Chapter 15
Supreme Court Reference

Nov-28-1991
The federal Minister of Justice refers David Milgaard's case to the Supreme Court of Canada.

Jan-16-1992
The Reference Case begins and David Milgaard is the first witness. The Supreme Court of Canada also hears evidence from Larry Fisher, the key trial witnesses and police witnesses.

Apr-6-1992
Legal counsel for the federal Department of Justice advises that attempts at DNA testing were unsuccessful. The Reference Case concludes with final arguments.

Apr-14-1992
The Supreme Court of Canada recommends to the federal Minister that she set aside David Milgaard's conviction and direct that a new trial be held.

Apr-16-1992
David Milgaard is released from jail. He is charged with second degree murder but a new trial is not held as the Crown enters a stay of proceedings.

1. Introduction

This Commission's interest in the Supreme Court Reference lies in whether the evidence before the Court or the opinion of the Court constituted information which came to the attention of the police or Saskatchewan Justice which should have caused them to reopen sooner. The Supreme Court's opinion was that the continued conviction of Milgaard would constitute a miscarriage of justice in view of new evidence reasonably capable of belief, which, taken together with the evidence adduced at trial, might reasonably have been expected to affect the verdict.

The Court recommended to federal Minister of Justice, Kim Campbell, that she quash the conviction and order a new trial. Saskatchewan Justice did not reopen the investigation into the death of Gail Miller as a result of this opinion, but rather recharged Milgaard and then stayed the charge. They did not speak of exonerating or compensating Milgaard until after the DNA results were known in 1997.

At this point, one must be careful to distinguish what the Milgaards perceived as being fair in terms of the timing of exoneration and compensation, and what was reasonably called for on the part of Saskatchewan Justice in terms of reopening the investigation into the death of Gail Miller, which is our specific concern under our Terms of Reference. I have not been asked to say whether Saskatchewan should have exonerated or compensated Milgaard sooner than it did.

Saskatchewan, as we have seen, saw no reason to reopen the investigation on the basis of information which came to it before the Supreme Court Reference. Officials were not persuaded that Fisher was chargeable for the murder, and they did not believe Wilson's recantation. On these two points, the Supreme Court expressed no opinion, saying only that the new evidence was something for a jury to consider on a new trial. Saskatchewan, on the other hand, had made its decision. The case against Milgaard remained intact. What was heard at the Supreme Court of Canada added nothing to the evidence before the federal Minister. It was only in 1997, when DNA evidence put Fisher in sexual contact with the victim, that reinvestigation of the death of Gail Miller was indicated.

A further side to the question of reinvestigating the death of Gail Miller is the fact that Fisher, the convicted rapist, was released from custody on May 26, 1994, still under suspicion for the murder of Gail Miller. Should this not have prompted Saskatchewan to reopen the investigation into her death? From Saskatchewan's point of view, the answer was no and there were two reasons, the first being that they still believed that Milgaard was guilty of Gail Miller's murder. The second reason was that the RCMP was coming to the end of a major investigation into alleged official wrongdoing related to the Milgaard conviction, and that investigation had expanded into a virtual reinvestigation of the death of Gail Miller. By the time the Flicker report was published, Justice Canada and Milgaard counsel were working towards DNA testing of semen stains on the victim's garments, with the knowledge and approval of Saskatchewan. It could be said, therefore, that a reinvestigation of the death of Gail Miller was ongoing during the course of the Flicker investigation (which began in 1992) and continued with the DNA inquiries to their culmination in 1997.

With that background we can turn to Inquiry evidence relating to the Supreme Court Reference.

On November 28, 1991, the federal Minister of Justice wrote to Wolch notifying him of the granting of the second s. 690 application. The preamble to the Order of Reference by the Lieutenant Governor in Council stated in part as follows: "Whereas there exists widespread concern whether there was a miscarriage of justice in the conviction of David Milgaard and it is in the public interest that the matter be inquired into".[1] In his testimony before the inquiry, Asper says that they were satisfied with the scope of the question posed by the Minister of Justice to the Supreme Court which asked, "…does the continued conviction of David Milgaard…constitute a miscarriage of justice?"[2]

On February 28, 1992, the Supreme Court published the following guidelines for deciding the circumstances under which the continued conviction would constitute a miscarriage of justice.[3]

1 Docid 157840 at 842.
2 Docid 157840 at 843.
3 Docid 305225.

REFERENCE RE DAVID MILGAARD

STATEMENT OF THE COURT WITH RESPECT TO WHAT WILL CONSTITUTE A MISCARRIAGE OF JUSTICE IN THE CIRCUMSTANCES OF THIS CASE

WHEREAS David Milgaard was convicted of the murder of Gail Miller on January 31, 1970, following a trial by judge and jury; and

WHEREAS that conviction was confirmed on appeal to the Saskatchewan Court of Appeal on January 5, 1971; and

WHEREAS an application for leave to appeal that conviction was dismissed by the Supreme Court of Canada on November 15, 1971; and

WHEREAS an application for mercy pursuant to s. 690 of the *Criminal Code* was made to the Minister of Justice on David Milgaard's behalf on December 28, 1988, and was rejected on February 27, 1991; and

WHEREAS a second application for mercy pursuant to s. 690 of the *Criminal Code* was made to the Minister of Justice on David Milgaard's behalf on August 14, 1991; and

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WHEREAS widespread concern existed as to whether there was a miscarriage of justice in the conviction of David Milgaard and it was thought to be in the public interest that the matter be inquired into; and

WHEREAS the matter was referred to this Honourable Court by Order in Council, P.C. 1991-2376 on November 28, 1991, in the following terms:

> ... HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Justice, pursuant to section 53 of the *Supreme Court Act*, is pleased hereby to submit to the Supreme Court of Canada for hearing and consideration of the following questions:
>
> (a) upon a review and consideration of the judicial record, the Reference Case that will be filed before this Court, and such further or other evidence as the Court, in its discretion, may receive and consider, does the continued conviction of David Milgaard in Saskatoon, Saskatchewan for the murder of Gail Miller, in the opinion of the Court, constitute a miscarriage of justice?
>
> (b) depending on the answer to the first question, what remedial action under the *Criminal Code*, if any, is advisable?;

AND WHEREAS this Honourable Court, having commenced its hearing and consideration of this matter, determined that it was in the interests of justice and the fair and efficient conduct of the proceedings to provide the parties to this Reference with guidelines it would apply in forming its opinion as to whether the continued conviction of David Milgaard constitutes a miscarriage of justice in this reference.

