

COMMISSION OF INQUIRY IN THE WRONGFUL  
CONVICTION OF DAVID MILGAARD

Honourable Mr. Justice E.P. MacCallum, Commissioner

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**SUBMISSION ON BEHALF OF  
THE GOVERNMENT OF SASKATCHEWAN**

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## SUBMISSION ON BEHALF OF THE GOVERNMENT OF SASKATCHEWAN

### I. Introduction

Mr. David Milgaard was wrongfully convicted of the murder of Ms. Gail Miller. Though innocent of the crime, he spent twenty-three years in jail. Saskatchewan deeply regrets this and regrets the difficulties connected with the wrongful conviction that Mr. Milgaard and his family have endured. Saskatchewan has apologized to Mr. Milgaard and his family and has provided compensation.

The mandate of the Commission is outlined in the Terms of Reference, the first term of which reads:

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

The Commission has provided guidelines for submissions prepared by all parties with standing. Item four in the document entitled "Guidelines for Written and Oral Submissions By Parties with Standing" reads:

Written submissions shall be as concise as practicable. They must relate only to the party's interest and to the Commission's Terms of Reference. Parties may make submissions regarding proposed findings and recommendations that are relevant to their interest. Where possible, submissions should identify how the proposed findings and recommendation fall within the Commission's Terms of Reference.

With this direction in mind, Saskatchewan's submission focuses on the knowledge its officials had, the actions taken by the officials and the reasons why decisions were made. The submission is meant to analyze the actions of Saskatchewan officials in light of all the events that occurred and is not meant as a criticism of any actions or decisions undertaken by other parties.

More specifically, the Government of Saskatchewan's submission will focus both on the 'conduct of the subsequent criminal proceedings' as well as 'whether the investigation should have been re-opened.' Given that former key Saskatchewan officials are represented by their own counsel, we recognize that the comments respecting "conduct of the subsequent criminal proceedings' will be comparatively shorter.

The evidence heard during the course of the Inquiry supports the position that the conduct of Saskatchewan officials, particularly Mr. T.D.R. Caldwell and Mr. Serge Kujawa, involved with the criminal proceedings relating to Mr. David Milgaard embodied professionalism and integrity.

The evidence received at the Inquiry revealed that the matter was, in fact, re-investigated on three occasions:

- by the Federal Government in the course of the section 690 *Criminal Code* analysis
- by the Supreme Court of Canada during the Reference proceedings
- by the RCMP and Alberta Justice during the Flicker investigation which was completed at the request of the Province of Saskatchewan

Based on the thoroughness of these investigations and reviews, there was nothing further that Saskatchewan could have done until the DNA results were made known. At that time, Saskatchewan did re-open the investigation into the death of Ms. Miller.

## **II. Argument**

### **1. Conduct of the Criminal Proceedings**

Allegations made against Saskatchewan officials by the Milgaards were based on speculation, not fact. In the course of the Inquiry, these allegations were denied by officials and former officials who testified. There was no evidence presented at the inquiry to counter or challenge these denials or to prove the Milgaard's allegations of impropriety.

#### **A. Adequacy of Disclosure**

Allegations have been made by the Milgaards or their representatives regarding the conduct of Mr. T.D.R. Caldwell both during and after the trial of Mr. Milgaard. Those allegations included the suppression of evidence to achieve a conviction and to assist in achieving favourable results in the Saskatchewan Court of Appeal relating to Mr. Milgaard's appeal.

The evidence heard in the course of the Inquiry depicts a substantially dissimilar version of events. During preliminary hearing and trial preparations, Mr. Caldwell and defence counsel for Mr. Milgaard, Mr. Calvin Tallis, had a respectful and co-operative professional relationship. Mr. Tallis was, in fact, afforded the courtesy of accessing more file information than common law principle in 1969 dictated was necessary for Crown counsel to provide. For example, Mr. Tallis was able to review Mr. Caldwell's file and was included in meetings with police investigators, including former Inspector Art Roberts<sup>1</sup>. At the request of Mr. Tallis, Mr. Caldwell reviewed all civilian witness statements with a view to disclosing statements that would be useful to Mr. Milgaard's defence.

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<sup>1</sup> Mr. Tallis: Transcript Volume 120, page 24171, line 2 - page 24172, line 1, February 8, 2006

Mr. Caldwell testified he believed he had fulfilled his disclosure duties to Mr. Milgaard and denied any impropriety in the form of suppression of any evidence that would have assisted Mr. Milgaard in formulating his defence. In his evidence at the Inquiry, Mr. Caldwell responded to his counsel's questions as follows:

Q ...and putting aside everything that you would do differently with the benefit of knowing that Mr. Milgaard was innocent of this crime in 1969, did you in any way consciously attempt, in 1969, or deliberately withhold anything from Mr. Tallis that you felt could be used by him to establish the innocence of David Milgaard?

A No, absolutely not, Ms. Knox.

Q In your - - and there's various correspondence, I won't go through it, that speaks with - - exchanged between you and him [Mr. Tallis], and notations in your file about discussions with him, invitations to him to come look at your file, for him to attend police meetings you were having with police officers; at any time did you ever make any suggestion to a police officer, "don't say that in front of Mr. Tallis", or did you have any police officer say to you, "don't let Cal Tallis know about that because he might get on to the fact that we're up to something' here or we're doin' a dirty deed?"

A None of that happened, I didn't detect that on the part of any police officers and it simply was not in - - it simply did not happen in this instance, period.<sup>2</sup>

No direct or circumstantial evidence has been presented at the Inquiry to refute Mr. Caldwell's statements on this issue.

The Supreme Court of Canada agreed with Mr. Caldwell. In their April 14, 1992 decision, the court stated:

"Nor has evidence been presented that there was inadequate disclosure in accordance with the practice prevailing at the time."<sup>3</sup>

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<sup>2</sup> Mr. Caldwell: Transcript Volume 91, page 18503, line 25 - page 18504, line 25, November 7, 2005

<sup>3</sup> Document 008879 at 008885; April 14, 1992 Reference Decision of the Supreme Court

The Milgaard allegations of suppression of evidence related also to the time period subsequent to Mr. Milgaard's conviction. The evidence alleged to be suppressed was the October 1970 Larry Fisher confession.<sup>4</sup> Again, the allegation was denied by Mr. Caldwell as follows:

Q The trial had ended, the appeal I think was argued in November of 1970 and the decision came out in January of 1971.

A Okay. I can't think that I would be doing much with the Milgaard prosecution file at that point. All the appeals, as we know, were being handled elsewhere by other people. Unless someone asked me to do something, I can't imagine what I would have done.

Q And did you wilfully suppress information on the file?

A Absolutely not.<sup>5</sup>

This denial is uncontroverted.

