

**COMMISSION OF INQUIRY
INTO THE WRONGFUL
CONVICTION OF DAVID MILGAARD**

**WRITTEN SUBMISSIONS OF
EUGENE WILLIAMS. Q.C.**

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A. Introduction

1. This Commission of Inquiry has as its central mandate:

...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.¹

2. The Commission is further charged 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.²

3. Eugene Williams, Q.C., is and was at all material times a lawyer with the Federal Department of Justice ("Federal Justice"). His involvement in this matter took place from approximately 1989 to 1992 and related to the applications for mercy brought by David Milgaard pursuant to then section 690 of the *Criminal Code*.
4. In 1989, Eugene Williams assumed the role of coordinator for Federal Justice of conviction review applications under section 690 of the *Criminal Code*. At about the same time, Mr. Williams assumed conduct of David Milgaard's first application for mercy under section 690 and became the legal counsel who handled the applications on behalf of Federal Justice.³
5. In that respect, Mr. Williams' activities do not directly relate to the central components of this Inquiry, that is, the investigation into Gail Miller's death and the "subsequent criminal proceedings resulting in the wrongful conviction of David Milgaard". However, because of the timing and nature of Mr. Williams' and Federal Justice's work on Mr. Milgaard's applications for mercy, the Federal conviction review process is part of the narrative connected to the final

¹ Commission of Inquiry Into the Wrongful Conviction of David Milgaard, Terms of Reference, paragraph 1

² Supra, note 1

³ Inquiry Transcripts, E. Williams, 32270 - 32272

component of the Commission's mandate. That is the question of whether the investigation into the death of Gail Miller ought to have been re-opened based on information received by the police and the Saskatchewan Department of Justice ("Saskatchewan Justice").

6. In light of the Commission's mandate and Mr. Williams' responsibilities, two features of his work might provide information helpful to the Commission's tasks:

- What new information or evidence respecting David Milgaard's conviction came to light during Mr. Williams' conduct of the section 690 applications; and,
- If there was such information, whether and when that information became known to other parties, including Saskatchewan Justice.

7. The object of this submission is to identify those features of Mr. Williams' work in investigating David Milgaard's section 690 applications - in terms of both timing and context - that may assist the Commission in meeting its mandate.

8. Having regard to the comprehensive and thorough manner in which Mr. Williams discharged his duties (and recorded his work), this submission could not reasonably capture all of his activities. Its scope and intent is more limited: to place Mr. Williams' work in the broader narrative context of the proceedings relating to David Milgaard.

B. The Former Section 690 Application Process and the Role of Federal Justice Counsel

9. At the time of David Milgaard's application for mercy of December, 1988, section 690 of the Criminal Code read as follows:

690. The Minister of Justice may, on an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,

(a) direct, by order in writing, a new trial or, in the case of a person under sentence of prevention detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

(b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person of the person under sentence of preventive detention, as the case may be; or

(c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

10. As explained by Mr. Williams, the section provided an extraordinary remedy starting with the presumption that the applicant's conviction was properly obtained. Parliament, however, recognized the possibility of errors and, even if a conviction had been maintained after all appellate remedies had been exhausted, some circumstances might require a means to have the original conviction reviewed. As Mr. Williams characterized it, applicants would have "another opportunity to have their case adjudicated by the courts".⁴
11. Section 690 gave the Minister the authority to grant several potential remedies, including a new trial, a new appeal or a reference to an appeal court for an opinion. The latter could also go by way of a reference to the Supreme Court of Canada pursuant to the *Supreme Court of Canada Act*, as occurred with respect to David Milgaard's second application. On such a reference, the Minister is effectively asking the court for "advice how to deal with a particular situation".⁵
12. The ministerial role is not to determine guilt or innocence, or whether there was in fact a wrongful conviction, but rather to ascertain whether the applicant should be granted the opportunity to have those questions determined by a court.⁶

⁴ Inquiry Transcripts, E. Williams; 32279 - 32281

⁵ Inquiry Transcripts, E. Williams; 32281 - 32283; 32287 - 32288

⁶ Inquiry Transcripts, E. Williams; 32285 - 32286

13. The Minister's discretion to grant a remedy would be exercised in cases where the applicant established that there was "a reasonable basis to conclude that a miscarriage of justice likely occurred".⁷
14. That test was not statutory, but a threshold historically established to engage the exercise of ministerial discretion. The "reasonable basis" might arise through the discovery of new evidence or advances in science that improved the understanding of evidence that was led at trial. It could relate to the outcome of the original case and go to factual innocence or it might relate to a miscarriage of justice caused by procedural or evidentiary flaws. Ultimately, the ministerial direction of a remedy flows from new information or evidence that provides a reasonable basis to demonstrate a doubt about the correctness of the original conviction. That threshold was characterized by Mr. Williams as a showing that it was "more probable than not there was a miscarriage of justice". If the applicant could demonstrate a likelihood of a wrongful conviction, a remedy would be granted.⁸
15. As noted above, the applicant's initial responsibility is to bring the grounds or basis for the assertion that there has been a wrongful conviction to the Minister's attention. The application is placed in the hands of Federal Justice counsel, such as Mr. Williams, for an initial review, then, if appropriate, a thorough investigation and, finally, preparation of a full report by that lawyer for the consideration of the Minister. The Minister makes her recommendation⁹. The applications

are dealt with conscientiously, in the knowledge that they represent the last available review to rectify a miscarriage of justice.¹⁰

