

**COMMISSION OF INQUIRY**  
**Sitting at Saskatoon, Saskatchewan**

**IN THE MATTER OF**  
**A COMMISSION OF INQUIRY PRESIDED OVER BY THE**  
**HONOURABLE JUSTICE E. MacCALLUM INTO THE**  
**WRONGFUL CONVICTION OF DAVID MILGAARD, ORDERED**  
**BY THE LIEUTENANT-GOVERNOR IN COUNCIL, FOR THE PROVINCE OF**  
**SASKATCHEWAN, OC 84/2004**

BETWEEN:

**HER MAJESTY THE QUEEN,**

Respondent

- and -

**LARRY FISHER**

Applicant

---

**APPLICATION BROUGHT ON BEHALF OF LARRY FISHER**

---

**BERESH DEPOE CUNNINGHAM**  
Barristers

300, 10110 - 107th Street  
Edmonton, Alberta  
T5J 1J4

**BRIAN A. BERESH**  
Counsel for the Applicant

**COMMISSION OF INQUIRY**  
**INTO THE WRONGFUL**  
**CONVICTION OF DAVID MILGAARD**  
1020-606 Spadina Crescent East  
Saskatoon, Saskatchewan  
S7K 3H1

**Mr. Douglas C. Hodson**  
Counsel for the Respondent

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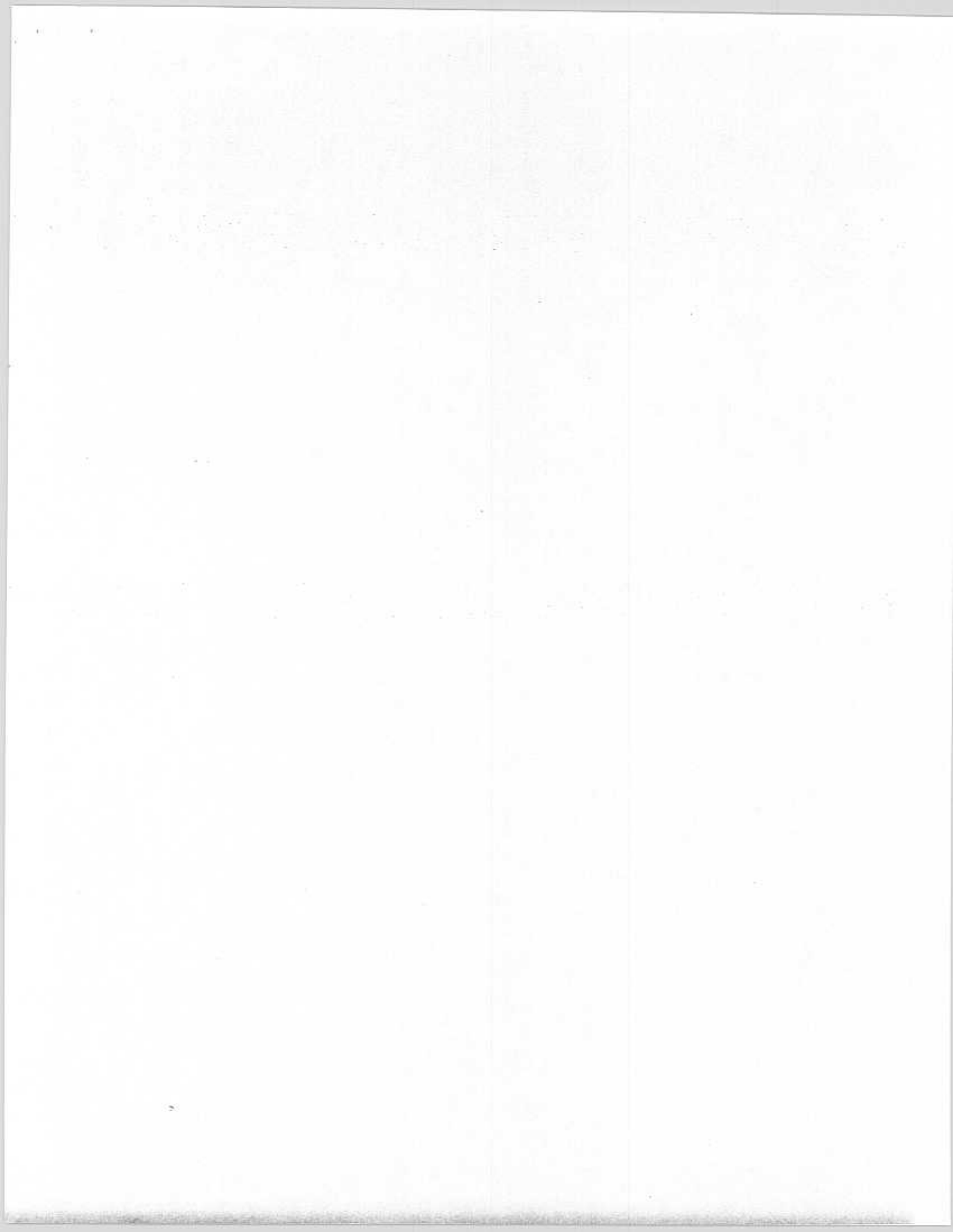
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**Mr. Douglas C. Hodson**  
Counsel for the Respondent

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**NOTICE OF MOTION**

---

**TAKE NOTICE** that an application will be made by counsel on behalf of Larry Fisher before the Honourable Mr. Justice E. MacCallum, Commissioner, at the Top of the Inn, Sheraton Cavalier, 612 Spadina Crescent East, Saskatoon, Saskatchewan on April 20, 2004 at 10:00 o'clock in the forenoon or so soon thereafter as the same may be heard, for an Order granting Larry Fisher full standing to appear through counsel at all stages of the Commission of Inquiry and to be heard through counsel in this matter.

**AND FURTHER TAKE NOTICE** that the Applicant will apply for an Order that Brian A. Beresh, Barrister and Solicitor, of Edmonton, Alberta, and his alternate, be appointed by this Commission of Inquiry to represent the interests of the said Larry Fisher throughout the proceedings.

**AND FURTHER TAKE NOTICE** that an application will be made for funding of counsel and for the payment of any and all reasonable disbursements incurred in the representation of the Applicant herein before this Commission of Inquiry.

**AND FURTHER TAKE NOTICE** that the basis for the application for standing will include the following:

- a) the Applicant is directly and substantially affected by the Inquiry;
- b) the Applicant represents interests and perspectives essential to the successful conduct of the Inquiry;
- c) the Applicant's counsel has special experience, expertise and knowledge of the matters within the Commission's Terms of Reference;
- d) that no other potential party before this Commission will properly, adequately, or in any way, represent the interests of the Applicant;
- e) that the Applicant has ongoing and future interests which may be affected by the evidence adduced or findings of this Commission, unlike any other potential party to the Commission;
- f) that the position of David Milgaard throughout has been to implicate the Applicant in the death of Gail Miller;
- g) the Applicant had previously received standing in the section 690 *Criminal Code* Reference held before the Supreme Court of Canada in 1991-1992;
- h) that Brian A. Beresh was appointed to represent Mr. Fisher's interests throughout that Reference;
- i) that Brian A. Beresh was appointed to represent Mr. Fisher at his criminal trial and on the appeal;
- j) that it would be contrary to the interests of justice not to permit the Applicant to have full standing before the Commission of Inquiry given the unique circumstances of this case;
- k) such further and other grounds as may be advanced in the application Argument appended hereto and as may be advanced before the Commission at the hearing of the application.