**B. No Connection Made Between the Commission of Sexual Assaults in the Area and the Gail Miller Murder**

**i) Mr. T.D.R. Caldwell**

The allegations of suppression of evidence are predicated on the allegation that Mr. Caldwell made a connection between the Miller murder and the individual who perpetrated sexual assaults on women in Saskatoon during this general time period. In fact, counsel for the Milgaards, in April 20, 1992 correspondence to then Justice Minister Robert Mitchell, wrote that the "Milgaard / Miller file clearly demonstrated that Mr. Caldwell had to have made the connection".<sup>6</sup> This allegation was again denied by

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<sup>4</sup> Document 026968 at 026969; September 8, 1992 letter from Mr. Wolch to the Honourable Robert Mitchell

<sup>5</sup> Mr. Caldwell: Transcript Volume 85, page 17326, lines 8 - 18, October 28, 2005

<sup>6</sup> Document 026935 at 026937; April 20, 1992 letter from Mr. Wolch to the Honourable Robert Mitchell

Mr. Caldwell during the Inquiry and no evidence was presented from the "Milgaard / Miller file" or elsewhere to substantiate the allegation.

Mr. Caldwell testified that when reviewing file materials provided to him by the Saskatoon Police Service with respect to the Miller murder, he found information relating to Mr. Fisher's first two sexual assault victims. In his distinctive blue pen, Mr. Caldwell struck lines through the documents and wrote "omit." He testified he did not think this information related to the prosecution and believed the information was inadvertently included on the Miller file.<sup>7</sup> He explained:

Q And are you able to tell us - - it looks from this, sir, you told us you have no recollection, but it appears you put a note, different file, omit and put a line through it. Can you explain what, based on your practice, what you think that might have meant?

A Yeah. I think in this case I concluded that this report had nothing to do with and no part in or on the David Milgaard prosecution file and I would have expected, Mr. Hodson, that is it meant something, some investigator would have phoned or showed up saying hey, what did you do about that (V) - - - - and (V1) - .<sup>8</sup>

Mr. Caldwell also testified that he was unaware of the police theory that the perpetrator of the Miller murder was also responsible for the unsolved sexual assaults in Saskatoon.<sup>9</sup> He neither gleaned this theory from his file nor was he so advised by police investigators.<sup>10</sup> Thus, this theory did not catalyze the realization in Mr. Caldwell of the possibility that anyone but Mr. Milgaard was responsible for the sexual assault

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<sup>7</sup> Mr. Caldwell: Transcript Volume 80, page 16051, line 2 - page 16054, line 4, October 4, 2005; Volume 81, 16198, line 15 - page 16217, line 9, October 5, 2005

<sup>8</sup> Mr. Caldwell: Transcript Volume 80, page 16052, line 25 - page 16053, line 12, October 4, 2005

<sup>9</sup> Mr. Caldwell: Transcript Volume 79, page 15771, line 16 - page 15772, line 11, October 3, 2005; Volume 81, page 16157, line 12 - page 16161, line 3, October 5, 2005

<sup>10</sup> Mr. Caldwell: Transcript Volume 81, page 16160, line 3 - page 16181, line 3, October 5, 2005



and death of Ms. Miller.

Mr. Caldwell further testified that had he been aware that even a tenuous connection existed between the murder and the rapes, he would have made this information known to Mr. Tallis.<sup>11</sup>

Mr. Caldwell's assertion he was not aware of the theory that someone other than Mr. Milgaard may have perpetrated the offence on Ms. Miller is credible given his oft stated view that the case against Mr. Milgaard was strong. Mr. Caldwell assessed Mr. Albert Cadrain as an honest young man, determined to provide his account of events to the court.<sup>12</sup> He believed Ms. Nichol John's May 24, 1969 statement particularly in light of the comments she made in the witness waiting room at Mr. Milgaard's preliminary hearing to the effect that she had witnessed the murder but was not going to repeat the story.<sup>13</sup> Mr. Caldwell was also comforted by his belief that the polygraph scientifically proved Mr. Ron Wilson's story to be accurate and believed Mr. Wilson's evidence.<sup>14</sup> The evidence of Mr. Craig Melnyk and George Lapchuk, though not "choir boys", added to the already strong case.<sup>15</sup>

## ii) **Mr. Serge Kujawa**

Allegations by or on behalf of the Milgaards have been made accusing Mr. Kujawa of

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<sup>11</sup> Mr. Caldwell: Transcript Volume 81, page 16224, lines 12 - 21, October 5, 2005; Volume 87, page 1760, line 21 - page 17812, line 4, October 31, 2005

<sup>12</sup> Mr. Caldwell: Transcript Volume 81, page 16366, line 6 - page 16366, line 20, October 5, 2005

<sup>13</sup> Mr. Caldwell: Transcript Volume 82, page 16438, line 11 - page 16439, line 20, October 6, 2005

<sup>14</sup> Mr. Caldwell: Transcript Volume 80, page 15961, lines 2 - 13; page 16093, line 2 - page 16094, line 3, October 4, 2005

<sup>15</sup> Mr. Caldwell: Transcript Volume 83, page 16649, line 10 - page 16650, line 12; page 16666, line 21 - page 16668, line 18, October 24, 2005

having been aware during the time of Mr. Milgaard's appeal that Larry Fisher was responsible for the attack on Ms. Miller.<sup>16</sup> There was no direct evidence that this occurred. Not only did Mr. Kujawa deny making this connection, there was corroborative evidence to support his contention.

During his evidence at the Inquiry, Mr. Kujawa clearly stated that he did not connect the Larry Fisher and David Milgaard files<sup>17</sup>, nor did he consider the possibility of a connection and dismiss it as improbable or impossible<sup>18</sup>. Mr. Kujawa's response to questions regarding making a connection and wilfully suppressing evidence are strongly and convincingly stated:

Q It has been suggested by some, Mr. Kujawa, that you in fact did draw a connection between the two cases and you deliberately suppressed and withheld the Fisher information from Mr. Tallis. How do you respond to that suggestion?

A Well, that's a very nasty suggestion and a very improper reading of my mind and my integrity and it says a lot about the people who made that suggestion.

Q And do you deny that?

A Yes, I totally deny that.<sup>19</sup>

And further:

Q Now, we also see that there were, through this time frame, allegations made by counsel for David Milgaard against a number of individuals and

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<sup>16</sup> Document 026935 at 026937; April 20, 1992 letter from Mr. Wolch to the Honourable Robert Mitchell

<sup>17</sup> Mr. Kujawa: Transcript Volume 130, page 26241, line 15 - page 26244, line 20, March 1, 2006

<sup>18</sup> Mr. Kujawa: Transcript Volume 130, page 26208, lines 6 - 15; page 26303, line 11 - page 26304, line 11; page 26310, line 20 - page 26311, line 1, March 1, 2006

<sup>19</sup> Mr. Kujawa: Transcript Volume 130, page 26212, lines 13 - 23, March 1, 2006

relating to a number of different matters, and again I think you were engaged in some debates on that. Can you tell us just generally what concerns you had with those types of allegations being made in the media?