305226

THEREFORE, this Honourable Court advises that it will apply the following guidelines in forming its opinion as to whether the continued conviction of David Milgaard constitutes a miscarriage of justice:

(a) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, the Court is satisfied beyond a reasonable doubt that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground, we would consider advising that the Governor in Council exercise his power under s. 749(2) of the *Criminal Code* to grant a free pardon to David Milgaard.

(b) The continued conviction of David Milgaard would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, the Court is satisfied on a preponderance of the evidence that David Milgaard is innocent of the murder of Gail Miller. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground, it would be open to David Milgaard to apply to reopen his application for leave to appeal to the Supreme Court of Canada with a view to determining

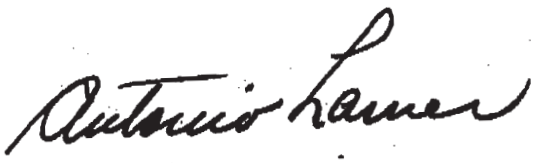
whether the conviction should be quashed and a verdict of acquittal entered, and we would advise the Minister of Justice to take no steps pending final determination of those proceedings.

(c) The continued conviction of David Milgaard would constitute a miscarriage of justice if there is new evidence put before this Court which is relevant to the issue of David Milgaard's guilt, which is reasonably capable of belief, and which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict. If we were to answer the first question put to this Court by the Governor General in the affirmative on this ground we would consider advising the Minister of Justice to quash the conviction and to direct a new trial under s. 690(*a*) of the *Criminal Code*. In this event it would be open to the Attorney-General of Saskatchewan, to enter a stay if a stay were deemed appropriate in view of all the circumstances including the time served by David Milgaard.

(d) If the judicial record, the Reference Case and such further evidence as this Court in its discretion may receive and consider, fails to establish a miscarriage of justice as set out in paragraphs (a), (b) or (c) above, we might nonetheless consider advising the Minister of Justice that granting of a conditional pardon under s. 749(2) of the *Criminal Code* may be warranted

where having regard to all the circumstances, it is felt some sympathetic consideration of David Milgaard's current situation is in order.

Dated this 28th day of February, 1992.



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305229

It is worth emphasizing that the Supreme Court speaks repeatedly of the "continued conviction"[4] as a possible miscarriage of justice. The ordinary sense of the words invites the conclusion that the Supreme Court was not concerned with the conviction itself as a miscarriage of justice but rather asked whether the continued conviction would constitute a miscarriage of justice in the circumstances. That interpretation is not without logical difficulties. Had the Court answered guidelines (a) or (b) in the affirmative it would be hard to describe the conviction itself as anything other than a miscarriage of justice.

As to guideline (c), however, when the finding was that there was new evidence reasonably capable of belief which could reasonably have been expected to affect the verdict, the notion of a continued conviction being a miscarriage of justice is apt. The new evidence, by definition, was not there at trial to have affected the verdict which was supportable on the evidence heard.

The Supreme Court hearing opened on January 21, 1992. The Chief Justice began by explaining the nature of the Reference Case.[5] The Court was assisting the federal Minister of Justice in the exercise of an administrative power.

Murray Brown acted for Saskatchewan Justice and Ronald Fainstein represented Justice Canada. Hersh Wolch acted on behalf of David Milgaard. Fisher requested and received intervenor status and was represented by Brian Beresh. My findings relating to the Reference are based mainly upon the Inquiry testimony of Brown and Fainstein, Wolch having elected to appear as counsel and not as a witness at this Inquiry.

Wolch argued that Milgaard's original trial was severely flawed by non-disclosure.[6] Brown did not take that as an allegation of deliberate withholding and saw Wolch' references to *Stinchcombe* as an attempt to apply recent law retroactively.

Milgaard counsel argued at this Inquiry that they were not allowed to present evidence of improper police conduct at the Supreme Court Reference, and that the finding by the Supreme Court that there was no credible evidence of police misconduct was flawed on that account. At the Inquiry, Asper said that he had a "very flawed recollection of what happened at the Supreme Court"[7] because Wolch handled counsel duties. As a result, he was not able to say whether they were restricted in calling evidence about police conduct having regard to the fact that Roberts was there to answer questions about the Wilson and John interviews.

In my view, the Supreme Court did not find credible evidence of police misconduct because Wolch had none to present. In his argument to the Supreme Court he said, "highly coercive and improper police tactics led to the witnesses Wilson, John and Cadrain eventually giving statements that incriminated Milgaard."[8] He also complained of "the highly objectionable techniques of Inspector Roberts".[9] But Wilson, John and Cadrain testified at the Supreme Court, as did Roberts, who described to the Court what he did. Brown and Fainstein testified at the Inquiry that police misconduct was a legitimate question before the Supreme Court, and I accept that.

4 Docid 305225 at 227 and 228.
5 Docid 208523 to 553.
6 Docid 218223.
7 T27323.
8 Docid 218223 at 218235.
9 Docid 218223 at 218238.