**AND FURTHER TAKE NOTICE** that the grounds upon which the Applicant relies for funding includes, but is not limited to the following:

- a) the Applicant has been incarcerated since July 25, 1997 (almost 7 years) and as such has not been employable;
- b) the Applicant has no savings from which counsel could be paid;
- c) there is no reasonable expectation that the Applicant will have any funds available before or during the hearing of this Commission;
- d) the Applicant is not able to contribute from his own funds in any fashion in order to participate in the Inquiry;
- e) the Applicant cannot be represented and will not be represented before this Commission if reasonable funding is not granted;
- f) the Applicant received funding for two lawyers and reasonable disbursements and expenses during his participation before the Milgaard Reference in the Supreme Court of Canada in 1991-1992;
- g) the Applicant was the recipient of a special funding order by the Honourable Mr. Justice Milliken, pursuant to his decision of September 9, 1997 in relation to his criminal trial;
- h) the Applicant was the recipient of a funding Order granted by Chief Justice Bayda on May 12, 2000, granting funding for the purposes of the Applicant's appeal to the Saskatchewan Court of Appeal;
- i) that it would be contrary to the interests of justice to not permit proper funding for representation of the Applicant's interests;
- l) such further and other grounds as may be advanced in the application Argument appended hereto and as may be advanced before the Commission of Inquiry at the hearing of the application.

**AND FURTHER TAKE NOTICE** that the Applicant will apply for an Order directing that the method of payment for legal services and disbursements be that, upon Affidavit by participating counsel certifying the provision of legal services. That funds be paid to Beresh DePoe Cunningham, Barristers, Edmonton, Alberta or alternatively that upon a review of any and all statements of accounts rendered by the Local Registrar for the Court of Queen's Bench, Saskatoon, Saskatchewan upon a review, for reasonableness, that monies be paid to Beresh DePoe Cunningham, Barristers, Edmonton, Alberta.

**DATED** at the City of Edmonton, in the Province of Alberta, this 6<sup>th</sup> day of April, 2004.

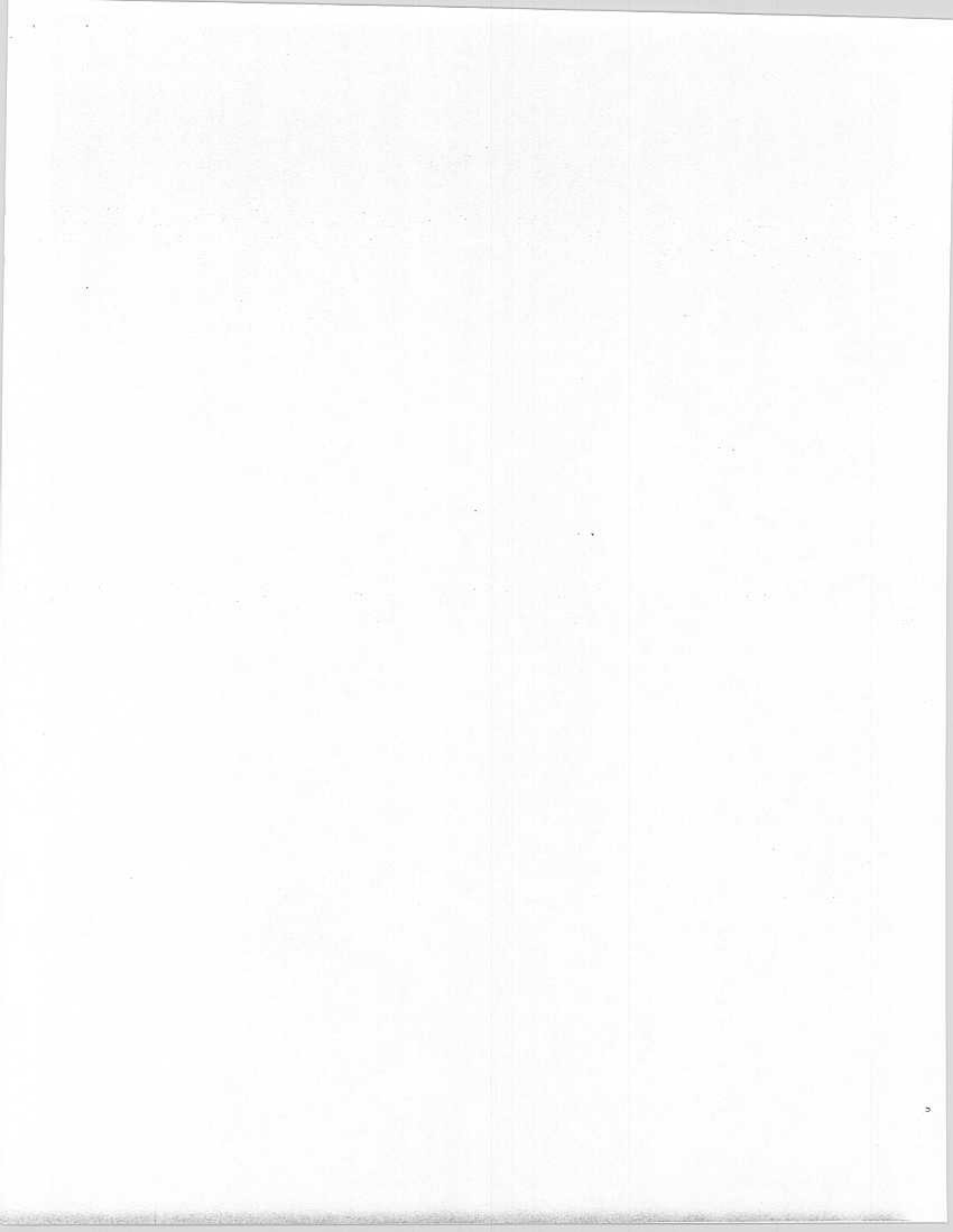
**BERESH DEPOE CUNNINGHAM**

Per: 

**BRIAN A. BERESH**  
Solicitors for Larry Fisher

TO: COMMISSION OF INQUIRY  
Att. Mr. Douglas Hodson  
TO: SASKATCHEWAN JUSTICE





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Applicant

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**AFFIDAVIT OF BRIAN M. J. HURLEY**

---

I, BRIAN M. J. HURLEY, Barrister, of the City of Edmonton, in the Province of Alberta, MAKE OATH AND SAY:

1. That I am a partner at Beresh DePoe Cunningham, Edmonton, Alberta and as such have personal knowledge of the matters referred to herein, except where stated to be based upon information and belief and where so stated, verily believe the same to be true.
2. That I have been engaged in the practice of law since 1993 and presently specialize in the practice of criminal law.
3. That I practice law with Brian A. Beresh who has represented Mr. Larry Fisher's interests since 1979-1980 including representation of him in Saskatchewan 1979-1980, representation of him at the time of the Milgaard Reference in the Supreme

- Court of Canada and more recently, representation of him at his criminal trial, appeal to the Saskatchewan Court of Appeal and the present leave application to the Supreme Court of Canada.
4. That I am advised by Brian A. Beresh that on March 24, 2004 leave to Appeal to the Supreme Court of Canada was filed in relation to the dismissal of Mr. Fisher's appeal by the Saskatchewan Court of Appeal in 2003. In addition, an application for an extension of time was also filed.
  5. Mr. Beresh advises that the Crown Respondent now has 30 days in which to reply to Mr. Fisher's application and Mr. Fisher will have 20 days thereafter in which to file a reply. Following that, the Supreme Court of Canada will consider the Leave Application. In Mr. Beresh's experience, there may be as much 4 or 5 months before a decision on the leave application is granted by the Supreme Court of Canada.
  6. Mr. Beresh advises that within 3 days of the Saskatchewan Court of Appeal's decision dismissing Mr. Fisher's appeal that he, by written correspondence advised the prosecution of Mr. Fisher's intention to appeal to the Supreme Court of Canada. Attached hereto and marked as Exhibit "A" to this my Affidavit is a photocopy of Mr. Beresh's correspondence. An intention to appeal is a prerequisite for the granting of an application for an extension of time for filing the Leave Motion. Mr. Beresh advises that seeking an extension of time is not uncommon on Applications for Leave to Appeal to the Supreme Court of Canada.
  7. That I assisted Mr. Beresh as second counsel in relation to Mr. Fisher's criminal jury trial. That trial commenced in the Spring of 1999 in Saskatoon, Saskatchewan and was concluded on November 22, 1999 when Mr. Fisher was convicted. He was not sentenced until January 4, 2000 when he was sentenced to life imprisonment on a charge of first degree murder.
  8. That I spoke to Larry Fisher on April 7, 2004 and as a result, Mr. Fisher provided to me the following information which he confirms to be correct and which is contained herein.