A Well, I thought I heard allegations to the effect that I was doing some covering up for God knows what and for who and why and I thought that those comments about my honesty and decency and understanding about what was going on was highly criminal, improper, inhuman behaviour, and I made comments to that effect. Sometimes I used expressions I shouldn't have used, but I was expressing the feelings that I felt then, and still do.<sup>20</sup>

Others who testified agree with Mr. Kujawa's contention that he did not make the connection nor did he suppress evidence. The strength of those views was apparent and the statements bear including. Mr. MacKay testified as follows:

Q ...And we've heard your thoughts on that as well, Mr. MacKay, on what material Mr. Kujawa reviewed in terms of his work on both matters. Do you have any recollection or knowledge of a connection being drawn by Mr. Kujawa or anyone else in the office in 1971 to the effect that Larry Fisher might be responsible for the Gail Miller murder?

A No.

Q Do you think that it is possible that Mr. Kujawa made this connection and chose to ignore it and / or cover it up?

A I'm not sure how to answer that question. I wouldn't know whether he made the connection or not because I never discussed either case with him. If you are asking me would I be surprised if he made the connection and ignored the connection or attempted to cover it up, I would be amazed.

Q And I guess I'm asking that from the perspective that you would have had an opportunity through the years in your work with Mr. Kujawa to observe his habits, his approach to his work, his ethics and otherwise.

A Yes.

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<sup>20</sup> Mr. Kujawa: Transcript Volume 130, page 26225, line 12 - page 26226, line 8, March 1, 2008

Q And I think my question comes from that context, whether, and I realize I'm asking for your own opinion, but having knowledge of those matters, would you expect that that would be something that Mr. Kujawa could possibly do?

A No, no, it would be antithetical to everything that I know Mr. Kujawa stands for and believes in and from a purely utilitarian point of view I can't, I cannot understand why he or anyone else would do it because at worst what it would mean if it -- if -- if there was -- if there was a -- if the prosecution had failed, if there was a wrongful conviction in this situation, then that matter would have been fixed if it came to Mr. Kujawa's attention, and the reasons why I say from a utilitarian point of view, that there is no, there's nothing involved in this except -- for Mr. Kujawa's sake, except for some embarrassment, and Mr. Kujawa would not be the one who would be embarrassed in any event. He couldn't be sued, *The Queen versus Nelles* came down from the supreme court long after this happened. He wouldn't be fired, we went into the Court of Appeal all the time and were told that people were convicted when they shouldn't have been convicted, it didn't happen all the time, but it happened from time to time. There would just be no reason why he would go into an elaborate cover-up for the purpose of what, antagonism to Mr. Milgaard? I can't see that. He didn't know Mr. Milgaard as far as I know. To protect the reputation of the prosecution service? That's absurd on its face because he would enhance the reputation of the prosecution service if he were aware of someone who was wrongfully convicted and did something about it, that would enhance the reputation, not be contrary to the reputation, so no, on any of my knowing Mr. Kujawa and on many, on practical reasons I just cannot, I couldn't accept that that was so.<sup>21</sup>

And further, in cross examination, Mr. MacKay commented:

Q And anybody, looking at both [files], can see that Fisher would have been a suspect in the Miller murder?

A Not necessarily, in -- not necessarily in head office. I didn't look at, well I didn't look at the cases, so I didn't -- it didn't occur to me to put the two together. If I had been doing the appeal, I'm not sure it would have occurred to me, because I didn't know the details of the Fisher -- or, and I'm speaking for myself -- I didn't know all I knew was that there were some sexual assaults and that there was someone who wanted to plead guilty to those sexual assaults.

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<sup>21</sup> Mr. MacKay: Transcript Volume 129, page 25915, line 12 - page 25917, line 25, February 28, 2008

Now I'm not suggesting that they aren't serious, of course they're serious, but they aren't so sensational that we would drop everything and say "we're going to concentrate on only these things."

And to take the other step is a real stretch, to say "well we would have been so familiar with the investigation file that we could not do anything except put 2 and 2 together and get 4 that there was a relationship between the two of them, that doesn't follow, and I must say, in my opinion, is a stretch."<sup>22</sup>

Mr. Calvin Tallis, Mr. Kujawa and Mr. Caldwell's adversary during the Milgaard proceedings, held a similar opinion. He stated:

Q And I appreciate that maybe I'm asking you to speculate on a situation where you, in fact, were not even engaged, - -

A Yeah.

Q - - but were you aware or are you aware, Mr. Tallis, or let me tell you that what we have heard in this Inquiry, of allegations that have been made by David Milgaard and his mother and his lawyers, that Serge Kujawa, Mr. Caldwell, and others connected Larry Fisher as the killer of Gail Miller at a time, perhaps in October 1970, and before Mr. Milgaard's legal avenues had been exhausted, and the allegation is that they connected Mr. Fisher as the killer and deliberately conspired to withhold this information from you and from others; do you have any knowledge or information to support or refute that allegation?

A I simply have no knowledge of what that is based on.

Q No, and I appreciate that, and I'm asking you. That allegation was made, and I'll go to some documents a bit later; is there anything, when you look back in your dealings with Mr. Kujawa or Mr. Caldwell or others, that would either support or refute the suggestion that they knew Larry Fisher was the real killer of Gail Miller and deliberately conspired to withhold that information from you?

A Well, I can think of nothing in my dealings with them that would suggest or point to them deliberately or conspiring - - I guess conspiring involves deliberation - - conspiring to withhold that information from me or - -

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<sup>22</sup> Mr. MacKay: Transcript Volume 169, page 25999, line 13 - page 26000, line 9, February 28, 2006

Q Based on your dealings with Mr. Caldwell and Mr. Kujawa, would you expect that if they had information at that time before Mr. Milgaard's appeals had expired that suggested David Milgaard was not the guilty party and that Larry Fisher was, that they would advise you of that?

A Yes, I certainly would never have suspected anything like that, because I knew each one of them to be a person of high personal and professional integrity.<sup>23</sup>

**a) Workload**

That Mr. Kujawa made a connection between the Miller murder and Larry Fisher is remote at best when considering the volume of files Mr. Kujawa dealt with at any given time. It appeared the David Milgaard and Larry Fisher files were in Head Office at the same time over the approximate period of February 1971 to November 1971 when Mr. Milgaard's Supreme Court leave application was denied, however there is no evidence to demonstrate that Mr. Kujawa had both files on his desk at the same time and certainly no evidence that he connected them.

In 1971, Mr. Kujawa worked in the Saskatchewan Prosecutions Division Head Office. His tasks were many. He was responsible for trial, Court of Appeal and Supreme Court matters as well as interprovincial matters and law reform issues. Mr. Kujawa estimated he handled approximately 400 sentence appeals annually, forty to fifty conviction appeals annually in addition to high profile trial matters which numbered approximately six.<sup>24</sup> In terms of days dedicated to court, Mr. Kujawa would have appeared in the Court of Appeal approximately eight to nine days a month. Trial days would be in addition to this number.<sup>25</sup>

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<sup>23</sup> Mr. Tallis: Transcript Volume 122, page 24774, line 25 - page 24776, line 18, February 10, 2006

<sup>24</sup> Mr. Kujawa: Transcript Volume 129, page 26103, line 7 - page 26113, line 20, February 28, 2006

<sup>25</sup> Mr. MacKay: Transcript Volume 129, page 26073, line 24 - page 26075, line 5, February 28, 2006

Given the volume and variety of matters Mr. Kujawa handled on an ongoing basis, it is an untenable argument that he would or should have identified any link between the two matters.

