

Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard

Volume 1

The Honourable
Mr. Justice Edward P. MacCallum
Commissioner

September 2008



Commission of Inquiry Into the
Wrongful Conviction of David Milgaard
Honourable Mr. Justice Edward P. MacCallum, Commissioner

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September 10, 2008

The Honourable Don Morgan, Q.C.
Attorney General
Room 355, Legislative Building
2405 Legislative Drive
Regina, Saskatchewan
S4S 0B3

Dear Mr. Attorney General:

**Re: Commission of Inquiry into the Wrongful Conviction of
David Milgaard**

Pursuant to Order in Council 84/2004, I have the honour to present to you
herewith my Report in the above matter.

Yours truly,



EDWARD P. MacCALLUM
Commissioner



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* Appendices are located on attached CD.



Foreword

David Milgaard was wrongfully convicted of murder on January 31, 1970, and served 23 years in prison. The enormity of such an injustice requires no further comment. He has been exonerated and compensated. His hope for this Inquiry is an explanation of why this happened to him and some assurance that others will not become victims in this way.

Briefly, the Terms of Reference direct us to inquire into the conduct of the investigation into the death of Gail Miller, the prosecution of David Milgaard, the question of whether the investigation should have been reopened earlier, and lastly, to make recommendations for the better administration of criminal justice in Saskatchewan.

Presented almost four years ago with some 341,634 pages of material, Commission staff faced a daunting task of organizing and preparing for the public hearings – one which they accomplished in less than a year.

There followed almost two years of public hearings which produced 40,774 pages of transcript and over 3,000 exhibits, all of which are available for public perusal on the internet at www.milgaardinquiry.ca. The effort to reduce the evidence into a coherent report of reasonable length has occupied our time since the close of hearings in December of 2006.

We are confident, however, that public exposure of all the facts for the first time has laid to rest many, if not all, of the vexing issues relating to this longstanding and regrettable chapter in the administration of justice in this province.

Joyce Milgaard led an epic struggle to free her son, beginning in about 1980 and running until he was released in 1992. In the course of that effort, the lives of a great many people were deeply affected, and public confidence in the administration of justice was shaken. David and Joyce Milgaard were foremost amongst those asking for a public inquiry, but many others whose interests had been affected over the years also welcomed a thorough public examination of all the facts and issues. At the close of public hearings, all parties, through their counsel, agreed that the effort had been worthwhile.

There is no simple explanation as to why David Milgaard was wrongfully convicted and why it took so long to reopen his case. I regret to say that not all the desired answers have emerged from the body of evidence. The case is historical and although the documents speak for themselves, there were, at times, critical failures to record. Although the available witnesses were many, some key ones are dead. Age, infirmity, hindsight, and mental reconstruction of events have affected the weight of the evidence, although most witnesses, despite the passage of time, were both credible and helpful.

The most intractable problem faced in getting all the answers stems from a lingering suspicion that trial evidence was gathered improperly.

The suspicion of police misconduct lives on. It has never been shown directly but it cannot be refuted to the satisfaction of all because circumstances surrounding the taking of two critical witness statements were not recorded when they should have been.

The Government of Saskatchewan has formally acknowledged that David Milgaard was convicted of a crime which he did not commit, and that he is factually innocent. The distinction between factual innocence and the legal presumption of innocence should be explained briefly for readers unfamiliar with

the criminal justice system. A person facing trial in criminal court is legally presumed innocent until proven guilty beyond a reasonable doubt. If the Crown fails to do this, the accused is found not guilty. There is no finding of factual innocence because that would not fall within the ambit or purpose of criminal law.¹

A Commissioner in a public inquiry is not part of the criminal trial process, and therefore has no jurisdictional difficulty to overcome in dealing with factual innocence. In this case, however, I have not been directed to make any findings in this respect. The Government of Saskatchewan, which called the Inquiry, has already acknowledged it.

The reader should also be aware that I am forbidden from making any findings of criminal or civil responsibility, and one further matter calls for preliminary comment. Under our rules, findings of misconduct against persons require notice. I have not made any and hence no notices have been sent. But to desist from identifying harmful actions, just because the reader might be critical of the actor, would be to render the process toothless. I have been generous in granting standing to anyone whose interests appeared to be engaged by the Terms of Reference. These persons were privileged participants in the Inquiry. Many of them were legally represented at public expense. Their actions were of course at issue, were vigorously defended, and are the subject of comment in this report. What I have to say will come as no surprise to them. Some, indeed, have publicly apologized.

Fourteen parties were granted standing in this Inquiry and are listed in Chapter 1.

As documentary evidence was presented to the Commission, each page was assigned a six-digit number. A document with more than one page is identified by the six-digit number on the first page. When reference to such evidence in the Report is made, it will be by the six-digit document identification number and will be shown in a footnote within the Report. When references are made to the transcript of the public hearing, they will be identified in a footnote, as, for example, "T5320", indicating the page on which the reference can be found.

