milgaard Group and circulated by the media. This experiential-based truth was produced in opposition to official power sources and offered a different explanation for Milgaard's wrongful conviction.

Joyce Milgaard's feelings of hope and faith that justice would be done were shattered when her son was shot in the back by police. She lost her faith in "justice." The shock she experienced encouraged her to take matters into her own hands. As a mother, she could not comprehend why police would gravely injure her unarmed son. As a citizen, she could not abide the violence behind these police actions. This trauma around the shooting caused her to question other aspects of the justice system. As years went on her and the Milgaard Group's frustrations turned into contempt and critique. The Group's experiences evinced a story of secrecy, lies, betrayal, cover-up, and systemic bias, all of which were the antithesis of what they thought a justice system should be about. Once the Group accepted that their original perceptions of justice were misplaced, they shared their perceptions and experiences of the truth with others. Their intentions were not to hurt with allegations; they wanted to speak the truth to power as they experienced it.

In some cases, experiential-based truths are welcomed by commissions of inquiry and officials. For instance, McMullan (2007) argued that the voices of the Westray miners were actively solicited and acknowledged at the public inquiry. They were used "as a balance to official accounts of non-culpability" (McMullan, 2007, p. 40). Similarly, the families of the dead in the Hillsborough soccer tragedy fought to have their truths heard. Despite cover-ups,

denials and negative verdicts, they told their stories until 2012 when the Hillsborough Independent Panel recognized and incorporated their voices into the public record (Scraton, 2013). The families finally received an apology for the injustice they had endured. This was not the case with the Milgaard Inquiry. The Milgaard Group's experiential-based truths were seen as threatening to the Commission's agenda of unpredictable error and minor reform. Indeed, the Commission's official discourse claimed that the Milgaard Group's actions and accounts caused a greater blemish on the face of justice than did any members of the justice system. This "us vs. them" mentality regarding the Milgaard Group prevailed throughout the Inquiry. Both sides were adamant about their truth claims and both defended their actions and reactions. The result was that the language of confidence restoration, condemnation and victim blaming overshadowed the positive findings of the Inquiry, and left the impression that little was accomplished to resolve the issues.

When the Inquiry Report was released in 2008, Joyce Milgaard was disappointed to discover that she was a "surprise subject of criticism" (CBC's *The National*, 2008). The Report had "harsh words for David Milgaard's outspoken mother" (Purdy, 2008). One journalist observed, "the report criticized the way Milgaard's mother and lawyers used the media to garner public support and bring political pressure to reopen the case" (Adam, 2008). Joyce Milgaard argued that the results were hurtful and contradictory. She claimed that Commissioner MacCallum "still hasn't seen that if we hadn't done all of those things, if I hadn't pushed the way I did" then David would still be in jail and the Inquiry would not exist (Purdy, 2008). Joyce Milgaard was defiant. She defended her theory of a cover-up which the Inquiry dismissed, and was steadfast in her radical and public actions: "I'm sorry. I really don't regret any of my actions. I did what I felt was necessary at the time and we got the

result that we wanted, which is David free” (Purdy, 2008). Although the Milgaard Group disagreed with the findings, they were prepared to let them “stand as the last word on this whole tragedy” (CBC’s *The National*, 2008). But Joyce Milgaard’s post-Inquiry comments about the Commission and the justice system bothered other parties involved at the Inquiry. Former police detective Eddie Karst was angry: “She can think whatever she wants. It’s her privilege . . . Obviously I don’t agree with it” (Purdy, 2008). One of the lawyers representing the Department of the Attorney General stated that it was “unfortunate that she still doesn’t regret having made those abusive comments about honest and competent, honourable men” (Purdy, 2008).

