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

HONOURABLE MR. JUSTICE EDWARD P. MacCALLUM,
COMMISSIONER

Written Submissions on Behalf of the Attorney General of Canada for the Minister of Justice (Canada)

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I. INTRODUCTION

1. The Honourable Mr. Justice Edward P. MacCallum, Commissioner, was given a mandate by the Government of Saskatchewan 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."

2. The Federal Minister of Justice (Canada) ("Minister") became involved in Mr. Milgaard's case upon receiving an application for Mercy from David Milgaard's legal counsel on December 28th, 1988 pursuant to what was then s. 617 of the *Criminal Code*.

3. After months of investigations and interviews carried out by the Minister's staff, Mr. Milgaard's first application for Mercy was denied on February 27, 1991.

The decision of the Minister was set out in detail in an 11 page letter addressed to Mr. Milgaard's legal counsel.

4. The Minister received a second application from Mr. Milgaard on August 14th, 1991 which culminated in a reference to the Supreme Court of Canada in January 1992, where the Minister of Justice sought the advice of the Court by asking two questions.

   - Upon a review of and consideration of the judicial record, the Reference Case that will be filed before this Court, and such further or other evidence as the Court, in it's discretion, may receive and consider, does the continued conviction of David Milgaard in Saskatoon, Saskatchewan for the murder of Gail Miller, in the opinion of the Court, constitute a miscarriage of justice?
   - Depending on the answer to the first question what remedial action under the Criminal Code, if any, is advisable?

5. During the Reference process, the Minister attempted to have DNA tests conducted to assist the Court. However, these tests were unsuccessful. The Minister continued to be involved in Mr. Milgaard's case by undertaking to the Supreme Court of Canada to have the DNA testing performed once DNA technology was more advanced.

6. The Minister ultimately arranged the DNA testing in 1997 which exonerated Mr. Milgaard and identified Mr. Fisher as Gail Miller's assailant.

7. As this is a Provincial Commission of Inquiry with a mandate to essentially determine whether Gail Miller's murder investigation should have been re-opened at any time prior to 1997, the evidence put forward by the Minister of Justice was intended to speak only to the facts gathered by the Minister during the investigations conducted upon receipt of Mr. Milgaard's s.617/s.690

applications as well as the facts leading up to the DNA testing performed in 1997.

II. The Constitutional Limits of a Provincial Commission of Inquiry

8. The Constitutional limits upon this Provincial Commission of Inquiry have been clearly established by the decision of Chief Justice Laing and it is therefore not necessary to speak at length to the issue.

9. However, the ruling came in the later stages of the Inquiry so it is important to clarify the position of the Minister, particularly as it pertains to documents within the Inquiry record which have been made public by the reference to the document by Counsel.

10. An example of one such document is the memorandum dated October 2, 1991 (Doc ID 152028) a memo from Douglas J.A. Rutherford to John Tait, Deputy Minister.

11. The decision of Chief Justice R. D. Laing set out in very clear terms what the constitutional limits on this Commission of Inquiry are by stating in paragraph 27,

> "...The constitutional limitation set out in the *Keable* decision precludes the Commission from asking federal Department of Justice lawyers "questions which seek to probe the reasons behind actions, including questions about advice given or received."

12. Just as any questions regarding advice which Justice Lawyers shared would be proscribed, it logically follows that all documents which are advice between various departmental officials would be proscribed.

13. As Commission Counsel recognized (at 39495, lines 19-21), while in the midst of questioning a Federal witness, certain documents were not put to Federal witnesses by Commission Counsel because of the recognition that the questions about the document were about advice and therefore, proscribed.

14. The Minister takes the position that the aforementioned documents are beyond the constitutional parameters of this Commission of Inquiry. Although the documents appear to have been disclosed and publicly posted, the fact remains that constitutional boundaries can not be waived like privilege.

15. The Minister asserts that the constitutional limits upon this Provincial Inquiry apply to both the viva voce evidence from Federal witnesses which can be considered, as well as the Federal documents which it may consider.

16. While it is generally true that one of the main considerations when one argues that privilege is lost or waived on a document is the public dissemination of the document, such a consideration can not apply to constitutional materials. Privilege can be waived, constitutional issues can not.

17. Therefore, even though some constitutionally protected documents have been widely distributed, the fact remains that if one accepts that constitutional limits can not be waived, the documents so mentioned simply can not be considered by this Commission of Inquiry.

III. THE APPLICATIONS FOR MERCY

1. Pre-Application Activities of the Milgaard Group

18. The activities of the Milgaard group prior to the filing of the first application on December 28, 1988 are important background to events leading up to the filing of that application. Essentially it took some eight years for the Milgaard group

to perfect an application to the Minister under s. 617. Their activities started with the retention of Gary Young in December of 1980. Mr. Young reviewed trial transcripts and forwarded a copy of them to Mrs. Milgaard in January of 1981. In addition, he made inquiries of the Saskatoon Police, confirmed the exhibits from trial were still with the Registrar and reviewed legislation and caselaw with respect to a reference. Following that Mr. Merchant was retained as counsel in April 1981 and he provided general advice on the requirements of an application for Ministerial Review.

19. During this time period witnesses were interviewed by Joyce Milgaard, Chris O'Brien and Peter Carlye-Gordge. In January, 1981 Mrs. Milgaard interviewed Lapchuk, John and Wilson. Mr. O'Brien interviewed Deborah Hall and Mrs. Milgaard again interviewed Wilson and John in April-May, 1981. Albert Cadrain was interviewed in February-March, 1983 by Peter Carlye-Gordge and Dennis Cadrain was interviewed in February, 1983. Linda Fisher was interviewed by him in March of 1983.

20. In January, 1986 Mr. Hersh Wolch is retained as legal counsel for David Milgaard. David Milgaard wrote to the Minister of Justice January 8, 1986 and on February 26, 1986 the Department of Justice opened a file under s. 617. It is important to note that on March 11, 1986 the executive assistant to the Minister of Justice wrote a letter to Mr. Milgaard in which she sets out what must be sent to the Minister in order for his application to be considered. (Doc. ID: 333268)

2. Activities between the Retention of the Wolch firm and the Application dated December 28, 1988

A. Dr. Ferris

21. On February 25, 1987, Dr. Ferris was identified by Mrs. Milgaard as a person who could do genetic fingerprinting. (Doc. ID: 182095)

22. In a letter dated September 15, 1987 Mrs. Milgaard wrote David Asper with an update on the Ferris report and the release of the exhibits. She advised that nothing had happened so she visited Mr. Wolch's office and got him to phone Dr. Ferris's office and dictate a letter with respect to the exhibits. (Doc. ID: 162412)

23. Mrs. Milgaard testified that nothing had been done on the Ferris opinion and the release of the exhibits in the absence of David Asper. (Transcript 32234)

24. On January 12, 1988 in accordance with a court order authorizing the release of the exhibits they were to be forwarded to Dr. Ferris for testing. (Doc ID: 267870) They were then forwarded by the Court on January 21, 1987.

25. The Ferris report was forwarded to Mr. Wolch on September 13, 1988.

26. It should be noted that from the time Dr. Ferris was identified by Mrs. Milgaard on February 26, 1987 to the receipt of the report, some 20 months had passed. Further, that the exhibits remained with Dr. Ferris for some 10 months after his report. In a memo dated June 30, 1989 from Mr. Wolch to Mr. Asper he reflected the urgent requirement that the exhibits be returned by Dr. Ferris to the Court as the Department of Justice are asking for them and the Court Order issued earlier required their return. The exhibits were only returned by Dr. Ferris on July 5, 1989 some 10 months after his report issued.

B. Deborah Hall

27. An Affidavit was sworn by Deborah Hall before David Asper on November 26, 1986.

C. David Milgaard

28. An Affidavit was sworn by David Milgaard before David Asper on November 26, 1986. The Affidavit of David Milgaard was forwarded to the Minister on August 29, 1989 some eight months after the first application was filed.

29. The report of Dr. Ferris and the Deborah Hall Affidavit were the two main grounds upon which the December 28, 1988 application was based.

3. Filing of the First Application: December 28, 1988

30. David Asper testified that when he joined the Wolch firm he was assigned the Milgaard file in March 1986 and that he had been provided with a box of materials that included trial transcripts and some investigative background materials gathered by Joyce Milgaard. Mrs. Milgaard testified that she gave every scrap of paper she had to the Wolch firm. Mr. Asper's initial task was to become familiar with the case. After reading the trial transcripts, discussions on what to do began. He also read the preliminary inquiry transcript to reconcile the differences. He had the benefit of the earlier investigation by Mrs. Milgaard, Peter Carlye-Gordge and others. He said that Mr. Wolch had some informal conversations with colleagues at the Department of Justice with reference to a s. 617 application. His opinion was that in order to make an application they had to find something new. It was ultimately decided that the bases of the application would be the Hall Affidavit and the Ferris Report.

4. The Effect of Failure of Applicant's Counsel to Interview Justice Tallis

31. The effect of the failure of the Applicant's Counsel to interview Justice Tallis before the filing of the first application directly affected the following aspects:

1. The reliance on Deborah Hall as a ground for the application;

2. The existence at the time of trial and the statement/interview of Ute Frank and it's effect on the Hall ground;
3. The crucial differences between the Affidavit of David Milgaard and what he told his counsel at trial.

32. It is significant to note that in assessing the application, Mr. Williams felt it crucial to his investigation to interview Justice Tallis.

33. In order to assess the significance of it, it is important to look at the correspondence and what information was obtained.

A. Contacts Hersh Wolch and David Asper had with Justice Tallis

34. Their first contact was made some four months after the Application was filed on May 10, 1989. Mr. Wolch wrote him outlining the background of their work to date (Doc. ID. 153486). This letter was advance warning of the proposed telephone call Mr. Wolch was going to make to Justice Tallis. He also mentioned that David Milgaard was prepared to waive privilege.

35. The next letter is sent from David Asper to Justice Tallis on October 18, 1989, some six months after first contact by letter. A request for the file is made and a solicitor/client waiver form is enclosed. (Doc. ID. 153499)

36. On December 6, 1989, Justice Tallis acknowledged receipt of the letter and undertook to find files if they still existed. (Doc. ID. 153494)

37. On April 17, 1990, Justice Tallis wrote counsel and advised that some material was available but nothing else has been located. (Doc. ID. 153506)

38. On August 15, 1990, Mr. Wolch provided Justice Tallis with an update. The issue as to the disclosure of Ron Wilson's statements and the identity of Larry

Fisher as the culprit were mentioned. He also requested information on his knowledge of other incidents that had occurred around the time of the murder. This letter was authored some five months after Larry Fisher was identified to Mr. Williams as a suspect. (Doc. ID. 153512)

39. It is important to note that no questions were asked by counsel as to:

    1. What David Milgaard told Justice Tallis at the time of trial.
    2. What knowledge, if any he had of the existence of Deborah Hall at time of trial.
    3. What knowledge, if any he had of the existence of Ute Frank and what she told him at the time of trial.