⁷ Inquiry Transcripts, E. Williams; 32290 - 32291; DocId 004426, Applications for the Mercy of the Crown, April 21, 1991

⁸ Inquiry Transcripts, E. Williams; 32290 - 32295

⁹ Inquiry Transcripts, E. Williams; 32309 - 32312; DocId 004426, supra, note 7

¹⁰ DocId 004426, supra, note 7

16. The departmental counsel's initial task was to "prescreen" the application. If, assuming the asserted grounds were made out, the Minister would not be provided with a basis to grant a remedy, the applicant would be informed that the application was dismissed for that reason. If, as in Mr. Milgaard's case, the prescreening was "passed", departmental officials would proceed with their investigation. At that point, missing essential information, such as trial transcripts and appellate records, would be requested from the applicant.¹¹
17. The nature and extent of the investigation undertaken by Federal Justice counsel like Mr. Williams turns on what might be required to assess the new information or evidence and how that relates to the criteria established for the exercise of the Minister's discretion under section 690. Mr. Williams and the Federal Justice counsel were essentially neutral investigators:

...I was simply the person who went out to ascertain whether the grounds advanced had a factual foundation, and to the extent that we asked or relied on the defence and on the Crown, so be it. It was not an adversarial process as we saw it¹²...

18. Ultimately, counsel prepared a report to the Minister so that the Minister would be able to decide, based on any evidence potentially signaling a basis to conclude that a miscarriage of justice may have occurred, whether to grant a remedy. The reports of departmental counsel like Mr. Williams moved through the internal departmental ladder, from Mr. Williams' supervisor, the director of criminal law, to the assistant deputy minister, criminal law, to the associate deputy minister, to the deputy minister and finally to the Minister's office.¹³
19. The role of Federal Justice counsel was described by Mr. Williams as follows:

Our job is to test or examine the facts that were advanced; one, to ensure that it was accurate, and two, if there are any matters that required clarification, to clarify them. Next our job was to

¹¹ Inquiry Transcripts, E. Williams, 32314

¹² Inquiry Transcripts, E. Williams, 39705

¹³ Inquiry Transcripts, E. Williams, 32225 - 32328

summarize that and based on a summary and on the information collected, to provide advice to the minister with respect to whether the grounds advanced and whether the information collected either signaled support for or not for the granting of a remedy. We took the role very, very seriously and endeavoured to do it as quickly as we could, but as thoroughly as we could, because we recognize the importance of this particular procedure to someone who is sitting in a jail convicted of an offence.¹⁴

20. As this Commission has heard, that role in this case was diligently and conscientiously fulfilled by Eugene Williams.

C. Overview of Significant Steps in the David Milgaard Section 690 Applications

21. One area of inquiry for the Commission has been the passage of time associated with the process of review of David Milgaard's conviction. It may be useful to illustrate by way of a chronology the more noteworthy steps taken in that process.

22. The following chronology supplements and can be read together with the chronology of events respecting David Milgaard's section 690 application prepared by Eugene Williams on April 23, 1992.¹⁵ This chronology begins somewhat earlier, from one of the earliest instances, in 1980, when David Milgaard and his advisors were considering an application under section 690 of the *Criminal Code* (at that time, section 617).

Date	Event or Document	Docid or Inquiry Transcript Reference
Dec-30-1980	Memo, Gary Young, then counsel to David Milgaard, noting, in part, his review of section 617 of <i>Criminal Code</i>	331967

¹⁴ Inquiry Transcripts, E. Williams, 32322

¹⁵ Docid 337474, Chronology of Events, Eugene Williams, April 23, 1992

Date	Event or Document	Docid or Inquiry Transcript Reference
May-26-1981	Letter from Gary Young to Joyce Milgaard respecting a possible application for a review through the Federal Department of Justice	331877
Jan-16-1986	Letter from Joyce Milgaard to Hersh Wolch addressing terms of potential retainer	213127
Feb-26-1986	Federal Justice opens a file respecting David Milgaard's section 617 application for mercy (in response to David Milgaard's letter to Justice Minister John Crosbie, Jan-28-1986; Docid 1182349)	333264
Mar-11-1986	Letter from H. Brown, Federal Justice, to David Milgaard, outlining application for mercy process	333262; 333268
May-28-1986	Letter from S.R. Fainstein, Federal Justice to David Milgaard; looking "forward to receiving Mr. Wolch's representations in connection with your application for mercy".	157000
Sept-2-1986	Memo, Hersh Wolch to David Asper - section 617 application discussed but "we would be far better off" with a T.V. show done first	182097
Sept-15-1986	Memo, David Asper to Hersh Wolch, advising that David Milgaard was getting very impatient and contemplating using another lawyer	182098
Nov-26-1986	Letter, Hersh Wolch to National Parole Board, advising in part that the brief to be filed with the Minister of Justice for David Milgaard's section 617 application is in its final stages and anticipate its completion before Christmas	213821
Feb-26-1987	Memo, David Asper to file; Possibility of analysis of blood or semen on trial exhibits by Dr. Ferris raised	182095
Sept-15-1987	Letter, David and Joyce Milgaard to David Asper, expressing frustration with the lack of progress on the case	162412

