Chapter 5
Systemic Issues

Many systemic issues were suggested by the evidence, but a good number of the problems seen in the Milgaard conviction have been remedied over time. Others have not. I will review some of the problem areas as they arose in the course of the investigation, prosecution, and reopening.

1. Forensic Evidence

In 1969, the identification officer was at an autopsy to seek the type of evidence needed. Police deferred to the pathologist, who was in charge, so the responsibility for keeping or discarding bodily substances would have been assumed by him.

The Inquiry heard expert opinion, which I accept, that quality control standards be set and maintained for the taking and analysis of body tissue and fluid samples. As well, samples not currently testable should be retained on the chance that scientific advances might make them useful. A case in point is the vaginal fluid discarded at autopsy. It might have been used for DNA profiling years later. I understand from the evidence that DNA profiling is routine in serious cases, so a caution for retention is probably unnecessary. Still, it should be made mandatory in all cases of forensic investigation of sudden death.

The Province of Saskatchewan has only recently engaged the services of forensic pathologists to do medical-legal autopsies. Quality control standards are difficult to maintain when autopsies are performed in various hospital settings. I recommend that dedicated medical examiners' facilities 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.

2. Inter-force Exchange of Information

As we have seen, early in the investigation of the Miller murder, RCMP officer Edwin Rasmussen recorded that three unsolved sexual assaults committed in 1968 and the Miller murder might be related. Evidence from Joseph Penkala and others convinces me that this was common knowledge between senior investigators in the Saskatoon Police and in the RCMP, but Rasmussen's report was not sent to Saskatoon Police, who were the prime investigators, leading to the allegation that they ignored it. Coordination between the forces was done informally and verbally. Written reports were not exchanged. In my view, when one force is assisting another, written reports should be exchanged to enhance coordination.

A second assisting force was Calgary's who supplied a polygrapher, Art Roberts. His reports were the property of the Calgary Police Department and he did not copy them to the Saskatoon Police, which left a significant gap in the information relating to the circumstances of his examination of John and Wilson.

I would recommend the mandatory sharing of continuation reports between all forces assisting in major cases. The reports would be directed to the file manager and would become part of the major case management file.

The Commission made inquiries as to the inter-agency exchange of police reports and there does not appear to be a direct policy. However, the Saskatchewan Police Commission Policy Manual,[1] dated April 2004, contains some relevant information.

> **Policy AA 10** deals with Authority and Jurisdiction.
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> "…police services are encouraged to assist other police services and/or obtain assistance of police officers from other jurisdictions."[2]

> **Policy OC 20** deals with Criminal Investigations.
>
> Police services will ensure they have the capacity to investigate offences, in particular serious and/or complex offenses, or are able to access the necessary resources and assistance. Police services will ensure they have the capacity to collect, store, analyze and retrieve intelligence with respect to criminal activity.
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> …
>
> Procedures for criminal investigations must include provisions:
>
> - for partnerships and internal and external co-operation that are necessary with respect to administering and conducting criminal investigations of serious and/or complex offences;

Policy OJ 10 deals with Liaison with Other Agencies. Police services "will establish and maintain an effective and mutually beneficial liaison with other agencies". It goes on to state that:

> Procedures will be developed with respect to liaison with other agencies including, but not limited to:
>
> - liaison with:
>
> …

1 Docid 338634.
2 Docid 338634 at 832.

- other police services;
…

- written agreements describing the terms, conditions and responsibilities of inter-agency relationships.

As compared to 1969, sharing of information within police forces has improved greatly according to evidence I accept. Bulletins are commonly posted throughout the service. The data bank offers access to all information by all members.

Because the RCMP frequently assists municipal police forces in the province, there should be written agreements between them describing the terms, conditions and responsibilities of inter-agency relationships.

3. Major Investigations

The investigation of major crimes in the province is much more structured today than it was in 1969. The Executive Director of the Saskatchewan Police Commission told us that all forces now use major case management, with a team reporting to a file manager. Senior investigators follow progressively more detailed courses, examples of which concern DNA, crime scene investigation, analysis and reconstruction, patterns of offending and victimization and the role of technology. Operational plans (of which the Mackie Summary is an example) are generated by a case manager. They are very common and are intended to either substantiate or eliminate leads. In general, officers preparing to interview a witness can access the file to see what other witnesses have said. Officer's notebooks are turned in at the end and form part of the file for disclosure. The entire case management file is delivered to the Crown.