**b) Lack of Familiarity with the Trial File**

Mr. Kujawa was simply not familiar with the documents and information contained in Mr. Caldwell's trial file and thus was not in a position to connect the offence to Larry Fisher. Mr. Kujawa was consulted by Mr. Caldwell with respect to the narrow issue of section 9(2) of the *Canada Evidence Act*. He did not provide an opinion as to whether a charge should have been laid nor did he direct the prosecution.<sup>26</sup>

In preparing for Mr. Milgaard's appeal, Mr. Kujawa followed the usual procedure of reviewing the trial record given because the record was the basis upon which an appeal was argued. Trial file documentation such as witness statements and police reports would only be a distraction to the fulfillment of the task of preparing for and arguing a conviction appeal. Review of the trial record meant a review of the transcript, the indictment and the notice of appeal only.<sup>27</sup>

**c) RCMP Reports Not Read**

A contractual relationship between the Royal Canadian Mounted Police and the Province of Saskatchewan was the catalyst for RCMP reports being submitted to the Attorney General's Department as a reporting mechanism, largely for administrative and informational purposes. The documents were received by the province's mail

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<sup>26</sup> Mr. Kujawa: Transcript Volume 129, page 26126, line 9 - page 26127, line 12, February 28, 2006; Mr. Caldwell: Transcript Volume 91, page 18451, line 14 - page 18452, line 6, November 7, 2005

<sup>27</sup> Mr. Kujawa: Transcript Volume 129, page 26109, line 23 - page 26112, line 1; page 26137, line 16 - page 26138, line 1, February 28, 2006; Mr. MacKay: Transcript Volume 128, page 25823, line 19 - page 25825, line 3; page 25832, line 21 - page 25837, line 1, February 27, 2006;

clerks and directed to Head Office of the Prosecutions unit. Mr. Kujawa, being focused on court matters, did not take an energetic interest in administrative matters, particularly relating to paper work.<sup>28</sup>

Ms. Elizabeth McFadyen, a colleague of Mr. Kujawa's, had taken on the administrative tasks in Head Office. She was largely responsible for directing the flow of correspondence, despite the mail office identifying the recipient as Mr. Kujawa. In order to send documents into internal Head Office filing, they had to be initialed and marked for filing. A document bearing the initials of a Head Office lawyer was commonly only dealt with by that particular lawyer. For instance, the May 7, 1969 Cpl. Rasmussen report<sup>29</sup> which attached the statements of a number of civilians including Larry Fisher sexual assault victims, bears the initials "EM" indicating that Ms. McFadyen dealt with the document and Mr. Kujawa did not.<sup>30</sup>

When Mr. Kujawa received file documentation or correspondence, unless it related to a charge already laid or the document noticeably indicated that a response was required, Mr. Kujawa would not read it. He instead just initialed it to get it into the filing system. Where the matter related to an appeal matter, given that an appeal was argued on the record, reading police reports, as previously noted, detracted from the task.<sup>31</sup> In Mr. Kujawa's words:

Q Are you able to tell us whether you received this report and, if so, whether you would have read it?

A I don't know if I did. The fact that I've marked file on it, it looks like I have

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<sup>28</sup> Mr. Brown: Transcript Volume 180, page 37442, line 23 - page 37443, line 12, September 11, 2006  
Mr. Kujawa: Transcript Volume 129, page 26120, lines 6 - 20, February 28, 2006

<sup>29</sup> Document 250597, May 7, 1969 Report of Cpl. Rasmussen

<sup>30</sup> Mr. MacKay: Transcript Volume 128, page 25805, line 3 - page 25806, line 14, February 27, 2006

<sup>31</sup> Mr. MacKay: Transcript Volume 128, page 25810, line 11 - page 25813, line 15, February 27, 2006



received it, but until there is a charge that needs reading and studying, I'm not going to read it. The fact that they are investigating something doesn't mean that I'm going to keep track of every sentence they write on it because we're getting nowhere near, as far as I know, to the court of law and therefore I haven't got anything that I can do there that's of any use, and if they have any questions in connection with an inquiry that they are conducting, then they direct that to me and that I should read and respond to.<sup>32</sup>

Even if Mr. Kujawa read all of the RCMP reports he initialed, there is simply no evidence that he connected that information to the Miller murder file nor is there any reason he should have.

### **C. Breckenridge Allegations**

On September 19, 1992 at a press conference in Winnipeg, Manitoba, Mrs. Joyce Milgaard, Mr. David Milgaard and Mr. Wolch advised that they were in receipt of information from a former Saskatchewan Justice employee that high-ranking Saskatchewan government officials, including Mr. Kujawa, were involved in covering up evidence that Larry Fisher had committed the sexual assault and murder of Gail Miller.<sup>33</sup> As a result of these allegations, Saskatchewan sought the assistance of the RCMP to conduct an investigation into the allegations of criminal wrongdoing and further requested the assistance of Alberta Justice officials to analyze the fruits of the investigation and make relevant determinations as to whether criminal charges ought to be pursued.

The RCMP undertook an exhaustive investigation referred to as "Flicker" which resulted in a report authored by Inspector M.J. Sawatsky<sup>34</sup>. A further report was then prepared

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<sup>32</sup> Mr. Kujawa: Transcript Volume 129, page 26120, lines 6 - 20, February 28, 2006

<sup>33</sup> Document 334827, September 19, 1992 Press Conference Transcript of Mrs. Milgaard, Mr. Milgaard and Mr. Wolch

<sup>34</sup> Document 023167, January 13, 1994 Report of Inspector Sawatsky

by Alberta Justice.<sup>35</sup> Saskatchewan had no role in this process other than as a recipient of the consequent decisions.

Even prior to the release of the RCMP and Alberta reports, some Saskatchewan officials and members of the media viewed the allegations as entirely without merit. This was borne of the nature of the allegations themselves. The Milgaards did not provide the name of their source in order for authorities to critique the information. However, authorities were soon able to determine his identity.<sup>36</sup> Authorities also readily established that this source, Mr. Michael Breckenridge was not employed with the Department of Justice until approximately two years after the date the Milgaards claimed he was.<sup>37</sup>

Saskatchewan officials concluded quickly as well that it was impossible that a file clerk would be privy to a meeting with high ranking government officials discussing any matter of a sensitive nature. As stated by Mr. Brown:

Q ...did you have an opportunity to review the statement [of Mr. Breckenridge] and consider what was in the statement and to determine whether it had credibility?

A Yes, I looked at the statement and listened to what was said at the press conference, and it was just - - it was outrageous. The notion that some file clerk would be in on what was going on in the office of the Attorney General or the Deputy Attorney General, the fact that they would so blithely slander these people by suggesting that they were involved in some kind of cover-up was, in my view, just outrageous and showed a degree of malice that I didn't think was there at that point.<sup>38</sup>

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<sup>35</sup> Document 032805, August 15, 1994 Report of Nell McCrank, Q.C. and Bruce Fraser, Q.C.