Indeed in the aftermath of the Report, the media rallied to Joyce Milgaard’s cause. Hersh Wolch argued that she was “unfairly criticized” and that “everything she did was in good faith . . . she was right – they had the wrong guy in jail” (Rollason, 2008). Peter Carlyle-Gordge insisted that she deserved an apology from those within the justice system who “tend to circle the wagons” (Rollason, 2008). One news article opined that the Commission’s findings resulted in misplaced “mother-blaming and media-blaming” (*The Globe & Mail*, 2008). What else was she to do, asked one reporter. Should she have “shushed her lawyers when all the processes she was trying to invoke went on behind closed doors?” (*The Globe & Mail*, 2008). In a letter to the editor, one reader observed that laying blame on Joyce Milgaard “exacerbates our lack of confidence” in the justice system (Walsh, 2008). A second reader was adamant and insisted that Joyce Milgaard be awarded “the Order of Canada” (Waddell, 2008).

The literature on commissions of inquiry tends to fall into one of two categories. On the one hand, public inquiries are often criticised because they are not always independent



from the governments who created them (Centa & Macklem, 2001), because they direct attention away from government controversies during times of political unrest (Courtney, 1969; D’Ombrain, 1997), and because their recommendations seldom get implemented (Stutz, 2008). Ultimately, they are framed as being unable to solve any real problems. On the other hand, public inquiries are praised for their ability to raise public awareness (D’Ombrain, 1997; Gilligan, 2004), their ability to uncover information, report findings, and suggest recommendations (Gilligan, 2004; McMullan, 2007), and their ability to reveal subaltern discourses that had previously been silenced (McMullan, 2007; Scraton, 2013).

My findings regarding the Milgaard Inquiry do not easily fit into either of these camps, but instead suggest a middle ground between the two. On the one hand, the Commission was successful in remaining independent from government forces and did more than just deflect attention away from the issues. They lobbied for access to evidence outside of their jurisdictional authority, they drew attention to minor errors, and they made recommendations to improve the administration of justice and the compensation process. Indeed they advocated for an autonomous review agency to be established to assist the wrongfully convicted in proving their innocence. These recommendations came out of lessons learned from Milgaard’s case and were supported by the Milgaard Group. On the other hand, their recommendations targeted the police, forensic evidence and post-conviction events for minor reform but avoided connecting these issues or discussing the broader social causes and conditions of Milgaard’s wrongful conviction. In Leo’s (2005) words they did not move beyond the simple “legal causes” as explanations for the wrongful conviction. The Commission emphasized *how* matters went wrong without addressing *why*.

Thus, the Milgaard Inquiry had both successes and failures. If wrongful convictions are as inevitable as Commission MacCallum suggests, then future public inquiries can learn some lessons from the Milgaard Inquiry. First, multiple faces of power were important in producing truths about the issues at hand. They allowed various parties to contribute to a discussion about the issues, but they also ensured that there was order and structure to the inquiry. Future Commissions should understand that while power should be centralized around them, there are also merits in allowing power to be exercised by multiple parties. The dispersal of power encourages discussion and learning rather than confrontation and blaming. Second, Commissioners should be mindful that by allowing multiple narratives to be heard, competing discourses will emerge. These discourses should not quickly be dismissed as threatening or “hierarchically inferior;” rather, they may present points that have previously gone unheard and may help to balance the “official,” expert opinions provided by members of the justice system. Third, public inquiries should shift their attention to examining the root social causes of wrongful convictions in order to examine *why* they occur, not just *how* they occur. Only then may we begin to see inquiries that produce ground-breaking recommendations that get implemented to help “fix” the issues of wrongful convictions.

### **Conclusions, Limitations and Suggestions for Future Research**

This thesis was exploratory and tried to develop a better understanding of the role of public inquiries as a response to cases of wrongful conviction. Using the work of Michel Foucault and Howard Becker, my analysis explored four main research questions: (1) What role did power relations play in the Milgaard Inquiry? (2) Did hierarchies of credibility emerge at the Milgaard Inquiry and with what effect? (3) How was knowledge, discourse,

and truth produced and reproduced throughout the Inquiry? (4) Was power challenged within the Inquiry and with what effect?