Although the leader of the Flicker investigation could not recall anything that was dropped or overlooked or any leads that were missed by the Saskatoon Police or RCMP in their investigation of the death of Gail Miller, under a major case management system, he said, one might have seen more extensive documentation going from the RCMP to the Saskatoon Police. As it was, it seemed that the RCMP reports were meant to satisfy superiors.

Senior officers of both Saskatoon Police and the RCMP agreed that members are better trained today, especially in the area of major investigations, including interviewing of subjects.

Although in 1969 senior officers of the Saskatoon Police met daily to discuss events, with briefings from a senior Detective Sergeant if required, the present day use of case management techniques in major crimes means that many of the procedures followed in the Miller murder investigation have been improved.

4. Recording of Interviews

We are told that polygraph examinations have been audio and videotaped for years, and other statements are commonly recorded in audio, video or both. To the extent practicable, that should always be so.

Both suspects and witnesses, however, will continue to make utterances outside the setting of formal statement taking. These might have relevance and should not be inadmissible merely for the lack of a video or audio recording. It is a matter of weight for the trial court. However, in view of the problems posed by the lack of recording of circumstances surrounding the Wilson and John statements of May 23 and 24, 1969, police should ensure that every statement taken from a young person in a major case, whether as witness or suspect, is both audio and video recorded.

5. Prosecutorial Matters

(a) Disclosure

Pre-trial disclosure is much wider today than was the practice in 1969 and 1970 due to *Stinchcombe*. As in 1969, disclosure is still done through the prosecutor, but it is based on the major case management file. Thus, both the practice of disclosure and its legal foundation have been extensively improved. Indeed, present day standards of disclosure have not been criticized by the parties.

(b) Trial Evidence

It was argued that consideration should be given to changing the rule against self-serving statements, so that the accused's statement could be admitted to help his case. I have reservations. If an accused testifies, his statement to police can be used to rebut suggestions of recent invention, but if he simply told the police he did not do the crime and he says the same thing in the stand under oath, the earlier statement would add nothing to the trial testimony. If the accused does not testify, on the other hand, the introduction in evidence of a statement he made to the police tending to show that he did not do the crime would only raise the question in the juror's minds of why he did not take the stand and repeat his statement under oath.

Although Milgaard counsel did not place importance on the s. 9 *Canada Evidence Act* question at the Inquiry, it is my view and that of some witnesses, that its application played a major role in the conviction of David Milgaard when jurors were allowed to hear the Nichol John statement read out to them even though its most incriminating parts were not adopted by her on the stand. A *voir dire* was not held which would have allowed defence the chance to probe, in the absence of the jury, the circumstances under which the statement was given to the police. The judge, hearing the circumstances, might have exercised his discretion to not permit cross-examination relating to the contents of the statement in the presence of the jury, who would then not have listened to incriminating evidence and possibly taken it for proof of contents.

A full treatment of this subject is found elsewhere in the Report. It has been argued that the common law has developed under *R. v. B* (K.G.B.)[3] in such a way that inconsistent out of court declarations are admissible for truth of contents in any event, provided they meet the criterion of reliability. That is so, but the fact is that an inconsistent statement under s. 9(2) of the *Canada Evidence Act* could still conceivably get before the jury without having met the same criteria of reliability, so the mischief illustrated by the application of that section in the Milgaard case might happen again unless legislative changes are made.

The proper functioning of s. 9(2) of the *Canada Evidence Act* depends upon the jury understanding and complying with the orthodox warning from the judge that out of court statements are not to be taken for truth of contents, unless adopted on the stand. Because the *Criminal Code* prevents jurors from disclosing matters of deliberation, direct evidence on the point cannot presently be obtained.

I recommend that the *Criminal Code* 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. Depending upon what is found, amendments to s. 9 of the *Canada Evidence Act* could then follow.