The position of the Attorney General for Saskatchewan, as appears in their argument of April 1992,[10] was that the applicant had failed to establish beyond a reasonable doubt, or on a balance of probabilities that he was innocent. He had also failed to establish that there was new, credible evidence available that, if put to a jury, would probably result in a different verdict in his case. Consequently he had not established that there was any miscarriage of justice.

2. Standard Required for a Remedy

At the end of the first week of evidence, the Chief Justice expressed the standard required for a remedy as whether the Crown could still prove its case. This concerned Brown because the 20 year lapse alone could make that impossible. He said that the test for Saskatchewan to reopen, in the sense of having the police do further investigation, is fairly loose. But it takes much more to get the Crown's agreement to set aside a conviction because of a miscarriage of justice.

Both Saskatchewan Justice and Justice Canada were concerned about the uncertainty. In Brown's view, the test used by the federal Minister of Justice in the s. 690 process was a useful guide and should be followed in the Reference (*R. v. Palmer and Palmer* (1980 50 C.C.C. (2d) 193 at 206). If there is credible new evidence, not available at trial, which could have affected the verdict, the Court should look at it. But points which were argued before the jury in the original trial will not suffice. Evidence not believed by the jury is not evidence which could be relied on by the reviewing court. There must come a point of finality. Being able to raise a reasonable doubt in 1992 would not meet the *Palmer* standard.

Saskatchewan had been placed in an awkward position, being instructed by the Supreme Court to argue for the conviction, while at the same time being receptive to evidence which might indicate Milgaard's innocence or call for a new trial, either of which would constitute a miscarriage of justice under the guidelines set by the Supreme Court. Notwithstanding the delicacy of their position, I am satisfied that Saskatchewan counsel performed their adversarial role while remaining open minded, as required by the nature of the Reference.

Brown testified that the usual presumption of regularity applied. There was no burden upon Saskatchewan to re-prosecute the case at the Reference, nor to establish that it could still put together a prosecution. All appeals having been dismissed, it was not an undue burden on Milgaard to produce some evidence to show that the verdict was unsafe. Merely making new assertions did not suffice. Raising matters which were obviously not credible would not move Saskatchewan to refer them to the police for investigation. Had Wilson's recantation been credible, Brown said, that might have been enough but as it was, without the DNA which came only in 1997, Milgaard would never have been able to show a miscarriage of justice to Saskatchewan's satisfaction.

Brown observed that if the bar was set too low, properly convicted persons would get a remedy. He did not criticize the Supreme Court opinion specifically, but I infer from his evidence that Saskatchewan's view at the time was that Milgaard had been properly convicted.

He did say that Saskatchewan's decision not to re-prosecute was based upon what the Supreme Court said, and upon the public interest. In setting its guidelines, the Supreme Court stated under guideline (c) that if a miscarriage of justice were found on the basis of new evidence "it would be open to the

10 Docid 234332.

Attorney-General of Saskatchewan, to enter a stay if a stay, were deemed appropriate in view of all the circumstances including the time served by David Milgaard".[11]

Under guideline (d), even if a miscarriage of justice had not been established, the Court might have considered advising the Minister that a conditional pardon was in order if it "…felt some sympathetic consideration of David Milgaard's current situation is in order".[12] This, said Brown, revealed a view that it was time for Milgaard to be released.

Had the Supreme Court believed Milgaard, said Brown, he would have been pardoned. His impression was, however, that Milgaard's testimony caused his defence counsel from the original trial, Tallis, to be called to contradict him on certain points, and there was no doubt Tallis was the one who was believed.

3. Preparation by Asper and Wolch

A further question to consider is whether there was additional information that should have come to the attention of the Supreme Court in 1992 that might have prompted Saskatchewan to reopen the investigation into the death of Gail Miller.

The Inquiry heard from witnesses as to what preparation went into the Reference, how it was conducted, and the reaction to it. I will now review some of that evidence.

According to Saskatchewan counsel Eric Neufeld's notes about a telephone conversation with Wolch on January 13, 1992,[13] eight days prior to the start of the hearing, Wolch did not know where to begin. His client was having emotional problems and Wilson was not cooperating. His witness list was still outstanding.

Asper said that prior to the hearing he had not organized the file for lack of time. Had he done so, he might have seen a transcribed interview between David and Joyce Milgaard, Carlyle-Gordge and solicitor Young, where David admitted having been in the motel room, high on drugs. Had David not denied the re-enactment before the Supreme Court who then heard from Tallis that his client told him it could have happened, Milgaard would have been more credible.

It is apparent from listening to a taped conversation between Joyce Milgaard and Asper that both were concerned about the appearance of bias in all the statements gathered by their group to date. In discussing with Joyce Milgaard who would interview Launa Edwards, Asper remarked that he did not want any of the statement taking that had gone on up to that point. It had to be straight and factual.[14] Speaking of the Centurion Ministries investigation, Asper remarked to Joyce, "Well the whole thing is tainted by Centurion, if Centurion is the taint, then the whole thing is tainted".[15] And further in the conversation he says, "…the statements that have been taken up to this point have been you know, horribly biased…which is fine".[16]

Wolch received Merchant's file on February 13, 1992, nearly a month after the Supreme Court hearing began.

11 Docid 305225 at 228.
12 Docid 305225 at 229.
13 Docid 026526.
14 Docid 336391 at 439.
15 Docid 336391 at 443.
16 Docid 336391 at 444.

A more welcome discovery was the Mackie Summary which seemed to Wolch and Asper to be a script of what the witnesses would say, drawn for the purpose of influencing them to say it at trial. I have analyzed this document elsewhere and cannot agree with that conclusion, but Wolch viewed the document as his "smoking gun" and promoted it as proof of police misconduct.

Generally speaking, Milgaard counsel did not provide expected disclosure, and they were tardy in producing a witness list for the Court. They lacked both resources and time. It is speculative to suggest that given more of both they might have convinced the Court at least of Milgaard's probable innocence, but what they had sufficed for a new trial.