B. Contacts Eugene Williams had with Justice Tallis

40. In a memo dated October 29th, 1989, Mr. Williams made reference to setting up a formal meeting with Justice Tallis to discuss Mr. Milgaard's trial. He had advised Mr. Wolch and he had no objection to such meeting. (Doc. ID. 333322)

41. A meeting was to be held November 6th, 1989, at the Court House in Regina. (Doc. ID. 333324) Mr. Williams testified that after his meeting with Justice Tallis on November 6th, 1989, he came to the conclusion that the Dr. Ferris opinion did not provide the bases for a remedy. Justice Tallis confirmed that he clearly understood the evidence at trial. (Transcript 32641, lines15-24)

42. Certain undertakings were given by the Crown in a letter from Mr. MacFarlane to Justice Tallis dated February 23rd, 1990. (Doc. ID. 157044)

43. In a memo dated March 13, 1990, Mr. Williams outlined discussions with Justice Tallis about a meeting and written questions that were sent to him on February 23, 1990. (Doc. ID. 333359)

44. A memo to file dated March 27, 1990 referencing a meeting Williams/Tallis on March 21st was prepared by Mr. Williams. (Doc. ID. 335388)

45. For the first time it is established that:

    1. David Milgaard admitted throwing the compact out of the car between Saskatoon and Calgary.
    2. He did not deny the account given by Melnyk and Lapchuk but explained the incident as either a joke or being stoned.

    NB: The second revelation is significant because the first application relies on the Deborah Hall Affidavit that said Melnyk and Lapchuk lied at trial. It is also significant because in his Affidavit, David Milgaard says it didn't happen.

46. In a memo dated April 17th, 1990, Mr. Williams thanked Justice Tallis for his candour during the meeting. (Doc. ID. 010013)

47. Mr. Williams summarized the details of his meeting with Justice Tallis in a memo dated May 11, 1990. (Doc. ID. 335386)

48. This significance of the interview of Justice Tallis with Mr. Williams and its effect on the first application is reflected as outlined in Mr. Williams' evidence. (Transcript 34220 lines 22-25, 34221 lines 1-25,34222 lines 1-25, 34223 lines 1-25, 34224 lines 1-9).

C. Summary of the Effect that Justice Tallis' Disclosure had on the s.617/s.690 Application

49. David Milgaard's version of events to his counsel did not support Deborah Hall's Affidavit.

50. In commenting on the failure to interview Justice Tallis by counsel for the Applicant, Mr. Williams said it showed him the level of research that had gone into the Application including some submissions without a full appreciation of the facts at trial or the information provided to counsel.

51. With respect to the Ferris ground, his discussions with Justice Tallis established that he understood the secretor issue and considered or wanted to deal with it at trial.

52. Accordingly, Mr. Williams said that he showed that Dr. Ferris had not read the evidence at trial and that it refuted the basis of the ground advanced by Dr. Ferris.

53. He testified that as a result of his discussions with Justice Tallis, he had to approach the other grounds very critically and that it re-enforced the need to re-verify what information he was getting.

54. The effect of the Tallis disclosure was commented upon in a conversation just before the Supreme Court Reference in January 1992. The conversation was between Mrs. Milgaard and her daughter Susan and Mrs. Milgaard advised that David Milgaard's Affidavit states that he knew nothing about the compact and that he did not re-enact the crime in the motel room. She commented on the effect that this may have had on the application to the Minister. She said that the whole thing is "a mess". (Doc ID. 336592 @ 639-641)

55. Mr. Asper's explains why they did not contact Justice Tallis and he attributed their failure to do so to the Milgaards' suspicion of everybody in the system. This however does not explain why Mr. Asper and Mr. Wolch as his counsel did not contact Justice Tallis before filing the application. (Transcript 25249 lines 5-11, 25250 lines 23-25, 25251 lines 1-5, 17-20, 25252 lines 5-15).

5. "Piecemeal Strategy" & Application by Instalments

56. From the outset of the application it is apparent that it would proceed by instalments. Evidence of that fact is demonstrated by the failure to provide certain information to the Minister from the outset. A conscious decision was made by counsel for the Applicant to keep it lean. For example, despite being advised as to the requirements for the application which were to include copies of the transcripts of the preliminary inquiry and trial, they did not accompany the initial application. (Doc. ID 333268, March 11, 1986) This required the Minister to request the entire evidence at Trial. (Doc. ID 004868, Feb. 16, 1989) This prompted Mr. Wolch to instruct Mr. Asper to obtain what was requested. (Doc ID 182113, March 8, 1989). On May 8, 1989 Mr. Wolch replied to the Minister's letter and forwarded the trial transcripts. (Doc. ID 032905).

57. Mr. Wolch in preparing to respond to the Minister's letter advised Mr. Asper that "we can either give them everything at once or piecemeal if we want to keep their interest up". (Doc. ID: 162407, April 3, 1989). While this piecemeal strategy was used it had a substantial impact on how the matter progressed which will be developed in detail later on in this submission with respect to the evidence of Mr. Williams.

58. It should, however, be observed that the use of this piecemeal strategy was verified by others in the Milgaard group. In response to a question put to him by Commission counsel, Mr. Asper used the expression "digestible pieces" with

respect to providing information to Justice. He acknowledged that over time as they kept getting new information and it was provided, it did "stretch" over time. (Transcript page: 25666 lines 3-18)

59. Mrs. Milgaard in response to questions from Commission counsel as to why the earlier information obtained from Ron Wilson in 1981 was not with the application, she testified that Mr. Wolch felt we should keep some information back. She testified further that they would have additional information to give to Justice as they went along. (Transcript page: 30372 lines 6-23)

6. Parallel Family Presentation

60. The idea of a family presentation by David Milgaard surfaces for the first time in his letter to his counsel on September 15, 1996. (Doc. ID: 213588) Following the filing of the first application in December 1988 there was a series of correspondence relating to the Applicant's filing of a separate family presentation in support of his application.

61. Mrs. Milgaard testified that the purpose in her son doing so was to keep him busy however the preparation of that presentation became a factor in the speed at which the application progressed:

- April 19, 1989 Mr. Milgaard wrote to the Minister, Mr. Milgaard said that it was expected to be completed by the end of May. (Doc. ID: 301671)
- May 8, 1989 Mr. Milgaard's counsel, Mr. Wolch wrote to the Minister of Justice formalized the filing of a separate presentation by the Milgaard's which once prepared would be forwarded in due course. (Doc. ID: 032905)

- June 1989 the Applicant advised the Minister that they were preparing that submission and a video. (Doc ID: 130118 at 121).

- September 10, 1989 Mr. Milgaard in a letter to the Minister's office, advised the Minister that his presentation was coming along slowly and that this part of the application would include a video from them. (Doc. ID: 130118 at 123)

- October 11, 1989 Mr. Williams wrote counsel for Mr. Milgaard and referred to his most recent correspondence in which he reiterated his intention to submit a presentation as part of his application to the Minister. Mr. Williams went on to observe that "armed with this information it would be premature to conclude our investigation at this time" (Doc ID: 157023).

- October 16, 1989 Mr. Williams forwarded a memorandum to the Minister's office outlining the status of the investigation. Mr. Williams advised that Mr. Milgaard in his September 15, 1989 letter has stated his intention to make additional representations in support of the application. He advised that they had to date not received those representations. In these circumstances he advised it is difficult to predict when the investigation would be finished. (Doc. ID: 333315)

- December 22, 1989 Mr. Milgaard once again wrote the Minister and in that letter he advised that he had completed quite a bit of the written part of the presentation and that the video segment of it was yet to be completed and advised further that it would be in two parts, part one is a re-enactment according to the evidence in the case and part two "is my family and myself talking to you". (Doc. ID: 333332)

62. Mr. Williams testified that he doesn't believe that the Minister ever received the family presentation.

63. He testified further that the effect of not receiving that family presentation as promised:

1. It impacted on his ability to complete his investigation.
2. That he had no way of knowing what additional grounds would be raised and what further investigation would be required.
3. That he was obliged to wait for it before filing his final report.

64. When questioned with respect to the family presentation, Mr. Asper described it as David's own little project. He went on to say that they were being fired routinely by Mr. Milgaard which caused their own internal delay. Mr. Asper conceded that he could understand why Mr. Williams would not want to risk their criticism of ignoring a presentation that Mr. Milgaard's letter claimed was coming. (Transcript 35918-919) He went on to further concede that there was no question that Mr. Milgaard's correspondence caused delays in the consideration of his application. (Transcript 35923)

7. The Effect of the Media on the s.617/s.690 Application

65. As part of their strategy, Counsel for the Applicant decided early on in the process to engage in the media as an ally in support of the s.617/s.690 application. In fact the Applicant's counsel engaged the media immediately upon the filing of Mr. Milgaard's first application with the Minister by sending a letter enclosing a copy of Mr. Milgaard's application to the Minister to the CBC. (Doc. ID. 163061)

66. Previously the CBC, and more specifically the Fifth Estate program, had been interested in running a story on David Milgaard but progress had stalled. The letter to the CBC was basically an ultimatum to decide within a 7 to 10 day time

limit whether to proceed with the program before the matter was taken to another news provider.

67. In a letter dated March 8, 1989 (a letter a little over two months after the application was filed), Applicant's counsel was advised by the CBC that other experts could challenge much of what Dr. Ferris had to say. (Doc. ID. 218743 @ 744). This demonstrated very early on, the frailty of the ground in the application relating to Dr. Ferris' report.

68. Mr. Williams explained his reasons for not contacting the media or issuing a press release after he got the Pat Alain report in August 1989 or his interview of Deborah Hall in November 1989. He testified that his Minister would be unhappy with him if he disclosed information which she had not yet had a chance to review and make a decision upon. He emphasised (as he did throughout his testimony) that the decision was the Minister's. His role was to gather the information provide advice and await the Minister's decision. His role was not to publicly discuss individual aspect of the investigation in the media. (Transcript 32478, lines 12-25 – 32479, lines 1-11)

69. This position was maintained despite the fact that information in his possession differed significantly from what was being portrayed in the media. (Transcript 32480, lines 1-6)

70. In elaborating on the reasons as to why neither he nor the Minister were able to engage in trying the case in the media, he said that when material was provided to Justice, they were constrained from commenting on it publicly. He set out those reasons in some detail. (Transcript 32877, lines 16-25 – 32888, lines 1-11)

71. On the second application he testified that the Reference allowed the gap between what Justice believed to be the facts and what the media portrayed

the facts to be dealt with in an open court. It also allowed them to point to a record that is public in terms of defending various assertions of what the facts really were. (Transcript 32880, lines 1-13)

72. Under cross-examination by Mr. Wolch, Mr. Williams conceded that the media's reporting was one of the motivating factors behind the Supreme Court Reference being held. (Transcript 39483, lines 2-14 – 39484, lines 1-18)

73. Mr. Asper testified that they had to resort to "extraordinary means and by that I mean bringing the media in the activity". He also said " I sincerely regret the circus that had to be unleashed in order to get the attention at the political level in order to get the action that we needed". (Transcript 27268, lines 4-25)

74. When questioned as to whether he ever identified a quote as being wrong which was attributed to him and taking steps to correct it, Mr. Asper replied that he did not recall taking such remedial steps. (Transcript 27480, lines 20-25 – 27481, lines 1-4)

75. He testified further that there were instances where he may have gone too far. (Transcript 27481, lines 20-22). He attributed it to saying things in the frenzy of the moment and that there were a lot of things that he would either have not said or said differently. (Transcript 22482, lines 3-4, lines 9-14).

76. He testified further that "but the process we got into is one that sets up hair-trigger comments, emotional comments, spur of the moment reactions and is not always entirely fair". (Transcript 27269, lines 4-9)

77. It is important to note that throughout this process that when the media reported erroneous facts, which due diligence and care could have prevented,

they never published one single retraction or correction to any such erroneous facts published.