3 [1993] 1 S.C.R. 740.

In 1970, murder trials in Saskatchewan had to be tried by judge and jury. Today, Calvin Tallis might have elected trial by judge alone if he thought that the case was not one which was suitable for a jury. Judges sitting alone are generally thought to be better equipped to disabuse their minds of inadmissible evidence, no matter how relevant it seems. But an accused who elects trial by judge and jury, whatever his reasons, is entitled to the full protection of the law. Section 9, as it now stands, seeks to strike a balance between the public interest in getting the truth from a hostile witness on the one hand, and prejudice to the accused on the other. If a better balance can be struck through the work of law reform commissions and parliamentarians, then it should be done.

6. Post-conviction Matters

(a) Follow-up on Reports

The Saskatoon Police, as we have seen, failed to investigate Linda Fisher's complaint of August 1980, relating to her husband, Larry, as the possible killer of Gail Miller. We heard that, in general, the police would not undertake a reopening on their own motion, but rather at the direction of Saskatchewan Justice, as their workload was too heavy to worry about decided cases. That is not to say that nothing would be done about a complaint, but it was clear that responsibility for follow-up lay with the detective assigned, and responsibility for passing the information to the convicted person or his representatives would lie with Saskatchewan Justice.

Evidence showed that Saskatoon Police dismissed the Linda Fisher complaint too readily. The officer who took it referred it to one of the investigating officers who decided that it did not call for further action. T.D.R. Caldwell says that had the statement reached him, he would have disclosed it to Milgaard, or someone on his behalf. He himself would not have dealt with it – rather, it would have been someone more independent, like the Director of Public Prosecutions, or an official from another city.

This complaint did not receive the attention it deserved. The Milgaard case should have been reopened in 1980 at least to the extent of questioning Fisher and verifying his movements on January 31, 1969.

Murray Sawatsky said that it is difficult to think of a substitute for the discretion of a duty officer. I agree, and that is why my recommendation will be a narrow one, related only to complaints that bear on the safety of a conviction.

At present, all complaints are signed off by the supervisor who decides whether follow-up will be done. In my view, this decision should not be left to the police whose job is finished after conviction and appeals. It is both unfair and unrealistic to expect them to maintain a watching brief on old matters or to reinvestigate on their own motion.

Murray Brown, then Director of Public Prosecutions for Saskatchewan, was unequivocal in saying that the Linda Fisher complaint should have been followed up, and that nothing, in effect, had been done. I think that the Director of that office is uniquely equipped to do something, and it is my recommendation that every complaint to police calling into question the safety of a conviction should be passed to the Director of Public Prosecutions.

The police agency receiving the complaint can note that it appears to be frivolous, if that is the case, but in my view, no police force should have to bear the heavy consequences of an incorrect evaluation, as this one was.

(b) Prosecutors and the National Parole Board

We have seen how Caldwell imprudently, but meaning well, supplied the Parole Board with details of the Miller murder and David Milgaard because:

- he thought that the Board wanted input from prosecutors; and
- he thought that the public interest required it.

I have found that his actions did not have a direct bearing on the reopening of the case, but they earned him the enmity of the Milgaard group, who perceived that he was biased and vindictive. This led to much public criticism of Caldwell and, by extension, of Saskatchewan Justice.

For the better administration of Justice in this province I recommend that prosecutors desist from unsolicited contact with the Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts 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.

(c) Retention of Trial Exhibits, Police Files and Notebooks

The Milgaard trial exhibits were retained, thanks to Caldwell, with the unforeseen result that DNA typing was possible in 1997.

Exhibits can be bulky and, in the case of biological exhibits, deteriorate over time. Retention poses a significant storage problem and a policy is not easy to devise. It is a common practice in the courts for the Crown to seek an order for destruction of exhibits once the appeal period has passed, but as this case shows, had such a request been granted, it would have led to the destruction of the victim's clothing which yielded the semen samples. I would recommend that in all homicide cases, all trial exhibits capable of yielding forensic samples 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.

As to documentary exhibits, electronic storage offers the possibility of accurate and indefinite retention. I recommend that in all indictable offence cases, documentary exhibits be scanned and stored electronically, unless a court orders otherwise.