<sup>36</sup> Document 004193, September 22, 1992 Cover letter and attachments from Mr. Murray Brown to Sgt. R.A. Pearson

<sup>37</sup> Document 004197, June 15, 1992 letter from the Public Service Commission re: employment records

<sup>38</sup> Mr. Brown: Transcript Volume 182, page 38073, line 20 - page 38074, line 9, September 13, 2006

It was well known that neither the Attorney General nor his Deputy Attorney General ever involved themselves in conduct of criminal prosecutions and would not have been involved in the type of meeting described by Mr. Breckenridge.<sup>39</sup>

Members of the media expressed difficulties with veracity of these allegations as well and seemed unwilling to accept what the Milgaards said.<sup>40</sup> On September 23, 1992, the *Star Phoenix* carried an opinion story in which the writer wanted more details than had been provided in the course of the September 19, 1992 press conference. The writer concluded that the "innuendos and allegations" were a "dead end".<sup>41</sup>

Had these allegations been true, Saskatchewan thought the Milgaards would and should have placed the information before the Supreme Court during the Reference to allow the court to determine whether the alleged activity amounted to a miscarriage of justice. In Mr. Brown's words:

Q ...And if Mr. Breckenridge's allegations were true, would that have been admissible evidence at the Supreme court reference?

A Well, never mind if they were true, if Mr. Wolch thought for a moment they might stand up under any kind of scrutiny they would have been brought forward and they would have been something the Supreme Court would have been willing to hear because that is direct evidence of Crown misconduct.<sup>42</sup>

That the Milgaards chose not to do this could lead to the conclusion that even they

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<sup>39</sup> Mr. Brown: Transcript, Volume 182, page 38081, line 3 - page 38082, line 2, September 13, 2006; Mr. MacKay: Transcript, Volume 129, page 25991, line 21 - page 25993, line 6, February 28, 2006

<sup>40</sup> Mr. Brown: Transcript Volume 182, page 38091, lines 15 - 22, September 13, 2006

<sup>41</sup> Document 279577, September 23, 1992 article "*Details needed*"

<sup>42</sup> Mr. Brown: Transcript Volume 182, page 38086, lines 6 - 15, September 13, 2006

were not confident with Mr. Breckenridge's story.

The incredulity by officials and media surrounding these allegations supported the denials of Mr. Caldwell and Mr. Kujawa<sup>43</sup> that they did not participate in a cover-up as claimed by the Milgaards.

After a comprehensive investigation and analysis, both RCMP investigators and Alberta Justice officials concluded that no impropriety whatever occurred as a result of actions taken by Saskatchewan officials.

RCMP Inspector Sawatsky concluded that:

Based on our examination of the files and our interviews of witnesses, the facts do not support the allegation of a connection or cover up within the Department. The available information suggests that at no time did KUJAWA, or anyone else in the Saskatchewan Department of the Attorney General, form a connection between the MILGAARD and FISHER cases.<sup>44</sup>

Having specifically considered Mr. Caldwell's actions<sup>45</sup>, Alberta Justice officials echoed the conclusion with this statement contained in their report:

Therefore, the RCMP investigation has failed to uncover any evidence to support the allegations against T.D.R. Caldwell.<sup>46</sup>

Alberta officials also concluded as follows:

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<sup>43</sup> Mr. Kujawa: Transcript Volume 130, page 26338, line 9 - page 26342, line 1, March 1, 2006

<sup>44</sup> Document 023167 at 023312, January 13, 1994 Report of Inspector Sawatsky

<sup>45</sup> Document 032805 at 032815 - 032819, August 15, 1994 Report of Neil McCrank, Q.C. and Bruce Fraser, Q.C.

<sup>46</sup> Document 032805 at 032819, August 15, 1994 Report of Neil McCrank, Q.C. and Bruce Fraser, Q.C.

Therefore, the RCMP investigation has failed to uncover any evidence to support the allegations against Mr. Serge Kujawa, Q.C., or any other members of the Saskatchewan Department of Justice including the then Attorney General Roy Romanow, Q.C.<sup>47</sup>

There was no evidence presented at the Inquiry that would have added a new dimension to the considerations and conclusions of the RCMP or Alberta officials.

#### **D. Larry Fisher Guilty Pleas**

As a specific example of suppression of evidence and cover-up, Mr. Kujawa had been accused by the Milgaards of improperly orchestrating the details of the Larry Fisher guilty pleas in 1971.<sup>48</sup> According to the Milgaards, everything about the guilty pleas pointed to a cover-up. The evidence at the Inquiry, however, has decidedly revealed otherwise. As Mr. MacKay indicated in his interview with RCMP in 1993 during the Flicker investigation:

... the accusation that the Department's handling of FISHER was to avoid publicity is pure nonsense. The timing of his appearance (e.g. Christmas season) was not prompted by any ulterior motive on behalf of anyone in the Department.<sup>49</sup>

And further in cross examination at the Inquiry, he stated:

Q I understand. But do you understand and appreciate, when you look at the delay in prosecuting Fisher, when you look at the location, when you look at the punishment he received and the lack of publicity, do you understand why reasonable people could come to the conclusion that there was a coverup?

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<sup>47</sup> Document 032805 at 032820, August 15, 1994 Report of Neil McCrank, Q.C. and Bruce Fraser, Q.C.

<sup>48</sup> Document 026935 at 026937 - 026938, April 20, 1992 letter of Mr. Wolch to the Honourable Robert Mitchell

<sup>49</sup> Document 023167 at 023314, January 13, 1994 Report of Inspector Sawatsky

A No.

Q Nothing, no --

A No.

Q A reasonable person looking at it?

A No.

Q No? Why not?

A Well, because -- I've attempted to give you an explanation, and a reasonable person can assume all sorts of things, I guess, --

Q True

A -- but in my opinion, no.

Q Okay. Those aren't assumptions, those are facts.

A Okay. Umm --

Q And I'm not saying you should accept the fact there was a coverup --

A No.

Q -- all I'm asking you is if you look at all of those facts would it not be reasonable to conclude that there is something wrong here and there was a coverup?

A No.<sup>50</sup>

At the Inquiry, Mr. Kujawa denied committing any improprieties when dealing with Mr. Fisher's matters. He stated:

Q In proceeding on the charges in Regina, Mr. Kujawa, was there any attempt on your part, or desire, to hide Mr. Fisher and / or his guilty pleas from the Saskatoon public, the Saskatoon Police, and David Milgaard or his counsel?

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<sup>50</sup> Mr. MacKay, Transcript Volume 129, page 26056, line 11 - page 26057, line 13, February 28, 2006

A None.

Q In proceeding by way of direct indictment, was there any attempt or desire on your part to deliberately avoid Mr. Fisher appearing in Saskatoon on these matters, whether it be in Magistrate Court or Queen's Bench Court, and for the purposes of keeping the charges against him and his pleas secret from the public, the police, or David Milgaard?