4. Preparation by Others

Brown testified that even before the first s. 690 application was decided, Saskatchewan knew that a complete investigation of all the Milgaard allegations had been done, and that media stories to the contrary were false. But after rejection of the application was announced, the media uproar was such that Saskatchewan supported a public airing of the issues. Then Director of Public Prosecutions, Ellen Gunn, discussed the matter with Justice Canada.

In November and December of 1991, Saskatchewan Justice received a copy of the Milgaard's second s. 690 application in preparation for the Supreme Court Reference, along with much other material. After the December 1988 application, Saskatchewan had simply supplied the files they had to federal investigators, but after the Reference was called, the province was instructed by the Court to appear in support of the original conviction. Brown told us that he was concerned that the Attorney General of Saskatchewan should be involved with the federal Reference at all, because Saskatchewan Justice officials had been accused of misconduct, yet they were instructed to advocate for the conviction by testing the evidence put up by counsel for Milgaard. Nevertheless, he and co-counsel Neufeld were free to take any action dictated by the evidence, and had they seen the need for a new trial they would have told federal officials at once.

Although Wolch later accused Saskatchewan of being biased in favour of the conviction, Brown says that Wolch expected them to be in an adversarial position,[17] and he recalled no complaint from him at the time.

Federal, provincial and Milgaard counsel met on December 9, 1991,[18] and according to Brown's evidence, which I accept, it was left to the parties to suggest witness names and to call whatever evidence was relevant. The province's witness list went to the Court in December 1991, but Wolch's was still outstanding in mid-January 1992.

On December 20, 1991, Brown wrote to Wolch requesting specific material, following Wolch's assurance of full disclosure.[19] They particularly wanted tapes of witness interviews conducted by Henderson of Centurion Ministries, on behalf of the Milgaards. They were unaware of Joyce Milgaard's efforts in 1981, but knowledge of the interviews she conducted at that time would have helped in assessing Wilson's statements.

Other areas of interest to the province were the tape of the John hypnosis session conducted by Dr. Martin Orne, and the blood type and secretor status of the perpetrator. Doubting the reliability of the

17 Docid 077760.
18 Docid 004312, 010085.
19 Docid 156827.

tests done 20 years before, they wanted to know if Fisher and Milgaard were A secretors, expecting Ferris to testify that forensic evidence excluded Milgaard. Asper gave an equivocal reply to Brown's interest in a Milgaard blood test,[20] having been assured earlier of his willingness to give a sample for testing.

All available Saskatoon Police notebooks were provided.[21] On January 2, 1992, Neufeld wrote to Corrections Canada[22] asking to review the file of David Milgaard. They were interested in any admissions of guilt by Milgaard that may have been noted on his file, and they were curious about David Milgaard's assertion that he was denied bail for refusal to admit guilt.

On January 8, 1992, Asper sent Brown the statement of Edwards[23] in which she said that Lapchuk admitted to her that the motel room re-enactment did not happen. Milgaard counsel were still arguing that the incident did not happen, so that issue was before the Supreme Court.

Witnesses and materials were wanted as soon as possible.[24] The Reference was called on November 28 and the Chief Justice met with counsel on December 9th. A further meeting about witnesses was held on January 16th. Counsel were to submit witness lists and the Court would decide who to call.

Brown was getting trial exhibits for Fainstein in January 1992.[25] The latter was looking after the testing. Saskatchewan was ready to go on January 14, 1992[26] except that they needed Wolch's witness list to finalize their own. Wolch needed to put up his best case and Saskatchewan would respond to it. Brown saw the burden of proof upon Milgaard as showing innocence, not merely raising a reasonable doubt, but the burden of proof issue still had not been decided when the hearing began.

An unexpected issue arose when David Milgaard testified before the Inquiry, giving, for the first time, an alibi showing that at all relevant times they were in a different part of the city getting the heater fixed and having chicken soup. Moreover, he said that he had told this to Tallis, who ignored it.

Brown said that federal investigators checked but found no service station across the river where Milgaard said they had stopped. Saskatchewan counsel did not believe the evidence. It was very important, and one would have expected it to have come out much earlier so they saw the need to call Tallis. Tallis said that he had received no such information from his client. This caused them to question Milgaard's general credibility including his denial of killing Gail Miller.

5. Disclosure

Brown testified, and I accept, that although Wolch and Asper agreed to full mutual disclosure,[27] they were "not terribly forthcoming".[28] Certain things, like the test for secretor status, and waiver of privilege for Tallis came only at the insistence of the Chief Justice. Saskatchewan never did get the Henderson/Wilson interview tapes, or, from Justice Canada, Justice McIntyre's report, the advice given to the Minister, or internal memoranda.

20	Docid 009789.
21	Docid 009082.
22	Docid 002674.
23	Docid 156836.
24	Docid 115797.
25	Docid 115835.
26	Docid 002623.
27	Docid 213342.
28	T37541.

Asper told Joyce Milgaard[29] that everybody wanted Henderson's tape of the Wilson interview "Because it's part of the disclosure" but they could not find him:

> Joyce: But we can't find him.
> David: Well, I'm trying.
> Joyce: Good! We can't find him.[30]

Asked if she ever expressed the hope (as one reading of the above might show) that the tape would not be produced to the authorities, Joyce Milgaard replied that it could be so, she could not remember. Her quoted response to Asper could, on its face, be read to mean that she approved of Asper looking for Henderson, because they could not find him, but in view of her reply to Commission Counsel, I find that she was glad that Henderson could not be located for the purpose of producing the tape. In his testimony before the inquiry, Henderson continued to give excuses for not producing it.