Date	Event or Document	Docid or Inquiry Transcript Reference
Jan-11-1988	Court Order, Justice Sirois, Sask. Q.B., releasing exhibits for testing by Dr. Ferris	255114
Sept-13-1988	Letter, Dr. James Ferris to Hersh Wolch; Report on examination of exhibits	002486
Oct-28-1988	Letter, Dr. Ferris to Hersh Wolch; Additional information	045841
Dec-28-1988	Letter, Hersh Wolch to Minister of Justice; First application for mercy of David Milgaard	000002
Dec-28-1988	Letter, David Asper to Sandra Bartlett, CBC; Providing copy of first application for mercy and seeking confirmation that CBC will air David Milgaard's story	163061
Feb-16-1989	Letter, Minister of Justice Doug Lewis to Hersh Wolch; Requesting additional documentation, reports, trial transcripts and waiver of solicitor-client privilege	004868
April-29-1989	Letter, David Milgaard to Minister of Justice; Enclosed waiver of solicitor-client privilege and advice that he and his family will also be sending a submission on their own	130118 (at 130120)
May-8-1989	Letter, Hersh Wolch to Minister of Justice; Including trial transcripts, other documents, submissions and advice that Milgaard will be making a separate presentation on the application that will be forwarded in due course	032905
June-6-1989	Letter, Eugene Williams to Saskatchewan Crown; Requested some trial exhibits	011471 (at 011555)
June-15-1989	Letter, received from David Milgaard by Federal Justice; David Milgaard and family will be making a video	130118
Aug-8-1989	Report, Patricia Alain, RCMP, to Eugene Williams	002477

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Date	Event or Document	Docid or Inquiry Transcript Reference
Aug-29-1989	Letter, David Asper to Federal Justice; Including Affidavit of David Milgaard	010056
Sept-6-1989	Memo to file, Eugene Williams; Advice from Barry Gaudette, RCMP, current technology could not test for presence of DNA; technology would be developed within two years	002479
Sept-10-1989	Letter from David Milgaard to Federal Justice; His family presentation is coming along slowly and will include a video	130118
Oct-2-1989	Letter from Hersh Wolch to Eugene Williams; Wanted to know when decision might be made	157021
Oct-11-1989	Letter from Eugene Williams to Hersh Wolch; Advised that investigation is continuing, Federal Justice awaiting David Milgaard presentation and Eugene Williams would be prepared to discuss further submissions with Hersh Wolch when he was to be in Ottawa in late November	157023
Oct-18-1989	Letter from Hersh Wolch to Eugene Williams; Information about juror at David Milgaard's trial	010054
Nov-Dec-1989	Chronology, Eugene Williams; Preliminary Departmental report prepared; Not pursued because of later events	337474
Jan-16-1990	Letter from Eugene Williams to Hersh Wolch; Fact gathering completed - if applicant had additional facts, advise the department within two weeks	157037
Jan-23-1990	Letter from Hersh Wolch to Eugene Williams; Financial support sought so that further information could be provided	001140
Feb-28-1990	Memo from Eugene Williams to file; David Asper of an anonymous tip that Larry Fisher murdered Gail Fisher; Steps to investigate begun	016133; 337474 (at 337475)

Date	Event or Document	Docid or Inquiry Transcript Reference
Mar-15-1990	Letter from David Asper to Eugene Williams; Further information provided respecting Larry Fisher and other matters; "many leads that ought to be pursued"	050467
Mar-26-1990	Letter from Eugene Williams to David Asper; Asked for any further submissions by April 12, 1990	157062
April-2-1990	Letter from David Asper to Eugene Williams; Final submissions made	010045
April-17-1990	Report, Sgt. R. Pearson, RCMP; Respecting investigation into Larry Fisher	004906
April-1990	Draft Departmental Report prepared by Eugene Williams; Abandoned due to later events	337474 (at 337476)
May-1-1990; May-15-1990	Letters from David Asper to Dr. Peter Markesteyn; Chief Medical Examiner retained to provide opinion on evidence	155505; 155507
May-15-1990	Letter from Eugene Williams to Dr. Markesteyn; Transcript of Judge's charge provided	333393
June-5-1990	Letter from David Asper to Eugene Williams; Enclosing Dr. Markesteyn report	157075
June-6-1990	Letter from Hersh Wolch to Eugene Williams; Included additional witness statements	157077
June-Aug-1990	Chronology of events, Eugene Williams; Numerous witnesses interviewed and other investigative steps taken	337474 (at 337477)
Aug-28-1990	Memorandum, Eugene Williams to Bruce MacFarlane; Outlining section 690 investigation and evidentiary findings	004374
Sept-10-1990	Letter from Hersh Wolch to Eugene Williams; Final position on application as requested by Eugene Williams	004394