A Not, not at all.<sup>51</sup>

Similarly, Mr. Caldwell was asked whether he was involved in a cover-up regarding Mr. Fisher's matters. The exchange went as follows:

Q Were you involved, sir - - and I think you have heard and seen in the past number of years, and I'll come back to this a bit later, allegations made that there was a deliberate cover-up or conspiracy to have Mr. Fisher dealt with in Regina rather than Saskatoon to prevent people, being Mr. Milgaard, his representatives, police, the public and others, from finding out about Mr. Fisher? You are aware of the various allegations

A Yeah, roughly speaking, yes.

Q Were you involved, sir, in any coverup with respect to Mr. Fisher's charges being dealt with in Regina?

A Absolutely not...<sup>52</sup>

#### **i) Direct Indictment**

The use of the direct indictment process was the most efficient method of dealing with the guilty pleas. In 1971, only the superior court could deal with guilty pleas respecting these sexual offences. Either a consent committal had to be sought at the Provincial Court level first or use a direct indictment to take the matters directly to the Court of

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<sup>51</sup> Mr. Kujawa: Transcript Volume 130, page 26191, line 19 - page 26192, line 8, March 1, 2006

<sup>52</sup> Mr. Caldwell: Transcript Volume 84, page 17001, line 13 - page 17002, line 1, October 25, 2005

Queen's Bench. The latter was clearly the most expedient.<sup>53</sup> Mr. Greenberg, counsel representing Mr. Fisher, resided in Winnipeg and was anxious to deal with the matters. He supported a quick process.<sup>54</sup>

## ii) Dealt with in Regina

Prosecutions Head Office and Mr. Kujawa were situated in Regina. Mr. Kujawa dealt with all interprovincial matters. The direct indictment needed to be signed by the Attorney General who was also situated in Regina. Mr. Caldwell was not familiar with the file nor did he have any familiarity in dealing with direct indictments. Finally, because the Court of Appeal dealt with sentence appeals on a regular basis in Regina, there was a well established process for transporting prisoners to Regina.<sup>55</sup>

It was also more convenient for Mr. Greenberg to travel from Winnipeg to Regina than to travel to Saskatoon and thus the location choice of Regina was an accommodation to him.<sup>56</sup>

## iii) Media Coverage

There was no evidence to support the allegation that the date of December 21, 1971 was chosen for the nefarious purpose of shielding public awareness from Mr. Fisher's

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<sup>53</sup> Mr. MacKay: Transcript Volume 128, page 25886, line 18 - page 25888, line 1, February 27, 2006;  
Mr. Kujawa: Transcript Volume 130, page 26188, line 24 - page 26189, line 4, March 1, 2006;  
Mr. Caldwell: Transcript Volume 84, page 16999, line 23 - page 17000, line 19, October 25, 2005;  
Mr. Brown: Transcript Volume 180, page 37488, lines 2 - 16, September 11, 2006

<sup>54</sup> Mr. MacKay: Transcript Volume 128, page 26889, lines 5-7, February 27, 2006

<sup>55</sup> Mr. MacKay: Transcript Volume 128, page 25893, line 10 - page 25894, line 20, February 27, 2006;  
Mr. MacKay: Transcript Volume 129, page 25929, line 3 - page 25936, line 9, February 28, 2006;  
Mr. Kujawa: Transcript Volume 130, page 26190, line 12 - page 26191, line 18, March 1, 2006;  
Mr. Tallis: Transcript Volume 122, page 24777, line 23 - page 24780, line 21, February 10, 2006;  
Mr. Brown: Transcript Volume 180, page 37531 line 13 - 37533, line 11, September 11, 2006

<sup>56</sup> Mr. Brown: Transcript Volume 180, page 37533, line 11 - page 37534, line 11, September 11, 2006



disposition. There was evidence, however, supporting precisely the opposite position. December 21, 1971 was the date chosen for sentencing for benign reasons. December 21, 1971 was a date provided by the court for a special sitting when a judge was available to handle Mr. Fisher's sentencing. It was also a date when both Mr. Kujawa's and Mr. Greenberg's schedules were open.<sup>57</sup>

Had the matters been dealt with in Saskatoon or had they been dealt with on a day other than December 21, there was no guarantee a reporter would have been present. In 1971, reporters were not dedicated to covering a crime beat. Coverage was sporadic on any day.<sup>58</sup>

In 1971, prosecutors did not hold press conferences to announce the results of court proceedings.<sup>59</sup>

Given that the *Star Phoenix* and the *Leader Post* were owned by the same company in 1971 and often shared stories, had the story been covered in Regina, it may well have also been carried in the *Star Phoenix*.<sup>60</sup> If December 21 in Regina had been chosen in attempt to coverup the sentencing results, there was certainly no guarantee that the story would not get to the public in any event. This certainly would not have been the wisest coverup plan.

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<sup>57</sup> Mr. MacKay: Transcript Volume 128, page 25897, line 8 - 25898, line 2, February 27, 2006;  
Mr. Brown: Transcript Volume 180, page 37466, line 14 - page 37467, line 5, September 11, 2006

<sup>58</sup> Mr. MacKay: Transcript Volume 128, page 25896, line 4 - 25897, line 7, February 27, 2006;  
Mr. Caldwell: Transcript Volume 84, page 17005, lines 6 - 11, October 25, 2005;  
Mr. Brown: Transcript Volume 180, page 37465, line 22 - page 37466, line 13, September 11, 2006

<sup>59</sup> Mr. Caldwell: Transcript Volume 84, page 17001, line 23 - page 17001, line 10, October 25, 2005;  
Mr. MacKay: Transcript Volume 129, page 26055, lines 7 - 23, February 28, 2006

<sup>60</sup> Mr. MacKay: Transcript Volume 129, page 26080, line 19 - 26082, line 6, February 28, 2006

iv) Delay

Mr. Kujawa denied that any improper motives were attached to Mr. Fisher's matters not being dealt with until December 1971. He stated:

Q Now as far as the, this indictment happening on December of 1971 as opposed to June of 1971, it has been suggested by some that you deliberately delayed the handling of this direct indictment from June '71 to December 1971 for nefarious purposes, in particular to allow Mr. Milgaard's appeal before the Supreme Court of Canada to be dealt with; am - - and I'll come to that a bit later. Again, did you do anything deliberate or take any steps to delay the disposition of Mr. Fisher's charge in the Saskatchewan courts?