It is now generally accepted that an officer's notebooks are the property of the police service. The minimum retention period is seven years. These are "books of original entry" and serve as the basis for police reports. As such, they can be important in claims of wrongful convictions, and I recommend that they be treated as police files and preserved as such.

All police and prosecution files covering trials of indictable offences should be retained in their original form for a year, then scanned and entered in a database where a permanent secure electronic record can be kept. The costs of scanning would in some measure be offset by the reduced cost of storage.

(d) Victim Services

In 1969, there were no victim support services in the Saskatoon Police but there are now. Victims were not informed of the resolution of their cases as a matter of policy, although certain officers took it upon themselves to do so. This led to accusations from the Milgaard group that Fisher's rape victims were not informed of his guilty pleas because the police wanted to conceal them.

There has been a change since 1969 in the status of victims in the criminal justice system. Once viewed as mere witnesses, they are now seen to have rights of participation in the trial process arising from their status as victims. I doubt, therefore, that one would find a jurisdiction where victims are no longer informed of the resolution of their cases, but if one exists, policies should be changed to require notification.

7. Review of Criminal Convictions

The review and recommendations relating to Canada's conviction review process are set out in Chapter 6.

8. The Role of the Court of Appeal on Appeal from Conviction and on Reference Under s. 690

It was argued as well that the Court of Appeal should have more latitude in ordering a new trial where it considers that the conviction might be unsafe, as opposed to finding that it is unsafe. In other words, less deference should be paid to findings of fact by the judge or jury at trial. As noted in the English experience, the government did not accede to the Royal Commission recommendation in this regard, and legislation required that the verdict be found to be unsafe.

As matters stand, a Court of Appeal can act on findings of fact where it perceives palpable or overriding error in the Court below. There should be continued acknowledgment of the advantage enjoyed by the trier of fact who hears testimony firsthand.

At trial, David Milgaard's failure to testify could not be used against him before the jury. But on appeal, it is not uncommon for Courts to take note of failure to testify when rejecting an appeal. At the Inquiry, this practice was criticized by some counsel.

I should think that it is not a matter of the Court of Appeal drawing an inference against the accused for failure to testify, but merely commenting on the fact that the accused did nothing to meet a prima facie case, when deciding whether or not to use s. 686 to say that no substantial miscarriage of justice had occurred as a result of a trial error. And one must not be misled into thinking that the same reasons which protect the right to silence at trial – the presumption of innocence and the privilege against self-incrimination – apply on appeal before a court whose function is different than that of the court of first instance.

Section 11(e) of the Charter does not apply on appeal. As noted by Finch, J.A. in *R. v. Branco*:

> …the presumption of innocence in favor of the accused before and during trial is extinguished upon conviction by proof beyond reasonable doubt of the accused's guilt. The conviction indicates that the Crown has successfully rebutted the presumption of innocence. While any verdict may be overturned on appeal, a conviction nevertheless replaces the presumption of innocence with the presumption of guilt. There is no reason to regard the appellant's guilt as being held in a state of suspension during the appeal process.[4]

4 *R. v. Branco* (1993), 25 C.R. (4th) 370 at para. 14 (B.C.C.A.)(WL).

And Sopinka, J. regarding s. 686(1)(b)(iii) of the *Criminal Code* in *R. v. Noble*:

> If the jury accepted as truthful the inculpatory evidence, the conviction was based not on the failure to testify but on the Crown's case, and the absence of an innocent explanation of the inculpatory evidence is a factor for the Court of Appeal to consider in assessing the reasonableness of this conclusion. The failure to testify was not used by the jury to find guilt beyond a reasonable doubt, but in the face of evidence which convinced the jury of guilt beyond a reasonable doubt subject only to the existence of an innocent explanation, the absence of an innocent explanation may be considered by the jury, and by an appellate court reviewing the jury's decision, in entering or upholding a conviction.[5]

Calvin Tallis conceded that an argument could be made for relieving against the practice in Courts of Appeal of taking note of the accused's failure to testify as a reason for rejecting an appeal, but noted that the Supreme Court of Canada had dealt with the matter and was unlikely to change.

