COMMISSION OF INQUIRY INTO ANY AND ALL ASPECTS OF THE CONDUCT OF THE INVESTIGATION INTO THE DEATH OF GAIL MILLER AND THE SUBSEQUENT CRIMINAL PROCEEDINGS RESULTING IN THE WRONGFUL CONVICTION OF DAVID EDGAR MILGAARD ON THE CHARGE THAT HE MURDERED GAIL MILLER

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COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD

SUBMISSIONS OF DAVID ASPER

ROLE OF DAVID ASPER

Mr. Asper's involvement with Mr. Milgaard's case began in 1986 when he was initially an articled student and subsequently a lawyer with the firm Wolch Pinx Tapper Scurfield. Mr. Asper was assigned duties relating to the case by senior counsel with the firm, Mr. Hersh Wolch, QC. Mr. Wolch had been retained by the Milgaard family to review the case and determine whether there were grounds upon which Mr. Milgaard's conviction could be reviewed.

Except for a period of time when he took a leave of absence from the firm, Mr. Asper remained involved as counsel in the Milgaard case until June of 1992, upon which date he ceased to practice law with Wolch Pinx Tapper Scurfield and commenced employment with CanWest Global Communications Corp.

As Mr. Wolch's associate, Mr. Asper had considerable involvement as Mr. Milgaard's counsel in the day to day investigative and legal work which culminated on December 28th, 1988 in Mr. Milgaard's first application to the Federal Justice Minister to review his conviction pursuant to Section 690 of the *Criminal Code*.

Mr. Asper, as Mr. Milgaard's counsel, had involvement in many key events that have been examined in this Inquiry. He participated in the investigation of an anonymous tip received by Hersh Wolch, QC, around February 26th, 1990, that Larry Fisher committed the murder of Gail Miller. Mr. Asper also investigated statements of a witness recanting some of their trial testimony and "new evidence" submitted in support of the first Section 690 application.

With respect to the responsibility in the Terms of Reference for this Commission "to seek to determine whether the investigation should have been re-opened based on information subsequently received by the police and the Department of Justice", Mr. Asper was often the person responsible for disclosure of the information to the authorities.

During his involvement as counsel for Mr. Milgaard, Mr. Asper's involvement went beyond strictly legal forums and included advocacy on Mr. Milgaard's behalf to raise public awareness of Mr. Milgaard's plight. For the entire time of Mr. Asper's involvement until the Reference was ordered, there was no strictly legal forum before which Mr. Asper could plead Mr. Milgaard's case. Section 690 of the *Criminal Code* provided for a review by the Minister of Justice, a politician. Since the *Criminal Code* left the decision to review the conviction with a politician, the forum for Mr. Asper's advocacy was often the "court of public opinion" to which politicians are answerable.

Mr. Asper was directly involved in the considerable investigative and legal work which culminated on August 14th, 1991 in David Milgaard filing a second application to the Minister

of Justice to review his conviction pursuant to Section 690 of the *Criminal Code*. This resulted in the Federal Minister of Justice referring David Milgaard's case to the Supreme Court of Canada on November 28, 1991 for a hearing, which began on March 11th, 1992 and continued until April 6, 1992. Mr. Wolch was senior counsel on the Reference Hearing, with Mr. Asper appearing as co-counsel. The decision of the Supreme Court of Canada, with which the Commission is familiar, was released on April 14, 1992.

Mr. Asper left the practice of law with Wolch Pinx Tapper Scurfield shortly thereafter to commence his employment with CanWest.

In the performance of his role as counsel for David Milgaard, it was the duty of Mr. Asper to raise issues which touched upon and possibly directly and substantially affected others who have appeared as parties to, or witnesses before, this Inquiry. In this Inquiry, some individuals who believe that they have been so affected have taken issue with actions taken or statements made by Mr. Asper while representing Mr. Milgaard. It is their right to correct "the record" but it does not follow that Mr. Asper should be subject to criticism for doing his duty.

ANY ADVERSE FINDINGS RELATING TO MR. ASPER'S ADVOCACY ON BEHALF OF MR. MILGAARD WOULD OFFEND THE PRINCIPLES OF PROPER ADVOCACY AND THE PROTECTION WHICH SHOULD BE AFFORDED TO ADVOCATES

In the "Overview of David Asper Evidence" circulated by Commission Counsel in anticipation of Mr. Asper's testimony it was stated that the testimony would:

> Review David Asper's commentary and criticism of the conduct of the investigation and trial and in particular, criticisms of particular police investigators, witnesses and participants in the trial process (eg. prosecutor, defence counsel and trial judge)

It is appropriate for the Commission to explore these areas with Mr. Asper, through his evidence, to provide a narrative as to how and when events unfolded during the representation of Mr. Milgaard. Given the public nature of Mr. Asper's advocacy for David Milgaard, it is also appropriate for the Commission to explore with Mr. Asper whether anything he said was, in retrospect, erroneous. What is not appropriate is for this Commission to "inquire into and report upon" the actions Mr. Asper took as advocate for Mr. Milgaard.

In this context of the appropriate areas of inquiry, Mr. Asper testified at length about matters also described in the "Overview of David Asper Evidence" circulated by Commission Counsel, namely to:

> Review the efforts made by David Asper and others on David Milgaard's behalf to have the investigation re-opened by the authorities.
>
> Review the information provided to the authorities on David Milgaard's behalf relevant to the re-opening of the investigation including all information provided to the authorities through the media and general public with a view to influencing the authorities to re-open the investigation. In particular identify the manner in which the information was obtained, when and how it was provided to authorities, and the relevance/purpose of the information provided.

> Review all information provided to the authorities through the two Section 690 applications and the Supreme Court Reference.