Saskatchewan Justice asked Wolch for disclosure of all witness statements[31] but Asper could not recall if the 1981 interview of Wilson or Wilson's interview by Boyd were produced. It appears that they were not, because Brown testified that he never saw the Joyce Milgaard/Wilson interviews from 1981 or the Wilson/Boyd interview of November 19, 1991 which Asper had. It appears that Joyce Milgaard urged Asper not to disclose it because it revealed drug use by the group.[32]

Milgaard counsel failed to disclose one item which was favorable to their case. It will be recalled that Brown regarded David Milgaard's alibi about having chicken soup at a garage across the river around the time of the murder as a recent invention for the Supreme Court. But at the Inquiry, a transcript of a telephone conversation was shown to counsel Gary Young. It is a conversation between David and Joyce Milgaard, Carlyle-Gordge and Young on January 22, 1981, in which David Milgaard was asked where they had stopped a woman for directions. He remembered a garage and turning right over a bridge, seeing a woman and thinking of grabbing her purse, and going to a garage and having some soup.[33]

Asper had gone to Regina to look at the prosecution file after the Reference had been ordered. He could not remember seeing it, but we know that it was arranged in six folders, under logical categories and was complete. Included were opening addresses, with notes, closing addresses and notes by Caldwell about witnesses and his notes at trial.

Asper acknowledged before us that in meetings with officials a list of issues was developed,[34] and that a large volume of documents came to them including police and prosecutor's files.

According to Brown, neither Wolch nor Asper asked for police reports on the Fisher prosecution file, but had they done so, Saskatchewan would have produced them.

6. Witnesses Called

David Milgaard was to be the first witness at the Supreme Court hearing but he did not want to be there. Brown suspected that he was trying to avoid testifying, whereas he seemingly had no problems giving press conferences.

29	Docid 335896 at 900.
30	Docid 335896 at 900.
31	Docid 156827.
32	Docid 336312 at 361.
33	Docid 155260.
34	Docid 334244, 004312 at 313.

On the issue of police misconduct, Fainstein wrote to the Chief Justice on January 31, 1992, proposing former police officers as witnesses who could speak to the way in which the Wilson and John statements were taken. Roberts was one of them.

Evidence concerning similarity of the rapes and the murder was available to all parties at the Reference.

Fisher was called in fairness to give him the chance to reply to allegations made against him. Chief Justice Lamer began to question him asking, "… Is there any chance that maybe you did encounter Gail Miller and when you left her that she was alive?"[35] The reply was, "I had nothing to do with the Gail Miller murder, sir".[36] It was a reply which was not really responsive to the question of whether he had encountered Gail Miller but left her alive. The response was that he did not murder her. But the Court left it at that.

7. Witnesses Not Called

Wolch told the Chief Justice that he wanted to question Caldwell in connection with the "document taken from his file"[37] (presumably the Mackie Summary) as well as about disclosure. Caldwell traveled to Ottawa to be available to Wolch as a witness were he needed. In the end, Wolch decided not to call Caldwell which is difficult to understand in view of later allegations made against him by the Milgaards. In Joyce Milgaard's affidavit[38] of February 21, 1992, filed at the Reference, disclosure was raised as an issue just as it was raised in their filed argument.[39] Who could be more helpful than the prosecutor himself on this subject? He had a complete file, whereas Tallis, who had no file, was called to testify. Brown told us that he did not need to call Caldwell because his evidence was not challenged.

Ferris, Markesteyn, Rossmo, Short, Mackie, Joyce Milgaard, and Henderson were not called but Asper could not remember the reason for this in his testimony before the Inquiry. Brown remembered that Mackie was unavailable to testify and Short was ill. Also, Asper could not tell us why the March 21, 1992, Breckenridge letter to Wolch[40] was not put before the Supreme Court. It accuses Roy Romanow (Attorney General), Lysyk (Deputy Minister) and Kujawa (Director of Public Prosecutions) of having closed door meetings about the Fisher and Milgaard cases. It later became the subject of a news conference held by the Milgaards to level serious accusations of wrongdoing against these individuals.

Brown told us that he wanted Henderson called in connection with the Wilson recantation, but neither his tape nor he could be located. Henderson's supervisor and the founder of Centurion Ministries, James McCloskey, had no direct evidence to offer.

Brown made the valid point that if Wolch wanted to allege misconduct by police officers it was up to him to call them at the Reference. He saw no need to call Penkala, but would not have objected to Caldwell and Kujawa being called.

35 Docid 114634 at 714.
36 Docid 114634 at 714.
37 Docid 317717 at 730.
38 Docid 010127.
39 Docid 218223 to 228.
40 Docid 159537.

8. Reference Issues

It is Brown's view that the media campaign caused the Supreme Court Reference which, in turn, resulted in David Milgaard's release from jail, and that but for the campaign, the conviction would not have been touched. I accept that. The Reference was not made on the merits of the grounds advanced.

Around the time of the Reference, in December 1991, Brown became aware of the Rutherford memorandum resulting from a meeting between McIntyre and Justice Canada officials. Their conclusion was that:

- there is still no reasonable basis to conclude that a miscarriage of justice has occurred;
- Fisher's attacks on other women do not undermine the substantial body of evidence supporting the conviction;
- the case against David Milgaard remained intact; and
- while the minds of jurors might harbour a doubt about Milgaard's culpability if confronted with evidence of a serial rapist in the area, there is no real link between Fisher and Gail Miller's murder.

Regardless, the consensus was that some judicial forum should be selected to correct the public misperception of the case.

Brown, as we have heard, respected both the s. 690 investigation and McIntyre's opinion, and this would not be evidence which should have caused police or Saskatchewan Justice officials to reopen sooner than they did.

The Milgaard argument for the Reference states their position on the reception of new evidence at paragraph 14:

> …the Court should hear and consider all relevant new evidence, whether admissible under a test for new evidence or not; should weigh this evidence along with the evidence at trial; should determine what, if any evidence is credible; and should determine whether all of the credible evidence causes the Court to doubt the correctness of the conviction.[41]

The position, clearly, was one for inclusion.