9. Mr. Fisher advises that within a day or two of the announcement of the death of Gail Miller in Saskatoon, Saskatchewan, that he was stopped by the Saskatoon City Police and interviewed and that he provided information as to his whereabouts to the police for the period of time during which the police suggested that Gail Miller was killed.
10. That he was not subsequently interviewed the Saskatoon City Police Force in relation to the death of Gail Miller.
11. Mr. Fisher advises that in the late 1980's, he became aware that David Milgaard or individuals on his behalf, were publicly suggesting that he was responsible for the death of Gail Miller.
12. Mr. Fisher further advises that he discovered from Mr. Beresh that Mr. Milgaard's second section 690 *Criminal Code* application relied heavily upon the assertion that he was responsible for the death of Gail Miller.
13. Mr. Fisher advises that he denies any involvement in the death of Gail Miller.
14. That I am advised by Brian A. Beresh and verily believe the same to be true that on Mr. Fisher's behalf, he on December 20, 1991, sought leave to permit Larry Fisher to intervene in the Supreme Court of Canada Reference, before the Supreme Court of Canada as ordered by Order in Council PC 1991-2376. Standing was granted by the Supreme Court to permit Mr. Fisher to cross-examine witnesses, lead evidence, retain experts and to fully represent Mr. Fisher's interests.
15. That I am further advised by Brian A. Beresh that he and Marvin Bloos appeared before the Supreme Court of Canada and represented Mr. Fisher's interests throughout the Reference.
16. The Supreme Court of Canada released its decision in relation to the Reference on April 14, 1992. It is attached hereto and marked as Exhibit "B" to this my Affidavit.

17. I am further advised by Larry Fisher that on July 25, 1997, he was arrested by the RCMP and charged with sexual assault and murder of Gail Miller.
18. Mr. Fisher advises that he, at that time, qualified for Legal Aid who refused to appoint Mr. Beresh who was then, and is now, a member in good standing of the Law Society of Saskatchewan to represent him during the criminal proceedings.
19. Mr. Fisher advises that he did not have confidence in any lawyer, other than Mr. Beresh, to represent him and as a result requested Mr. Beresh to make an application for funding to the Court of Queen's Bench of Saskatchewan. Attached hereto and marked as Exhibit "C" to this my Affidavit is a photocopy of Mr. Fisher's Affidavit, without attached Exhibits (the Exhibits are not relevant to this application but are available should the Commission wish to view them).
20. That I am advised by Mr. Beresh that on September 9, 1997 Justice Milliken, by way of fiat, appointed both he and myself to represent Mr. Fisher with a direction for compensation. Attached hereto and marked as Exhibit "D" to this my Affidavit is a photocopy of Justice Milliken's fiat.
21. I am further advised by Mr. Beresh that Chief Justice Bayda issued an endorsement on May 12, 2000 assigning Mr. Beresh to act on Mr. Fisher's behalf in relation to the appeal and delegated the task of fixing a reasonable legal fee to the Registrar of that Court. Attached hereto and marked as Exhibit "E" to this my Affidavit, is a photocopy of that endorsement.
22. That I am advised by Mr. Fisher that he has been incarcerated since his arrest on July 25, 1997 and as a result he has not been employable since that date. He presently has no means of income, whatsoever.
23. Mr. Fisher further advises that he has no savings and no other source from which to obtain funds to reimburse counsel for legal services rendered in relation to preparation for and attendances at the Commission for the purposes of protecting his interests.

- 24. That I am further advised by Mr. Beresh that neither he, nor anyone from his office is prepared to represent Mr. Fisher's interests at the Commission unless appropriate compensation is awarded.
- 25. That I am advised by Mr. Beresh that he proposes that fees be paid upon certification by way of Affidavit by counsel providing the services along with a statement of account provided that the statement of account is sealed and not opened for public inspection until the conclusion of the Inquiry.
- 26. Mr. Beresh further advises that during the criminal proceedings prior to the appeal that he was required to provide his statements of account to the Local Registrar, of the Court of Queen's Bench, Saskatoon, Saskatchewan for a review as to reasonableness, but without taxation, and on the further understanding that following review, the accounts were sealed. Attached hereto and marked as Exhibit " F" is the Order of Mr. Justice Milliken dealing with this issue. In relation to the fees on the appeal, that the accounts were taxed by the Registrar of the Court of Appeal and thereafter sealed.
- 27. That I am advised by Mr. Beresh that he sincerely believes that it would be contrary to the interests of justice not to permit Mr. Fisher standing and funding in relation to the work of this Commission.
- 28. That I make this Affidavit in support of the Notice of Motion filed with this Honourable Court which motion is returnable on April 20, 2004.

SWORN BEFORE ME at the City of )  
 Edmonton, in the Province of )  
 Alberta, this 7th day of )  
 April A.D. 2004. )  
 \_\_\_\_\_ )  
 A Commissioner for Oaths in and for )  
 Province of Alberta )

**CHRISTIAN P. BANKS**  
 Barrister and Solicitor

  
 \_\_\_\_\_  
 BRIAN M. J. HURLEY

**BERESH  
DEPOE  
CUNNINGHAM**  
BARRISTERS

October 2, 2003  
Our File: 97,6300-B

SENT BY FAX ONLY (306) 787-9111.

Saskatchewan Department of Justice  
Constitutional Law Branch  
8th Floor, 1874 Scarth Street  
Regina, Saskatchewan  
S4P 3V7

Attn: Mr. Graeme Mitchell, Director

Dear Sir:

Re: Larry FISHER

As you are undoubtedly aware, the Saskatchewan Court of Appeal has now rendered its decision.

Mr. Fisher wishes now to bring an application for leave to appeal to the Supreme Court of Canada. Once again, we are faced with the issue of funding the costs of bringing this application.

Please consider this my formal request that you consent to an Order directing the Minister of Justice for the Province of Saskatchewan and/or the Government of Saskatchewan to pay for the legal costs incurred in preparing an Application for Leave to Appeal to the Supreme Court of Canada.

I await to hear from you.

Yours truly,

BERESH DEPOE CUNNINGHAM

Per: 

BRIAN A. BERESH  
BAB\*Im

This is Exhibit "A" referred to in the  
Affidavit of

...Brian M. Hurley...  
Sworn before me this 7<sup>th</sup> day  
of April A.D., 2003

.....  
A Notary Public, A Commissioner for Oaths  
In and for the Province of Alberta

**CHRISTIAN P. BANKS**  
Barrister and Solicitor

300 MacLean Block  
10110 - 107 Street  
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www.bdc.cc

Brian A. Beresh\*  
B.A., LL.B.  
(Also a member of the  
Saskatchewan Bar)

D'Arcy DePoe\*  
B.A., LL.B.

David R. Cunningham\*  
B.A., LL.B.

Bob H. Aloneissi\*  
B.A., LL.B.

Edmond O'Neill\*  
B.A., LL.B.

Brian M.J. Hurley\*  
B.A., LL.B.

Eamon A. O'Keefe  
B.A.(Hon.), LL.B.

Christian P. Banks  
B.A., LL.B.(Hon.)

Chris Millsap  
B.A., LL.B.

Darin D. Sprake†  
LL.B.