In "reviewing the efforts made by David Asper on David Milgaard's behalf" it must be remembered that but for the efforts of Mr. Asper, Mr. Milgaard would still stand convicted of the murder of Gail Miller. Further, but for the efforts of Mr. Asper, Larry Fisher, an extremely dangerous criminal, would not have been brought to justice for the murder of Gail Miller – and may very well be at large posing a continuing danger to our society. The Commission, by giving a voice to the police and prosecutors whose actions convicted Mr. Milgaard, should be careful to ensure that a mockery should not be made of the process required to win Mr. Milgaard's freedom.

There have been other miscarriages of justice in the past and, no matter how perfect we strive to make our justice system, there will be miscarriages of justice in the future. Many of the issues that this Commission has considered have already been considered by other Commissions of Inquiry into miscarriages of justice. Further, the passage of time has resulted in changes that have removed problems that contributed to the miscarriage of justice in this case.

For example, forensics have advanced since 1970 and police organizational and legal changes have taken place. Rapes are no longer investigated by the morality squad in Saskatoon (and are not regarded as a "morality offence" anywhere in Canada) rather than the major crime squad which also has the responsibility for investigating murders. The law now requires complete disclosure. There is also a greater recognition that miscarriages of justice take place and the systems for addressing them have improved. It is not really necessary for the Commission report to bring about reforms in areas where they have already taken place.

It is, therefore, all the more important that the Commission "do no harm" to those who honestly undertake to advocate vigorously for those who may be wrongly convicted. In doing his or her duty, the advocate is bound to challenge powerful societal forces – the police, prosecutors, government and even the judiciary. Nothing should be done by this Commission which might deter advocates from taking on such duties in the future. There are already enough obstacles that the wrongly convicted face and enough personal and professional sacrifices that advocates who take on such cases make. Criticism of their advocacy with the benefit of twenty-twenty hindsight should not occur. This theme will be developed further below.

Mr. Asper testified at length. Because of the breadth of the subject matters referred to in the "Overview" which formed the framework for the testimony of Mr. Asper led by Mr. Hodson, his testimony encompassed nearly all aspects of the matters being examined by this Inquiry. In the *Guidelines for Written and Oral Submissions by Parties* counsel is instructed to make submissions "as concise as practicable" and "relate only to the party's interest".

Mr. Asper sought, and obtained, party status and the representation of counsel on his behalf before the Inquiry only when in his preparation to be a witness before the Inquiry it became apparent that the transcripts of the Commission's hearings contained frequent references to Mr. Asper by other parties or their counsel, many with a critical connotation. The evidence establishes that the statements made by Mr. Asper in his role as advocate for Mr. Milgaard were made in good faith and with a belief in the truth of them. That fact did not spare him from the critical comments, which were not stopped by the Commission.

While Mr. Asper acknowledges that he might have been wrong about some things (i.e. missing files), his advocacy was not just done in good faith but as the case unraveled and more facts became known, and other facts became known (i.e. the extent of prosecutorial lack of disclosure), Mr. Asper was actually correct to an extent far beyond what Mr. Asper said that may have been in error at the time. For example, the material which Mr. Caldwell did not disclose to the defence (excluding and not disclosing overwhelming evidence from civilians that directly contradicted the evidence of unreliable witnesses which was led by the Crown) not only might have led to the real killer but also fundamentally disproved the Crown's theory at trial. In their evidence, in essence, both Mr. Caldwell and Mr. Tallis agree with this proposition.

As noted above, in the performance of his role as counsel for David Milgaard, it was the duty of Mr. Asper to raise issues which touched upon and possibly directly and substantially affected others. Mr. Asper takes no issue with these individuals defending their conduct or reputations but does take issue with the attacks upon him for doing his duty as advocate.

In this context it must be remembered that the common law has consistently displayed great caution with regard to imposing any liability on advocates. This caution is reflected in the leading judgment of Brett MR in the Court of Appeal in *Munster v Lamb* (1883) 11 QBD 588 (at 603-4) where it was said:

> A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged ... The reason of the rule is, that a counsel who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.

It is of the greatest importance that advocates in particular are free from the threat of civil and criminal liability or any critical "findings" by an inquiry, such as this one, which might impair the twin imperatives of free expression and putting an effective case on behalf of one's client. Advocates are required to argue as effectively as they can, on the basis of facts which they cannot be sure are true. The privilege for advocates has a broad scope. It applies not only to words spoken in court but also to statements made incidental to the litigation, even if such statements are made without any basis: *Waple v Surrey County Council* [1997] 2 All ER 836. A lawyer may be subject to a negligence suit brought by his own client, but it is clearly established that lawyers owe no wider duties to those adverse to their clients: *Gran Gelato v Richcliff (Group) Ltd* [1992] 2 WLR 867.

While the common law provides an enhanced protection through privilege to advocates doing their duty, even the general public is free to criticize those involved in the administration of justice. The Privy Council in *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 (at 355) has said:

> [w]here the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or in public, the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

Consistent with this authority the Canadian Judicial Council ("Some Guidelines on the Use of Contempt Powers", September 1996, p. 38, found at www.cjc-ccm.gc.ca.) has stated that "in our view, counsel should not be inhibited by the risk of contempt from presenting *any* submission."

Counsel have a duty to argue even hopeless cases and the advocate should not be compelled to be on his guard to see that his arguments, even when put in the form of statements of fact, fall within the limits of what might conceivably be free from subsequent criticism.