Date	Event or Document	Docid or Inquiry Transcript Reference
Oct-1-1990	Meeting, Hersh Wolch and David Asper and Federal Justice officials	337474 (at 337478)
Oct-1-16-1990	Chronology of events, Eugene Williams; Departmental report to the Minister prepared	337474 (at 337478)
Oct-17-1990 Nov-14-1990	Chronology of events; Eugene Williams; Senior Department officials reviewed report; The Honourable William R. McIntyre, Q.C., retained to provide advice to the Department	337474 (at 337478)
Nov-14-1990 Feb-7-1991	Chronology of Events, Eugene Williams; Case reviewed by The Honourable W.R. McIntyre, Q.C.; Materials provided by Federal Justice; Advice received (Feb. 7.1991) from Honourable W.R. McIntyre, Q.C.	337474 (at 337478)
Feb-7-1991	Letter from Minister Campbell to Hersh Wolch; Application under section 690 has been dismissed	001529
Aug-14-2001	Letter from Hersh Wolch to Federal Justice Minister Kim Campbell; David Milgaard's second application for mercy	000184
Aug-23-1991	Letter from David Asper to Minister Campbell; Additional information provided	012672
Aug-30-1991	Letter from Hersh Wolch to Minister Campbell; Additional information provided	333582
Sept-5-1991	Chronology of Events; Departmental agent appointed to review the second application	337474 (at 337479)
Sept-11-1991	Letter, Hersh Wolch to Bruce MacFarlane, Federal Justice; Assessment of similar fact evidence	131986
Sept-11-1991	Request by RCMP Sgt. Pearson and Federal Justice to have RCMP Criminal Information Analytical Services analyze similar fact evidence respecting Larry Fisher	011903

Date	Event or Document	Docid or Inquiry Transcript Reference
Oct-10-1991	Memo from Sgt. Pearson to Eugene Williams; Enclosed similar fact assessment completed by RCMP analytical unit	011861
Nov-14-1991	Investigation Report, Sgt. Pearson; Updating investigation steps taken on second application	011848
Nov-28-1991	Minister Campbell referred the case to the Supreme Court of Canada	337474 (at 337480)
Jan-16-1992	Chronology of Events; Supreme Court of Canada case on Reference commenced	337474 (at 337480)
April-14-1992	Supreme Court of Canada Decision on Reference	160801
April 16-1992	Stay of Proceedings directed by Saskatchewan Justice	268050

D. The Differences Between the First and Second 690 Applications

23. Although both of David Milgaard's applications were made and considered under section 690 of the *Criminal Code*, there was a significant difference between them in terms of how the Federal Minister of Justice elected to secure advice as to how to respond to them.
24. The first application proceeded by way of the more conventional route, as generally described in paragraphs 9 to 19 of this submission. The application of December, 1988 was received and departmental counsel, Eugene Williams, was assigned to investigate and assess the case.
25. Although Mr. Milgaard's first application proceeded "by installments", the effect of that was to lengthen but not substantively alter the essence of the process. All of the evidentiary, procedural and factual questions were examined by Mr. Williams, with the aid of others, such as the RCMP, where appropriate.

26. Eventually, a departmental report was prepared and that, together with the advice of other senior departmental officials and that of the Honourable William R. McIntyre, Q.C., was considered by the Minister of Justice in arriving at her determination.
27. That determination was that the basis for a probable wrongful conviction had not been made out on the evidence. Minister Campbell's decision was conveyed in her detailed letter to Mr. Milgaard's counsel of February 27, 1991.¹⁶
28. In contrast, departmental officials and outside experts did not act as advisors to the Minister on the merits of the second application. Instead, the Supreme Court of Canada was asked to assume the role of advisor to the Minister by way of the reference to the Supreme Court of Canada made by Minister Campbell on November 28, 1991.¹⁷
29. As described by Eugene Williams, the part he played on the second application differed from his role on the first. While he did some investigative follow-up on the second application, that was on an *ad hoc* basis, pending a determination as to how the second application would be handled. Ultimately, much of the investigative work was done in an open forum before the Supreme Court of Canada.¹⁸
30. This had a number of implications. Once it was decided to proceed with a Reference, the primary object was to gather and package information for consideration by the Supreme Court of Canada. The testing and assessing of that information took place in the forum of the Reference. The decision on the Reference was the advice to the Minister.

¹⁶ DocId 334386, Letter, Minister of Justice to Hersh Wolch

¹⁷ DocId 001805, Reference to Supreme Court of Canada

¹⁸ Inquiry Transcripts, E. Williams, 39082 - 39084

E. The Information Gathered in the 690 Process

31. In light of the volume of information gathered by Eugene Williams and others, an item by item recitation of that process would serve no purpose useful to this submission. However, an examination of the kinds and sources of information for each of the two application may be instructive.
32. That analysis may shed light on the evolution of Mr. Milgaard's case in support of his assertion of a wrongful conviction. The two time frames are as follows:
- December 28, 1988 (the date of the first application) to February 7, 1991 (the date materials were provided to Minister Campbell for her consideration); and,
 - August 14, 1991 (the date of the second application) to April 6, 1992 (the conclusion of the Supreme Court of Canada Reference case)
33. With respect to the first application, the following chart sets out some of the more significant evidentiary or informational developments (exclusive of information bearing on Larry Fisher which is addressed in Part F):