Marvin R. Bloos  
B.A.(Hon.), LL.B., LL.M.  
Appellate Counsel



IN THE MATTER OF Section 53 of the  
*Supreme Court Act, R.S.C., 1985, c. S-26;*

DANS L'AFFAIRE de l'article 53 de la  
*Loi sur la Cour suprême, L.R.C. (1985),  
ch. S-26;*

AND IN THE MATTER OF a  
Reference by the Governor in Council  
concerning whether the conviction of  
David Milgaard in Saskatoon,  
Saskatchewan on January 31, 1970 for  
the murder of Gail Miller on January 31,  
1969 constitutes a miscarriage of justice,  
and what remedial action, if any, is  
advisable, as set out in Order in Council  
P.C. 1991-2376, dated the 28th day of  
November, 1991

ET DANS L'AFFAIRE d'un renvoi  
adressé par le Gouverneur en conseil  
pour savoir si la déclaration de  
culpabilité prononcée contre David  
Milgaard, à Saskatoon (Saskatchewan),  
le 31 janvier 1970, pour le meurtre de  
Gail Miller, survenu le 31 janvier 1969,  
constitue une erreur judiciaire, et pour  
déterminer quelle mesure corrective, le  
cas échéant, devrait être prise, tel  
qu'exposé dans le décret C.P. 1991-2376,  
en date du 28 novembre 1991

CORAM:

The Rt. Hon. Antonio Lamer, P.C.  
The Hon. Mr. Justice Sopinka  
The Hon. Mr. Justice Cory  
The Hon. Mme Justice McLachlin  
The Hon. Mr. Justice Iacobucci

CORAM:

Le très hon. Antonio Lamer, c.p.  
L'honorable juge Sopinka  
L'honorable juge Cory  
L'honorable juge McLachlin  
L'honorable juge Iacobucci

Appeal heard:  
January 16, 1992  
January 21-24, 1992  
February 17-20, 1992  
March 4, 1992  
March 9-12, 1992  
April 6, 1992

This is Exhibit "B" referred to in the  
Affidavit of  
Sworn before me this ..... day  
of ..... A.D. 2001

Appel entendu:  
Le 16 janvier 1992  
Du 21 au 24 janvier 1992  
Du 17 au 20 février 1992  
Le 4 mars 1992  
Du 9 au 12 mars 1992  
Le 6 avril 1992

Judgment rendered:  
April 14, 1992

CHRISTIAN P. BANKS  
Barrister and Solicitor

Jugement rendu:  
Le 14 avril 1992

Reasons for judgment by  
The Court

Motifs de jugement par  
La Cour

Counsel at hearing:

Avocats à l'audience:

For David Milgaard:  
H. Wolch, Q.C.  
David Asper

Pour David Milgaard:  
H. Wolch, c.r.  
David Asper



For the Attorney General for  
Saskatchewan:  
Murray Brown  
Eric Neufeld

For the Attorney General of Canada:  
S.R. Fainstein, Q.C.  
Robert Frater

For Larry B. Fisher:  
Brian A. Beresh

Pour le Procureur général de la  
Saskatchewan:  
Murray Brown  
Eric Neufeld

Pour le Procureur général du Canada:  
S.R. Fainstein, c.r.  
Robert Frater

Pour Larry B. Fisher:  
Brian A. Beresh

**Indexed as:** *Reference re Milgaard (Can.).*

**Répertorié:** *Renvoi relatif à Milgaard (Can.).*

THE SUPREME COURT OF CANADA

IN THE MATTER OF SECTION 53 OF THE SUPREME COURT ACT, R.S.C., 1985,  
c. S-26:

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IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL CONCERNING WHETHER THE CONVICTION OF DAVID MILGAARD IN SASKATOON, SASKATCHEWAN ON JANUARY 31, 1970 FOR THE MURDER OF GAIL MILLER ON JANUARY 31, 1969 CONSTITUTES A MISCARRIAGE OF JUSTICE, AND WHAT REMEDIAL ACTION, IF ANY, IS ADVISABLE, AS SET OUT IN ORDER IN COUNCIL PC 1991-2376, DATED THE 28TH DAY OF NOVEMBER, 1991

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CORAM: The Chief Justice and Sopinka, Cory,  
McLachlin and Iacobucci JJ.

**BY THE COURT:**

This matter was referred to this Court by Order in Council, P.C. 1991-2376.

That Order provides:

WHEREAS David Milgaard was convicted on January 31, 1970 following a trial by Judge and Jury at Saskatoon, Saskatchewan, for the murder of Gail Miller on January 31, 1969, and was sentenced to imprisonment for life;

WHEREAS David Milgaard appealed the conviction to the Court of Appeal for Saskatchewan, which dismissed the appeal on January 5, 1971;

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

WHEREAS, by a letter dated December 28, 1988, an application was made to the Minister of Justice by David Milgaard's counsel, seeking the mercy of the Crown pursuant to section 690 of the *Criminal Code*, which application, after due consideration, was declined on February 27, 1991;

WHEREAS, by a letter dated August 14, 1991, a second application was made to the Minister of Justice by David Milgaard's counsel for the mercy of

the Crown, pursuant to section 690 of the *Criminal Code*, based on different grounds from the first application made on December 28, 1988;

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;

AND WHEREAS the Governor in Council sees fit to refer that matter to the Supreme Court of Canada;

THEREFORE, 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 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?

During the course of the hearing the Court determined that in the interests of justice the guidelines that would be followed in responding to the questions should be set out for the parties. These guidelines provide:

- (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.

It is appropriate to begin by stating that in our view David Milgaard had the benefit of a fair trial in January 1970. 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. Nor has evidence been presented that there was inadequate disclosure in accordance with the practice prevailing at the time. Milgaard was represented by able and experienced

counsel. No error in law or procedure has been established. At the conclusion of the first trial, there was ample evidence upon which the jury, which had been properly instructed, could return a verdict of guilty.

However, fresh evidence has been presented to us. Ronald Wilson, a key witness at the trial, has recanted part of his testimony. Additional evidence has been presented with respect to the alleged motel room confession. More importantly, there was evidence led as to sexual assaults committed by Larry Fisher which came to light in October 1970, when Fisher made a confession.

In our view, this evidence, together with other evidence we have heard, constitutes credible evidence that could reasonably be expected to have affected the verdict of the jury considering the guilt or innocence of David Milgaard. Our conclusion in this respect is not to be taken as a finding of guilt against Fisher, nor indeed that the evidence would justify charging him with the murder of Gail Miller.

We now consider the options set out in the guidelines.

As to the first, we are not satisfied beyond a reasonable doubt that David Milgaard is innocent of the murder of Gail Miller.

As to the second, we are not satisfied, on the basis of the judicial record, the Reference case and the further evidence heard on this Reference, on a preponderance of all the evidence, that David Milgaard is innocent of that murder.

Third, we are satisfied that there has been new evidence placed before us 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. We will therefore be advising the Minister to quash the conviction and to direct a new trial under s. 690(a) of the *Criminal Code*. In light of this decision, it would be inappropriate to discuss the evidence in detail or to comment upon the credibility of the witnesses.

Nonetheless we will set out in brief the basis for our recommendation to the Minister of Justice that she should direct that a new trial be held.

Without being exhaustive it will suffice to observe that there is some evidence which if accepted by a jury could implicate Milgaard in the murder of Gail Miller.

Early in the morning of January 31, 1969, Milgaard, Nichol John and Ronald Wilson drove from Regina to Saskatoon. The evidence of Nichol John and the final version of the recantation of Ronald Wilson indicates that in Saskatoon, sometime before 7:00 a.m. on that morning they stopped a woman walking by their car to ask for directions. Shortly after that, the car became stuck, Wilson and Milgaard got out of the car and walked away in different directions to seek assistance. Wilson returned to the



car before Milgaard. Justice Tallis, before his appointment to the bench, had acted as counsel for Milgaard. Ordinarily discussions between a solicitor and a client are privileged and cannot be disclosed by the solicitor without the permission of the client. Milgaard waived all privilege and as a result, Justice Tallis testified as to statements made to him by Milgaard.

Without enumerating them fully, or commenting on which should prevail, it will suffice to observe that there were a number of differences in the testimony given by Milgaard and Justice Tallis on this reference.

Justice Tallis testified that Milgaard denied any involvement in the murder. However, Milgaard did confirm to his counsel the sequence of events related by Nichol John and Wilson that is set out above. Milgaard confirmed the evidence given by Nichol John and Ronald Wilson that he had broken into a building at some point during the trip from Regina to Saskatoon. Justice Tallis stated that Milgaard referred to the pedestrian whom they stopped to ask for directions as an older woman, but could not give a more precise estimate of her age. As well, Milgaard admitted to Tallis that he looked at her with a view to possibly robbing her. Other evidence indicates that Gail Miller's purse was taken by somebody and thrown in a garbage can.