In *Law Society of Upper Canada v. Clark*, [1995] L.S.D.D. No. 199 (L.S.U.C.), a disciplinary case was brought against a lawyer for statements he made in court stating that various Attorneys General of Canada, judges and lawyers, were guilty of criminal conduct, including treason, fraud and crimes related to genocide of aboriginal peoples. Despite these harsh statements, the Law Society found the lawyer's statements did not constitute professional misconduct, that "advocacy in court is a crucial aspect of freedom of expression guaranteed by the Constitution" and that "the Law Society should be loath, in professional discipline proceedings, to become the arbiter of lawyers' advocacy techniques." It further stated that:

> [W]hat would in most other circumstances be regarded as extravagant, disrespectful and discourteous language, in Mr Clark's case emanated directly from the legal argument that he was vigorously advancing on behalf of his clients. . . The lawyer's duty to resolutely advance every argument the lawyer thinks will help the client's case is of fundamental importance to the proper functioning of our judicial system.

The leading Canadian case on the constitutionality of the offence of contempt arose in the context of a charge of "scandalizing the court" against a lawyer for statements made outside court. The accused, Harry Kopyto, made a statement reported in the press which is worth quoting in full:

> This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it. Mr. Dowson [the plaintiff] and I have lost faith in the judicial system to render justice. We're wondering what is the point of appealing and continuing this charade of the court in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together you'd think they were put together with Krazy Glue.

In considering the right to freedom of expression, Cory J.A. (one of the judges who ruled with the majority and who subsequently sat on the Supreme Court of Canada) stated:

> A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious

> complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved.

...

> The courts play an important role in any democratic society... As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned... But the courts are not fragile flowers that will wither in the hot heat of controversy.

The court held that statements of a sincerely held belief on a matter of public interest, even if intemperately worded, come within the protection afforded by section 2(b) of the *Charter*. The majority also held that the offence was unconstitutional on the basis that a person could be convicted of contempt without proof that the statement made would actually have the effect of bringing the administration of justice into disrepute.

Cory J. later stated in *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326 at 1336-7:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

The right of an accused to make full answer and defence is well recognized in Canadian law and this includes the right of an accused, through counsel, to assert defences based on prosecutorial or police misconduct, and abuse of process.

APPLICATION OF THE TERMS OF REFERENCE TO MR. ASPER

Mr. Asper was called as a witness as part of the Milgaard Re-opening Witnesses Phase of the Inquiry.

As Mr. Asper has previously submitted to the Commission and to the Court of Queen's Bench for the Province of Saskatchewan upon the judicial review proceedings, it is the submission of Mr. Asper that the Commissioner cannot, within the constitutional limitations of a provincially constituted inquiry, inquire into and report on the matters that relate to "federal aspects" including the two applications to the federal Minister of Justice for review or the reference to the Supreme Court of Canada.

The decision of the Court of Queen's Bench for the Province of Saskatchewan on the judicial review application was that the Commission could not, within the constitutional authority of an inquiry appointed by the Province of Saskatchewan, inquire into the conduct or the job performance of a federal employee on behalf of his or her employer. Therefore, it is submitted that the Commissioner cannot inquire from any witness, including the Respondent Asper, into issues which are in substance issues about the conduct, management and operation of the federal Department of Justice.

It is also submitted that any examination by the Inquiry into the role played by David Asper should be restricted to matters within the Inquiry's legitimate scope as set forth in the Inquiry's terms of reference. Mr. Asper's advocacy, including his relationship and dealings with the

media when acting as counsel for Mr. Milgaard, is not a matter within the Inquiry's legitimate scope as set forth in the Inquiry's terms of reference.

Many newspaper clippings and media articles were presented to Mr. Asper. Commission Counsel led evidence from Mr. Asper about his relationship with the media and the role of the media in bringing about Mr. Milgaard's freedom.

Commission counsel, has made no secret about the Inquiry's intention to inquire into the role of the media. Indeed the Commission has devoted Phase Six of the Inquiry to that purpose. The problem is that the terms of reference provide no mandate for the Inquiry to investigate or make findings about the role of the media in bringing about Mr. Milgaard's release.

The terms of reference provide no mandate for the Inquiry to investigate or make findings about the role of Mr. Asper (or anyone else involved in Mr. Milgaard's post-conviction representation) in bringing about the freedom of Mr. Milgaard.

The Commission's Terms of Reference are:

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

Prior to the commencement of hearings, the Commission prepared a Position paper outlining its interpretation of the Terms of Reference. The paper states:

> The Commission has the responsibility to "seek to determine" whether the investigation into the death of Gail Miller should have been re-opened based on information subsequently received by the police and the Department of Justice.
>
> The relevant time period for this determination runs from the date of David Milgaard's conviction (January 31, 1970) to the date that the investigation was re-opened. Based upon information provided by the Department of Justice and the RCMP, the investigation into the death of Gail Miller was re-opened when the Department of Justice was advised of new DNA evidence linking Larry Fisher to the murder of Gail Miller.

An alternative interpretation of the terms of reference mandate to inquire "whether the investigation should have been re-opened" would be to refer to the investigation and the prosecution of David Milgaard. Under this interpretation the proper scope of the inquiry is whether the case should have been re-opened when new evidence came to light after the Milgaard trial and up until the time that the investigation was re-opened when the Minister of Justice ordered the Supreme Court of Canada to conduct a hearing into Mr. Milgaard's conviction.

MR. ASPER'S EVIDENCE

It is not intended in these submissions to address all areas of Mr. Asper's testimony in detail. If specific comments are required, as a result of the submissions of any other party, they will be addressed in the Reply Submissions. Mr. Asper submits the following with respect to the following aspects of his testimony.

Acquisition of Sources of Information

It is submitted that the evidence before the Commission establishes that Mr. Asper was diligent in his efforts to gather together all of the material required to advance Mr. Milgaard's position.

First Application to the Minister — s.690

Mr. Asper gave evidence with respect to his understanding of how the s.690 would work and his disappointment that the cooperative approach that he envisaged was not what took place. He described the preparation of the first written application dated December 28, 1988. This included the development of the forensic components of the application from Dr. Ferris, Dr. Markestyn and Dr. Merry; a review of the facts and the development of the "impossibility" argument, as well as submissions relating to the evidence of Cadrain, Wilson, John, Melnyk, Lapohuk and Hall.