Although Milgaard counsel failed to make a case of police misconduct before the Supreme Court, Asper, outside the hearing room, implied undue influence by police. This was reported by the StarPhoenix on February 18, 1992. "Police created game-plan for Milgaard: lawyers" read the headline, referring to the Mackie Summary. Key witnesses, he said, changed their stories to mirror the police theory after being brought back to Saskatoon, "re-questioned and driven around the murder scene".[42] Asper says that it was his view at the time and he told the Globe and Mail that "someone put the theory to paper, and the police were then instructed to round up the required witnesses".[43]

Argument along these lines was made to the five judges of the Supreme Court. In their decision, they state, "We have not been presented with any probative evidence that the police acted improperly in the investigation of the robbery, sexual assault and murder of Gail Miller, or in their interviews with any of the witnesses".[44]

41 Docid 009853 at 859.
42 Docid 228041.
43 Docid 004258.
44 Docid 008879 at 885.

Milgaard counsel have presented no new evidence to me that makes up the deficit in proof noted by the Supreme Court, but continued insistence upon police wrongdoing has left the Commission with no choice but to present, for public scrutiny, every scrap of paper and every witness of relevance.

The expenditure of time and money has been enormous, and in the view of some, unnecessary, following, as it does, thorough and costly investigations more than a decade ago by the RCMP, Alberta Justice and the Saskatoon Police Commission into allegations by the Milgaard group of criminal misconduct and cover-up by police, Crown and government officials. The group has written the investigations off as whitewashes. And they have extended the criticism to Justice Canada, whom they accuse of mismanaging the s. 690 applications of David Milgaard, and to Saskatchewan Justice, whom they accuse of foot-dragging in the reopening of the Milgaard case.

On January 30, 1992, after Wilson, John and David Milgaard had testified, Brown told Fainstein that the court would want to hear from Short, Mackie, Karst, Hall and Frank.[45] His letter went to Wolch as well. Brown said that the whole point of calling police officers was to reveal the circumstances of the questioning.

On January 31, 1992, Fainstein of Justice Canada wrote to the Chief Justice about witnesses to be called, including "….former police officers, who can speak, *inter alia*, to the way in which statements were obtained from Mr. Wilson and Ms. John".[46] The letter was copied to Wolch and Asper who, thought Brown, were parties to the agreement.

There is no doubt, I find, that police and prosecutorial misconduct was a live issue at the Supreme Court.

9. Reference Counsel

(a) Wolch and Asper

Wolch was not in an enviable position at the Supreme Court. He was short of preparation time and short of resources. The Court wanted to hear from Milgaard who was not potentially a strong witness. Tallis, for reasons explained earlier, had advised against him testifying at trial, and in the intervening 22 years, Milgaard had undergone considerable trauma, both psychological and physical, during his life in prison.

Not unreasonably, Wolch tried to have his client excused from testifying at the Supreme Court and he also tried to limit questioning of Milgaard's counsel Tallis, writing to him on February 27, 1992,[47] saying that privilege would be waived to the extent of allowing the Court to ask questions but not other parties.

Tallis told us that he was appalled by this and instructed Justice officials to ensure that this limitation would not apply.

Wolch persisted, however, and applied (unsuccessfully) to the Supreme Court to limit questioning of Tallis to the Court.[48]

In the result, Milgaard was examined before the judges of the Supreme Court and cross-examined. He denied killing Gail Miller, but his denial did not convince the judges on a preponderance of evidence that he was innocent.

45 Docid 009799.
46 Docid 286438.
47 Docid 153531.
48 Docid 232815 at 820.

Asper appears to have played no direct role in the Reference hearings themselves. Behind the scenes, however, it seems that he was fully occupied in briefing Wolch.

(b) Fainstein

Fainstein, formerly of Justice Canada, testified at the Inquiry. His direct role in the reopening of the Milgaard case began as counsel for the Supreme Court Reference and continued with DNA typing of samples from Gail Miller's clothing. Fainstein, like Brown, had very wide experience at senior levels of the criminal justice system.[49]

He made the point that the Supreme Court gave advice and did not render a judgment. I accept, in essence, that is what they did, but the document issued by the Supreme Court is described as a "Judgment"[50] and it has been widely referred to as such.

Fainstein described the Reference as the view of five dispassionate, learned judges with everything before them but the DNA evidence. They were left in 1992 with at least an equal possibility that David Milgaard was the culprit. I accept that. The Court recommended a new trial for David Milgaard, but expressed no opinion that Larry Fisher should be charged.

Fainstein's attention had been drawn to the Milgaard case in the form of Milgaard's letter to Minister Crosbie dated January 28, 1986.[51] He read the Court of Appeal decision. He responded to Milgaard,[52] setting out the application requirements. As we have seen, David Milgaard apparently did not show the letter to Asper.

Fainstein opened a file, expecting an application, but none came. Milgaard had told the Minister that Wolch was his lawyer and although he knew him very well, Fainstein told us that until the application was filed in December 1988, he had no recollection of discussions between them as to the requirements for an application under s. 617, as it then was. When the application was finally made, Williams took charge of it but in 1991, Fainstein was named to represent Justice Canada at the Reference.

His role in the Supreme Court Reference was a leading and varied one, and he said that the Court was entitled to hear any evidence which was open to the Minister of Justice. Rules were based on relevance, fairness and natural justice. The Court at first wanted to call and question witnesses, but it became apparent that they needed help, and the proceeding became more conventional. He does not recall the Court refusing any witness wanted by a party.

Although subpoenaed, Short and Mackie were unavailable. Police misconduct however was "absolutely germaine" given the concern about the statements of Wilson and John. That is why Roberts was there.