Nichol John and Albert Cadrain, whom the group picked up in Saskatoon, testified that Nichol John had found a compact or a makeup bag in the Wilson car after they left Saskatoon. It had not been there earlier. When Nichol John inquired about

it, David Milgaard seized it and threw it out of the car. Justice Tallis testified that David Milgaard had confirmed this had occurred and could not give any explanation for his actions. Milgaard also told his counsel that he may have had a knife in his possession when he arrived in Saskatoon.

Albert Cadrain testified that he saw blood on the pants and shirt of Milgaard when Milgaard changed his clothes at the Cadrain house.

In addition there is the evidence of the motel room incident which could be taken as an admission of murder by Milgaard, or as a joke made in very poor taste, or as mere drug-induced rambling.

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

It is therefore appropriate to recommend to the Minister of Justice that she set aside the conviction and direct that a new trial be held.

It would be open to the Attorney General of Saskatchewan under the *Criminal Code* to enter a stay if that course were deemed appropriate in light of all the circumstances.

However, if a stay is not entered, a new trial proceeds and a verdict of guilty is returned, then we would recommend that the Minister of Justice consider granting a conditional pardon to David Milgaard with respect to any sentence imposed.

IN THE COURT OF QUEEN'S BENCH OF SASKATCHEWAN  
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

This is Exhibit "C" referred to in the  
Affidavit of HER MAJESTY THE QUEEN,

Brian M. Hurley  
Sworn before me this 7th day  
of April, A.D. 2004

RESPONDENT

- and -

A Notary Public, A Commissioner for Oaths  
in and for the Province of Alberta

CHRISTIAN P. BANKS  
Barrister and Solicitor

LARRY FISHER,

APPLICANT

---

AFFIDAVIT OF LARRY FISHER

---

I, LARRY FISHER, of the City of Saskatoon, in the Province of Saskatchewan,  
MAKE OATH AND SAY AS FOLLOWS:

1. That on the 25th of July, 1997, I was arrested by the Royal Canadian Mounted Police and charged with sexual assault and murder and as such have personal knowledge of the matters and facts hereinafter deposed to, except where stated to be on information and belief and where so stated I verily believe the same to be true.
2. That following my arrest I requested the Legal Aid Commission for Saskatchewan to determine whether I qualify for Legal Aid. I had also informed Legal Aid that Mr. Brian Beresh, of Edmonton, Alberta, is my counsel of choice to represent me.

- ✓ 3. That I was advised by Katherine Grier the Area Director for the Saskatchewan Legal Aid Commission in Saskatoon that although I qualify for Legal Aid I could not select Mr. Beresh as my lawyer as he does not reside in Saskatchewan.
- ✓ 4. That I am advised by Brian A. Beresh and verily believe the same to be true that his office received a letter from Katherine Grier, a copy of which is attached hereto and marked as Exhibit "A" to this my Affidavit.
- ✓ 5. That I am advised by Brian A. Beresh and verily believe the same to be true that on my behalf he requested an explanation of Ms. Grier's decision. Attached hereto and marked as Exhibit "B" to this my Affidavit is a copy of Mr. Beresh's letter of August 5th, 1997.
- ✓ 6. That I am advised by Brian A. Beresh and verily believe the same to be true that he received a reply to his correspondence of August 5th, 1997, which is attached hereto and marked as Exhibit "C" to this my Affidavit.
- ✓ 7. That I am advised by Brian A. Beresh and verily believe the same to be true that on August 6th, 1997, he forwarded a further letter to Katherine Grier requesting the opinion referred to in the correspondence of August 1st, 1997. Attached hereto and marked as Exhibit "D" to this my Affidavit is a photocopy of that correspondence. I am advised by Mr. Beresh that he has never received the opinion referred to in that letter.
- ✓ 8. That upon being told by Mr. Beresh that Legal Aid would not reconsider its decision I asked him to send a letter from me to the Minister of Justice asking him to intervene and appoint a lawyer to represent my interests. I am advised by Mr. Beresh that he forwarded my letter and a letter of a close personal friend which also made the same request.
- ✓ 9. That I am advised by Brian A. Beresh and verily believe the same to be true that he received a reply to my request on August 19th, 1997, from the Minister of Justice. That response is attached hereto and marked as Exhibit "E" to this my Affidavit.


10. That the reason I have requested that Mr. Beresh represent me is that I have great faith and trust in his abilities given his past representation of me. I do not have that trust in any other lawyer in the Province of Saskatchewan.
11. The trust for Mr. Beresh arose from the following:
- (a) In 1980 he represented me in relation to charges that I was facing in North Battleford when he practiced law in that community.
  - (b) Mr. Beresh represented me ably and fully before the Milgaard Supreme Court of Canada Reference.
  - (c) Since the conclusion of the Reference Mr. Beresh has met with me and provided advice to me from time to time.
  - (d) That since I became a suspect in this case members of his office and Mr. Beresh have provided advice to me.
12. That I am advised by Brian A. Beresh and verily believe the same to be true that he has spoken to Mr. Dean Sinclair who is the main prosecutor in the case against me. According to Mr. Sinclair the prosecution has several thousand pages of disclosure and as a result preparation for the preliminary inquiry and trial will be extensive.
13. Mr. Sinclair has also informed Mr. Beresh that Mr. Al Johnson a senior Crown Prosecutor in Regina will also be one of the prosecutors on the file with Mr. Sinclair.
14. That as a result of the position of the Legal Aid Commission and the Minister of Justice my case has not been set down for preliminary inquiry as I had hoped it would be. The next appearance is scheduled for September 25th, 1997, in Saskatoon. I am most concerned about the delay caused in this case.
15. That without being allowed the benefit of Mr. Beresh's expertise I am being denied of my right to fully and properly answer these charges and defend myself against them.

16. That I am also very concerned about any delay in this case because of the ever mounting publicity that surrounds this case.

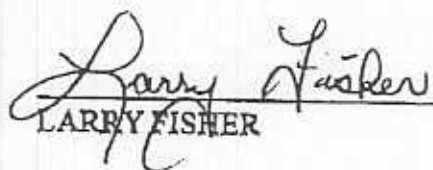
17. That I am advised by Brian A. Beresh and verily believe the same to be true that two editorials appeared recently in local Saskatoon newspapers in relation to this issue. Attached hereto and marked as Exhibits "F" and "G" are photocopies of those articles.

18. That I make this Affidavit in support of the relief sought in the Notice of Motion filed with this Honourable Court on August 25th, 1997.

SWORN BEFORE ME at the City of )  
Saskatoon, in the Province of Saskatchewan )  
\_\_\_\_\_ this 26<sup>th</sup> day of August, )  
A.D. 1997. )

  
\_\_\_\_\_  
A Commissioner for Oaths in and for )  
Province of Saskatchewan )

*Being a Solicitor*

  
\_\_\_\_\_  
LARRY FISHER

This document was delivered by agents:

**KRAUS McKAY PEDERSON**  
Barristers and Solicitors  
#300, 333 - 3rd Avenue N.  
Saskatoon, Saskatchewan  
S7K 2H9

Attn: Mr. Terry G. Hymers

Tel: (306) 652-8833  
FAX: (306) 652-3333

Solicitor for the Applicant being:

**BERESH DEPOE CUNNINGHAM**  
Barristers and Solicitors  
#300, 10110 - 107 Street  
Edmonton, Alberta  
T5J 1J4

Tel: (403) 421-4766  
FAX: (403) 429-0346

Lawyer in charge of file: **BRIAN A. BERESH**

Address for service is in care of the agent above.

This is Exhibit "D" referred to in the Affidavit of

.....Brian M. Hurley.....  
Sworn before me this.....26.....day  
of.....April.....A.D., 2004  
.....

QBG 1670

September 9, 1997

of 1997

A Notary Public, A Commissioner for Oaths  
In and for the Province of Alberta  
**CHRISTIAN P. BANKS**  
Barrister and Solicitor  
FIAT

Before Mr. Justice J. D. Milliken

Larry Fisher made an application for an order that Brian Beresh of the City of Edmonton and his assistant Brian Hurley be appointed as defence counsel to represent Mr. Fisher in respect to the charges of murder and rape of Gail Miller.