8. Eugene Williams Evidence on the s.617/s.690 Process and the Respective Roles of the Parties in that Process

78. He testified that the Applicant and/or his counsel must firstly identify the grounds that might provide the basis for a remedy under s.617/s.690.

79. Mr. Milgaard, as the Applicant, identified two grounds and an argument as to why these grounds met the threshold.

80. The Applicant had the responsibility to put forward to the Minister whatever evidence they felt necessary to establish a likelihood that a miscarriage of Justice had occurred.

81. Mr. Williams was the Minister's lawyer and it was his job to assist the Minister in discharging her duties under s.617/s.690.

82. Upon receipt of the application, Mr. William's first task was to examine the application and pre-screen it. He examined the grounds advanced and if he could answer yes to the question "would these grounds if established provide the Minister with a basis for granting a remedy" he would proceed further. He testified that the application passed the initial screening test. In practice, this pre-screening was usually done within two or three weeks of the receipt of the application.

83. Mr. Williams then looked at the balance of the material and found that the application was not complete because the trial transcripts and appellate records did not accompany the written brief. He required the trial transcript to look at the impact of the new evidence in relation to the trial evidence.

84. Mr. Williams testified that it was one of his tasks to investigate the accuracy and the completeness of the evidence put forward with respect to the grounds.

85. Mr. Williams tasks on this application were:

a. To review the facts relevant to the grounds advanced. This was done to understand the case and the facts of the case to figure out where the grounds fit in.

b. To examine and assess any new evidence or information to test the accuracy and completeness of the new information and to ensure that the factual basis that supported the ground had been tested on behalf of the Minister. Mr. Williams then went on to describe what he meant by "tested". In his role he stated he was not there to defeat the application but to find out more about the circumstances under which it came into being. The purpose of doing that was "to compare and contrast and to clarify".

c. To assess the extent to which the evidence and information gathered is or may be relevant to the criteria to be considered by the Minister in s.617/s.690. Mr. Williams testified that it was to zero in on the new information that might have affected the outcome of the trial.

86. Mr. Williams summarized the nature and purpose of the investigation that he would undertake on behalf of the Minister as follows:

a. To test and examine the facts that were advanced. (Transcript pages: 32309 – 322)

b. To clarify matters that require clarification.

c. To summarize the investigation undertaken by the Department of Justice, to provide advice to the Minister with respect to whether the grounds advanced supported the granting of a remedy.

(See also Transcript pages: 38709 – 712. Commission Counsel's recap of Mr. Williams' role in the s.617/s.690 process)
(Transcript 38709, lines 14 – 25; 38710, lines 1 -25;
38711, lines 1 – 25; 38712, lines 1 – 19)

87. When Mr. Williams was questioned as to whether he ever told anyone as to his personal views on the guilt or innocence of David Milgaard, he denied having such discussion with anyone. He said that the process did not engage a personal view as to whether David Milgaard was guilty or innocent. He went on to say that his views are irrelevant as to whether he is or is not guilty. His job was to find out whether the grounds raised are such that it can give the Minister a basis to provide a remedy. He emphasized that that has only one client who is entitled to that view and that is the Minister. (Transcript page: 39062)

88. Mr. Williams testified that he did not share with Mr. Asper any information with respect to the two tasks he was doing for the Minister. He reiterated his role was to provide service to the Minister and the duty he owed the Minister to provide his legal assessment solely to her. He testified that it would be inappropriate for him to share his assessment because his role was to advise the Minister and that his advice may not have always be accepted by the Minister. He could not take on the role as a decision maker because it was not his to make.

(Transcript page: 32416, lines 16 – 21; 32416, lines 16 – 21;
32417, lines 1 – 25; 32418, lines 19 – 25,
32419, lines 1 – 25; 32420, lines 1 -12)

9. <u>Eugene Williams Chronology (Doc. ID: 337474)</u>

89. The document "David Milgaard Chronology of Events" dated April 23, 1992 is an excellent synoptic overview of Mr. William's investigation starting with the first application through to the Supreme Court Reference. (Doc. ID: 337474)

Doc. ID: 337474 is attached as Appendix "A" to this submission.

90. The purpose for the preparation of this document was set out by Mr. Williams in his evidence. (Transcript 39675 lines 20 – 25, 39676 lines 1 – 2)

91. It demonstrated the fact that the application was made in instalments which required Mr. Williams to stop his investigation in order to follow up on the information provided by counsel for the Applicant. (Transcript 39676 lines 11 – 23)

92. The chronology document is a good guide in setting out the application by instalments and while the document in its entirety is commended to this Inquiry, certain important dates and activities should be highlighted.

93. Mr. Williams had prepared a preliminary Departmental Report in November/December, 1989 but did not pursue it because of the following:

    a. On January 10, 1990, counsel for David Milgaard wrote to the Department and advised they wanted to develop the evidence further. At the same time they requested financial assistance. (Doc. ID: 001140).

    b. On January 23, 1990, additional information was provided and a request for funds made. (Doc. ID: 001140 at 42)

    c. On February 28, 1990, Mr. Asper identified Larry Fisher as the real killer. (Doc. ID's: 016133, 333341)

94. In late March, 1990 the Department sought final submissions which were forwarded April 2, 1990. (Doc ID's: 157062, 010045)

95. As a result, a draft Departmental Report was again prepared but did not proceed because of the following:

    a. Counsel for the Applicant on May 1, 1990 retained the Chief Medical Examiner for Manitoba to conduct a second forensic examination. (Doc. ID: 155505)

    b. On June 5, 1990 the second forensic report was received by Mr. Williams. (Doc. ID: 157077)

    c. On June 6, 1990, Ronald Wilson was identified as another witness to assist on the application. (Doc. ID: 157077)

96. As a result the R.C.M.P. were asked to assist in finding Ronald Wilson and Albert Cadrain.

97. Final written submissions were requested in early September, 1990 and received on September 11, 1990. (Doc. ID: 004394)

98. The chronology then goes on to set out the events leading up to the Minister's letter of February 27, 1991.

99. The balance of the chronology sets out the second application dated August 14, 1991 and events leading up to the Supreme Court Reference decision of April 14, 1992.

100. Mr. Asper testified when he was cross-examined on the chronology that he agreed that if there was a further request to develop the evidence that it made sense to stop preparation of a preliminary Departmental Report. (Transcript 35863, lines 3 – 13)

101. Mr. Asper reiterated that view when asked about the April, 1990 Departmental Report and Mr. Williams awaiting further information from the Applicant. (Transcript 35869, lines 11 – 19)

102. Mr. Asper went on to suggest that because of the "dim view" that the Department had taken of the application that they would try to "pile on a little bit". This was in reference to Mr. Williams awaiting the Markestyn report that Mr. Asper had ordered. (Transcript 35871, lines 12 – 25)

103. Mr. Asper agreed that it ended up turning out as an application by instalments. (Transcript 35882, lines 22 – 25)

104. Attached as Appendix "B" to this submission is a summary of Eugene Williams' investigative activities – February 28 – September 1990.

10. Williams/Pearson Investigative Steps Taken re: Larry Fisher

105. After David Asper contacted Mr. Williams with the Larry Fisher information on February 28, 1990. Mr. Williams immediately contacted Sgt. Pearson on that same day and requested his investigative assistance. He also contacted Mr. Caldwell and asked him to check his files on Larry/Linda Fisher. He also obtained Larry Fisher's criminal record. The next day he contacted Saskatoon City Policy by telephone and letter for information on Larry Fisher.

106. Linda Fisher was located by Sgt. Pearson on March 8, 1990 and on March 14, 1990 Sgt. Pearson interviewed her. On March 24, 1990 Mr. Williams conducted an interview of her under oath.

107. On April 10, 1990 Sgt. Pearson met Larry Fisher for the first time and interviewed him. He requested he provide a blood sample, take a polygraph and provide a statement.

108. Accordingly, within six weeks of the receipt of the Larry Fisher information from Mr. Asper interviews of Linda Fisher had been conducted by Sgt. Pearson and Mr. Williams and Larry Fisher was interviewed for the first time. It is important to note that other activities related to Larry Fisher were conducted during this short period by Mr. Williams and Sgt. Pearson.

109. On April 23,1990 Sgt. Pearson called Steven Carter, Larry Fisher's lawyer and explained he wanted a blood sample. Mr. Carter said he would interview Larry Fisher and get back to him. (Doc. ID: 056743 at 764 paragraph 107)

110. Attempts to contact Mr. Carter were made and Sgt. Pearson was successful in reaching him on May 3, 1990. Mr. Carter advised that Larry Fisher wished to wait until the end of May to think about the request for an interview. (Doc ID: 056767 paragraph 127)

111. On May 8, 1990 Sgt. Pearson had a brief interview of Larry Fisher and he was ill and didn't want to do anything until after May 19, 1990.

112. On June 8, 1990 Sgt. Pearson went to meet Larry Fisher at Prince Albert Penitentiary. Mr. Carter was present. Sgt. Pearson after discussions with Larry Fisher agreed to re-attend when Mr. Carter was available. (Doc. ID: 056778 paragraph 159, 779 paragraphs 160 – 162)

113. On June 15, 1990 Sgt. Pearson received a letter from Mr. Carter advising that Mr. Pick was Mr. Fisher's new lawyer. (Doc. ID: 056780 paragraph 170). On June 22, 1990 Mr. Pick called Sgt. Pearson and advised he would be meeting with Larry Fisher in the next few days. (Doc. ID: 056782 paragraph 179)

114. On June 28, 1990 Mr. Williams spoke to Mr. Pick (Doc. ID: 010016). On July 3, 1990 Mr. Pick phoned Sgt. Pearson and advised that he and Mr. Williams

could interview Fisher. It was also arranged that he be polygraphed by a private polygrapher. (Doc. ID: 056784 at paragraph 189). Arrangements were made for July 12 for the interview which was to be taped.

115. On July 5, 1990 Mr. Williams spoke to Mr. Pick with the regard to the proposed interview. (Doc. ID: 010018)

116. On July 6, 1990 Mr. Williams had a telephone conversation with Mr. Pick to have an understanding as to the terms of the interview. (Doc. ID: 011841)

117. On July 10, 1990 there was a conversation between Mr. Williams and Mr. Pick. (Doc. ID: 011840).

118. On July 12, 1990 Mr. Williams and Sgt. Pearson met Fisher and Pick. The interview was taped. (Doc. ID: 056786 – 87 paragraphs 198 - 199)

119. On July 13, 1990 Mr. Williams prepared a memorandum to file outlining the Larry Fisher interview conducted on July 12, 1990. (Doc. ID: 338056)

120. On August 20, 1990 Sgt. Pearson contacted the polygrapher who advised because of Fisher's physical condition the test performed was inconclusive. (Doc. ID: 056789 paragraph 209)

121. There was further activity in September 1990 with respect to Fisher relating to a further polygraph but none was conducted.

11. Larry Fisher – Pearson/Asper Contacts (March 14 – June 20, 1990)

122. When Sgt. Pearson was contacted by Mr. Williams to assist him in the Larry Fisher investigation as part of the s.617/s.690 process, Sgt. Pearson had considerable contact on a continuing basis with Mr. Asper. In a period of three

months from March 14 to June 20, 1990, there were ten telephone conversations between them.