I find that if more proof was needed on the matter, Fainstein delivered the final rebuttal to Wolch's contention that misconduct was not in issue. It was. And so was disclosure, he said, or anything else that might have contributed to a miscarriage of justice. I accept that.

49	Docid 339840.
50	Docid 008879.
51	Docid 333272.
52	Docid 333262.

(c) Brown

Brown says that he argued what he thought, unrestricted by his role as an advocate, and he thought that there had been no proof of innocence and no new credible evidence that if put to a jury, would probably result in a different verdict. No miscarriage of justice had been established.

Commenting upon some of the witnesses, Brown said that Albert Cadrain testified in a straightforward manner and that nothing he said impeached his original evidence. He saw internal contradictions in Wilson's evidence, describing him as incredibly easy to lead and turn around.

As to the Fisher rapes, Brown argued that the applicant had not shown how Tallis might have used the information had it been disclosed. He said that without being able to suggest a perpetrator or show a connection with the murder, even the defence might not have been able to get the evidence admitted, and if they had, he does not think that it would have affected the jury's assessment of the case.

Milgaard had to confront the evidence that tied him to the event. When a defendant does not testify and says somebody else did it, the jury wonders why the defendant did not take the stand to say he did not do it. I accept that. But the Supreme Court thought that a jury should have the chance to consider the evidence in a new trial. The accused could have chosen to testify then.

Brown acknowledges that in his argument he might have applied a higher standard than the defence would have to meet. Still, the fewer similarities there are, the easier it is for the Crown to pick apart the evidence.

I find his argument about the Victim 12 assault to be persuasive. Fisher could not have been prosecuted on her identification made 22 years after the event. And if it was he who assaulted her at 7:07 a.m. and Miller's assault was at about the same time, Fisher would be out of the area of the murder.

In Brown's view, the Supreme Court was left with an unequivocal denial of the murder by Fisher and a denial by Milgaard which was weakened by other traversed evidence. The thinking was that Milgaard should be out irrespective of his entitlement to a remedy under s. 690. Were it not for that, he believes that the second application would not have succeeded on the merits. I need not agree or disagree with that. The relevant point for me is that in holding that view, Brown would not be inclined to reopen.

10. Major Issues

(a) Mackie Summary

Joyce Milgaard told us that she and Asper had seen the Mackie Summary many times without realizing its significance. But Wolch saw it as a script for witnesses to follow – amazing, she said.[53] Indeed it was. There was good reason for Asper and her not seeing it as a script. It was not. But to the Milgaard group, it showed and still shows, that the first statements of Wilson and John were the truth.

Referred to her book,[54] Joyce acknowledged that she had received the Mackie Summary in the late 1980s but that she and Asper saw no significance in it until Wolch looked at it at the time of the Reference and concluded that it "…set out the prosecution's game plan…the police were ordered to get David's

53 T31329.
54 Docid 269317 at 555.

young friends, interrogate them and get them to make statements that conformed to the Crown's theory, which they did in May 1969".[55]

Neither Joyce Milgaard's grave accusations against Crown and police in her book, nor repeated suggestions to like effect made to witnesses during the Inquiry have succeeded in showing that the Mackie Summary is anything but what it purports to be–a mixture of fact, theory and proposed investigative action.

Wolch, in the Supreme Court, and later Asper in the press, presented the Mackie Summary as evidence that the police enlisted witnesses to give testimony which fit their script.[56] Brown did not perceive much interest in the document by the judges.

Milgaard counsel made a determined effort at the Inquiry to demonstrate that official misconduct was not a subject for the Reference. He asked Asper in cross-examination if the latter had been chastised by the Court for raising police conduct. The answer was revelatory. He had been chastised by the Chief Justice for speaking to the media about the Mackie Summary.

(b) Wilson Recantation

Some Inquiry witnesses were asked about the effect of the Wilson recantation at the Supreme Court Reference. Williams commented that it did not dislodge the trial testimony which had been subject to cross-examination. To Brown, the recantation was wrong, and the trial evidence stood. Had Wilson lied at trial, his recantation should have been more credible. It was not, and it did not undo his trial evidence which the jury had considered. Asked about his concern for lack of the Wilson/Henderson tape Brown explained that Wilson was "a mess"[57] in the Supreme Court, and they were curious as to how Henderson had managed to produce such a coherent statement.

Brown observed that in looking at recantations he asks, why the change of mind? He does not start by thinking that a witness lies when he recants evidence which favoured the Crown. He sends the police to investigate. At the Supreme Court Brown argued that no weight could be placed upon Wilson's recantation because he was not a credible witness at the Reference. As well, his recantation came 22 years after the trial evidence, far too remote to be a credible, reliable attack on his trial evidence. Justice Sopinka suggested that it became a matter of weight, but in applying the Palmer test, the credible new evidence might be that he is a perjurer now and perhaps was then. Brown argued that such an inference cannot be drawn. People change over 20 years. The discussion moved on at the Supreme Court hearing to other matters. Brown maintains his position today, but it is not clear to me from the court's opinion whether they accorded any weight to Wilson's recantation evidence or to his being a perjurer in applying the Palmer test.

(c) Milgaard Disclosures to Tallis

Prior to the Reference, Brown did not know what Tallis would say and the latter would not tell him, citing solicitor/client privilege. That, however, was waived for the Reference where Tallis related that his client admitted having thrown out a compact, although he denied it in his own testimony before the Supreme Court. According to Brown, the point developed as an issue of credibility more so than an indication of guilt. The conviction was, after all, a given.

55 T31434-T31435.
56 Docid 032522.
57 T38213.

As to the sexual assaults, Tallis was not asked what he would have done differently had he known about them – and the answer was not obvious.

11. Reaction to Supreme Court Opinion

As might be expected, the opinion is a carefully worded document which merits close reading. It appears as Appendix R to this report.