First I found that power relations were a crucial part of the Milgaard Inquiry and were both centralized and dispersed. On the one hand, power was centralized around the members of the Commission who employed a variety of techniques to collect, organize, review, present, and circulated public truths and official discourses about Milgaard's case and its aftermath. On the other hand, by encouraging interested parties to contribute their version of events, power was dispersed and exercised by most groups (Foucault, 1978, 1980). Several competing truth claims emerged in regards to the treatment of witnesses, the post-conviction events, and the reopening of the murder investigation. All truth claims were assessed by the Commission and ordered in a manner akin to Becker's (1967) notion of a "hierarchy of credibility." Claims put forth by those in positions of authority and expertise typically were labelled as credible and thus more likely to influence the Commission's official discourses. Despite a few noteworthy instances, the most credible groups were members of Justice Canada, Saskatchewan Justice, lawyers and the police. Truth claims not considered "credible," especially those of the Milgaard Group, were denounced, denied, and delegitimized.

Second, the production and reproduction of official truth claims and discourses were essential to the Inquiry's purpose. As Burton and Carlen (1979) argue, "the general form of appropriation of a problem is to reconstruct the narrative within a discourse that articulates with existent ideological practices" (p. 45). Through its discourses of "confidence" and "legitimacy" the Commission sought to address and define the wrongful conviction as well as to restore confidence to the justice system. They employed several techniques in

exercising their power, many of which were akin to Cohen's (2001) techniques of denial. By creatively interpreting, contextualizing and justifying the actions and errors of justice system parties, the Commission framed the wrongful conviction as an unfortunate error. They blamed the victim and downplayed claims that justice had been corrupted. The Commission did not accept alternate, unofficial explanations which threatened the ideology of the criminal justice system.

Third, I discovered that the Commission's exercises of power and their official discourses were met with resistance. Foucault (1991) argues that discourses are never absolute and they are often subject to re-interpretations and transformations. The Milgaard Group acted as truth-tellers and explained their understanding of the wrongful conviction and the justice system based on their experiences with them. The result was that they created their own discourse about the conviction, both outside and at the Inquiry, alleging that Milgaard was the victim of deliberate conspiracy and cover-up. Their resistance discourse was challenged by the Commission at the Inquiry. Throughout the Report, the Commission questioned the actions of the Group and consistently de-legitimized their narratives in an attempt to reaffirm the justice system's hegemony. There were two explanations of the wrongful conviction, but the Commission downplayed that of its critics and circulated the discourses emanating from credible, authoritative sources.

Fourth, although the Commission argued that the purpose of the Inquiry was to appease public concerns and restore confidence to the justice system, there were still conflicting views regarding the results of the Inquiry. Those who were not found to be at fault seemed pleased with the Inquiry's results and felt that the issues had been addressed and that the justice system had been protected. Yet, it is still unclear exactly *why* Milgaard was

wrongfully convicted, and there still seems to be unsettled accounts concerning the official explanations that were offered. This suggests that there may be a disconnect between those in positions of authority and those who rely on the public inquiries' discourses explaining how they should write, speak and think about the issue at hand. Although inquiries are often emotional in nature as the truth is evinced, the "us vs. them" mentality that emerged throughout the Milgaard Inquiry caused problems. Unfortunately, the Commission's desire to restore confidence and legitimacy to the justice system by de-legitimizing those who fought tirelessly to prove innocence overshadowed the remaining findings regarding an explanation of the wrongful conviction. This resulted in mixed emotions regarding the truths produced by the Milgaard Inquiry.

My thesis has studied wrongful convictions and public inquiries together. But my experience in analyzing the Milgaard Inquiry suggests certain limitations and other areas for future research. In designing my thesis, I chose one case to study. A more comprehensive study of all seven Canadian wrongful conviction public inquiries would allow for comparisons and generalizations regarding the constitution of official truths of wrongful conviction in Canada. By focusing on the findings of these inquiries, several questions could be answered: Are governments failing to see the value of independent review agencies? Are commissioners simply recycling the recommendations of past inquiries as techniques for restoring confidence? A comparative study could also be useful in revealing common social root causes between wrongful convictions and whether commissions of inquiry are capable of addressing these issues in their production of truths and discourses. Such a study could build on Leo's (2005) ideas and help to explain the social explanations of wrongful convictions as they are being presented to the public via commissions of inquiry.