Date	Event or Document	Docid or Inquiry Transcript Reference
Dec-28-1988	Initial application; Reports of Dr. Ferris and Affidavit of Deborah Hall	000002
May-2-1989	David Milgaard's counsel provided trial transcripts and other documents	032928
Aug-8-1989	Patricia Alain, RCMP, provided her analysis of Dr. Ferris' report	002477
Aug-29-1989	Affidavit of David Milgaard provided	010056
Sept-8-1989	Barry Gandette, RCMP Forensic Laboratory, provided his report respecting DNA analysis	002479

Date	Event or Document	Docid or Inquiry Transcript Reference
Nov-6-8-1989	Deborah Hall, Justice Tallis, Nichol John and Dr. Emson interviewed by Eugene Williams	337474
March-22-1990	Eugene Williams obtained materials from the prosecution file	332387
April-17-1990	Eugene Williams spoke with Justice Tallis	010013
June-5-1990	Dr. Markesteyn report provided	333434
June-6-1990	Handwritten statements of Ronald Wilson and Dennis Cadrain provided to Eugene Williams by David Asper	157077
June-11-1990	Dr. Ferris interviewed by Eugene Williams	002483
June-11-1990	Dennis Cadrain interviewed by Eugene Williams	002969
June-14-1990	Ed Karst interviewed by Eugene Williams	002248
June-15-1990	Eugene Williams met with Albert Cadrain	002969
July-20-1990	Eugene Williams interviewed Ron Wilson	001327
Aug-1-1990	Eugene Williams interviewed Craig Melnyk	155223
Aug-2-1990	Eugene Williams interviewed George Lapchuk	155213
Aug-30-1990	Eugene Williams spoke to Art Roberts (polygraph)	151588
Sept-12-1990	Sgt. Pearson obtained a statement from Estelle Cadrain	002619
Sept-20-1990	Sgt. Pearson obtained a statement from Marcel Cadrain	002593
Dec-13-1990	Sgt. Pearson interviewed coroner Harry Emson	056743 (at 056794)

34. With respect to the second application, a survey of the acquisition of additional material is set out below:

Date	Event or Document	Docid or Inquiry Transcript Reference
Sept-20-1991	Eugene Williams spoke with Nichol John	333657
Sept-25-1990	A psychologist and hypnotist interviewed Nichol John under hypnosis	011861
Oct-Nov-1991	Sgt. Pearson interviewed former Saskatoon police officer Tom Parker; Key notebooks of Saskatoon City Police investigators involved in original Gail Miller murder investigation located	011848
Nov-12&19-1991	Dr. C. Perry's reports evaluating Nichol John's hypnosis session submitted	337474
Nov-18-1991	Dr. R. Fleming's report respecting Nichol John submitted	337474
Dec-19-1991	Eugene Williams interviewed Ute Frank	326514
Nov-15- Dec-30-1991	Sgt. Pearson obtained additional Saskatoon Police notes of original investigation, interviewed various witnesses	056639
Jan-10-1992	Nichol John interviewed by Prof. M. Orne under hypnosis	337474

35. From the foregoing, it is evident that the non-Fisher investigation on the second application primarily involved obtaining information from or about Nicol John, Ute Frank and the Saskatoon Police Service records.
36. The "evolution" from application one to application two of the information from or about persons other than Larry Fisher described above is likely relatively neutral insofar as the case for David Milgaard's wrongful conviction is concerned. In other words, some of that evidence might be seen to implicate Mr. Milgaard in Gail Miller's murder, and some might be seen to weaken that case against him.

37. What remains then is an examination of the impact of the additional information received by Federal Justice and placed before the Supreme Court of Canada on the reference with respect to Larry Fisher.

F. Uncovering Information Respecting Larry Fisher

38. It is plain that the Larry Fisher information was the most significant factor in the Supreme Court of Canada's recommendation on the Reference. The Court noted:

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 patterns of the sexual assaults committed by Fisher, could well affect a jury's assessment of the guilt or innocence of Milgaard.¹⁹

39. Again, it may be instructive to break down the acquisition by Federal Justice of information respecting Larry Fisher into the time periods of the first and second applications. A summary of that information obtained during the course of the first application is as follows:

Date	Event or Document	Docid or Inquiry Transcript Reference
Feb-28-1990	Memo to file, Eugene Williams; David Asper advised him of an anonymous tip that Larry Fisher was responsible for the murder of Gail Miller	016133
Mar-14-1990	Sgt. Pearson interviewed Linda Fisher	004923
Mar-15-1990	Letter, David Asper to Eugene Williams, included information about Larry Fisher's record	050467
Mar-22-1990	Information received from Saskatchewan Police Service	155226