123. On March 6, 1990 Sgt. Pearson received confirmation of Mr. Williams' request for assistance accompanied by a copy of Mr. Asper's letter regarding Larry Fisher.

124. The summary of these telephone conversations are set out in Sgt. Pearson's report (Doc. ID: 056743). The dates of these calls and the paragraph references are set out below as follows with a brief summary of the subject matters of the conversations are set out below as follows:

a. **March 14, 1990** (paragraph 35 @ 056750)
Discussion as to status of investigation to date.

b. **March 19, 1990** (paragraph 52 @ 056755)
Discussion to assure David Asper/Joyce Milgaard that new information re: Larry Fisher being pursued.

c. **March 20, 1990** (paragraphs 54, 55, 56 @ 056755-56)
Discussion re: Larry Fisher.

d. **March 28, 1990** (paragraph 86 @ 056761)
Discussion as to status report Fisher.

e. **April 17, 1990** (paragraph 102 @ 056763)
Pearson talks about conversation Williams/Asper to Eugene Williams. (Doc. ID: 333384)

f. **April 17, 1990** (paragraph 106 @ 056764)
Pearson contact with Fisher.

g. **April 24, 1990** (paragraph 109 @ 056765)
Discussion re: Barker and information on case.

h. **May 4, 1990** (paragraphs 129 – 130 @ 056767-771)
Extensive conversation re: David Milgaard recollection of events day of murder.

i. **May 9, 1990** (paragraph 132 @ 056771)
Discussion re: Pearson made contact with Fisher

j. **May 10, 1990** (paragraphs 134 - 136 @ 056772)
Discussion re: Joyce Milgaard contact with John Harvard & media re: Larry Fisher.

k. **June 20, 1990** (paragraph 176 @ 056781)
Discussion re: progress with Larry Fisher. Meeting with Larry Fisher and new lawyer next week.

125. These conversations reflect the information that was being provided on a continuing basis by Sgt. Pearson to Mr. Asper which contradicted suggestions that limited information was being provided to Milgaard's counsel on the Larry Fisher investigation.

126. This summary does not reflect the continuing and ongoing contacts between David Asper and Eugene Williams as the Larry Fisher investigation progressed.

12. Deborah Hall, Ute Frank and Linda Fisher

A. Deborah Hall

127. On November 23,1986, Ms. Hall swore an Affidavit before David Asper. In her Affidavit she said that the motel re-enactment in Regina did not occur and that Melynk and Lapchuk lied about the re-enactment of the murder by David Milgaard. (Doc. ID. 016600)

128. As the Deborah Hall Affidavit was one of the two bases for the s.617/s.690 application, Eugene Williams interviewed her on November 6, 1989 under oath. (Doc. ID. 001285)

129. For the first time, in that interview Ms. Hall, without prompting from Mr. Williams, told him the words that David Milgaard used at the time of re-enacting the murder. She said that the words used were "crude and sarcastic". (Doc. ID. 001285 @ 320)

130. At this Inquiry under examination by Commission Counsel, she stated that this was probably the first time she'd told anybody the words used by David Milgaard. She said her reason for doing so was that "this man was from the justice department, I had to tell it exactly like it was that I remembered it". (Transcript 3406, lines 2-8)

131. Ms. Hall went on to testify that while she alleged Mr. Williams "put words in her mouth", with respect to the words spoken by David Milgaard, she said " those were my answers". (Transcript 3418, lines 1-6)

132. Mr. Williams testified that he was "flabbergasted" by Ms. Hall's response. He testified the words came from her without any prompting from him and that he was surprised they were never in the Affidavit. The conclusion he reached was that regardless as to whether David Milgaard was serious or joking, his assessment was that the accusation of a lie could not be supported by her own words. He said that her words described in a similar way, the actions that Melynk and Lapchuk testified to at trial. (Transcript 32734, lines 2-9)

133. When questioned by the Commissioner, Mr. Williams said that it caused him question the veracity of Ms. Hall's Affidavit. He concluded that it did not support the contention that two witnesses who had testified at trial about an important factual element had lied. (Transcript 32737, line 1-12)

134. Mr. Williams testified that there was no significant change in Ms. Hall's demeanour, that she expressed no concern about Mr. Williams' manner of questioning her or his treatment of her, there was an exchange of pleasantries and she left. (Transcript 32745, lines 11-18 32746, lines 1-25, 32747, lines 1-10)

135. Mr. Williams testified that they did not share the results of the interview with Mr. Asper and when asked why he did not, he said it was because the information was for the Minister. He said that the interview could have been given to Mr. Wolch and Mr. Asper at the October 1, 1990 meeting. (Transcript 32757, lines 9-23 – 32757, lines 9-23, 32758, lines 1-7)

136. On the issue of disclosure of the results of his investigation, Mr. Williams gave his explanation that it was his obligation to provide information to the Minister. He did however give Applicant's counsel an opportunity before the Minister made a decision to make additional comments and submissions. He took the view further that since Ms. Hall was the Applicant's witness and that they could talk to her about what she had told Mr. Williams. (Transcript 32758, lines 4-7, 32759, lines 15-25, 32760, line 1-3)

137. As a result of Mr. William's examination of Ms. Hall, she reported to Mr. Asper that she felt that Mr. Williams had been aggressive, cynical and belittling of her. Mr. Asper testified that he did not discuss any of the details of what she had said at the examination. (Transcript 26527 – 28, see also Transcript 25454)

138. Mr. Asper after speaking with Ms. Hall wrote a letter to Mr. Williams on June 12,1990 raising concerns about Mr. Williams' treatment of witnesses, including Deborah Hall, while conducting interviews (Doc. ID. 010035)

139. Mr. Williams testified that Mr. Wolch and Mr. Asper without reading the transcript or hearing the tapes of the interviews, were quite prepared to accept the word of the witness, absent any details that he had acted improperly. He testified that the effect of that allegation was to dissuade some other potential witnesses from testifying. (Transcript 34842, lines 1-17). This Inquiry has had the benefit of hearing the tape of the interview of Deborah Hall and reading the transcript. It is readily apparent from listening to that tape that the actions as

alleged by her of Mr. Williams are not supported by that review. (Tape Doc. ID. 337469, Transcript Doc. ID. 001285)

140. It is of significance to note that despite being aware of the contents of Ms. Hall's interview which contradicts her Affidavit (provided at the meeting October 1,1990). Mr. Asper, continued to publicly state that Melynk and Lapchuk who testified at trial were liars and that there was no re-enactment. (Doc. ID. 335020 at 29-30) (The Shirley Show, September 17/91)

141. In a telephone conversation between David Asper and Mrs. Milgaard, which took place in early June, 1990, they discussed a meeting that Mr. Wolch and Mr. Williams had at which Mr. Williams' conduct toward witnesses and their reactions was discussed. Mr. Asper says that he was going to go to Saskatchewan and get statements describing the treatment that Ms. Hall got at the hands of the Justice investigator. Mr. Asper testified that he never followed up on obtaining a statement. (Doc ID. 334936 at 963-4) Mr. Asper testified that he does not recall ever asking Deborah Hall and Linda Fisher to put in writing their concern about their treatment by Mr. Williams. (Transcript 26938)

142. Counsel for the Applicant failed to provide Mr. Williams with Chris O'Brien's interview of Ms. Hall of late January, 1991.

B. Ute Frank

143. Mrs. Milgaard testified that in addition to the Melynk/Lapchuk statements she got the Ute Frank statement from Gary Young's file which he had obtained from Justice Tallis. (Transcript 29881, lines 21-25). She testified that she gave every scrap of paper she had over to the Wolch firm in 1986 which would have included her statement.

144. In a letter, dated August 29,1989, David Asper wrote to the Minister in which he discussed the Ute Frank's statement. Mr. Asper purported to set out its significance in support of the evidence of Ms. Hall. He requested a copy of the Ms. Frank's statement and stated he was unaware of its existence. (Doc. ID. 010056) The evidence at this Inquiry does not support Mr. Asper's position that he was unaware of its existence given that Mrs. Milgaard has told this Inquiry that she had given it to him in 1986.

145. David Asper wrote Peter Carlyle-Gordge on October 2, 1989 and advised that he had recently discovered that Justice was in possession of a statement given by Ute Frank. (Doc. ID. 156668)

146. On October 2, 1989, Mr. Williams forwarded a copy of her statement to Mr. Asper and stated that had he had the benefit of reading before writing the Minister, he would have avoided improperly characterising its contents. (Doc. ID. 157019)

147. If counsel for the Applicant had interviewed Justice Tallis, he would have discovered (as Mr. Williams did in his November 1989 interview) that her testimony would not have advanced his client's case. He said that with the benefit of her statement and his interview of her, Justice Tallis felt it better if she were not called. Essentially he determined that it would bolster the evidence of Melynk and Lapchuk. (Transcript 32642, lines 4-25 – 32643, lines 1-9, see also Transcript 32653, lines 3-23)

148. On being questioned by Commission Counsel and asked if in his view Ms. Frank would have been a more damaging witness against David Milgaard than Melynk or Lapchuk, Justice Tallis replied that was certainly his conclusion. (Transcript 24508, lines 18-21)

149. In an article by Dan Lett published on October 22, 1989, the significance of Ute Frank statement (with attribution to Mr. Asper) is set out. The article leaves the clear impression that the federal Justice Department had it for 20 years. This is in direct contradiction to the fact that it was obtained by Mrs. Milgaard in the early 1980s and given to David Asper in 1986. The thrust of the story is that it was withheld from trial counsel, it supported the affidavit of Deborah Hall and that it refuted Melnyk and Lapchuk's version of events at trial. No retraction of the erroneous facts recited in the article was ever published. (Doc. ID. 220222)

150. Further when questioned as to whether he wanted to find Ms. Hall after talking to Ms. Frank, Justice Tallis concluded that she would not have been of assistance to David Milgaard. (Transcript 24512, lines 15-21)

C. Linda Fisher

151. Eugene Williams interviewed Linda Fisher on March 24,1990 after she had been interviewed by Mrs. Milgaard on March 9th and 10th, 1990 and Sgt. Pearson on March 14, 1990. He examined Mrs. Fisher under oath.

152. A tape recording of that interview and a transcript were prepared. (Doc. ID's 326510 and 016037)

153. Mrs. Fisher testified that Mr. Williams was not interested in discrediting her statement and that he wanted to know all the possibilities. (Transcript 15430, lines 1-16)

154. She also advised that she did not feel intimidated by either the fact she was being interviewed or the manner in which the questions were asked by Mr. Williams. (Transcript 15681, lines 5-15)

155. Sgt. Pearson testified that he had an opportunity to observe their interaction at the interview. He described the atmosphere to be fairly jovial. He never got the sense that she was intimidated or frightened by Mr. Williams. He observed that Mr. Williams was always very professional and that he would dispute that Mr. Williams ever intimidated Mrs. Fisher. He denied any agenda on Mr. William's part and that he appeared to be probing to determine what it is that she really had. (Transcript 19119, lines 20-23, 19120, lines 23-25, 19121, lines 1-8, 24-25, 19122, lines 1-15, 22-25, 19123, lines 22-25, 19124, lines 1-7)

156. This Inquiry has had the benefit of hearing the taped interview of Linda Fisher and reading the transcript. It is readily apparent from listening to that tape that the actions as alleged by her of Mr. Williams are not supported by that review.

13. Allegation of a Conflict of Interest Williams/Caldwell

1) The issue is first raised by David Asper in his letter to the Minister, August 14, 1990. (Doc. ID 157100).