Second, despite my analysis of the Inquiry Report we do not know *why* Milgaard was wrongfully convicted. As Leo (2005) notes we need to focus on the decision-making processes of those involved in the criminal justice system. We know from the Commission's work that most parties followed "normal procedures," but what does this mean for future research? Two research options are obvious. While I was unable to examine the 40,000 pages of hearing documents and testimonies at the Inquiry, a critical discourse analysis could build on what I have already developed in this thesis. For instance, a comparison between testimonies from the original trial transcript and testimonies at the Inquiry might better reveal further evidence about the exercise of power, the transformation of discourses, and the ways in which truths were produced and reproduced at the Inquiry. Indeed, this type of analysis could explore the socio-political pressures for maintaining a conviction once the justice system has processed and sanctioned offenders. Second, a different methodological approach could also be considered. For instance, interviews with parties involved at the Inquiry, or a participant-observation study of the inquiry process proper might help to better understand how decisions are made by members of the justice system and members of the Commission proper.

Third, a key piece of useful information was missing at the Inquiry: the voices of those who determined Milgaard's guilt were not heard. Commissioner MacCallum argued that there was a "strong possibility" that the jury based their verdict on Nichol John's statement that she saw Milgaard stab a woman even though they were warned against considering it (*Milgaard Inquiry*, 2008, p. 494). The Commissioner argued that it would have been difficult for members of the jury to ignore an eyewitness account of the murder. As such, he recommended:

The Criminal Code should be amended to permit academic inquiry into jury deliberations with a view to gathering evidence of the extent to which jurors accept and apply instructions on the admissibility of evidence, particularly relating to inconsistent out of court statements. Amendments to s.9 of the Canada Evidence Act should then be considered (*Milgaard Inquiry*, 2008, p. 413).

Commissioner MacCallum's recommendation focuses on how the jury views evidence and witness statements. I would also suggest examining the actual jury deliberation process. A survey of past jury members who sat on wrongful conviction cases could explore how they arrived at a finding of guilt. How did the exercise of power and the constitution of truth operate inside the jury deliberation process? How was evidence ordered? Who were the acknowledged truth definers? Who were dismissed and with what consequences?

Lastly, I focused my analysis on the Inquiry Report, turning to other sources only when I needed information that was not available in the Report. For example, the media played a crucial role in Milgaard's case but I examined a small percentage of the stories that were produced and circulated. Thus, a study of the role of the media in relation to the Milgaard case, and other major wrongful conviction cases would be an interesting way to study public perceptions of the miscarriages of justice. Researchers could examine how the wrongfully convicted individual is constructed and reconstructed through media accounts over time. Studies could also explore how the media creates public truths about wrongful conviction cases. While some critics argue that traditional forms of the media are less influential to the public, the popularity of social media is growing. Research might also study how access to technology and information shapes our awareness of wrongful convictions internationally and influences related debates over issues such as the death penalty?

In sum, this thesis has studied wrongful convictions and public inquiries together, analyzing how power, resistance and truth telling influenced the production of truths and

discourses about a miscarriage of justice. It has revealed that wrongful convictions and public inquiries are political in nature and contain paradoxes and ironies. The Milgaard Inquiry straddled a line between numerous binaries: the dispersal of power versus the centralization of power; the need for public truths about the wrongful conviction versus accepting experiential truths voiced by those outside of official power; *how* Milgaard was wrongfully convicted versus *why* he was wrongfully convicted; the task of identifying errors versus the task of restoring confidence; and whether the Inquiry was seen as a success versus whether it was a failure. Indeed, public inquiries are not simply fact-finding institutions that divert attention and blame during crises of legitimacy. Rather, they represent a complex intersection of the exercise of power, the transformation of discourses, the production of truths, and acts of resistance. One thing is certain: there is still much to learn and discover about the function of public inquiries.



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### Appendix A: Directory of Persons Referenced

The following is adapted a similar table in the Milgaard Inquiry Report (2008, pp. 20-31)

unless an additional source is given.