¹⁹ Reference re Milgaard, [1992] 1 S.C.R. 866 at para 18

Date	Event or Document	Docid or Inquiry Transcript Reference
Mar-24-1990	Sworn statement from Linda Fisher' (Sgt. Pearson and Eugene Williams)	001918
Mar-24-1990	North Battleford attempted murder file obtained by Sgt. Pearson	056743 (at 056760)
April-2-1990	Letter from Sgt. Pearson to Eugene Williams, Larry Fisher psychological information	001809
April-3-1990	Sgt. Pearson obtained statement from Larry Fisher's employer	004979
April-10-1990	Sgt. Pearson interviewed Larry Fisher	004906
June-1-1990	Sgt. Pearson obtained knife from Linda Fisher	056743 (at 056763)
July-4-1990	Sgt. Pearson told by Eugene Williams that Larry Fisher offences took place in Saskatoon, not Regina	056743 (at 056784)
July-9-1990	Polygraph examination conducted on Larry Fisher	002369
July-12-1990	Larry Fisher interviewed by Sgt. Pearson and Eugene Williams	061960
July-13-1990	Larry Fisher 1998 offence file obtained from Saskatoon Police Service	056743

40. It is also evident that the efforts of Sgt. Pearson and Eugene Williams during the investigation of Mr. Milgaard's first application resulted in the collection of:²⁰

- police files respecting Larry Fisher victims V5, V7, V8 and V10; and,
- a summary of the three Larry Fisher 1968 Saskatoon assaults relating to his guilty pleas.

²⁰ Inquiry Transcripts, E. Williams, 34158 - 34162

41. A similar chronology respecting the Fisher information obtained by Federal Justice during the second application is as follows:

Date	Event or Document	Docid or Inquiry Transcript Reference
Aug-14-1991	Second 690 application submitted to Minister of Justice by David Milgaard	000184
Aug-23-1991	Letter and additional information submitted to Minister Campbell by David Asper	012672
Aug-28-1991	Saskatoon Police Service completed review of sex offences in Saskatoon from 1968 - 1970	012700
Aug-29-1991	Letter and additional information submitted to Minister Campbell by Hersh Wolch	165524
Sept-3-1991	Saskatoon Police Service located files respecting Fisher's victims	056743
Sept-11-1991	Letter, Hersh Wolch to Bruce MacFarlane; Submissions respecting Fisher offences and similar fact analysis	131986
Sept-12-1991	Eugene Williams advised Sgt. Pearson that Larry Fishes provided a blood sample to the penitentiary service	056743
Sept-26-1991	Larry Fisher penitentiary records reviewed	011861
Oct-10-1991	RCMP Division Criminal Investigation Analytical Services Report provided to Eugene Williams	009033
Aug-29-1991 - Dec-16-1991	Sgt. Pearson conducted various investigative steps, including interviews with some of Larry Fisher's victims and other potential witnesses such as Roy Pambrun	056639
Dec-20-1991	Revised RCMP Criminal Investigation Analytical Services similar fact analysis is completed	048943

42. The second application added or altered the information known by Federal Justice officials about Larry Fisher in a number of respects. More importantly, however one might view that additional information, the process of the second application was different from the first.
43. In his testimony, Mr. Williams confirmed that, subject to additional details that became available after about mid-September 1991 (which he did not meaningfully assess), the new information that came with the second application to that point included the Centurion Ministries' interviews and summaries of information from victims, the partial V1 file from the Saskatoon Police Service and the V10 file.²¹
44. While Mr. Williams' view that the additional information received to mid-September 1991 might not have changed his assessment of whether a miscarriage of justice had occurred, he noted that he did not in fact perform that type of assessment on the second application. The second application was to be handled differently.²²
45. On the second application, Mr. Williams was requested to gather information, but his recommendation or assessment was not sought and he did not prepare a report similar to what he had prepared on the first application:

The extent of work that I did on the second application was miniscule by comparison to the work I did on the first application.²³

46. Two additional tools of note were the similar fact analyses on the Fisher offences and the Gail Miller murder prepared by the RCMP Division Criminal Investigation Analytical Services in their reports of October 10, 1991 and December 20, 1991. All of the information relevant to those offences was gathered and collected in a

²¹ Inquiry Transcripts, E. Williams, 39101 / 21 - 25 - 39103 / 1 - 18

²² Inquiry Transcripts, E. Williams, 39103 / 19 - 25 - 39104 / 1 - 15

²³ Inquiry Transcripts, E. Williams, 39328 / 7 - 25 - 39330 / 1 - 10

single package to permit a more methodical and careful analysis of the similar fact issue.

47. Interestingly, in each of those reports, the conclusions were expressed as follows:

Writers have attempted to objectively outline known or modus operandi of given offenses [sic] and to design the report in such a way that its readers can arrive at their own conclusions.²⁴

48. It thus appears that with respect to the Larry Fisher evidence, the RCMP was taking the same approach as the Minister of Justice and her departmental staff, including Eugene Williams, on David Milgaard's second application: gathering a comprehensive package of evidence and presenting it to the reviewer (the Supreme Court on the Reference hearing) so that it could be fairly and fully assessed.