2) The Dan Lett article August 29, 1990 raised it publicly. (Doc. ID 004745).

3) Eugene Williams responded to John Maddigan (Minister's Office) with respect to the allegation on August 31, 1990. (Doc. ID 151588).

A. Eugene Williams

157. Mr. Williams testified that his contact with Mr. Caldwell was to assist him:
   1. in getting access to police files;
   2. in getting access to police investigators;
   3. in his understanding the theory of the Crown's case.

158. Mr. Williams emphasised that Mr. Caldwell did not take part in any of his deliberations and Mr. Williams did not share with him any of his perceptions

about the case. Further he testified that he never solicited any views about his thoughts on the Applicant's grounds.

159. With respect to the Crown's theory at trial he wanted to know Mr. Caldwell's theory and what was said to the jury. It assisted him in determining whether the serological evidence linked David Milgaard to the crime and if so then Dr. Ferris' report would be significant. In the end he determined that the evidence neither inculpated nor exculpated David Milgaard. It was neutral. In summary Eugene Williams simply asked Mr. Caldwell to open the door to provide him with the opportunity to get information. He did not ask Mr. Caldwell to make an assessment for him.

(Transcript 32456, lines 1 -25; 453, lines 1 – 25;
454, lines 1 – 25; 458, lines 1 – 25)
(See also: Transcript 38936, lines 17 – 25; 937 lines 1 – 25,
938, lines 3 – 6; 942, lines 12 – 19)

160. The key documents that outline Mr. Caldwell's role according to Mr. Williams are: Doc ID's: 016 105; 016106; 112398 and 332053.

B. TDR Caldwell

161. Mr. Caldwell testified that:

1. He assisted Eugene Williams/Rick Pearson in locating various civilians and police.
2. He was not involved in giving any advice or thoughts to assist in Mr. Williams' deliberations.
3. He did not give advice to the Minister in connection with the s.617/s.690 application.
4. He was not involved in any of the deliberations by Federal Justice on the s.617/s.690 application.

(Transcript pages: 17238, lines 17 – 25; 17246, lines 2- 25;
243, lines 18 – 25, 244, lines 1 -5)

162. It is clear from the evidence of Mr. Williams and Mr. Caldwell that it fails to disclose the existence of the conflict of interest as alleged.

14. Ronald Wilson Recantation

163. After Ronald Wilson is interviewed by Paul Henderson and provides a written statement recanting his trial testimony, a copy is forwarded to Mr. Williams on June 6, 1990. (Doc. ID. 157077)

164. The Ronald Wilson statement of some 6 ½ pages is the result of an eight hour interview when Mr. Henderson interviewed him on June 4, 1990. The tape of that complete interview has never been made available to this Inquiry. (Doc. ID. 000248)

165. On June 7, 1990 Mr. Williams wrote the RCMP for assistance in locating Mr. Wilson and on June 18, 1990 he went to Nakusp, BC and Mr. Wilson advised his lawyer that he did not wish to be interviewed.

166. Counsel for Mr. Wilson, Ken Watson, wrote a letter to Mr. Williams on June 19, 1990 and advised that he will be making no statements to him. He said that any further evidence will be given before a court. He raised the issue of other witnesses who were dissatisfied with their treatment when interviewed by him. He said this information came to him from Mr. Asper. (Doc. ID. 003558)

167. In a conversation between David Asper and Joyce Milgaard, which took place between June 6 to 8, 1990, they have a discussion about Mr. Williams' desire to interview Mr. Wilson. They discuss the fact that they do not want to disclose to Mr. Williams where he is. Mrs. Milgaard says that they have to get to Mr. Wilson before Justice does. (Doc. ID. 334936 at 963-964)

168. On July 20th, 1990 Mr. Williams interviewed Ronald Wilson under oath with his counsel present. Further discussions took place with regard to a polygraph examination of Mr. Wilson being conducted. Counsel for Mr. Wilson agreed but imposed conditions on the test. On September 6, 1990 Justice decided not to pursue the polygraph because of conditions imposed by Mr. Wilson's counsel.

169. Mr. Williams testified that his efforts to discuss Mr. Wilson's statement with him was frustrated by that actions of Mr. Asper which were reflected in Mr. Watson's letter to him. In his words, it had the effect of dissuading other potential witnesses from cooperating. (Transcript 3481, lines 23-25, 34282, lines 2-14)

170. He further testified that as a result of Mr. Wilson speaking to Mr. Henderson and Mr. Lett but not being prepared to discuss it with him, that he had doubts as to the credibility of Mr. Wilson's statement. While being encouraged on one hand to speed up and complete the application, Applicant's counsel took certain steps to frustrate his ability to test his recantation. (Transcript 34807, lines 5-25) (See also Transcript 34809, lines 13-22)

171. In preparation for the interview of Mr. Wilson, as part of the process he had to explore the circumstances under which he provided his recantation. (Transcript 346648, lines 10-14)

172. The interview of Mr. Wilson was required to determine the substance of what it was that Mr. Wilson was recanting which required Mr. Williams to:

    1. Make a time line of Mr. Wilson's dealing with the police. (Transcript 34649, lines 10-20)
    2. Check the evidence at trial and check against that record. (Transcript 34650, lines 1-9)

3. Check the new version of facts against the record and other known facts. (Transcript 34650, lines 11-15)

173. The purpose of that exercise was to gather all this information to provide it to the Minister who could then assess the significance or weight that ought to be given to the recantation. (Transcript 34650, lines 20-25)

174. In summary, Mr. Williams had to review his previous statements, the statements of some of the police investigators and his testimony at the trial and preliminary inquiry. (Transcript 34651, lines 16-20)

175. Mr. Williams formed the opinion of after his interview of Ronald Wilson that his recantation statement was not reliable. As a consequence, his view was that it did not dislodge his trial testimony. (Transcript 39401, lines 8-11)

176. He went on to say that in his assessment of Mr. Wilson's various statements, he simply pointed out the areas of divergence between what he was now saying, what he said at trial and what other witnesses confirmed. (Transcript 39401, lines 21-25)

177. It is important to note that although there were two interviews of Ronald Wilson conducted by Mrs. Milgaard in January and April, 1981, that counsel for the Applicant did not provide them to Mr. Williams to assist him in his investigation.

178. Dr. Neil Boyd testified that after referring to the role he should have had in his investigation, stated that looking at Mr. Williams's interview of Mr. Wilson in retrospect, Mr. Williams' task was to be very tough with him to ensure under cross-examination that his recantation stood up. (Transcript 27924, lines 3-12)

15. Documents of earlier Interviews of Witnesses that were not provided to Mr. Williams

179. The Commission Document ID: 337731 outlining the witnesses interviewed by Mrs. Milgaard and others, sets out what interview transcripts were only turned over to the authorities just before the Supreme Court Reference in 1992.

180. This document was produced by Commission counsel and Mr. Williams was questioned as to whether he was aware of the existence of the interview transcripts when he conducted his investigation under s.617/s.690. He was also questioned as to what use he might have put these documents if they had been provided by the Applicant.

181. He was asked generally as to whether he was aware that Mrs. Milgaard had transcripts of telephone/personal interviews with many key witnesses. He replied he was not. (Transcript 39246, lines 8 – 14)

182. He was then referred to the Nicol John interview in 1981 and asked if it would have been helpful and he said it would have been. (Transcript 39246, lines 15 – 24)

183. He was questioned as to his knowledge as to the existence of the two interviews of Ron Wilson conducted in 1981 and he said he was not and that they would have been of assistance in his investigation of the recantation. (Transcript 39247, lines 1 – 25; 248, lines 1 – 6)

184. He testified that their value to his investigation would be that they were closer to the recording of the event and that it made the recollection more reliable.

185. Commission counsel also questioned Mr. Williams on Albert and Dennis Cadrain interviews that he was unaware of but would have been useful to him. (Transcript 39248, lines 7 – 25)

186. A review of the document also discloses that the two interviews of George Lapchuk by Joyce Milgaard in 1981 were not provided to Mr. Williams.

187. When questioned by Commission counsel, Mr. Asper essentially could not recall why the transcripts of interviews were not provided to Mr. Williams.

188. With respect to the Ron Wilson interviews, he did not recall why they were not given to him. (Transcript 25581, lines 19 – 25; 582, lines 1 – 9)

189. Mr. Asper gave similar responses with respect to the following interviews:

- Peter Carlyle-Gordge's interviews of Albert, Dennis and Estelle Cadrain. (Transcript 25582, lines 16 – 25; 583 ,lines 1 – 6)
- The Joyce Milgaard/Tony Merchant interview of Nichol John in 1981. (Transcript 25583, lines 13 – 22)

190. He had no recollection as to why David Milgaard's Affidavit of November 26, 1986 was only forwarded in August, 1989 to the Minister and did not form part of the original application. (Transcript 25583, lines 23 – 25; 584, lines 1 – 13)

16. Second Application

191. Mr. Williams characterized his role on the second application as being asked to verify certain facts with respect to the facts alleged. Following that verification a decision was made by Senior Management and the Minister to have the Supreme Court examine the grounds advanced. The Minister would then be guided by the advice given by the court in terms of the disposition of the second application. (Transcript 39328, lines 16-25 – 39329, lines 9-21)

192. He described the work he did on the second application as being "miniscule" by comparison to the work he did on the first application. (Transcript 39329, lines 21-24)

193. During this Inquiry, Mr. Williams was cross examined by counsel for Mr. Milgaard at length on the similar fact issue utilizing the decisions in *Regina vs. Arp* [1998] 3 S.C.R. 339 and the decision of the Saskatchewan Court of Appeal regarding *Regina v. Larry Fisher* (2003 SKCA 90). It is very important to note that these cases were heard some 6 to 11 years, respectively, after Mr. Williams dealt with Mr. Milgaard's matter.

194. It is also important to distinguish between the information the Saskatchewan Court of Appeal had when considering Mr. Fisher's matter and the evidence Mr. Williams had about Mr. Fisher. When counsel put the details of the evidence relied upon by the Crown in the prosecution of Larry Fisher to Mr. Williams, there was some evidence he was aware of on the first application, some evidence he became aware of on the second application and some information he did not have at all. (Transcript 39315 to 39327)

A. [redacted]

195. On the second application filed on August 14, 1991 [redacted] was listed at the top as the first victim of Larry Fisher. The inclusion of Ms. [redacted] in the Applicant's similar fact analysis is another example, similar to Hall and Ferris, of a ground for which there proved to be no factual foundation.

196. [redacted] had been earlier identified as a potential rape victim of Larry Fisher by Mr. Asper and she was contacted by letter from him on June 3, 1991. (Doc. ID: 056530)

197. Considerable investigation was conducted by Sgt. Pearson and he had numerous contacts with [redacted] between October 24 and December 24, 1991. (Doc ID: 056743, 808 at paragraph 304, 811 at paragraphs 322 – 323, 813 at paragraphs 328 – 330, 817 at paragraph 351, 834 at paragraph 426)

198. Despite the reliance of the Applicant on the evidence of [redacted] in the second application there were some concerns expressed about her inclusion.