(a) By Milgaard Group

Asper told us that because his objective was to get Milgaard out of prison, he regarded the 1992 Supreme Court decision as a success. The Milgaard family did not, however, because they wanted complete exoneration and Saskatchewan had entered a stay, declining to re-try Milgaard.[58] This left Milgaard in legal limbo, with officials continuing to question his innocence. In directing a stay, Attorney General Bob Mitchell declined compensation, saying that not a single judge of the Supreme Court of Canada was convinced that Milgaard was innocent or had suffered a miscarriage of justice. Debate ensued between Milgaard supporters and Attorney General Mitchell.[59]

Wolch made it clear in his letter to Mitchell of August 27, 1992, that evidence was wilfully suppressed by the Crown Attorney's office from October 1970, and the continued suppression of the evidence constituted the miscarriage of justice referred to by the Supreme Court. But, in fact, the Supreme Court made no finding, express or implied, of suppression of evidence as constituting a miscarriage of justice. Had they done so, that would surely have constituted evidence coming to the attention of Saskatchewan Justice on the basis of which they should have reopened the investigation into the death of Gail Miller.

For Milgaard, the Supreme Court opinion was something of a pyrrhic victory. He had won the battle for a remedy, but lost the war for exoneration and compensation, a loss which was not to be reversed for five more years through DNA typing.

(b) By Saskatchewan Justice

I find that Brown and other Justice officials were appalled at the tactics of the Milgaard group from the time the application was filed on December 28, 1988 until the case was reopened. This resulted in a subjective component to their responses. It reinforced their belief in David Milgaard's guilt and engendered a deep mistrust in anything put forward by Joyce Milgaard, her counsel and her supporters, including some in the press. However, I find that if reliable and substantial information had come to their attention which indicated a miscarriage of justice, they would have acted on it despite the tension between them and the Milgaard group.

Saskatchewan Justice saw nothing in the Supreme Court opinion which called for reopening under the investigation of the death of Gail Miller, and they saw nothing in it which called for compensation and exoneration for David Milgaard because no miscarriage of justice had been shown.

It is not within my Terms of Reference to question an executive decision not to pay compensation, but had the Supreme Court opinion been that the conviction of Milgaard, as opposed to his "continued conviction",[60] constituted a miscarriage of justice, that would have meant that Saskatchewan should

58 Docid 020392.
59 Docid 165259, 026768, 165264, 027095, 162851.
60 Docid 008879 at 889.

have reopened the investigation into the death of Gail Miller at once. But that was not so. The information which demanded a reopening came only in 1997 with the DNA results.

I am satisfied that the Inquiry evidence given by Murray Brown fully and accurately reflected the actions and the approach taken by Saskatchewan Justice to the Milgaard file, from the time Brown was given charge of it in 1989.

The Supreme Court opinion, he said, was a statement that Milgaard had not produced evidence of misconduct. As to the new evidence, Brown took a very critical view saying that it could not reasonably be expected to have affected the verdict, but the Supreme Court was looking for a way to free Milgaard and this was it. In his view, the Court thought in 1993 that Milgaard had been punished enough, and so gave Saskatchewan a broad hint to stay the charge.[61]

When Wilson's recantation was discredited at the Supreme Court, Milgaard was shown to be relying on an utterly unreliable witness, said Brown, and thus found himself in a worse position.

The judges did not believe Milgaard and so could not conclude that he was even probably innocent. Had they done so, says Brown, the investigation would have been reopened and compensation considered if the finding was that something wrong had happened. The Court thought that the new evidence was reasonably capable of belief, but that there was a sufficient case left to go to a jury. The use of the phrase "continued conviction"[62] being a miscarriage of justice clearly suggests, he says, that there had been no miscarriage of justice but that there could be if the conviction were allowed to stand in the face of new evidence. I agree.

On April 14, 1992, Brown reported the findings of the Supreme Court to his Deputy Attorney General.[63] He foresaw a "public relations war"[64] by the Milgaards who had been denied a chance at compensation by the Supreme Court's failure to find wrongful conviction, or say that Milgaard was innocent. The opinion temporarily dampened the media campaign.

He thought that a new trial would be a pointless waste of scarce resources. There was a chance of a not guilty verdict but, equally, it could have gone the other way. All the Milgaards had produced at the Supreme Court was an impression that he was likely guilty. They had every chance to show misconduct and non-disclosure but they failed. A public inquiry was not justified.

Brown expected a compensation claim to be made because in a discussion with Wolch, Asper and Fainstein, a contingency fee agreement was mentioned. So they looked for another pressure campaign through the media to be directed at the Minister, but this time they were told that they were to respond to allegations.

They filed a new indictment and stayed it.[65] There was a federal/provincial agreement for payment of compensation but the criteria had not been met. Minister Mitchell announced the stay by way of a news conference on April 16, 1992. Wolch gave his own statement the same day,[66] saying that his client was now innocent, the conviction having been quashed. Rather, says Brown, he was presumed to be

61	Docid 033150.
62	Docid 008879 at 889.
63	Docid 153889.
64	Docid 153889 at 890.
65	Docid 267900.
66	Docid 328328.

innocent. Wolch also stated that "the miscarriage of justice came to light in 1970".[67] No, says Brown, the literal reading of the opinion tells you otherwise. I agree.

(c) By Justice Canada

The Supreme Court's recommendation to quash the conviction, Fainstein said, resulted from application of the Palmer test. At the end of the Supreme Court Reference he thought that David Milgaard was probably guilty. But Palmer deals with reasonable doubt and that is the way the Supreme Court used it, not in the context of whether Milgaard committed the crime or not. I accept that.

12. Conclusion

I conclude that the Supreme Court Reference in 1992 did not produce information coming to the attention of the police or Saskatchewan Justice on the basis of which they should have reopened the investigation into the death of Gail Miller.

67 Docid 328328.