Each step of the process was examined chronologically and demonstrated the reasonableness and good faith of the performance by Mr. Asper of his duties. He specifically testified about his dealings with the federal Justice Department, Eugene Williams, Rick Pearson. To the extent that this evidence is utilized by the Commission to establish the narrative of events and the flow of information to the authorities, the evidence is appropriately utilized by the Commission. It is not, however, appropriate for this provincial inquiry to inquire into and report upon the activities of the federal Justice Department, its employees, or Mr. Asper's dealings with them.

Similarily, Mr. Asper testified as to the involvement of media in the application process and why the involvement of the media was required in the circumstances.

Allegations of Error in the First Application

Mr. Asper gave evidence with respect to his state of knowledge in relation to all of the specific submissions he made, including submissions that raised issues of error on the part of others. In retrospect, some of Mr. Asper's submissions were wrong. The evidence, however, clearly establishes that Mr. Asper at all times acted reasonably and in good faith in the performance of his duty.

Second Application to the Minister

Mr. Asper testified the preparation about the second written application to the Minister. This included the Larry Fisher "similar fact" evidence, the role of Centurion Ministries, the re-enactment video and the development of the Boyd/Rosmo report materials. Again, the evidence clearly establishes that Mr. Asper at all times acted reasonably and in good faith in the performance of his duty.

Reference to the Supreme Court of Canada

Mr. Asper testified about the preparation for and presentations at the Reference and the response to official response to the Supreme Court judgment – the staying of charges but refusal to exonerate, compensate or order Inquiry. Again, the evidence clearly establishes that Mr. Asper at all times acted reasonably and in good faith in the performance of his duty.

Post-reference Representation of Mr. Milgaard

Although questioned about the allegations of conspiracy and cover-up of Michael Breckenridge, Mr. Asper's involvement as counsel to the Milgaard's had ceased by June 1992. Mr. Asper's involvement in relation to the Breckenridge allegations was very limited.

On May 11, 1992, Mr. Asper, on behalf of Mr. Wolch's firm, wrote to Mr. Mike Robinson of Robinson Investigations (document 156898) asking the firm to investigate the allegations of Mr. Breckenridge contained in his letter of March 21, 1992 (document 159537). Robinson Investigations reported by letter to Mr. Asper dated May 26, 1992 (document 213939 plus statement document 004012). Although the reporting letter was addressed to him, Mr. Asper recalls no specific dealings with Robinson Investigations about the Breckenridge matter (transcript page 27484). It appears that, although the reporting letter is dated letter May 26, 1992, it was not received until June 12, 1992 (document 156905, transcript 27495). Mr. Asper believes that he was no longer at the Wolch firm by this time (he went to Australia to work for CanWest in June) and that Greg Rodin of the Wolch firm was dealing with the matter (transcript 25108).

Mr. Asper testified that he did not believe Mr. Breckenridge's allegation that Roy Romanow was involved in any cover-up because he knew him and had a "huge amount of respect for him" (transcript page 27420). Mr. Asper was unwilling to advance the allegations made by Mr. Breckenridge (transcript page 27490).

1993 RCMP Investigation

Mr. Asper provided information to RCMP investigators at the request of the investigators. At page 023201 (page 34)of the RCMP report, Mr. Sawatzky refers to the "Issues Provided by Robert Bruce and David Asper". Further, the effect of Mr. Sawatzky's evidence has been that some of the potential criminal charges the RCMP investigated were issues that originated with Mr. Asper.

In fact, Mr. Asper laid no criminal complaint against anyone involved in the investigation or prosecution of Mr. Milgaard. While Mr. Asper "raised issues" with respect to investigative techniques or prosecutorial practices, it is the duty of counsel for accused persons to "raise issues" with respect to investigative techniques or prosecutorial practices. This happens every day of the week in every criminal court across Canada without counsel being accused of making criminal allegations against police or prosecutors.

It was Saskatchewan Justice officials that re-characterized Mr. Wolch's request for a federal public inquiry into a "criminal complaint". In doing so they set up a straw man that could be easily knocked down by Mr. Sawatsky's investigation.

SYSTEMIC ISSUES

Mr. Asper testified to the systemic issues that he encountered in advancing Mr. Milgaard's cause.

Section 690 Process

Mr. Asper testified that a great deal of the frustration which occurred during his representation of Mr. Milgaard could have been avoided if there had been an initial meeting with the Justice Canada staff to set the protocol for the process. Mr. Asper was surprised at the adversarial nature of process, did not know the precise burden of proof on an applicant and what fresh evidence test Mr. Milgaard would have to overcome. There was a problem with the absence of statutory or other formal guidance as to how such reviews should be carried out and the basis on which the Minister should be satisfied before referring a matter to the Court.

Mr. Asper was generally aware of the obstacle that an applicant has to overcome since a jury had made a finding as to the evidence and the Court of Appeal had reviewed the evidence. He testified that it was apparent that the Department of Justice wasn't prepared to entertain just a re-arguing of the case. He had to get something new.

Mr. Asper felt it was important as an introduction to looking at anything new that was provided and to give credibility to anything new that was provided, to establish that the trial itself had a questionable result.

Finally, a factor that became most evident in cases involving the review of possible wrongful convictions was a growing awareness of the constitutional tension inherent in the process, with its potential for conflict between the role of the executive and the position of the courts. The Court's own view of its constitutional role is that it exists to prevent error rather than to prevent injustice. The section 690 process went beyond the appeal process but without any clear definition of what, short of error which could have been addressable on appeal, constituted a miscarriage of justice.