A No, not a thing.<sup>61</sup>

Any delay in getting Mr. Fisher's matters into court had to do with general office procedure and also the provincial election and change of government in mid-1971. As previously stated, Mr. Kujawa was noted for his courtroom ability and the time dedicated to those pursuits. He was not known to take a keen interest in administrative matters. That responsibility in Head Office fell to Ms. McFadyen and, to a lesser degree, Mr. MacKay. A request to deal with Mr. Fisher's matters having arrived in the form of a letter would not have been immediately dealt with by Mr. Kujawa. In any event, Mr. Kujawa likely deduced that Mr. Fisher, facing thirteen years of incarceration, need not be dealt with immediately.<sup>62</sup>

Mr. MacKay ultimately assisted in making arrangements with Mr. Greenberg. Mr. Kujawa sought the direct indictment first from then Attorney General Mr. D.V. Heald on June 25, 1971.<sup>63</sup> However, Mr. Heald did not sign the document. This was to be

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<sup>61</sup> Mr. Kujawa: Transcript Volume 130, page 26197, lines 2 - 13, March 1, 2006

<sup>62</sup> Mr. Brown, Transcript Volume 180, page 37531, line 13 - page 37533, line 11, September 11, 2006

<sup>63</sup> Document 010690, June 25, 1971 letter from Mr. Kujawa to Mr. D.V. Heald

expected given that the province was on the eve of an election. In the experience of Saskatchewan officials, any delay just prior to and during the time of an election was to be expected. If there was a change in government, a delay was also expected post election as the new Ministers required a period of time of approximately six weeks to settle in.<sup>64</sup>

#### **v) Reporting to Victims**

In 1971, there were no formal rules with which to adhere to report the outcome of criminal matters to the victims of crime. In fact, during this time period, prosecutors regularly did not report any dispositions to victims. They usually received information either from sitting in on the court proceedings or from police investigators. Reporting to police officers was inconsistent as well. It was not until the victims' rights movement in the 1990s that the practices changed to greater inclusivity and information sharing.<sup>65</sup>

#### **vi) Sentence**

Mr. Fisher received a thirteen year sentence in Winnipeg prior to dealing with his Saskatoon offences. Mr. Kujawa and others viewed the thirteen year period as an extremely lengthy sentence which, knowing the sentencing patterns of the Saskatchewan Court of Appeal, would not have been increased in a Saskatchewan court either with a lengthier concurrent term or a shorter consecutive sentence. A thirteen year sentence for sexual offences, even with this degree of seriousness would simply not attract a sentence longer than thirteen years and given the applicability of the principle of totality, a Saskatchewan court was not about to increase overall period of

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<sup>64</sup> Mr. Brown: Transcript Volume 180, page 37534, line 12 - page 37535, line 18, September 11, 2006;

<sup>65</sup> Mr. Brown: Transcript Volume 180, page 37485, lines 5 - 21, September 11, 2006;  
Mr. MacKay: Transcript Volume 128, page 25902, line 19 - 25904, line 4, February 27, 2006

incarceration. Had Mr Kujawa asked the court to entertain a longer sentence, he would have jeopardized his good reputation.<sup>66</sup>

As an illustration of sentencing patterns in Saskatchewan, when Mr. Fisher was convicted of attempting to kill and sexually assaulting his final victim in 1980, he received a sentence of ten years. This was the sentence having taken into consideration the numerous convictions for similar offences already accrued on his criminal record.<sup>67</sup>

## **2. Re-opening of the Investigation**

### **A. Post Appeal to Dismissal of the First Application (February 27, 1991)**

After Mr. Milgaard's appeal and up to February 27, 1991, the Milgaards sought the province's assistance solely for the purpose of assisting to retrieve the Miller exhibits from the Court of Queen's Bench in Saskatoon. Saskatchewan consented to their application and was fully co-operative.<sup>68</sup>

Mr. Milgaard's first section 690 application pursuant to the *Criminal Code* was submitted to the Federal Department of Justice on December 28, 1988. Then Minister of Justice Kim Campbell dismissed the application on February 27, 1991.<sup>69</sup>

The application and all relevant materials were provided by the Milgaards to Federal

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<sup>66</sup> Mr. Kujawa: Transcript Volume 130, page 26182, line 10 - page 26183, line 20, March 1, 2006;  
Mr. MacKay: Transcript Volume 129, page 26034, line 4 - page 26037, line 19, February 28, 2006

<sup>67</sup> Mr. MacKay: Transcript Volume 129, page 26059, line 21 - page 26060, line 16, February 28, 2006

<sup>68</sup> Document 001637, October 6, 1987 letter from Mr. Fred Dehm to Mr. Wolch;  
Document 001609, November 9, 1987 letter from Mr. Wolch to Mr. Dehm;  
Document 156783, December 4, 1987 letter from Mr. Dehm to Mr. Wolch

<sup>69</sup> Document 004635, February 27, 1991 response of the Honourable Kim Campbell

government officials. Saskatchewan did not receive any materials from the Milgaards during this time period nor was Saskatchewan asked by the Milgaards or anyone on their behalf to participate in the application or respond to any of their concerns.<sup>70</sup>

During this time frame, Federal officials did not provide Saskatchewan with a copy of the Milgaard's application.<sup>71</sup> The Federal government did not seek advice from the province. Instead, they sought, for their own consideration and analysis, information in the form of Saskatchewan's file materials. Simply, the role Saskatchewan played in the first application was as a conduit to file information.<sup>72</sup>

Saskatchewan received some of its own information regarding the application and the Milgaards' concerns via media reports. Several reported stories advanced by the Milgaards caused Saskatchewan to either conduct its own investigation into the veracity of the stories or speak to Federal Government officials on an informal basis to seek their views.<sup>73</sup> The resulting information caused Saskatchewan to begin having doubts about the credibility of the information provided as well as the credibility of the information providers.

On June 7, 1990, a story written by Mr. Dan Lett and carried in both the *Leader Post* and the *Star Phoenix* indicated that Mr. Ron Wilson had been forced by police to lie about Mr. Milgaard's involvement in the Miller attack.<sup>74</sup> Saskatchewan learned from Federal officials that they had spoken with Mr. Wilson who could not explain how police

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<sup>70</sup> Mr. Brown: Transcript Volume 179, page 37270, lines 5 - 19, September 7, 2006

<sup>71</sup> Mr. Brown: Transcript Volume 178, page 37158, lines 2 - 21, September 6, 2006

<sup>72</sup> Mr. Brown: Transcript Volume 178, page 37154, lines 9 - 23, September 6, 2006; Volume 179, page 37368, lines 6 - 16, September 7, 2006

<sup>73</sup> Mr. Brown: Transcript Volume 178, page 37179, line 9 - page 37180, line 20, September 6, 2006; Volume 178, page 37234, lines 13 - 17, September 7, 2006

<sup>74</sup> Document 004783, June 7, 1990 article "*Milgaard witness says police forced him to lie*"

manipulated him, how police frightened him or how police forced Mr. Wilson to agree with what they wanted.<sup>75</sup>

Saskatchewan recognized that these stories were being written by reporters who had become Milgaard advocates and appeared to be forsaking investigative responsibility for their work. As Mr. Brown stated:

Q And again, you commented I think just a few minutes ago that - - did Saskatchewan Justice have skepticism about what was being put forward by this time, skepticism about what was being reported by way of allegations?

A Oh, absolutely. At this point a number of reporters, and Dan Lett was certainly one of them had crossed over to the point of being a partisan, he was clearly in the Milgaard camp working for them, and whatever that does to your objectivity, it certainly doesn't help it. The other thing is when you looked at the news media reports, it's clear that for the most part they were simply taking what David Asper or Joyce Milgaard would tell the and that was the story, there was no evaluation of it all.<sup>76</sup>

On June 26, 1990, Mr. Lett penned another article which was carried in the *Winnipeg Free Press*, the *Globe and Mail* and the *Star Phoenix*.<sup>77</sup> The story contained details regarding Albert Cadrain's experience with Miller investigators. Saskatchewan again concluded that this allegation was not credible. Mr. Brown explained:

A We didn't believe it.