Fisher in his affidavit sworn August 26, 1997, stated that he had requested The Legal Aid Commission for Saskatchewan to determine if he was qualified for Legal Aid and if he was he wanted Brian Beresh of Edmonton, Alberta to be his counsel. Fisher stated that he was informed that he qualified for Legal Aid but Beresh would not be appointed due to Beresh not being a resident of the Province of Saskatchewan. Fisher stated that Beresh after being satisfied that Legal Aid would not change its position wrote to the Minister of Justice on behalf of Fisher requesting the Minister appoint Beresh as his counsel. Fisher states that the Minister in his letter of reply informed Beresh that he had no involvement in appointing counsel for a particular accused person and he suggested that the court is the appropriate authority to determine whether an accused requires access to out-of-province counsel to obtain a fair trial.

Mr. Fisher stated that Beresh had been his counsel in 1980 in respect to charges in the North Battleford area and had represented Fisher when he appeared before the Milgaard reference in the Supreme Court of Canada, and that Beresh had given Fisher advice since that time.

The grounds set forth in the application are that the denial by The Legal Aid Commission and Minister of Justice for Saskatchewan to appoint Beresh as Fisher's counsel infringes on Fisher's right to a fair trial under the provisions of section 7 and 11 of *The Charter of Rights and Freedoms*.



The Minister's position, as set out in a written memorandum filed August 27, 1997, is that there is no need to consider issues under *The Canadian Charter of Rights and Freedoms* as the court of Queen's Bench has inherent jurisdiction to order the appointment of counsel, when necessary to ensure an accused person receives a fair trial. The Minister also contends that if the court does appoint counsel that the counsel should be paid on the basis of the Legal Aid Tariff and that as the charges against Fisher are serious and they have some features of unusual complexity that rather than depart from legal aid tariff the Minister submits that a flexible approach can be taken to the amount of preparation time that will be authorized and that counsel appointed should be paid reasonable travelling expenses from his office in Edmonton to Saskatoon for the various appearances that will be necessary and that the other costs such as expert witness fees should be dealt with by negotiation between the Executive Director of Court Services and if counsel and the director cannot come to agreement then either party could apply either to the Local Registrar or the Court of Queen's Bench for directions.

In respect to the matter of appointment of second counsel the Minister took no position but pointed out that under Legal Aid Tariff co-counsel is rarely appointed and the same position should be taken for court appointed counsel.

Beresh in his notice of motion contended that I have the power to make the appointment of counsel under the provisions of sections 7 and 11 of *The Charter* in order to ensure a fair trial. Counsel for the Minister, Mr. Irvine contended that there was no violation of Fisher's charter rights by the refusal of The Legal Aid Commission or the Minister to appoint Beresh as his counsel, and that the Court of Queen's Bench had the inherent right to appoint counsel for an accused person, in order to ensure a fair trial.

It has been my opinion, that in criminal matters, a judge of this court has the inherent jurisdiction to appoint counsel for an accused person in order to ensure a fair trial. I am also of the opinion that the provision of sections 7 and 11 of *The Charter of Rights and Freedoms*

which provide for a fair trial for an accused person can be used to bring into play section 24(1) of *The Charter* in order for a Judge of this court to order the appointment of counsel for an accused person.

In deciding whether I should appoint Beresh as Fisher's counsel I considered the following:

1. That Gail Miller was murdered over thirty years ago;
2. That David Milgaard had been convicted of her death;
3. That The Supreme Court of Canada held a reference into Miller's death and Milgaard's conviction;
4. That Fisher was a witness at the reference;
5. That Beresh represented Fisher at the reference and he was paid a fee of \$160 an hour for his work on Fisher's behalf by the Federal Department of Justice.
6. That there are complex issues concerning admission of evidence which will arise in Fisher's trial.

I decided that the above facts makes the trial of Fisher unique and therefore as Beresh had been involved on Fisher's behalf at the reference, and the matters reviewed at the reference are the same matters for the most part which will be dealt with at the trial of Fisher, it would not result in a fair trial for Fisher, if Beresh did not represent Fisher at this trial. I therefore appointed Beresh as Fisher's counsel.

In respect to the appointment of a second counsel as requested by Beresh I decided that as the department was going to have Mr. Sinclair and Mr. Johnston involved in prosecution of Fisher, that in order to ensure a fair trial that second counsel should be appointed and I so ordered.

I asked Beresh if he would accept the proposal of the Minister that the hourly fee payable should be \$66 an hour on an unlimited basis and Beresh stated that he would not be

able to accept the appointment if \$66 was the hourly fee payable to him. Beresh pointed out to me that the majority of The Supreme Court in *R. v. Curragh Inc.* 118 CCC 3rd @ 481 held that in the unique circumstances of that case the accused person should receive reasonable legal costs for the proceedings to date and as well they should be paid reasonable legal costs incurred in the new trial and based upon this decision as the Fisher case was unique I could order the Minister to pay reasonable legal fees for Beresh. Beresh contends that \$200 is a reasonable hourly fee.

I informed Beresh that I would not direct the Minister to pay his suggested hourly fee as negotiation should be carried on between the Minister's representative and Beresh to reach an agreement on a reasonable hourly fee. If no agreement was reached between the parties then I would determine what would be a reasonable hourly fee. I directed counsel to supply me with information as to what court appointed counsel were given in the way of an hourly rate in the provinces of British Columbia, Alberta, and Manitoba and I requested information from the counsel for the Minister as to the hourly rates paid by the Department of Justice to counsel appointed by the department in respect to both criminal and civil matters.

I adjourned the application in order to allow time for further negotiation and to locate the required information.

At the hearing on September 5, 1997 Mr. G. Mitchell, on behalf of the Minister, contended that the court has the jurisdiction to appoint counsel for an accused person in order to ensure a fair trial but the court has no jurisdiction to set the hourly fee payable by the Minister to an accused's counsel. The authority for this contention is *R. v. Savard* 106 CCC 3d 130 @ 157. This was a case where counsel was appointed under section 672.24 of *The Criminal Code* and the trial judge ordered that his fees be paid by the Attorney General of Canada and the majority of panel of the Alberta Court of Appeal held the trial judge did not have the authority to make such an order in the absence of express language requiring the government to pay.

Mitchell acknowledged that *R. v. Curragh Inc.* (supra) appears to have taken a different view of the right of a court to make the government responsible for payment of fees of counsel, however, Mitchell contends that the majority made the order under the provisions of *The Charter of Rights and Freedoms* rather than under the common law inherent jurisdiction of the court to appoint counsel for an accused person to ensure a fair trial.

It seems to me that because of the unique facts of this case, as previously set out, that under the principles of fundamental justice an accused person is entitled to a fair trial and in my view there would not be a fair trial if Beresh does not conduct the defence of the charges facing Fisher. I am therefore satisfied that sections 7 and 11 of *The Charter* are infringed and that section 24(1) of *The Charter of Rights and Freedoms* applies.

In *R. v. Curragh* the majority found the circumstances of that case to be unique and I find the circumstances of this case to be unique so therefore I rely upon *R. v. Curragh* as the authority for fixing a reasonable hourly fee for both of the counsel I have appointed and to deal with other costs pertaining to the defence of Fisher.

Mitchell contends that the tariff fee for court of \$66 an hour set in 1993 under *The Legal Aid Act* should be considered to be reasonable and that if this tariff fee is not followed in this case a precedent will be set which will be harmful to the legal aid system in this province.

I don't think that the circumstances which have occurred in this case, namely a charge of murder and rape which took place over thirty years ago for which another person was convicted and now exonerated and the accused person having appeared at a reference with the same counsel he wishes now to have represent him, will happen again in this province in another thirty years. I am therefore of the opinion that my rulings on this application will not set a precedent which will affect the Legal Aid Tariff.

I have reviewed the hourly rates paid to outside counsel doing work for the Department of Justice and it appears the range is from \$50 to \$360 U.S. however, senior Saskatchewan counsel have received from \$135 to \$190 an hour.