G. Transmission of the 690 Application Investigative Findings

49. During the course of this Inquiry, Mr. Williams was questioned about what of the information he gathered was provided to:
- Minister of Justice Kim Campbell and senior Federal Justice officials;
 - The Honourable William H. McIntyre, Q.C.; and,
 - Saskatchewan Justice officials, particularly Murray Brown, Q.C., at that time, the Director of Appeals for Saskatchewan.
50. With respect to the material provided to the Minister for her review of the first application leading up to her revision of February 22, 1991, the evidence is plain that she had the complete package of materials at her disposal.
51. A number of factors point to this conclusion. The Minister's February 27, 1991 decision letter itself signals her comprehensive review of the full set of materials

²⁴ DocId 009033 at 009055 and DocId 048943 at 048972

gathered up by her department and submitted by the applicant.²⁵ The Minister's subsequent letter to Joyce Milgaard confirms her "own thorough and careful review before arriving at my decision in this case".²⁶

52. During this Inquiry, counsel for David Milgaard read excerpts of former Minister Campbell's memoirs into the record during his cross-examination of Eugene Williams. These excerpts further confirmed the fullness of the package available to and reviewed by the Minister on the first application (in the Minister's words "[i]t was all there").²⁷
53. Finally, Eugene Williams confirmed that all of the materials available to and gathered up by him went to Minister Campbell ("everything pertinent to the investigation"). In light of his role as the central federal official in gathering all of the material on Mr. Milgaard's first application, no reasonable conclusion can be drawn other than that the Minister was fully briefed on the first application.²⁸
54. A similar situation prevails with respect to the material available to the Honourable William A. McIntyre when he was called upon to advise the Minister during the first application. The only reasonable conclusion that can be drawn is that he had a complete package of materials available for his review.
55. Both the documentary record and the testimony of Eugene Williams confirm that conclusion, even having regard to the limits on this aspect of the inquiry because of jurisdictional and solicitor-client privilege limitations. For example, the Minister advised in her February 27, 1991 decision letter that "Mr. McIntyre has reviewed the case in detail and has provided his advice to me".²⁹ Later, in her memoirs,

²⁵ Docid 001529, letter, February 27, 1991, Minister of Justice to Hersh Wolch

²⁶ Docid 213827, Letter, April 30, 1991, Minister of Justice to Joyce Milgaard

²⁷ Inquiry Transcripts, E. Williams, 39417/15 - 20; 39421 / 8 - 20

²⁸ Inquiry Transcripts, E. Williams, supra, note 23; 39695 / 1 - 25

²⁹ Docid 001529, Letter, February 27, 1991, Minister of Justice to Hersh Wolch

Ms. Campbell confirmed that Mr. McIntyre "had all the evidence available to the government".³⁰

56. The latter assertion was confirmed by Eugene Williams who "had no information to dispute the accuracy of that".³¹ Mr. Williams is in the ideal position to confirm that. He was the justice official primarily responsible for gathering up the material on Mr. Milgaard's application and one of the individuals responsible for providing material to Mr. McIntyre so that he could in turn advise the Minister.³²
57. Indeed, Mr. Williams was able to specifically confirm that "the Milgaard position" - such as the letter of September 10, 1998, from counsel for Mr. Milgaard - was provided to Mr. McIntyre.³³
58. In late 1990, when Mr. McIntyre was retained by the Minister, Mr. Williams had completed his departmental report.³⁴ That document, together with "its appendices" were provided to Mr. McIntyre.³⁵ Finally, Mr. Williams when directly asked the question confirmed that Mr. McIntyre was provided with all of the evidence available to the government and specifically all of the material gathered up by Eugene Williams.³⁶
59. Not surprisingly, and appropriately so, the extent to which Murray Brown, Q.C., and his Saskatchewan Justice colleagues were provided with information by Federal Justice and Eugene Williams was quite different. As Mr. Brown testified, although Federal Justice was being "very thorough" in their investigation of the Milgaard application, Federal Justice could share with Saskatchewan Justice certain information while other information could not be shared. However,

³⁰ Inquiry Transcripts, E. Williams, 39441 / 1 - 19

³¹ Inquiry Transcripts, E. Williams, 39442 / 6 - 13

³² Inquiry Transcripts, E. Williams, 39265 / 1 - 21

³³ Inquiry Transcripts, E. Williams, 39266 / 12 - 25 - 39267 / 1 - 3

³⁴ Inquiry Transcripts, E. Williams, 39263 / 4 - 14

³⁵ Doc id 333598, Memo from E.F. Williams to Douglas Rutherford, September 5, 1991

³⁶ Inquiry Transcripts, E. Williams, 39697 / 1 - 23, 39699 / 16 - 17

overall, before the Minister's decision on the first application, Mr. Brown had an understanding of the case which was consistent with what Saskatchewan Justice later learned in more detail through participation on the Reference case. Insofar as Mr. Williams' approach to the matter was concerned, Mr. Brown described him as "fairly discreet".³⁷

60. Once the Reference was directed, the advice Mr. Brown gave to the Saskatchewan Minister was based on what came out at the Supreme Court of Canada and not what may have come from the Federal Minister.³⁸
61. The document generated during the Federal Justice investigation reviewed by Mr. Brown and relied upon by Saskatchewan Justice in its assessment of the Milgaard case was Mr. McIntyre's opinions provided to Minister Campbell. That opinion, as understood by Mr. Brown, was essentially that there was not a strong case for re-opening and that the Federal Minister had accepted that advice in her February 27, 1991 decision not to grant Mr. Milgaard a remedy. That information was relevant to Mr. Brown and his department and one of the considerations in assessing whether to take any steps with respect to re-opening the investigation into Gail Miller's death.³⁹
62. In the context of these three individuals - and, indeed, in the context of the entire section 690 process - it is plain that Eugene Williams shared and protected information in a most professional manner, fully consonant with his duties as both counsel on these particular applications and as a barrister and solicitor.