Longer documents, or particularly important ones, will appear as appendices to the Report. Persons will be referred to by surname, unless there is a chance of confusion, as between persons sharing surnames.

The Report is based upon evidence which has accumulated from 1968 until the close of our hearings in October of 2006.

The Report is divided into two Volumes. Volume I includes a concise chronology of events, an overview of facts, an executive summary and a summary of findings and recommendations. The Executive Summary is intended to identify and summarize some important issues. The Overview of Facts represents a freestanding report in itself, much more detailed than the Executive Summary. Subsequent chapters in Volume II are organized on the basis of issues and significant events, where the reader will find more detail and source material identified.

A Chronology of Events appears in Chapter 2. It is intended to provide orientation to the reader by reference to undisputed facts. A more detailed chronology appears as Appendix "A".

1

Her Majesty the Queen v. William Mullins-Johnson, 2007 ONCA 720, 228 C.C.C.(3d) 505, citing THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF: Ronald Dalton, Gregory Parsons, Randy Druken, Annex 3, page 342.

Acknowledgments

From Commissioner MacCallum

This Inquiry proved to be unexpectedly complex and challenging. Both the time needed to accomplish the task and its cost have greatly exceeded initial estimates. In spite of this, the Government of Saskatchewan has remained fully supportive throughout. Although granted standing at the Inquiry as well as having called and paid for the Inquiry, the Government has managed its delicate task in a scrupulously non-partisan manner, in the interests of the better administration of criminal justice in this province.

Candace Cook served as Executive Director of the Commission of Inquiry from its inception until release of this report. Her management and communication skills were equal to the many challenges she faced in the preparation and public hearing phases of the Inquiry. Notwithstanding the term of three years devoted to these tasks, she graciously agreed to review and edit the report. She has been unfailingly cheerful and helpful to everyone concerned in the Inquiry. All of us owe her a great debt of gratitude.

The search for Commission Counsel was not difficult. Many prominent and highly qualified counsel expressed interest. Douglas Hodson, Q.C. of MacPherson Leslie & Tyerman LLP accepted an assignment which proved to be far more onerous than expected, requiring him to devote very long hours to the work of the Commission while still discharging responsibilities to a large and busy law practice. Notwithstanding the unwelcome length of the Inquiry, he has applied himself unreservedly to the public service asked of him.

Thanks are due to Mr. Hodson and other members of his firm for generously placing their facilities and personnel at the service of the Commission. I have asked Mr. Hodson to acknowledge individuals, but I feel obliged to personally thank counsel from his firm, Vanessa Monar Enweani, Jordan Hardy and John Agioritis for their invaluable contributions to the work of the Commission, and for constructive criticism and other contributions to the report.

I am personally indebted to our Document Manager, chief stenographer and factotum, Sandra Boswell, whose remarkable skills and work ethic made possible the electronic presentation of evidence at the public hearings, as well as the production of this report.

All of the above, together with those acknowledged by Mr. Hodson have rendered a significant public service by their participation in this Inquiry. What set them apart was their unflagging spirit of goodwill and devotion to the task and I am most grateful.

From Commission Counsel

I would like to acknowledge the contributions of a number of individuals who I had the pleasure of working with during the course of the Inquiry. The Commission staff are listed on page 7 of the Report.

I was fortunate to have the very able assistance of three lawyers from MacPherson Leslie and Tyerman LLP who served as Assistant Commission Counsel. I would like to thank Vanessa Monar Enweani, Jordan Hardy and John Agioritis for their advice and support provided throughout the Inquiry.

Document management was a critical task in our preparations and during the course of public hearings. Sandra Boswell and Kara Isabelle were of invaluable assistance to me, and to all counsel through the

course of the Inquiry. Kevin Short provided advice to the Commission on document management, allowing our Inquiry to operate efficiently. I would like to acknowledge and thank Mr. Short for his significant contributions to the Inquiry process.

I would like to thank our investigator Don Christal for his assistance in helping to locate and arrange interviews with many of the Inquiry's witnesses. I would also like to thank all of the Inquiry witnesses and other people we interviewed. Without exception, every witness was courteous and co-operative, making our task much easier.

Special mention and thanks must be given to our Executive Director Candace Cook, our Commission Clerk Irene Beitel and our Taxing Officer Ed Beitel.

Counsel for the parties with standing are listed in Chapter 1 of the Report. They played a very important role in the Inquiry and I would like to acknowledge and thank all of the legal counsel who appeared before the Commission as counsel for parties or witnesses. I appreciated the professional courtesy and co-operation displayed by counsel, and very much enjoyed working with all of them.

Lastly, on behalf of my co-counsel and the Commission staff, I would like to thank Commissioner MacCallum for the privilege of serving on this Commission of Inquiry. The sincere and genuine interest expressed by Commissioner MacCallum in the lives and well-being of Commission personnel will be remembered by all those who worked with him well beyond the Inquiry process.