I am satisfied that a reasonable hourly fee for Mr. Beresh is \$150 an hour and a reasonable hourly fee for Brian Hurley is \$75 an hour. There will be no limit on the hours of both counsel. Monthly itemized billings will be made to the Local Registrar at Saskatoon, the accounts will be forwarded to the Minister for payment. Once the total hourly fees are in excess of \$50,000 a review of this order may be made to the court.

In respect to travelling expenses and accommodation and living expenses of both counsel and other expenses including witness fees, I direct that these items be negotiated between Beresh and the Executive Director of Legal Services and if an agreement cannot be reached then application can be made to the court for directions. Beresh shall submit itemized accounts for the above expenses on a monthly basis to the Local Registrar who shall submit same to the Minister for payment.

I direct that Beresh shall be entitled to include his time for making this application and his initial appearance in court as part of his fees for the Fisher trial.

*Milliken*

J.

RECEIVED  
MAY 18 2000

This is Exhibit "E" referred to in the Affidavit of

..... Brian M. Husley .....

Sworn before me this 12<sup>th</sup> day

of April A.D., 2000



A Notary Public, A Commissioner for Oaths  
in and for the Province of Alberta

**CHRISTIAN P. BANKS**  
Barrister and Solicitor

12 May 2000

Mr. Marvin R. Bloos  
Messrs. Beresh, Depoe and Cunningham  
Barristers and Solicitors  
300 - 101110 - 107 Street  
EDMONTON, Alberta  
T5J 1J4

Court of Appeal,  
2425 Victoria Avenue,  
REGINA, Saskatchewan,  
S4P 3V7

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Re: Court of Appeal judgment - 22

*The Queen v. Fisher*

Enclosed please find copy of decision in the above.

D

2000SKCA56



Docket: 22

*THE COURT OF APPEAL FOR SASKATCHEWAN*

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**ENDORSEMENT**

APPLICANT: LARRY FISHER

RESPONDENT: HER MAJESTY THE QUEEN

COUNSEL: Mr. M. Bloos for appellant (applicant)  
Mr. G. Mitchell Q.C. for respondent

CHAMBER APPLICATION  
HEARD: May 10, 2000

CHAMBER JUDGE: The Honourable Chief Justice E.D. Bayda

FILE: Docket #22

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BAYDA C.J.S.:

[1] This is an application by the appellant under s. 684(1) of the *Criminal Code* for an order assigning not one but two counsel to act on behalf of the appellant in respect of this appeal. Mr. Mitchell on behalf of the Attorney General conceded that although the appellant did not formally apply for legal aid respecting this appeal and was not formally refused legal aid, he may be deemed

to have been refused legal aid for the purposes of this application. He further conceded that the appellant has satisfied all of the requirements for the assignment of one counsel and does not take any position whether that counsel ought to be Mr. Beresh or Mr. Bloos. My task, in effect, is reduced to determining whether notwithstanding the appointment of one highly capable counsel "it appears desirable in the interests of justice that the [appellant] should have legal assistance" (to use the words of s. 684(1)) in the form of a second duly designated legal counsel.

[2] I am not persuaded that the "interests of justice", in the circumstances, dictate the requirement of a second duly designated counsel. I, accordingly, assign Mr. Beresh, the lead counsel at trial, to act on behalf of the appellant in respect of this appeal and decline to appoint a second counsel.

[3] The assignment of Mr. Beresh as sole counsel does not preclude his using the services of other members of his firm to assist him in the preparation of the appeal and charging for those services at a rate proportionate to the quality of the services provided.

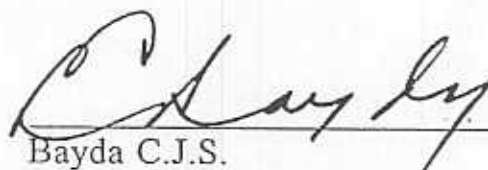
[4] Appellant's counsel also requested that I fix the rate at which counsel assigned by me should be entitled to charge for his fees and suggested a rate in excess of the Legal Aid Tariff. Mr. Mitchell, on behalf of the Attorney-General, requested I fix a rate that accords with the Legal Aid Tariff. Given the provisions contained in ss. (3) of s. 684 I decline to fix any rate. Parliament has taken the pains to specifically delegate that task to the Registrar of this Court should the



Attorney General and counsel not agree upon the fees. Although it is not necessary for me to decide the issue (and I do not do so) I question whether in the light of the wording of ss. (3) I have the jurisdiction to fix the rate.

[5] There will be an order accordingly.

DATED at Regina, in the Province of Saskatchewan, this 12<sup>th</sup> day of May,  
A.D. 2000.

  
Bayda C.J.S.

This is Exhibit "F" referred to in the Affidavit of

Brian M. Hurley

Sworn before me this 7th day

of April A.D., 2007

CANADA

PROVINCE OF SASKATCHEWAN

A Notary Public, A Commissioner for Oaths  
In and for the Province of Alberta

CHRISTIAN P. BANKS

Barrister and Solicitor

Q.B. No. 1670 of 1997

IN THE COURT OF QUEEN'S BENCH OF SASKATCHEWAN

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

HER MAJESTY THE QUEEN,

RESPONDENT

- and -

LARRY FISHER,

APPLICANT

ORDER

SASKATCHEWAN  
JUSTICE  
DEC 24 1997  
CONSTITUTIONAL  
BRANCH

ORDER

BEFORE THE HONOURABLE  
MR. JUSTICE J.D. MILLIKEN  
IN CHAMBERS

)  
)  
)

ON WEDNESDAY, THE 10TH DAY  
OF DECEMBER, 1997.

UPON the application of Counsel on behalf of the Applicant and upon hearing counsel on behalf of the Applicant and upon hearing counsel on behalf of the Respondent:

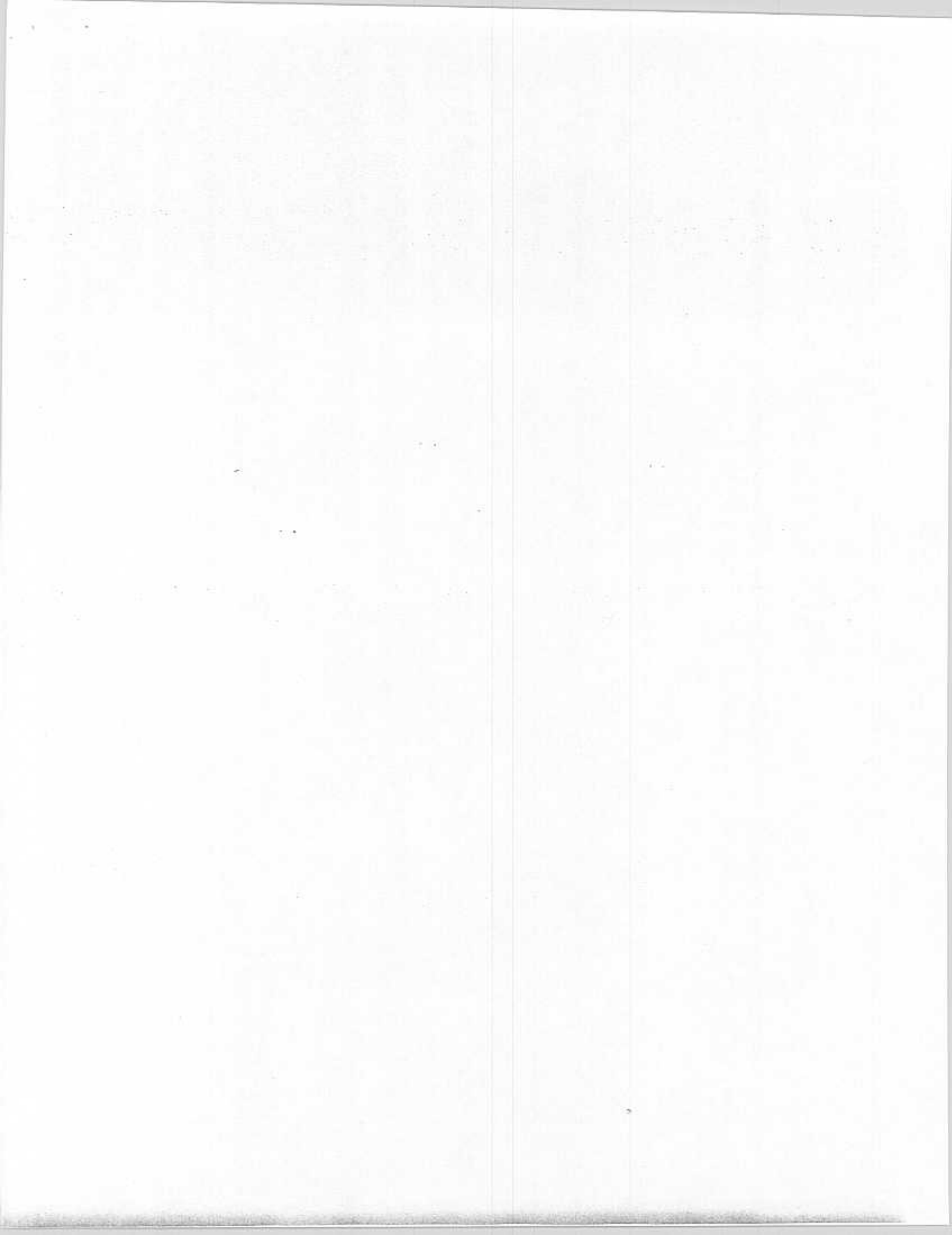
IT IS HEREBY ORDERED, DIRECTED AND ADJUDGED AS FOLLOWS:

1. That Beresh Depoe Cunningham will prepare and provide statements of accounts of legal services rendered either once per month, or once very two months.
2. That Beresh Depoe Cunningham will forward statements of accounts for legal services directly to Mr. D. Berezowsky, the Registrar of the Saskatoon Court House, who will review the accounts to determine whether they appear to be reasonable.
3. That unless ordered by this Court, the said Registrar will thereafter seal the accounts and maintain them in a sealed condition pending the final disposition of this matter, including any and all appeals.
4. That the said Registrar will thereafter advise the Executive Director of Legal Services of the amount to be paid to Beresh Depoe Cunningham and that sum will be paid forthwith by the Government of Saskatchewan to Beresh Depoe Cunningham.
5. That any and all legal fees, including agents fees, will be covered by the within Order from the date of Mr. Fisher's arrest and onwards.

ISSUED at the City of Saskatoon, Saskatchewan this 22<sup>nd</sup> day of December, 1997.



DEPUTY REGISTRAR



COMMISSION OF INQUIRY  
Sitting at Saskatoon, Saskatchewan

IN THE MATTER OF  
A COMMISSION OF INQUIRY PRESIDED OVER BY THE  
HONOURABLE JUSTICE E. MacCALLUM INTO THE  
WRONGFUL CONVICTION OF DAVID MILGAARD, ORDERED  
BY THE LIEUTENANT-GOVERNOR IN COUNCIL, FOR THE PROVINCE OF  
SASKATCHEWAN, OC 84/2004

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

LARRY FISHER

Applicant

---

MEMORANDUM OF ARGUMENT

---

**Introduction - Relief Sought**

1. The Applicant requests full standing to participate throughout the hearings held by this Commission of Inquiry.
2. The Applicant further requests the appointment of counsel, Brian A. Beresh, Beresh DePoe Cunningham, Barristers, Edmonton, Alberta and alternate counsel to appear and represent the Applicant's interests.
3. The Applicant further requests payment of counsel at a reasonable rate and payment of any all reasonable disbursements to be confirmed by either certifying Affidavit or

review by the Local Registrar at Saskatoon, Saskatchewan and thereafter sealed pending the conclusion of the Commission of Inquiry.

### **Brief Historical Overview**

4. Larry Fisher was interviewed by the Saskatoon Police Force within days of the death of Gail Miller.
5. In the late 1980's he discovered that David Milgaard or individuals on his behalf were publicly suggesting that he, not Milgaard, was responsible for the death of Gail Miller.
6. A Reference to the Supreme Court of Canada was directed in relation to Mr. Milgaard's application pursuant to section 690 of the *Criminal Code*. Mr. Fisher applied for and obtained Intervener status for the purposes of that Reference.
7. Brian A. Beresh and Marvin Bloos were appointed to represent Mr. Fisher's interests and did represent him throughout the proceedings in relation to that Reference.
8. On April 14, 1992, five members of the Supreme Court of Canada issued their decision in relation to that Reference.
9. On July 25, 1997, Larry Fisher was arrested and charged with sexual assault and murder of Gail Miller. Since that date he has remained in custody.
10. Following a lengthy trial, Mr. Fisher was convicted on November 22, 1999 and sentenced on January 4, 2000, to life imprisonment.

11. Mr. Fisher's Appeal to the Saskatchewan Court of Appeal from the conviction was dismissed on September 29, 2003.
12. On March 24, 1004 he filed a Leave to Appeal to the Supreme Court of Canada along with an application to extend time for the filing of the Leave Application. That application is presently pending before the Supreme Court of Canada without a fixed date for decision.

### **Standing Criteria is Met**

13. It is respectfully submitted that Mr. Fisher's applications fulfill the criteria established for standing before this Commission of Inquiry.
14. He represents a unique and fundamental interest. Historically he and David Milgaard have been the only two individuals whose names have been linked to the death of Gail Miller.
15. His interests and perspectives will not be represented by any other potential party to this Commission of Inquiry and his representation is necessary for the successful conduct of the Inquiry.
16. Mr. Fisher was initially considered a potential witness and subsequently an accused in relation to the death of Gail Miller.
17. Mr. Fisher has ongoing interests in the outcome of this matter, whether or not Leave to Appeal is granted by the Supreme Court of Canada. If Leave to Appeal is not granted, Mr. Fisher still faces the prospect of future parole hearings, future applications pursuant to section 696 of the *Criminal Code* and the potential of a "faint hope" hearing in relation to early release.

18. Mr. Fisher has a clear interest in how Gail Miller's death was investigated by the Saskatoon City Police Force and in particular, why the officers chose to investigate the matter in the fashion they did and as to the reliability of their findings.
19. The witnesses to be called at the investigative phase of this Commission of Inquiry will likely be the same witnesses called on the "conviction of David Milgaard" phase of the Commission of Inquiry.
20. The Inquiry will necessarily deal extensively with Mr. Fisher, his background and his eventual conviction in determining how the initial investigation resulted in the conviction of David Milgaard and whether the investigation should have been re-opened based on information subsequently received by the police and Department of Justice.
21. Mr. Milgaard's challenges of his conviction, following the dismissal of his appeal by the Saskatchewan Court of Appeal, all made reference to Mr. Fisher as a potential pothor suspect.
22. Mr. Beresh has represented Mr. Fisher on various matters since 1980 and was his counsel before the Supreme Court of Canada on the Milgaard Reference and was counsel for Mr. Fisher in the subsequent criminal proceedings against him. His knowledge of the initial investigation and subsequent proceedings will be of great assistance to the conduct of the Inquiry and to ensuring that the Inquiry fulfills its mandate as required by the Order in Council.
23. It is respectfully submitted that no other potential party to this Commission has a greater interest than Mr. Fisher given the potential affect upon his future.



### **Funding Criteria is Met**

24. It is respectfully submitted that Mr. Fisher's application satisfies the funding criteria established by the Standing and Funding Guidelines.
  
25. It is respectfully submitted that the criteria are met for the following reasons:
  - a) Mr. Fisher is presently in indigent circumstances and has been incarcerated since July 25, 1997;
  - b) Mr. Fisher has no independent means of support, directly or indirectly, to fund the appearance of counsel;
  - c) Counsel will not appear unless reasonable funding is granted;
  - d) He is not able to contribute any of his own funds or personnel to participate in the Inquiry;
  - e) A clear and workable proposal for payment and administering of the funds has been proposed by counsel for Mr. Fisher including certification by Affidavit of counsel and/or review for reasonableness by the local Registrar, provided that accounts are sealed until such time as the Commission has concluded its Inquiry.

### **Authorities**

26. The Applicant relies upon the authorities appended hereto for the purposes of seeking standing before this Inquiry.