Name	Role & Description
Alain, Patricia	Chief Scientist of Serology for the RCMP; provided forensic assistance to Eugene Williams during his review of the David Milgaard s.690 applications
Asper, David	Legal counsel to David Milgaard from 1986 to 1992
Bence, Alfred	Chief Justice who presided over David Milgaard's 1969 trial for the murder of Gail Miller (Milgaard Inquiry, 2008)
Cadrain, Albert	David Milgaard's friend and travelling companion in 1969; he alerted police to Milgaard as a potential suspect for the murder
Caldwell, T.D.R.	Crown prosecutor at Milgaard's trial
Campbell, Kim	Federal Justice Minister from February 23, 1990 to January 3, 1993; made decisions on both of David Mildgaard's s.690 applications
Carlyle-Gordge, Peter	Journalist and writer who worked for Macleans Magazine between 1978 and 1983; active member of the Milgaard Group
Cory, Peter	Former Justice of the Supreme Court of Canada from 1989 to 1999; acted as commissioner to several inquiries in Canada including <i>The Inquiry Regarding Thomas Sophonow</i> (Government of Manitoba, 2001; Judges of the Court)
Danchuk, Walter and Sandra	Their vehicle became stuck in the snow with Ron Wilson's car and they waited for a tow truck with Wilson, David Milgaard, and Nichol John on the morning of the murder
Driskell, James	Wrongfully convicted of the 1990 murder of Perry Dean Harder in Winnipeg, MB. With the help of the Association in Defence of the Wrongly Convicted, Driskell's case was deemed a miscarriage of justice in 2005. An inquiry into his conviction revealed issues of improper disclosure, unsavoury witnesses, police misconduct and forensic issues (Anderson & Anderson, 2009; Government of Manitoba, 2007)
Ferris, Dr. James	Forensic pathologist who provided an opinion to David Milgaard's legal counsel in September, 1988
Fisher, Larry	Gail Miller's true murderer; responsible for several sexual assaults in Saskatoon and Winnipeg; lived in the basement apartment of Cadrain's home at the time of the Miller murder
Fisher, Linda	Larry Fisher's ex-wife; went to the Saskatoon Police in August 1980 with suspicions of her husband as Gail Miller's murderer
Hall, Deborah	Witness from the 1969 motel-room party where it was

	alleged that David Milgaard re-enacted the murder; swore an affidavit on the matter as part of Milgaard's first s.690 application
Henderson, Paul	An investigator for Centurion Ministries, Inc. who worked extensively with the Milgaard Group
Hickman, Alexander	Former Chief Justice of the Newfoundland Supreme Court who headed the <i>Royal Commission on the Donald Marshall Jr. Prosecution</i> (Katz, 2011)
John, Nichol	David Milgaard's friend and travelling companion on January 31, 1969; later gave an incriminating statement to police saying she witnessed the murder
Karst, Eddie	Detective with the Saskatoon Police in 1969; interviewed Albert Cadrain, Ron Wilson and David Milgaard as part of his active role in the Miller investigation
Kaufman, Fred	Former Justice with the Court of Appeal of Quebec from 1973-1991; Commissioner for the <i>Kaufman Commission on Proceedings Involving Guy Paul Morin</i> (Government of Ontario, 1997; Former Judges of the Court of Appeal)
Kujawa, Serge	Director of Public Prosecutions for the Department of the Attorney General of Saskatchewan from 1969 to 1974; was involved in prosecuting Larry Fisher for the Winnipeg and Saskatoon sexual assaults
Lapchuk, George	Witness from the 1969 motel-room party who alleged that David Milgaard re-enacted the Gail Miller murder in front of him
LeSage, Patrick	Former Chief Justice of the Ontario Superior Court of Justice; Commissioner for the <i>Commission of Inquiry Into Certain Aspects of the Trial and Conviction of James Driskell</i> (Anderson & Anderson, 2009; Government of Manitoba, 2007)
Lett, Dan	Journalist and report with the Winnipeg Free Press who wrote various newspaper articles about David Milgaard's case; an active member of the Milgaard Group
Mackie, Raymond	Detective Sergeant with the Saskatoon Police in 1969 who was in charge of the Miller murder investigation; took Nichol John's incriminating statement on May 24, 1969
Markesteyn, Dr. Peter	Chief Medical Examiner for the Manitoba Department of Justice; provided a report to David Asper in June, 1990 assessing Dr. Ferris' forensic opinion as well as forensic evidence used at trial
Marshall, Donald Jr.	Wrongfully convicted for the murder of Sandy Seale; acquitted in 1983 by the Supreme Court of Canada and a Royal Commission found he was wrongfully convicted because of coerced witnesses, police misconduct, tunnel vision, and systemic racism (Katz, 2011; Nova Scotia Department of Justice, 1989)