Weaknesses in the section 690 process include:

- the process was essentially reactive with rarely any effort being made by Ministerial staff to investigate and obtain fresh evidence that might be relevant to the case. And yet, unless the applicant provided sufficient information to meet the "fresh evidence" test, the threshold for a review of the case would not be reached;

- the scope and effectiveness of inquiries were constrained by the constitutional framework within which they took place. There was a reluctance for the executive to instigate or take a different view of the evidence that had previously been considered by the courts as it was seen as impugning the finality of the court's process, or impeaching a jury's verdict;

- the process lacked transparency in that it was carried out behind closed doors and the criteria by which applications were assessed were largely unknown and inaccessible;

- the appropriateness of a minister determining whether or not to refer a high profile case to the Court was questioned, as the decision could be perceived as having been influenced by public, police or parliamentary pressure;

- the role of the Minister charged with reviewing cases of persons wrongly convicted was often incompatible with the Minister's other roles (for example in Canada where the Minister was also the Chief Prosecutor if the case being examined was a federal prosecution);

- the experience and skills of those tasked with conducting reviews were often quite limited, or influenced by their backgrounds as hawkish prosecutors;

- the process was lengthy, subject to delay and led to very few cases being referred to the Court.

Challenges facing the wrongfully convicted

Mr. Asper testified about the financial and legal resources for persons alleging wrongful conviction. There wasn't a specific legal proceeding to which a Legal Aid funding certificate would be attached and Legal Aid sought a basis for argument that was based on principles of error that had already been dealt with by the Court of Appeal.

Another challenge is the requirement to release privilege which was imposed upon Mr. Milgaard in order that application would be considered. It is submitted that applicants should not be required to waive this fundamental constitutional right in order to advance a claim of wrongful conviction.

Another factor which arose in the Milgaard case is the focus of the federal Justice staff from the outset of their involvement on the failure of Mr. Milgaard to testify. The right to silence, too, is a fundamental constitutional right, the exercise of which should not be held against an applicant. Yet it was, even though in this case given the age of Mr. Milgaard at the time of his trial, the decision as to whether he should testify or not would be primarily based on Mr. Tallis' opinion that the Crown had not presented "a case to meet", a decision that was clearly not Mr. Milgaard's alone.

It is not surprising that federal Justice lawyers involved in the section 690 review process would focus on the failure of the applicant to testify. That was a frequent focus in their original "day jobs" as appellate level counsel for the Crown responsible for responding to the appeals of accused convicted by trial courts. During the relevant time periods, the appellate courts had permitted the Crown on appeals to make reference to the failure of an accused to testify when responding before the courts of appeal to appeals by accused.

Even after the Charter, In *R. v. Noble*, [1997] 1 S.C.R. 874 Sopinka J. drew a distinction between the right to silence principles applicable at the trial level and those applicable at the appellate level. He acknowledged the wealth of case law which supports the right of appellate courts to consider the silence of the accused in determining if a guilty verdict was reasonable, and rationalized this with the prohibition of such consideration at trial by stating that the *Charter* principles operate differently on appeal. With respect to the presumption of innocence he concluded:

> [T]he presumption of innocence does not operate with the same vigour in the context of an appeal of a conviction as it does at trial. After the guilty verdict has been entered, it is no longer incumbent on the Crown to establish guilt — that guilt having already been proved beyond a reasonable doubt — rather it is incumbent on the appellant to demonstrate an error at trial. In such a context, the presumption of innocence is not applied in the same manner as it is at trial.

In the Commission of Inquiry into the Wrongful Conviction of Gregory Parsons, former Chief Justice Lamer made the following observations (at pages 159 – 160 of the report):

> Counsel for Ms. Knox examined Mr. Simmonds at great length on the decision not to call Gregory Parsons as a witness in his defence. There is little question in my mind that this was a significant factor in the minds of the jurors. The allegation of such a vicious murder against one's own mother together with an alleged relationship of hostility cried out for a denial from her son. It is possible that if he had taken the stand to testify, Gregory Parsons' true character would have emerged. The jury might have seen for themselves that he was not a "monster" or an "animal" but a caring son. But he also might have created the opposite impression.
>
> The decision whether or not an accused should testily can be one of the most difficult for defence counsel to address. Occasionally, an accused will insist on doing so and, unless he is likely to commit perjury, defence counsel normally will not attempt to stand in his way. In this case, there was no criminal record that could unfairly prejudice the jury if it came out in his testimony. Mr. Simmonds consulted with other senior counsel, with the father and with the accused and it was agreed that he should not testify.
>
> Some of the evidence he would have given was available through his statements. He was vulnerable to cross-examination on the letter he wrote with respect to the peace bond application but most of all, in the words of Mr. Simmonds:
>
> > he wouldn't have been a match for the Crown...
>
> Her ability to attack, and probably destroy, the unfavourable evidence of her own witness was demonstrated in relation to Rose Marshall. Her cross-examination of Anne Marie Johnson, was also aggressive and effective. <u>This happened even though both were telling the truth.</u>
>
> Moreover, I understand that Mr. Parsons was not the same man at the time of the trial that he is today. When testifying before me recently, he said he was still working to cope with his anger, even though he was mature, articulate and convincing. Mr. Simrnonds testified that at the time of the trial:
>
> > Greg was a very young man, a very angry man, as a result of the treatment, he had absolutely no trust in the system starting from his arrest the conflict, right up to the events in the trial.
>
> I can understand that defence counsel would not want to risk him being provoked in cross-examination to burst out with a hostile or even threatening reaction towards Ms. Knox. Indeed, even at the outset of this Inquiry, he expressed such anger toward her.
>
> Mr. Simmonds also testified that one of the reasons he did not call Mr. Parsons was that he felt he had no "case to meet". I may observe, in passing that it was my decision in Dubois ix the Queen [1985] 2 S.C.R. 350, that elevated this concept from Professor Ratushny's book on Self-Incrimination, to a constitutional principle! <u>The difficulty is that in a jury trial, the point at which that standard has been met can be very difficult to gauge.</u>