199. Mr. Henderson testified that it was never established that Larry Fisher was responsible for the attack on her. (Transcript 22985 lines 19 – 25)

200. Mr. Henderson who interviewed [redacted] did not think that she was a reliable witness for anybody and that she was not necessary to the Larry Fisher package. (Transcript 28926, lines 15 – 25, 927, lines 1 – 9)

201. Mrs. Milgaard testified on cross-examination that Mr. Wolch and Mr. Asper decided that since they had it, that it better go in. She testified further that she didn't find it relevant. (Transcript 32249, lines 18 – 25; 250, lines 1 -4)

17. Grounds relied upon by the Applicant and the Findings of the Investigator

202. In the first application, the Applicant relied upon Dr. Ferris and Deborah Hall. The results of the investigation by Mr. Williams resulted in the finding that neither ground supported the application.

203. Mr. Williams testified as to how his experience with the Ferris ground influenced his thinking on other information provided. He said it caused them to look at the Applicant's submission with a great deal of care and careful scrutiny. He went on to further explain that the earlier bases were incomplete,

misleading and had to be looked at very closely. (Transcript 34515, lines 1 – 12)

204. When the identity of Larry Fisher was given to Mr. Williams the results of the Pearson/Williams investigation established no nexus between Larry Fisher and the murder of Gail Miller.

205. When the so called recantation of Ronald Wilson was brought forward, it was found by Mr. Williams not to be credible.

206. When the second application was filed it was based on similar fact/act evidence. It was supported by a media blitz and it was determined based on the similar fact/act evidence, that a public hearing was necessary.

207. Mr. Williams testified that the Reference was held because of the public's concern about the correctness of the process and the concerns about the administration of justice. (Transcript 39484, lines 1- 8)

208. Mr. Asper conceded when questioned about the two grounds relied upon, that the value of them in convincing the authorities to reopen the investigation were not as good as he thought they were. (Transcript 26572, lines 1 -5)

209. Mrs. Milgaard testified under cross-examination that in retrospect their reliance on the Deborah Hall Affidavit and the Ferris report literally backfired on them and that knowing what they know now, would never have submitted it in the first place. (Transcript 33284, lines 19 – 24)

210. She testified further that had they read the transcript carefully they wouldn't have submitted the Hall Affidavit and been embarrassed at the end by having submitted it. (Transcript 33287, lines 1 – 6)

211. When cross-examined Mr. Asper said he did not share Mrs. Milgaard's view but conceded that Hall's evidence, in hindsight was very weak and corroborative of the evidence at trial, but said they had to get the door open and that was it. (Transcript 36160, lines 16 – 25; 161, lines 1 – 3)

212. Under cross-examination Mr. Williams summarized what occurred with respect to both applications. The first application, which contained four or possibly five grounds which when investigated, had no factual foundation. When the second application arrived that had to find a process that in the final result had an assessment mechanism that was public, transparent and would permit the Minister to get the best advice possible. (Transcript 39288, Lines 1 – 22)

213. Mr. Williams testified that the first application was by instalments coupled with the media program. He said that in a very short period of time there was Larry Fisher, Albert Cadrain, Dr. Markestyn and Ron Wilson. There were allegations of sloppy investigation, that Justice had been sitting on their hands, the dog urine issue and that the police had botched the investigation and coerced witnesses. He stated that all the allegations were untrue and patently false but he could not go public with their conclusions because the investigation had not been concluded. He said that they could have simply given up and sent it to the courts giving a remedy. He said they chose not to do so. (Transcript 34736, lines 15 – 25; 737, lines 1 – 10)

IV. THE DNA TESTING

1. The Evidence of Ronald Fainstein, Q.C.

214. The Federal Department of Justice arranged for DNA testing of Gail Miller's clothing on two occasions. Once in 1992 and then again in 1997. The Federal Department of Justice assumed this role as part of the prerogative of Mercy as

outlined by Mr. Ronald Fainstein, Q.C. at transcript page 39784 at lines 14-25 through to transcript page 39785 line 1

> " My view was that the result of the reference was that Milgaard was released from prison but he was not exonerated, there was a real cloud over the situation, and if it were possible for science to give us the answer as to who, in fact, was Gail Miller's assailant, then it was certainly something that should be pursued in the public interest, and consistent with my understanding of the ambit of the royal prerogative of mercy, and without even necessarily the need for a further s.617/s.690 application or something to that effect, it was just something that had to be done"

215. Mr. Fainstein comments further on what he believed the role of the Federal Government was with respect to exhausting the scientific avenues for the Miller exhibits, at transcript 39841, line24 through to transcript 39842 line 7.

> "...I mean, our role during the reference proceedings was, in essence, you know, to liaise with and to deal with all counsel and I think we were respected as people who were at, more or less at arm's length in some respects and that everyone seemed to be happy with our maintaining this interest and seeing this through, but certainly if Saskatchewan had other ideas, we would have dealt with that."

216. In 1992, the exhibits which were thought to have contained the remaining stains were brought by Mr. Fainstein to Marcia Eisenburg at Roche Labs in North Carolina. Roche Labs were engaged by the Federal Department of Justice on the advice of the Dr. Ron Fourney of the RCMP (transcript page 39834 lines 1-4). The type of DNA testing employed by Roche Labs was DQ Alpha which at the time, was thought to be the appropriate tests for type of exhibit material which remained from the Miller murder. As reported by Eisenburg (Doc ID: 174222) DNA testing was unsuccessful due to the presence of PCR inhibitors.

217. However, during the testing done by Roche Labs, the genetic profiles of Mr. Fisher and Mr. Milgaard were established. (see Transcript 39802 at line 24 through to page 39803 line 14)

> "....the DQ Alpha profiles of Fisher and Milgaard were established and they were known and the frequency with which those profiles occur in the general population were also known and as Dr. Fourney indicated in his letter of April, '96, April 18th, 1996, in Milgaard's case his profile was shared with one in every 15 people in the general population, his DQ Alpha profile; in Fisher's case, his profile was shared with one in every 14 people in the general population, which would mean in a city of about 200,000 people, which I believe is roughly the population of Saskatoon, there would be more then 14, 000 people any of whom could have contributed that profile, so the significance of a match wouldn't be nearly as great."

218. The unsuccessful results of the DNA testing done in North Carolina were reported to the Supreme Court of Canada on April 6, 2002 by Mr. Fainstein (Doc ID 122967 at page 122971 line 20 through to page 122972 line 17).

219. As the transcript from the Supreme Court of Canada indicates, Mr. Fainstein was aware that the science of DNA was evolving and new techniques which could work with samples similar to those of the Miller murder were on the horizon. It was in that vein that Mr. Fainstein contacted the RCMP on two occasions shortly after the testing was completed in North Carolina to essentially request that testing on the Miller exhibits be attempted once the "new technology" had fully evolved for Court purposes.

220. On April 7, 1992 Mr. Fainstien wrote to Barry Gaudette, Patricia Alain and Ron Fourney (Doc ID 230984) at the R.C.M.P. asking to be advised once the "new technology" has essentially been validated for Court purposes.

221. On April 15,1992 Mr. Fainstein wrote to Dr. Fourney (Doc ID 334763) suggesting that further DNA testing be done once a "reasonably promising technique becomes available."

222. On January 26, 1995, Mr. Greg Rodin contacted Mr. Fainstein by telephone, after DNA testing exonerated Guy Paul Morin, about the possibility of trying again to have having DNA testing done on the Miller exhibits. (transcript 39853 lines 1-5) He later contacted Mr. Fainstein by letter on February 21st, 1995. (Doc ID 164907) at which time Mr. Rodin formally requested that some agreement be reached as to the testing protocol to be utilized for the DNA testing of the Miller exhibits.

223. After consulting with Dr. Fourney of the R.C.M.P. (Transcript 39858 lines 3-8), Mr. Fainstein sent a letter to Mr. Milgaard's counsel, Mr. Fisher's counsel and to the Government of Saskatchewan on March 30th,1995 with what was essentially an offer to do DNA testing with a protocol attached. (Doc ID 032749)

224. Almost 9 months after Mr. Fainstein's offer for DNA testing was extended to Mr. Milgaard's counsel, Dr. Edward Blake responded on December 4, 1995 to Mr. Fainstein's offer with a proposal of his own. (Doc ID: 268709)

225. Dr. Blake was the scientist chosen on behalf of the Milgaard family to review the testing protocol. Dr. Fourney had proposed STR (Short Tandem Repeats) testing and Dr. Blake wanted to see DQ Aplha-Polymarker testing.

226. Mr. Fainstein sent Dr. Blake's December 4th letter to Dr. Fourney for consideration on December 11, 1995 (as we can see from Doc ID 230508). Dr. Fourney then responded to Mr. Fainstein with a 56 page document on April 18, 1996 (Doc ID: 230508). This was Dr. Fourney's extensive response to Dr. Blake's proposal. (Transcript 39905 and 39906 lines 23 through to 2)

227. On April 22, 1996 Mr. Fainstein sent a letter to all parties based on Dr. Fourney's April 18, 1996 material and proposed testing on the basis of the conditions set out in Mr. Fainstein's letter (Doc ID 032678)

228. The proposal of April 22, 1996 continued to be a matter of debate between Mr. Fainstein and Mr. Lockyer. As Mr. Fainstein pointed out in his evidence before this Inquiry (Transcript page 39934 , 39935 lines 24,25 and 1) there was a level of frustration building on the side of Federal Department of Justice and the R.C.M.P. forensic lab. As the press reports of the day indicate, Mr. Fainstein felt "he bent over backwards" [to accommodate Mr. Lockyer] (transcript 39937 at lines 19 and 20). On Dr. Fourney's suggestion, Mr. Lockyer was invited to come to Dr. Fourney's lab to try to break the impasse. (transcript 39934 at lines 11 to transcript page 1)

229. This meeting was proposed to Mr. Lockyer and it eventually took place on October 4, 1996. (Doc ID 231024)

230. An Agreement for the protocol for testing was finally reached in April 1997 and the testing was done in July of 1997.

231. At the end of the negotiations, the parties ultimately agreed upon most of the original conditions put forward by Mr. Fainstein in March of 1995 with a couple of revisions to satisfy Mr. Lockyer and Dr. Blake. Some of these revisions included the condition that DQ Alpha testing be done if less than a nanogram of material was found, having Dr. Blake present as an observer and testing for spermatozoa if the STR testing was not used. The main purpose for identification of spermatozoa was to link the DNA to a male donor. This was not necessary for an STR process as it could chemically identify (through the use of Amelogenin) whether the DNA tested was male or female.

232. It is important to note that Mr. Fainstein, when considering the appropriate DNA testing for the Miller exhibits 1995, was concerned about the future use of the testing. He says at page 39868 lines 6-11

> "I was thinking ahead to the eventual ly (sic) use of the materials, and I didn't know what the result would be, but I considered what would happen in either event and, in my cautious way, was trying to eliminate any possible bones of contention."

At line 18,

> "Basically I wanted the most solid results to be achieved."

233. At the time the two methods of testing were being considered, there were four important underlying facts which Dr. Fourney considered when recommending the appropriate testing for the Gail Miller exhibits (See Doc ID 230508 at page 230521). These considerations were,

- Limited Quantity of Sample
- Age and degradation of the sample
- PCR inhibition
- The potential for a mixed DNA profile

234. Part of Dr. Fourney's opinion, and the opinion of the other scientists he engaged on the Miller matter, was based on the scientific knowledge gained from the attempted DNA testing done by Roche Labs in 1992. Scientists knew what the genetic profiles would be with *DQ Alpha* testing of Mr. Fisher and Mr. Milgaard and the also knew about the presence of PCR inhibitors in the stain.