9. Public Inquiries into Claims of Wrongful Conviction

Public inquiries relating to wrongful convictions will continue to be held, I am sure. They answer an undeniable need for public disclosure, but they are expensive, disruptive to people's lives, and too often protracted and litigious. The English experience has seen a lessening in numbers of public inquiries called since the establishment of the Criminal Cases Review Commission. It is my hope that the establishment of a similar agency in this country will achieve the same result.

10. Stay of Proceedings

The entry of a Crown stay under s. 579 of the *Criminal Code* was recently considered by both Commissioner Lamer[6] and Commissioner LeSage.[7] Commissioner LeSage described the effect of a stay as follows:

> …The plain dictionary meaning of the term 'stay' is that it is a 'suspension of judicial proceeding' or a postponement of carrying out a judgment'. Former Chief Justice Lamer recently addressed the issue and concluded, 'A stay of proceedings simply puts the charge on hold.' Black's Law Dictionary gives the legal meaning of the verb stay as 'to hold [it] in abeyance' and defines the noun stay as 'a suspension of the case'.
>
> There appears to be no room for disagreement with this common sense, and legal, understanding of the effect of a Crown stay entered pursuant to s. 579 of the *Criminal Code*. Given that the Crown can recommence the same proceedings at any point, after entering an s. 579 stay, it is not accurate to say that the stay 'terminates' or puts 'an end' to the charge(s). It merely suspends the proceedings to await some further decision by the Crown as to the status of the prosecution.[8]

Commissioner Lamer noted that the Crown is given broad discretion to determine the manner in which a prosecution may be terminated:

5 *R. v. Noble*, [1997] 1 S.C.R. 874 at para. 103.
6 The Right Honourable Antonio Lamer, "The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken" (Newfoundland and Labrador, 2006).
7 Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (Manitoba, 2007).
8 Ibid at 126-127.

> There are a number of ways in which a prosecution may be terminated other than by proceeding to a verdict. The Crown has a discretion as to which avenue to choose and this prosecutorial discretion, ordinarily, is not reviewable by the courts. The Crown may:
>
> (1) Withdraw a charge at any time prior to a plea by the accused, or with the leave of the Court, after a plea has been entered;
>
> (2) Enter a stay of proceedings;
>
> (3) Proceed with the trial but elect not to call any evidence or to stop calling further evidence, and asking the judge or jury to acquit.
>
> The control of a prosecution, and the ability to terminate it as well as the ability to select the manner of termination is an important dimension of the Crown's *quasi-judicial* responsibilities.[9]

Commissioner Lamer made recommendations on the circumstances in which a Crown stay should be entered.[10] He concluded that a Crown stay should only be entered where there "is a reasonable likelihood of recommencement of the proceedings" but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen. In contrast, where "there is no probability of a conviction nor a reasonable likelihood of recommencement of the proceedings" it would be appropriate for the Crown to commence the trial but to elect to call no evidence and request an acquittal. Similarly, a withdrawal of the charge would be appropriate where the Crown Attorney decided that reasonable and probable grounds did not exist to lay the charge, there is no probability of a conviction, or, it is not in the public interest to proceed with the charge.

Commissioner LeSage considered the use of the Crown stay power in the context of conviction review proceedings (or "s. 696 cases"). Commissioner LeSage's mandate required him to investigate and report on matters surrounding the trial and conviction of James Driskell on June 14, 1991 for murder. After more than 13 years in prison, Driskell was released on bail pending a review of his conviction by the federal Minister of Justice pursuant to s. 696.2. His conviction was set aside and a new trial was ordered by the Minister. However, the Manitoba Attorney General directed a stay of proceedings. Commissioner LeSage found that in these circumstances, there was a reasonable expectation of either a retrial or a verdict of acquittal:

> Judicial processes are by definition, open public processes. Executive processes are generally not open and public. The conviction entered in these s. 696 cases was entered by judicial order after an open public trial. When the executive sets aside the conviction, it does so after a necessarily confidential internal review of the case. The public knows only about the evidence that was aired publicly at the original criminal trial. **When the executive sends the matter back to the courts, after finding a "reasonable basis" for a "likely" miscarriage of justice, the s. 696 process creates a reasonable expectation that there will be some kind of public accounting for the case at a judicial hearing.**