> In such circumstances, there is always the danger that if an accused testifies and is convicted, it is open to the appeal court to find that there was no miscarriage of justice based on the view that the jury simply did not believe the accused. By putting the accused on the stand, the defence can lose its grounds for appeal. The decision not to call the accused as a witness may be safer to make when it is apparent that error has already occurred requiring a new trial.
>
> In my view, the decision not to call Mr. Parsons as a witness is certainly understandable.
>
> **Emphasis added**

Department of Justice counsel who process section 690 applications overlook the reasons stressed by Chief Justice Lamer for the failure of accused persons to testify. It is submitted the "appellate Crown Counsel mindset" (often held by prosecuting counsel who have never defended an accused in their professional lives) should not result in the utilization of this line of authority to put blinders on to the wrongful conviction claims of applicants, simply because the applicant did not testify.

Notwithstanding this authority, the right to silence embraces a number of distinct rights which are included in s. 7 of the *Charter* as principles of fundamental justice. Two aspects of the right to silence that is, the right to pre-trial silence and silence at trial are still important. The latter is specifically protected in s. 11(*c*) of the *Charter*.

Decision Making Body (Minister v. IndependentTribunal)

Mr. Asper has testified that if there had been a proper system and a proper systemic structure to deal with the Milgaard applications, and if the Milgaard application process had dealt with the application as counsel for Mr. Milgaard had hoped, none of the resort to the media would have been necessary and Mr. Asper would have been very happy to utilize such a fair process.

Mr. Asper testified about his efforts to put public pressure and influence on the minister to make a political decision and his evidence was that he decided to take that tact because he didn't think Mr. Milgaard was getting, and would not get, a proper response without invoking this public pressure and influence. Nobody has testified that Mr. Asper was wrong in this view.

The Minister, of course, is a politician, a Member of Parliament and Cabinet who has a duty to the electors of the country that is a democratic duty. When broad issues of justice and fairness are involved, these political duties sometimes may be distinct from the Minister's legal duties that are imposed by statute. With the Minister acting in the capacity contemplated under the section 690 there is an inherent potential conflict of interest. When someone applies under section 690 the question is whether it is the Minister as a law officer of the Crown or as a political person who is responsible to decide the case.

Mr. Asper observed in his testimony that he saw, over the course of this and other cases, ministerial and political assistants start to get involved as the public pressure, one way or another, heats up. Mr. Asper fairly raises the question as to whether section 690, which is a statutory provision that calls on the Minister to act as the Minister of Justice in considering applications, creates a potential conflict with the Minister acting as a Member of Parliament and a politician. While in the Milgaard case, public opinion assisted Mr. Milgaard there are many cases where inflamed public opinion is detrimental to the case being advanced by an applicant.

The following principles can be tentatively advanced as relevant to considering alternative arrangements for the review of possible wrongful convictions:

- Consistency with constitutional principle – it is not offensive to the independence of the courts for an executive body to consider justice issues beyond judicial error;
- Impartial and thorough consideration of applications;
- A transparent process that can be understood by applicants;
- Effective communication with and disclosure to the applicant of how the process will work;
- The decision in each case to be accompanied by reasons;
- Availability of independent forensic experts;
- Laws to ensure the preservation of exhibits that may be required to be subject to forensic examination;
- Effective investigative procedures to explore all grounds for doubt about the conviction;
- Appropriate use of resources;
- A process that retains public confidence even in difficult cases.

Role of the Media and Public

It is not within the mandate of this Commission to inquire into or report upon the Role of the Media or make findings critical of individual media participants. Nothing in the Terms of Reference gives the relevant media outlets or media personnel any notice that their conduct would be scrutinized by this Inquiry.

The media will always have an interest in the administration of justice generally and the types of cases where issues of miscarriage of justice are raised. The media would not fulfill its (constitutionally protected) role of informing the public with respect to matters of public importance if this were not so. This involvement of the media, including their investigative efforts, does not depend upon anything done by Mr. Asper in this case, or other counsel in future cases.

By virtue of his familiarity with the processes of the media, Mr. Asper was aware of what factors of Mr. Milgaard's case may be of interest to the media. Mr. Asper was also aware of the flip side of getting the media involved. There is risk that involvement of the media can backfire and witnesses can get scared off or the media may conclude that an applicant's case is without merit. There is not process to appeal or overturn such a determination by the media.

Lessons to be learned from this and other Miscarriages of Justice

Various commissions and studies, in Canada and around the world, have provided valuable insight into the systemic causes of wrongful convictions and into what has gone wrong in

individual cases. What is startling, however, is that some problems, themes and mistakes arise time and time again, regardless of where the miscarriage of justice took place. These problems relate to the conduct of police, Crown Counsel, defence lawyers, judges and forensic scientists, and they are not confined to proceedings in the courtroom.

When a miscarriage of justice occurs, it is not usually the result of just one mistake, but rather a combination of events. Therefore, just as the problems and errors are multi-layered, so too must the solutions also be multi-faceted. The responsibility to prevent wrongful convictions, therefore, falls on all participants in the criminal justice system. Police officers, Crown counsel, forensic scientists, judges and defence counsel all have a role to play in ensuring that innocent people are not convicted of crimes they didn't commit. Furthermore, this is an issue that does not touch on one single province or jurisdiction alone. As useful as commissions of inquiry may be, they usually come many years after the fact – the goal of all justice system participants must be to prevent wrongful convictions from occurring in the first place.