235. Given the view that there may only be one more opportunity to do DNA testing on Gail Miller's clothing because only a small sample remained, Mr. Fainstein's determination to utilize the best type of DNA testing available in 1995 was extremely important.

V. Systemic Issues

236. The Minister asserts that the terms of reference for this Inquiry do not permit a review of the what is now s.696.1 of the Criminal Code of Canada. The Terms of reference for the Milgaard Inquiry are,

> "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 justice in the Province of Saskatchewan"

237. While the Supreme Court of Canada's decision in *McKeigan and Hickman* [1989] 2 S.C.R. 796 does appear to permit recommendations about the s.617/s.690 process, the terms of reference for that Provincial Inquiry, being the Marshall inquiry, were broader then the Terms of Reference for this Inquiry.

238. The Terms of Reference for the Marshall Inquiry as cited in *MacKeigan v. Hickman, supra*, at page 818, were,

> "On October 28, 1986, the Governor in Council instituted the present Royal Commission with a mandate to "inquire into, report their findings, and make recommendations to the Governor in Council respecting the investigation of the death of Sandford William Seale on the 28-29th day of May,A.D., 1971; the charging and prosecution of Donald Marshall, Jr. with that death; the subsequent conviction and sentencing of Donald Marshall, Jr. for the non-capital murder of Sandford William Seale for which he was subsequently found to be not guilty; and such other related matters which Commissioners consider relevant to the Inquiry."

239. The Terms of Reference at the Milgaard Inquiry provide no express authority to inquire into Mr. Milgaard's s.617/s.690 process, the Supreme Court reference or the release of David Milgaard.

240. Therefore, in order for this Inquiry to reach into the areas of the s.696.1 process, the Terms of Reference would have to be interpreted to have included the s.696.1process to be somewhere within the Terms of Reference.

241. In the Marshall Inquiry terms of reference, there was a general "catch-all" provision at the end which said,

> "...and such other related matters which the Commissioners consider relevant to the Inquiry".

242. The Milgaard Inquiry Terms of Reference do not have this same catch-all provision, rather it quite properly focuses on the Administration of Justice in Saskatchewan.

243. To assist in interpreting the meaning in the Milgaard Terms of Reference, the following quote from Pigeon J. in *Keable*, [1979] 1. S.C.R. 218 at pp. 241-242,

> "Great stress was laid by the appellants as well as by intervenants on Dickson's J. statement in *Di Iorio*, at p. 208, that 'A provincial commission of inquiry, inquiring into *any* subject, might submit a report in which it appeared that changes in federal laws would be desirable' That was said *obiter* in a case concerning an inquiry into organized crime. As previously noted, the basis of the decision was that such an inquiry into criminal activities is within the proper scope of 'The Administration of Justice in the Province'. The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The commission might therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable ['soumettre un rapport d'où il ressort que certaines modifications de la loi fédérale sont souhaitables']. This does not meant that the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission."

244. The question then becomes one of whether the s.696.1 process is a matter within provincial competence. Since the power to grant remedies under these provisions of *The Criminal Code* is only held by the Federal Minister of Justice, it is difficult to envisage Provincial competence in this area.

245. It is for this reason and due to the fact that the Mercy provisions have changed substantially since Mr. Milgaard's applications were considered, that the Federal Minister of Justice did not request that any witnesses be called to speak to the current conviction review process. In addition, the only systemic witness to be heard by the Commission, was not examined by Counsel for the Federal Minister.

246. If in fact the Terms of Reference do permit this Commission of Inquiry to properly make recommendations upon the mercy provisions of *The Criminal Code*, the evidence about the current process was not comprehensive enough to effectively make informed recommendations. Any systemic evidence that may have been offered was essentially tendered in bits and pieces. While there was some evidence given by Mr. Williams on the current legislation, it was more explanatory in nature especially given that he no longer works in the area of conviction review.

247. There was no evidence before this Inquiry about the current, day to day conviction review process in Canada.

248. Mr. Kyle's evidence was interesting but he was unable to provide any real comparison between the system in the United Kingdom and Canada. Mr. Kyle knew very little about the conviction review process in Canada or Mr. Milgaard's case as pointed out by Commission Counsel (Transcript page 40014 at line 10 through to page 40015 line 9). As a starting point, the administration of criminal justice in Canada is very different then it is in the

United Kingdom and this coupled with the fact that Mr. Kyle had only very general knowledge of the process in Canada or Mr. Milgaard's experience, makes his evidence of limited value for the purpose of recommendations.

VI. Conclusion

249. Part of the mandate of this Inquiry is to establish whether the investigation into Gail Miller's death should have been re-opened earlier then it was.

250. As the Minister was involved in collecting facts during the investigation of Mr. Milgaard's s.617/s.690 applications, their lawyers and much of their fact finding efforts have become part of the Inquiry record.

251. As this Inquiry has shown, prior to the DNA tests in 1997 which implicated Larry Fisher and excluded David Edgar Milgaard, it was difficult for all those persons legally assessing the matter, including Five Learned Justices of the Supreme Court of Canada, to have a conclusive view of Mr. Milgaard's culpability for the murder of Gail Miller. While there is much debate about what the advice given by the Supreme Court meant, it remains clear from reviewing the advice rendered by the Court, that it was not an easy matter for the Court to consider.

252. As this inquiry has shown, the efforts of the Minister's staff were hindered in many ways by the actions of those who advocated on behalf of Mr. Milgaard or Mr. Milgaard himself. Such examples include the media efforts, the fact that Mr. Milgaard's first s.617/s.690 application essentially came in three installments and the "family presentation".

253. It is also clear from evidence revealed at this Inquiry that Mr. Milgaard's representatives did not provide all of the information which they had gathered over the years. (See doc ID 337731) Mr. Williams was clear in his evidence

that the provision of this material would have assisted him to investigate the case. This is particularly true of the observation made by Mr. Carlye-Gordge about Larry Fisher.

254. Despite serious, unfounded allegations being leveled directly at the Minister, Federal Investigators or other Federal Justice Lawyers by learned counsel in the press, the Minister's staff continued to work diligently on Mr. Milgaard's matter.

255. After the matter was considered by the Supreme Court of Canada, The Minister's staff assumed the role of having DNA testing conducted on the Gail Miller exhibits as part of the s.617/s.690 process. Mr. Fainstein clearly explained why the Minister assumed responsibility for having the testing done after Mr. Milgaard's case was before the Supreme Court of Canada and the careful steps he took to get the best testing available for the time.

256. It's unfortunate that it took well over 2 years to have the DNA testing completed due to the negotiations between Mr. Lockyer and Mr. Fainstein over the protocol for testing. However, as the evidence before this Inquiry suggests, the delay is not attributable to Mr. Fainstien.

257. In addition to wanting to clear up the matter of Mr. Milgaard's conviction, Mr. Fainstein was also concerned about the use of the DNA evidence for a future prosecution should Mr. Fisher be found to be the donor. This was of critical importance as the evidence shows that all involved the final round of negotiations for the testing of the Gail Miller exhibits have said that they believed that there was only one last opportunity to do DNA testing.

258. The evidence at this Inquiry shows that the then Minister and her staff, on whom she relied for advice, conscientiously and diligently worked through all of the issues presented either by Mr. Milgaard himself or through learned counsel.

There were clearly difficulties with Mr. Milgaard's case but no one in the Minister's office ever took the responsibility of uncovering the truth of the matter lightly as the large volume of memos and letters generated by the Minister's staff suggest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Saskatoon, Saskatchewan, this 14th day of November, 2006.

THE ATTORNEY GENERAL OF CANADA

Per: _____
David G. Frayer, Q.C.
Counsel for the Attorney General of Canada

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Appendix "A"

DAVID MILGAARD April 23, 1992

CHRONOLOGY OF EVENTS

The following is a chronology of events concerning David Milgaard's application under Section 690 of the *Criminal Code*.

#1

December 28, 1988:	Original application under Sections 690 *Criminal Code* forwarded by counsel. It listed two bases for relief, namely, the new evidence of Deborah Hall, and the report of Dr. James Ferris that questioned the validity of the scientific evidence presented at trial.
February 16, 1989	The Minister requested Milgaard's counsel to provide the trial and appellate record, the forensic reports, and a waiver of solicitor-client privilege, noting that they were "essential to the assessment of this application ... ."
April 29, 1989:	Counsel for Milgaard sent a waiver of solicitor-client privilege in response to the February 16, 1989 Departmental request.
May 8, 1989:	The trial and appellate record were sent by counsel for Milgaard.
June 6, 1989	Departmental counsel requested access to the trial exhibits in Milgaard case.
August 8, 1989	At the request of the Department, Ms. P.M. Alain, Chief Scientist, Serology, R.C.M.P. Forensic Laboratory submitted her analysis of Dr. Ferris' report.
August 29, 1989:	Affidavit of David Milgaard forwarded by counsel for the applicant; also, counsel for Milgaard sought information from the Department.
September 8, 1989	At the request of the Department, Mr. Barry Gaudette, Chief Scientist - Molecular Genetics, R.C.M.P. Forensic Laboratory submitted his report concerning the feasibility of conducting DNA analysis on the Milgaard trial exhibits.
October 2, 1989:	Counsel for Milgaard wrote to ask for a status report on the Departmental review.

October 11, 1989: A status report was prepared and forwarded to counsel for Milgaard, and Mr. Walch was told of his client's desire to provide the Minister with a family presentation as part of the application.

October 18, 1989: Counsel for Milgaard advised that he had uncovered new evidence relating to a member of David Milgaard's jury. Counsel undertook to pursue it and advise the Department in due course.

November 6-8, 1989 Departmental counsel interviewed Deborah Hall, Justice Tallis, Nichol John and Dr. Emson.

(A preliminary Departmental report was prepared in November/December, 1989. It was not pursued due to the events described below.)

January 10, 1990: Counsel for Mr. Milgaard wrote to the Department. He advised that he would like to develop the evidence further, and to refine his submission, but lacked financial resources to do so. He enquired whether the Department could provide those resources to enable him to physically portray the Crown's theory of the case.

January 23, 1990: Counsel for Mr. Milgaard wrote to the Department. He provided additional information concerning the application and sought funds to continue his own investigation.

February 28, 1990: Counsel for Milgaard advised that he had discovered important new evidence - namely, Larry Fisher whom he identified as the real killer. He sought money to continue his investigation; alternatively, he asked the Government to pursue it.

(The Department pursued this aspect of the investigation. On March 1, 1990 the R.C.M.P. were asked to investigate these allegations; separately the Department also requested the Saskatoon Police to respond to written inquiries on March 1, 1990.)

March 3, 1990: Joyce Milgaard, mother of the applicant, forwarded material to the Department.

March 15, 1990: Counsel for Milgaard wrote to the Department, providing further new information. He advised that he was "pleased" that the R.C.M.P. were investigating the case and noted that he felt that "there are many leads that ought to be pursued" by the Government. He provided an assurance that he would assist the Department in its review.

March 18, 1990 Departmental Counsel interviewed Linda Fisher, the former wife of Larry Fisher to clarify the statements she had given to the Milgaard family.

Late March, 1990: The Department sought "final submissions" from counsel for the applicant.

April 2, 1990: "Final" submissions were forwarded by counsel for Milgaard and were received on April 10, 1990.

April 17, 1990: Sgt. Pearson sent his report that outlined his investigations of Larry Fisher.