9 Supra note 5 at 317.
10 Ibid at 322-324.

> **Given my previous conclusion, that a Crown stay merely suspends the proceedings, it cannot amount to a final statement as to the validity of the prosecution.** Furthermore, the process for entering a Crown stay by way of writing a letter to the Clerk of the Court means that no judicial hearing need take place. There is no opportunity for the court to adjudicate on the case in any way.
>
> I agree with the conclusions of the *Lamer Inquiry* on this point:
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> > A stay of proceedings may leave an impression with the public that the charge is merely being "postponed" or "the authorities" in a broad sense, still believe in the validity of the charge. That impression is likely to be magnified where, as in this case, the accused had already been convicted and spent years in prison prior to his successful appeal.[11]

Commissioner LeSage found that a need for public proceedings and judicial supervision exists in cases where an accused has been convicted at a public trial, has spent years in jail and has then gone through the confidential executive process of a successful s. 696 review. In such cases, a Crown stay should only be used in very limited circumstances. He commented as follows:

> This issue is discussed in Professor Roach's Report at pp. 21 – 29. He notes that the Crown has 4 options upon receiving an s. 696 order from the Minister of Justice directing "a new trial": first, to proceed to trial; second, to offer no evidence and invite an acquittal; third, to seek a withdrawal of the charge; and fourth, to enter a stay. There are two overarching distinctions between these various options. The first three options all require a court proceeding and some judicial supervision whereas the fourth option generally does not. In addition, the first two options produce a final verdict that will protect the accused against subsequent proceedings whereas the last two options provide no protection against double jeopardy. **In other words, the Crown stay is the only option that is characterized by both a lack of judicial supervision and a lack of finality.**
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> In these circumstances, Professor Roach agrees with the *Lamer Inquiry* recommendations to the effect that the Crown should either offer no evidence, or withdraw the charge, where it has been determined that there is no reasonable prospect of conviction. The Crown stay should only be used "where there is a reasonable likelihood of recommencement of proceedings" and where, for example, the Crown simply needs more time to allow the police 'to conduct further investigation.'
> …
>
> I am in general agreement with Professor Roach, and with the *Lamer Inquiry* recommendations, in the particular context of s. 696 cases. Although the *Lamer Inquiry* recommendations deal with the broad use of the Crown stay power, in all contexts, for example, at an initial trial, this is beyond the scope of my terms of reference.
> …
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> **Given my conclusion that the Crown stay power is a temporary suspension of proceedings, pending a final determination by the Crown as to the validity of the prosecution, it is my view that a "stay" should only be exercised in an s. 696**

11 Supra note 6 at 129.

> **case where there is some reasonable likelihood that the proceedings will be recommenced.** Assuming there is an ongoing investigation, then once it concludes the case should be brought back to court for final determination, either by way of trial, the offering of no evidence or the withdrawal of charges. Although the latter option is like the stay in that it does not provide any protection against double jeopardy, it is preferable to the stay because it is requested in open court, it is subject to some judicial supervision and it sends a clear message to the public that the Crown is not prosecuting the case, as opposed to temporarily putting the case "on hold" by entering a stay. The word "withdrawal" is on its face more telling than a 'stay'.[12]

Commissioner LeSage concluded in his report that "the entry of a Crown stay does leave residual stigma and is not a satisfactory final remedy in s. 696 cases."[13] For these reasons, only in circumstances where there is some reasonable likelihood of recommencing proceedings against the accused, should the Crown exercise its discretion to stay the proceedings.