MacCallum, Edward	Former Justice of the Alberta Court of Queen's Bench; Commissioner for the <i>Commission of Inquiry into the Wrongful Conviction of David Milgaard</i> (Milgaard Inquiry, 2008)
McCloskey, James (Jim)	Founder of Centurion Ministries Inc., a United-States organization that investigates claims of wrongful conviction; an active member of the Milgaard Group who gave various public statements about David Milgaard's case
McIntyre, William	Former Justice of the Supreme Court of Canada; was retained by the federal Department of Justice to provide his opinion respecting David Milgaard's s690 applications
McLellan, Anne	Minister of Justice of Canada in 1977 who formally announced David Milgaard's exoneration and issued an apology on behalf of the Government of Canada (Milgaard Inquiry, 2008)
Melnyk, Craig	Witness from the 1969 motel-room party who alleged that David Milgaard re-enacted the Gail Miller murder in front of him
Merchant, Anthony	Legal counsel to David and Joyce Milgaard from 1981 to 1984
Milgaard, David	Wrongfully convicted of Gail Miller's murder on January 31, 1970. His conviction was set aside and he was released from prison on April 16, 1992 following the 1992 Supreme Court of Canada reference into his application for relief under s.690 of the Criminal Code
Milgaard, Joyce	David Milgaard's mother; leader of the Milgaard Group
Miller, Gail	Raped and murdered by Larry Fisher on January 31, 1969
Morin, Guy Paul	Wrongfully convicted for the 1984 murder of Christine Jessop; was acquitted in 1995 and a public inquiry found that his conviction was the result of poor forensic evidence, the abuse of police informants, and police misconduct (Government of Ontario, 1997)
Mulroney, Brian	Prime Minister of Canada from 1984-1993; Joyce Milgaard met with him to discuss the review of David Milgaard's case (Canada's Prime Ministers)
Paynter, Bruce	Staff Sergeant in charge of the Serology Section of the RCMP Crime Detection Lab in Regina in 1969; conducted tests on evidence from the Miller murder at the request of the Saskatoon Police
Rasmussen, Robert	Manager of the Trav-a-Leer motel where David Milgaard asked for direction on the morning of January 31, 1969
Richard, K. Peter	Former Justice of the Supreme Court of Nova Scotia; sat as Commissioner for the <i>Westray Mine Public Inquiry</i> (Richard, 1997)
Roberts, Art	In 1969 he was an Inspector and polygraph operator with the Calgary Police Service; at the request of the Saskatoon

	Police, he conducted interrogations and polygraph examinations of Ron Wilson and Nichol John
Romanow, Roy	Premier of Saskatchewan from 1991 to 2001 (Premiers of Saskatchewan)
Sophonow, Thomas	Wrongfully convicted for the 1981 murder of Barbara Stoppel, acquitted in 1985 and exonerated in 1999; an inquiry into his case found that he was convicted because of eyewitness misidentification, tunnel vision, evidence issues, and the use of jailhouse informants (Government of Manitoba, 2001; Katz, 2011)
Tallis, Calvin	David Milgaard's defence counsel during his preliminary inquiry, trial and appeal to the Saskatchewan Court of Appeal
Wagner, Kenneth	Involved with the Gail Miller murder investigation in 1969; took Linda Fisher's 1980 statement concerning her suspicions of Larry Fisher
Williams, Eugene	Lawyer for the federal Department of Justice; assigned to review the evidence of David Milgaard's s.690 applications between 1989 and 1992 and provide information to the Justice Minister on the applications
Wilson, Ron	David Milgaard's friend and travelling companion on January 31, 1969; testified against Milgaard at trial but recanted his testimony in 1990
Wolch, Hersh	Legal counsel to David Milgaard from 1986 onwards
Young, Gary	Legal counsel to Joyce and David Milgaard in the early 1980s