(In April, 1990 the Departmental report to the Minister was once again prepared in draft, but was abandoned due to the events described below.)

May 1, 1990: Counsel for Milgaard retained the Chief Medical Examiner for the Province of Manitoba to conduct a second forensic examination of certain important evidence.

May 15, 1990: The Department provided information to the Chief Medical Examiner to assist him in his review.

May 17, 1990: The Department sought and received an assurance that it would receive a copy of Dr. Markesteyn's forensic report.

June 5, 1990: Counsel for Milgaard forwarded the report of the Chief Medical Examiner dated June 4, 1990.

June 6, 1990: Counsel for Milgaard advised that he had identified another witness that would assist him in the application, Ronald Wilson.

(The RCMP were asked to arrange for an interview of this witness, and were also asked to locate another witness that may assist)

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June 12, 1990: Counsel for Milgaard wrote to the Department, and sought additional facts relating to the application. Counsel also complained about the aggressive questioning by the Department's counsel when interviewing some witnesses.

June 18, 1990 Departmental counsel went to Nakusp, B.C. to interview Ronald Wilson. Mr. Wilson via his counsel indicated that he did not wish to be interviewed.

June/July, 1990: Several witnesses, some of whom were identified by counsel for Milgaard, were approached by the Department. Two retained counsel, and resisted being interviewed. As Section 690 of the *Criminal Code* lacks coercive powers to examine witnesses, protracted negotiations and discussions between the Department and counsel for these witnesses subsequently ensued.

July 5, 1990: Counsel for Milgaard wrote to the Department and asked for our assistance in obtaining Saskatoon Police Department files concerning the person identified as the real killer.

(July: the Department sought, unsuccessfully, to obtain all of these reports.)

July 12, 1990: One of the witnesses, the alleged killer, was interviewed by the Department at the Regional Psychiatric Facility in Saskatoon.

July 20, 1990: Departmental counsel interviewed Ronald Wilson.

August 1-5, 1990: Further witnesses were interviewed by the Department in British Columbia and Saskatchewan.

August 9, 1990: The Department continued negotiations with counsel for one of the witnesses to have that witness submit to a polygraph examination. Counsel for the witness agreed, but imposed several conditions.

August; 1990: Departmental counsel researched several issues that had to be addressed before a final report could be prepared.

August 14, 1990; Counsel for the witness Wilson confirmed the conditions he was imposing concerning the proposed polygraph examination.

September 6, 1990:	The Department decided not to pursue the polygraph examination in view of the conditions imposed by the witnesses' counsel. (They could not be met.)
Early September, 1990:	Final submissions sought by the Department from counsel for Milgaard.
September 10, 1990:	Final written submissions received from counsel for Milgaard.
September 11, 1990:	Further R.C.M.P. investigative report received concerning this application.
October 1, 1990:	Hersh Wolch and David Asper, counsel for Milgaard, had during the preceding several months expressed an interest in meeting personally with Departmental officials involved in the review of the case. Officials agreed, and the meeting took place on the 1st of October, 1990. The purpose of the meeting was to permit counsel with the opportunity to provide their perspective of the case personally and fully.
October 1-16, 1990:	The Departmental report to the Minister was prepared.
October 17, 1990 to November 5, 1990:	Senior Departmental officials reviewed the investigation and the report.
November 6, 1990 to November 14, 1990:	The Departmental report and recommendations were referred to the Deputy Minister. Discussions took place concerning the prospects of retaining the Honourable William R. McIntyre, Q.C.
November 14, 1990:	The Honourable William R. McIntyre, Q.C. was retained to provide advice to the Department.
November 14, 1990 to February 6, 1991:	The Honourable William R. McIntyre, Q.C. reviewed the case. The Department provided information and materials to Mr. McIntyre as and when requested.
February 7, 1991:	Advice received by the Department from the Honourable William R. McIntyre, Q.C.

February 7, 1991:	The application, Departmental report and recommendations were forwarded to the Minister of Justice for consideration under Section 690 of the *Criminal Code*.
February 27, 1991:	The Minister advised counsel for David Milgaard that the application had been dismissed.
No. 1 August 14, 1991:	Second application under Section 690 of the *Criminal Code* forwarded by Counsel for David Milgaard. It lists one ground for relief.
August 23, 1991:	Counsel for Milgaard provided a statement from another witness relating to Larry Fisher.
August 30, 1991:	Counsel for Milgaard provided another statement from a witness.
September 5, 1991:	Departmental agent appointed to review the second application by David Milgaard for the mercy of the Crown.
September 6, 1991:	Prime Minister Mulroney promised Joyce Milgaard that he would look into the David Milgaard case.
September 11, 1991:	The Department received additional materials from the Saskatoon Police Force.
	The Department received submissions from David Milgaard's counsel on the similarity of the "Fisher rapes" to the murder of Gail Miller.
September 25,1991:	A psychologist and hypnotist interviewed Nichol Demyen under hypnosis;
October 10, 1991:	The R.C.M.P. provided to the Department their analysis of the Fisher rapes and the Gail Miller murder.
October 24, 1991:	Counsel for Milgaard submitted the Boyd report and incorporated the report in his submissions to the Minister.
November 6, 1991:	An expert was retained to analyze Ms. Demyen's September 25, 1991 hypnotic session.

A forensic psychiatrist, Dr. Russell Fleming was retained to determine whether Ms. Demyen's inability to recall the events of January 31, 1969 was due to post traumatic stress disorder.

November 11, 1991: Counsel for Milgaard met with DJAR, BAM and EFW and were shown the videotape of Ms. Demyen's hypnosis session.

November 12, 1991: Dr. Campbell Perry submitted his report outlining his evaluation of Ms. Demyen's hypnosis session with Dr. Pulos.

November 14, 1991: Sgt. R.A. Pearson submitted his report concerning his investigation of the Larry Fisher rapes and the allegations contained in the Centurion Ministries investigation.

November 14, 1991: Counsel for Milgaard promised to send the audio tape of the interview between Professor Boyd and Ronald Wilson.

November 18, 1991: Dr. Russell Fleming submitted his report.

November 19, 1991: Dr. Campbell Perry submitted his report concerning his E.A.T. session with Ms. Demyen.

November 19, 1991: Counsel for Milgaard provided additional submissions in support of his application.

November 28, 1991: The Application of David Milgaard is referred to the Supreme Court of Canada pursuant to Section 53 of the *Supreme Court Act*.

December 17, 1991: Professor Martin Orne was retained to review the hypnosis sessions with Nichol Demyen and advise whether a second session should be undertaken.

December 19, 1991: Ute Frank was interviewed in Nanaimo, B.C.

January, 10, 1992: Professor Orne interviewed Nichol Demyen under hypnosis.

January 16, 1992: The Supreme Court of Canada began to hear testimony in the David Milgaard Application. Closing arguments were scheduled for April 6, 1992.

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March 1992:	DNA analysis was attempted, unsuccessfully, on the semen stains from the victim's underwear.
April 6, 1992:	Counsel delivered their final submissions to the Supreme Court of Canada.
April 14, 1992:	The Supreme Court delivered its opinion recommending a new trial. In the event that Mr. Milgaard were convicted when re-tried, the Court recommended a conditional pardon.

Appendix "B"

Eugene Williams' investigative activities: February 28 - September 1990

Date	February 1990
28	Williams receives call from David Asper re: Larry Fisher
	Williams contacts Caldwell re: prosecution file
	Criminal record of Larry Earl Fisher obtained by Williams.
	Sergeant Pearson's assistance requested by Williams
Date	**March 1990**
1	Williams contacts Saskatoon Police - request information re: Larry/Linda Fisher
5	Williams writes Asper would like to speak with Sydney Wilson directly
8	Williams summary of evidence to Pearson
11	Williams advised of Joyce Milgaard's visit to Larry Fisher's mother
13	Williams Speaks to Asper, Asper advises spoken to Mrs. Milgaard to refrain from interviewing witnesses connected to Larry Fisher
	Williams memo to file re. Justice Tallis written questions/proposed meeting
15	Williams. a) conversation with Wolch re: Joyce Milgaard avoid contact with potential witnesses. b) spoke to Pearson re: Linda Fisher interview / Fisher convictions. c) conversation with Caldwell.
	Asper letter to Williams: a) criminal record / conviction dates Fisher. b) copy of Joyce Milgaard's statement from Linda Fisher
16	Wolch to Williams: a) Two statements of Linda Fisher b) Statement of her Uncle
22	Notes of Caldwell attendance with Williams to look at prosecution file.
23	Pearson/Williams meet with Saskatoon City Police
24	Sergeant Pearson and Williams obtain a sworn statement from Linda Fisher
26	Williams writes Asper - further submissions to be forwarded by April 12, 1990
Date	**April 1990**
2	Pearson to Williams enclosing copies of psychological/psychiatric reports
	Asper to Williams advising no further submissions
9	Williams/Wolch telecon - Wolch alerts him to anticipated media coverage
17	Williams prepares memo re: meeting with Mr. Justice Tallis
28	Pearson updates Williams on status of Fisher Investigation

Date	May 1990
15	Williams forwards transcript of Judge's Jury charge to Dr Markestyn
21	Williams to Wolch confirms earlier conversation. Wolch agreed to provide Dr. Markestyn's report
29	Williams telecon with Dr. Markestyn requests copy of report
Date	**June 1990**
5	Asper forwards copy of Dr. Markestyn's report to Williams. Williams forwards on to Murray Brown
6	Williams contacts Penkala request for results polygraph and report re: Wilson and John
7	Williams requests Kelowna RCMP assistance to locate Ron Wilson
11	Williams interviews Dr. Ferris in Vancouver, BC
	Williams interviews Dennis Cadrain in Port Coquitlam, BC
12	Williams speaks with Markestyn and Merry in Winnipeg, MB
14	Williams speaks to Karst in Saskatoon, SK
15	Williams meets with Albert Cadrain in Surrey, BC
18	Williams to Nakusp, BC to interview Ron Wilson
19	Williams speaks to Wilson's counsel. Ron Wilson's refusal to be interviewed confirmed.
	Williams analyzes Wilson's recent statement along with evidence at Preliminary Inquiry and Trial
26	Williams contacts Roberts by phone
27	Williams writes Calgary Police requesting records and notes from 1969 polygraph
28	Williams speaks to Pick re: interview of Larry Fisher
Date	**July 1990**
4	Williams advises Pearson Larry Fisher offences took place in Saskatoon not Regina
5	Williams/Pick telecon re: Larry Fisher interview for July 12, 1990
	Calgary advises Williams no documentation found re. polygraph
	Wolch letter to Williams
	Williams memo to file re. Karst interview
6	Williams writes Pick confirms terms/conditions of interview
10	Williams Memo re: conversation with Pick
	Williams speaks to Wolch
12	Williams/Pearson Interview Larry Fisher
13	Williams/Pearson attend Saskatoon City Police
20	Williams interview Wilson
30	Letter Williams/Lapchuk re: meeting

Date	**August 1990**
1	Williams/Melnyk interview in BC
2	Williams/Lapchuk interview in BC
4	Williams statement from John Patterson Regina, SK
9	Williams letter to Watson re Wilson
	Watson replied to Williams re: Wilson
22	Williams to Joe Schalk re polygraph Wilson
30	Williams to Roberts
31	Williams memo to press attache re: conflict allegation
Date	**September 1990**
6	Williams to Watson re: Wilson
10	Wolch to Williams