H. The Current Section 696.1 Conviction Review Process

63. A number of important changes have been made to Canada's statutory regime respecting applications for ministerial review of alleged wrongful convictions since Mr. Milgaard made his two applications. It is apparent that had the current

³⁷ Inquiry Transcripts, M. Brown, 38584 - 38590

³⁸ Inquiry Transcripts, M. Brown, 38590 / 7 - 20

³⁹ Inquiry Transcripts, M. Brown, 37483 / 12 - 25; 38484 - 37486 / 15

scheme been in place at that time, the applications may have proceeded somewhat differently.

64. In 2002, section 690 of the *Criminal Code* was repealed and replaced by sections 696.1 and 694.4 of the *Criminal Code*. Together with the *Regulations Respecting Application for Ministerial Review - Miscarriage of Justice* ("the Regulations"), portions of the *Inquiries Act*, R.S.C. 1985, C. I-11 and common law and constitutional law principles, those sections govern the Minister of Justice's power to review a conviction to determine whether there may have been a miscarriage of justice.

65. The main features of the new *Criminal Code* sections are:

- articulation of the test for review and provision of a remedy (a reasonable basis to conclude a miscarriage of justice likely occurred; s. 693.3(3));
- setting out of available remedies (s. 693.3(3));
- factors taken into account on the application (s. 696.4));
- prescribing form and content and the review process for the application by regulation (ss. 696.1 and 696.2));
- providing that certain powers under the *Inquiries Act* be granted to the Minister or his delegate (powers to require evidence orally or in writing under oath and the production of documents; ss. 696.2(2) and (3)); and,
- the ability of the applicant to seek interim release, where the Minister has given a direction or made a reference under s. 696.3 (s. 679.(7)).

66. The Regulations in part provide for:

- the form and content of applications (s. 2);
- the procedure for review of the application (ss. 3 and 4);
- the conduct of a preliminary assessment of the application to determine whether a basis for conducting an investigation is present (ss. 3 and 4); and,
- where an investigation is concluded, the provision of an investigation report to the applicant (s. 5).

67. As well, since the implementation of this new process, it has been judicially determined that an applicant may have the right to seek judicial interim release earlier than the statutorily granted right (at the time when the Minister might issue a direction or refer the matter to a court under section 696.3).
68. While the test continues to evolve, the *Charter* or the common law now to offer the applicant this opportunity once an investigation has been directed by the Minister. At that stage, there has been a preliminary determination that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred. The conventional test for appellate release - the application is not frivolous, the applicant will surrender himself into custody and the public interest not require the application's detention - can then be applied.⁴⁰
69. In this case, Eugene Williams testified as to the potential impact these changes might have had on David Milgaard's applications, noting, for example, that the absence of the power to compel evidence delayed the timing of the interviews of Larry Fisher and Ron Wilson.⁴¹ As well, the prospect of judicial interim release may have been of benefit to Mr. Milgaard. In that respect, it is noted that Mr. Williams concluded that Mr. Milgaard's first application passed the "prescreening" process in early 1989.⁴²
70. The other benefit of the new legislation identified by Mr. Williams identified by Mr. Williams was the direction and detail it offered to applicants with respect to what was expected of them on the application. In Mr. Milgaard's case, a full application from the outset rather than an "application by installments" might have generated an earlier conclusion and a faster remedy.
71. Overall, the legislative changes may well have had a beneficial impact on Mr. Milgaard's applications.

⁴⁰ *R. v. Phillion*, [2003] O.J. No. 3422 (S.C.J.)
R. v. Driskell, [2004] M.J. No. 7 (Q.B.)

⁴¹ Inquiry Transcripts, E. Williams, 39245 - 39255; 39628 - 39635

⁴² Inquiry Transcripts, E. Williams, 39245 - 39255; 39628 - 39635

I. **Conclusion**

72. It is respectfully submitted that a number of conclusions useful to the meeting of this Commission's mandate can be drawn from a fair-minded assessment of the process of David Milgaard's two applications for the mercy of the Crown.

73. Those conclusions include:

- At the time, the 690 process was based largely on a common law but principled approach to objectively ascertaining and assessing the merits of applications under section 690;
- In this case, federal officials, and in particular, Eugene Williams, carried out their duties entirely in accordance with that principled approach and, indeed, often exceeded any reasonable expectations respecting the discharge of their duties;
- All advisors and decision-makers in the section 690 process were armed with all the pertinent information that was available in order for them to properly form their advice and make their decisions; and,
- Although Mr. Milgaard eventually obtained a remedy involving the setting aside of his conviction and the entry of a stay of proceedings, the road to that remedy might well have been somewhat smoother or shorter if the current miscarriage of justice procedures had been in place at the time of his applications.

74. In sum, as challenging as it might have been, once all of the requisite information was gathered, the section 690 process operated in accordance with its design.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF NOVEMBER, 2006.

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