In the fall of 2002, in response to a number of wrongful convictions across the country and the various reports of inquiries they generated, the FPT Heads of Prosecutions Committee established a Working Group on the Prevention of Miscarriages of Justice. The Working Group was also asked to review and comment on the excellent paper *Convicting the Innocent – A triple failure of the justice system*, prepared by Bruce A. MacFarlane, Q.C., Deputy Attorney General of Manitoba, and presented at the Heads of Prosecutions Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003.

The report focuses on the issues that have been identified time and time again, both in Canada and elsewhere, as the key factors that contribute to wrongful convictions:

- tunnel vision
- mistaken eyewitness identification and testimony
- false confessions
- in-custody informers
- DNA evidence
- forensic evidence and expert testimony
- education and training of all involved in the justice system
- media and public pressure to convict

International studies, including the study referred to above prepared by Bruce A. MacFarlane, Q.C., show that that the cases in which the public are most concerned (brutal murders and the killing of young children, for instance) and where the stakes are the highest, are precisely the types of cases where those responsible for bringing a perpetrator to justice resort to tactics that ultimately undermine the entire case for the prosecution. In most cases, the miscarriages of justice are not the result of intentional misconduct or a "frame" but the *Birmingham Six* case illustrates that counsel representing an accused cannot assume that this is never the case.

A recent development is the release of the report of the former Chief Justice of Canada, the Rt. Hon. Antonio Lamer (The *Report of the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* is available at

http://www.justice.gov.nl.ca/just/lamer/LamerReport.pdf), into three cases of miscarriage of justice in the province of Newfoundland and Labrador.

The findings of a former Chief Justice of Canada on the failings of Canada's justice system are significant. He noted: [1]

> The conviction of innocent people has been established with increasing frequency in Canada in recent years. The Supreme Court of Canada recently referred to "a disturbing Canadian series of wrongful convictions" commencing with Donald Marshall Jr. in 1971 and including David Milgaard, Guy Paul Morin, Thomas Sophonow and Gregory Parsons: *The United States zv. Burns [2001} 1 S.C.R.* 283 at paras *97 et seq.*, commonly referred to as the *Burns and Rafay* case. In each of these wrongful convictions, a Royal Commission, such as this one, was established to determine what "went wrong" in order to determine how such gross miscarriages of justice can be avoided in future.

Chief Justice Lamer's findings are worthy of note and have application throughout Canada and beyond. Justice Lamer made these comments about the "criminal justice system" in his report relating to Mr. Dalton: [2]

> A common feature running through Mr. Dalton's sad journey was the narrow focus of so many of the actors. How could they appreciate the injustice that was occurring before their eyes when they did not see him as a person and did not listen to him?
>
> . . . .
>
> However, many of the individuals and the institutions they represented often saw only the narrowest of issues for which they were specifically responsible. They did not recognize that their contributions were only meaningful in the context of the criminal justice "system". Each **of us** has responsibility not only for our own specific **tasks but also for the results ultimately** reached by **the "system".**
>
> This is not a new problem for the criminal justice system. The following passage is taken from an essay written by G.K. Chesterton almost 100 years ago, after he had served on a jury. He was impressed by the fresh perspective that a jury could bring to the work of professionals who could become insensitive because of familiarity:
>
> > Now it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things... And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment they only see their own workshop.
>
> **The criminal justice system did not "see" Mr. Dalton for almost eight years and, <u>for that, we are all responsible.</u>**

(emphasis in original)

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[1] The *Report of the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken,* at page 70.

[2] The *Report of the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken,* at pages 66- 68.

When a miscarriage of justice occurs, the cases studied clearly establish that it is not usually the result of just one mistake, but rather a combination of events. As Chief Justice Lamer notes in his report, the responsibility to prevent wrongful convictions, therefore, falls on all participants in the criminal justice system. Police officers, prosecutors, forensic scientists, judges and defence counsel all have a role to play in ensuring that innocent people are not convicted of crimes they didn't commit.

Of the common problems referred to above, the core problem appears to be "tunnel vision".

The Core Problem - "Tunnel Vision"

As noted in the Justice Canada Working Group Report, tunnel vision, and its perverse by-product "noble cause corruption," have been identified as a leading cause of wrongful convictions in Canada and elsewhere. Tunnel vision has been defined as "the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one's conduct in response to the information." Tunnel vision often occurs when the "hydraulic pressure" of public opinion creates an atmosphere in which state authorities seek to convict someone despite the existence of ambiguous or contradictory evidence.

This "hydraulic pressure" flows from the public outrage in high profile cases which can translate into intense pressure on the police to arrest and on prosecutors to convict, with speed becoming the overriding factor. This can contribute to tunnel vision when the investigative team focuses prematurely; resulting in the arrest and prosecution of a suspect against whom there is some evidence, while other leads and potential lines of investigation go unexplored.

The Canadian wrongful conviction inquiries have all comments on this phenomenon:

- The *Marshall Inquiry* stated:
    - We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement -- is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.
- The Sophonow Inquiry stated:
    - Tunnel vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focussed upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events that could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.
- The Guy Paul Morin Inquiry stated:
    - Investigating officers should not attain an elevated standing in an investigation through acquiring or pursuing the "best" suspect or lead. This promotes

competition between investigative teams for the best lead, results in tunnel vision and isolates teams of officers from each other.