The Ontario Court of Appeal also recently commented on the stigma that can come with a Crown stay in the case of *R v. Truscott*.[14] Truscott had applied to the federal Minister for review of his conviction and his case was referred by the federal Minister to the Ontario Court of Appeal. The Crown acknowledged that if the Court ordered a new trial, a new trial would not be possible because of the lengthy passage of time. However, the Crown maintained that the inability to hold a new trial was irrelevant to the manner in which the Court should exercise its remedial powers. In other words, if there was an evidentiary basis upon which Truscott could be convicted, a new trial should be ordered. Legal counsel for Truscott argued for an acquittal and a declaration of innocence. The Court of Appeal observed:

> This is one of those cases where a new trial could result in an acquittal or a conviction. In most cases, that conclusion would lead to an order for a new trial. However, to order a new trial in these circumstances merely because the remaining evidence clears a relatively low evidentiary threshold, knowing full well that a new trial will never be held, would be unfair to the appellant and does a disservice to the public. Nor would an order for a new trial accompanied by a further order staying the new trial be an adequate remedy. It would remove the stigma of the appellant's conviction, but leave in the place the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one.
>
> …
>
> The integrity of the criminal justice system would also be served by bringing finality to this long-running case. The public uncertainty as to the validity of the appellant's conviction, reflected in the Minister's decision to order the Reference, deserves, if possible, a more definitive answer than an order for a new trial knowing that a new trial will never be held.[15]

In the unique circumstances of the case, the Ontario Court of Appeal approached the determination of the appropriate remedy by envisioning how a hypothetical new trial would proceed in light of the information before it. The Court was of the view that Truscott should be entitled to an acquittal if it was more probable

12 Ibid at 130-131.
13 Ibid at 129.
14 2007 ONCA 575, 225 C.C.C. (3d) 321..
15 Ibid at 392-393.

than not that he would be acquitted at a hypothetical new trial, and that was the case. In the result, his appeal was allowed, his conviction set aside and an acquittal was entered.

Was the use of the Crown stay in David Milgaard's case appropriate? It left him with significant stigma which was only lifted five years later with the DNA results and Fisher's subsequent conviction. But for them, it might still exist. Without a new trial, he was left without the chance of a not guilty verdict, and there was a strong argument to be made that he was entitled to at least that much. It would not have amounted to an official declaration of innocence, but no accused person has a right to expect that from a court.

It was clear from Murray Brown's testimony that consideration was given to the possibility of holding a new trial. In an April 14, 1992 memorandum that he prepared for the Deputy Attorney General he wrote:

> It should be noted here in answer to any suggestion that Milgaard needs a new trial to establish his innocence, that he has now had three opportunities to establish his innocence: once at trial, once in the Court of Appeal and now in an extraordinary proceeding before the Supreme Court. On each occasion he has failed to do so…[16]

Brown testified at the Inquiry:

> Q. What about the notion of simply having a new trial, and not presenting evidence, and having him acquitted that way?
>
> A. And we would do that why?
>
> Q. Well, no I'm asking you. I mean I think that was, in other words, to give Mr. Milgaard the opportunity of being found not guilty?
>
> A. He had that opportunity and he couldn't prove he was innocent, he couldn't make a case for the Supreme Court to suggest that they even thought he was wrongly convicted.[17]

Brown did acknowledge that an acquittal may have given David Milgaard "some comfort" but he did not think that it would have changed the public's view of the situation. As to the Supreme Court of Canada's opinion:

> …It didn't say that it found he was wrongly convicted, it didn't say that it thought he was innocent, and the suggestion to us that we stay the proceedings pretty much blocks his avenue towards sort of any kind of exoneration, even the kind that might have arisen from a not-guilty verdict.[18]

I am in agreement with the recommendations of Commissioner LeSage regarding the very limited use that should be made of the Crown stay in the context of s. 696.1 conviction review cases. However, I have concluded that the decision of the Attorney General of Saskatchewan to enter a stay was, in 1992, a reasonable one. In its April 14, 1992 decision, the Supreme Court of Canada stated that it would be open to the Attorney General of Saskatchewan to enter a stay of proceedings if that course were deemed appropriate in all of the circumstances. If a stay was not entered, but a new trial proceeded and a verdict

16 T37976-T37977.
17 T37990.
18 T37982.

of guilty was returned, then the Court recommended that the Minister of Justice consider granting a conditional pardon to David Milgaard with respect to any sentence imposed. Brown told the Inquiry that he considered the Court's decision to be a "very broad hint to the Attorney General of Saskatchewan that he should have stayed the prosecution."[19]

19 T37974.