In the Newfoundland Commission report, Chief Justice Lamer noted these findings and added his own: [3]

> These reports and other literature identity a number of recurring features in wrongful conviction cases. These include:
>
> > • A crime which is horrible and alarming, giving it a high profile in the community and creating public pressure to find and convict the perpetrator immediately;
> >
> > • An absence of direct evidence, leading to reliance upon "circumstances" which are subjectively interpreted to draw inferences of guilt; (frequently such inferences are logically weak and are, occasionally, "far-fetched");
> >
> > • Reliance upon highly questionable evidence such as "jailhouse informants";
> >
> > • The "demonizing" of a suspect, who may be a "loner", "outsider" or member of a minority group;
> >
> > • Exaggeration of adversarial roles on the part of the police and prosecutors, leading to "noble cause corruption". This involves the justification of improper professional practices in order to achieve the perceived "correct" result.
>
> All of these features may contribute to the malaise of "tunnel vision" which, in turn, may reinforce them, creating a vicious circle.
>
> Tunnel vision is rarely the result of malice on the part of individuals. Rather it is generated by a police and prosecutorial culture that allows the subconscious mind to rationalize a biased approach to the evidence. Moreover, it is mutually reinforcing amongst police officers, amongst prosecutors and in the interaction between these groups of professionals. It may even affect judges.
>
> Commissioner Kaufman described tunnel vision as:
>
> > ... the single one sided and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to the information.
>
> Commissioner Cory elaborated:
>
> > Tunnel Vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focussed upon an individual or incident that no other person or incident registers In the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events which could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.
> >
> > Once "locked in" to the theory of their case, it is not difficult to understand how some police officers, with "noble" motivation, may move from mere interpretation of the evidence to more malignant practices. These could include "assisting" witnesses in their

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[3] The *Report of the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken,* at pages 71- 72.

> recollection, ignoring relevant evidence that does not support their mission and using coercion to attempt to obtain admissions from the single suspect, whose guilt is assumed.

Many of these consequences became visible in the case of Gregory Parsons. It is important to emphasize that these were not the result of personal malice. This "disease" is transmitted through individuals but it does not mean those who carry it are evil. There is no question that the conduct of the professionals "infected by this virus" has inflicted profound pain and suffering on the victims. ..the accused, family and friends. However, in the case of Gregory Parsons, I perceive that it has also caused genuine anguish to those professionals who were misguided by tunnel vision, for the pain and suffering it has caused.

I agree with the submission of Association in Defence of the Wrongfully Convicted (AIDWYC), that "the causes of wrongful convictions are fundamentally systemic". Commissioner Kaufman also emphasized systemic problems:

> The case of Guy Paul Morin is not an aberration... What I mean is that the **causes of Morin's** conviction are rooted in systemic problems, as well as the individual failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in future.

It is important, therefore, when considering the tragic plight of Gregory Parsons, to bear in mind that many of the individual failings within the criminal justice system may have been driven by systemic forces, primarily, tunnel vision.

Chief Justice Lamer spoke to one wrongfully convicted about the role of the system: [4]

When Mr. Parsons finished testifying, I made the following statement to him:

> At the time of your conviction, I was the Chief Justice of this country, the head of the system that convicted you, and I'm publicly inviting all those that were judges at the time to join me in accepting joint and several responsibility for the system having done to you what it did.
>
> I wish to indulge in this opportunity to extend my apology to all of those who may have suffered injustice in our legal system while I held this role. Since the ultimate problem is inevitably systemic, those of us who form that system cannot simply say that any particular injustice has nothing to do with me.
>
> I hope that the personal observations of Gregory Parsons in this section will help all of us involved in the criminal justice system to give pause. We should consider Oliver Cromwell's plea just before the Battle of Dunbar:
>
> > I beseech ye in the bowels of Christ, think that ye may be mistaken.
>
> Justice Learned Hand said decades ago that he would like to have these words written over the portals of every courthouse of the nation. It is an important reminder for all police officers, counsel and judges.

As noted in the Justice Canada Working Group Report, the following practices have been recommended to assist in deterring tunnel vision:

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[4] The *Report of the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken,* at pages 100 -101.

- Crown policies on the role of the Crown should emphasize the quasi-judicial role of the prosecution and the danger of adopting the views and/or enthusiasm of others. Policies should also stress that Crowns should remain open to alternate theories put forward by defence counsel and other parties.

- All jurisdictions should consider adopting a "best practice," where feasible given geographic realities, of having a different Crown Attorney prosecute the case than the Crown Attorney who advised that there were grounds to lay the charge. Different considerations might apply with mega-cases.

- In jurisdictions without pre-charge screening, charges should be scrutinized by Crowns as soon as practicable.

- Second opinions and case review should be available in all areas.

- There should be internal checks and balances through supervision by senior staff in all areas with roles and accountabilities clearly defined and a lead Crown on a particular case clearly identified.

- Crown offices should encourage a workplace culture that does not discourage questions, consultations, and consideration of a defence perspective by Crown Attorneys.

- Crowns and police should respect their mutual independence, while fostering cooperation and early consultation to ensure their common goal of achieving justice.

- Regular training for Crowns and police on the dangers and prevention of tunnel vision should be implemented. Training for Crown Attorneys should include a component dealing with the role of the police, and training for police should include a component dealing with the role of the Crown.

In his report, Chief Justice Lamer endorsed the utilization of a "contrarian view" approach to be utilized in major investigations: [5]

> I wish to comment on one specific aspect of this Report, related to the Parsons' investigation experience, and one more general observation in support of this Report.
>
> Under the heading of Major Case Management, there is a section entitled, Contrarian View where an analogy is drawn between the "scientific method" and police work. The observation is made that:
>
> > Scientists know that the best way to have their research findings accepted is to do everything possible to disprove their own hypothesis.
>
> The absence of such a "contrarian' or "truth-scrutinizing" role was the fatal flaw in this investigation. Everyone simply "jumped on the bandwagon" or "looked the other way". The Report states that this role should be assigned to the leadership role of the case

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[5] The *Report of the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken,* at pages 132.

manager. It is by no means a weakness, but is a strength, of leadership to ask: "Are you sure we are not mistaken"?

We adopt Chief Justice Lamer's comments in these submissions.

As noted above, Mr. Asper reserves the right to respond to any of the submissions of other parties that may affect him.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

This 14th day of November 2006

Donald J. Sorochan, QC
Counsel to David Asper