Q And why not?

A Well, that's just not the way the Saskatoon police were known to operate or any other police force in the province, and second, Albert Cadrain

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<sup>75</sup> Mr. Brown: Transcript Volume 179, page 37271, line 18 - page 37272, line 5, September 7, 2006

<sup>76</sup> Mr. Brown: Transcript Volume 179, page 37279, lines 6 - 21, September 7, 2006

<sup>77</sup> Document 039118, June 26, 1990 article "*Milgaard witness says detectives 'tortured' him*"

presented himself at the front desk of the police station, they didn't have to go looking for him, he came in and volunteered information.<sup>78</sup>

On July 17, 1990, a further Dan Lett story was published.<sup>79</sup> This article contained the allegation that the March 3, 1969 statement of Mr. Wilson was not provided to Mr. Milgaard's defence counsel, Mr. Tallis. In 1990, Mr. Brown was asked to personally look into this allegation. Mr. Brown read the preliminary hearing transcript and discovered that Mr. Tallis clearly knew the contents of the statement given the manner in which Mr. Tallis' cross examination of Mr. Wilson was conducted.<sup>80</sup> Saskatchewan's own investigation revealed that the allegations contained in this story were erroneous.

The media stories continued. August 29, 1990 saw a further article published.<sup>81</sup> This story alleged a conflict of interest on behalf of the Federal government because they spoke with Mr. Caldwell regarding his file. Saskatchewan's view of the article and response were detailed by Mr. Brown:

Q ...Do you recall Saskatchewan Justice becoming aware of this allegation, or this information, in this media article?

A Yes.

Q And can you tell us, what was your reaction to it, or your response?

A Well, politely put, I suppose we thought it rather foolish. The extent to which Bobs Caldwell was involved was he was providing information. Had the Federal Government not gone to him for that information, then of course the allegation would have been "well, they are not trying, they are not doing the job so apparently, one way or another, there's corruption involved", or something like that. This just, at this point it just seemed to

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<sup>78</sup> Mr. Brown: Transcript Volume 179, page 37280, lines 11 - 188, September 7, 2006

<sup>79</sup> Document 027179, July 17, 1990 article "*Witness statement withheld*"

<sup>80</sup> Mr. Brown: Transcript Volume 179, page 37293, line 8 - 37295, line 1, September 7, 2006

<sup>81</sup> Document 004745, August 29, 1990 article "*Ex-prosecutor helping probe Milgaard case*"

be more of the nonsense coming out of Milgaard camp, this was, again, really a very foolish characterization of what was going on.<sup>82</sup>

: As the media campaign progressed, it became apparent to Saskatchewan that the approach employed by the Milgaards was more about applying continuous public pressure on the Federal Minister to persuade her to provide the Milgaards with a remedy and less about providing credible examples of misconduct that the province felt compelled to investigate or any officials, Federal or provincial, felt compelled to believe.

Had these allegations been meritorious examples of misconduct with some form of identifiable confirmatory evidence, Saskatchewan believed that they would have been presented to provincial or federal officials first rather than conveyed through the media. Credible examples did not require a particular media spin prior to being released to officials for consideration. Not providing the information to federal officials first and Saskatchewan at all, caused suspicion at the provincial level. As Mr Brown noted:

Q You said, your earlier words were that it caused - - the fact that it was in the media, and I believe not brought to, you said to your attention or to the authorities, that that caused you a concern initially. Can you elaborate on that? What do you mean?

A Well, it makes me suspicious. If you are not going to bring it to me directly and let me see exactly what you've got, it makes me suspicious that maybe you don't have what you are claiming to have.

Q Now, at this point, though, when you say brought it to you, Saskatchewan Justice wasn't directly involved in this process?

A That's correct

Q And are you saying that if it was, in your words, gold, you would have thought that they would have brought it to Saskatchewan Justice in any event, notwithstanding the fact that Federal Justice was investigating it?

A Well, yes. I mean, at the end of the day they know that if they are

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<sup>82</sup> Mr. Brown: Transcript Volume 178, page 37299, lines 5 - 22, September 7, 2008



successful it's coming back to us anyway, and even with respect to the federal government, as I understand it, the process tended to be news conference first, federal government second, and that's -- again, that causes me some concern.

Q And concern in what way, about --

A Well, yeah, if what they've got is substantial information that's going to be of real assistance to their case, you don't take it to the news media first, you take it to the people who can do you the most good.

Q Being whom?

A Being the Federal Minister's officials.

Q So are you telling us that that, that the manner in which they were providing information not only to you, but to Federal Justice, caused you a concern?

A Yes.

Q And what if anything did it cause Saskatchewan Justice to think about the credibility and reliability of what was being reported in the media?

A Well, it seemed to be certainly sensational and quoted in, or given to the news media in the form of sensational headlines as opposed to simply giving them the straight goods and saying here's, you know, here's the document, this is what she said, that and, as it turned out, it seemed like they were trickling the information out, you know, the first thing they gave out was the Deborah Hall and the Rex Ferris stuff, then they would trickle out a little more information, maybe Wilson or whatever it was, and that seemed to me to be more aimed at a publicity game than really providing us with information.<sup>83</sup>

Had the Milgaards presented Saskatchewan with seemingly credible information regarding misconduct, Saskatchewan would have looked into it.<sup>84</sup> Because Federal officials had been provided with the Milgaards' application and because Saskatchewan

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<sup>83</sup> Mr. Brown: Transcript Volume 178, page 37183, line 6 - page 37185, line 12, September 6, 2006

<sup>84</sup> Mr. Brown: Transcript Volume 178, page 37118, lines 4 - 8, September 6, 2006

was aware that they had undertaken an investigation into the matter, there was nothing in addition to the Federal investigation that Saskatchewan could have undertaken that would have advanced the analysis.<sup>85</sup>

Saskatchewan was not concerned that Federal officials were investigating matters that affected the province because Saskatchewan was of the view that the Federal Government did a very thorough job of investigating section 690 claims. Also, the investigation was being done in the context of an application for the exercise of the prerogative of mercy which was legitimately the function of the Federal government.<sup>86</sup> If during the course of their investigation, any impropriety was identified, Saskatchewan would be advised. As a result, Saskatchewan chose to rely on the Federal Government on the basis that they trusted Federal officials and the quality of their investigation.<sup>87</sup>

During preparations for the Supreme Court Reference and upon reviewing the disclosure provided by Federal officials, Saskatchewan was convinced that the investigation undertaken was complete and had been handled with integrity.<sup>88</sup>

During this time, Saskatchewan was also aware that as part of the Federal investigation, the RCMP were asked to examine the claim that Larry Fisher was responsible for the sexual assault and death of Ms. Miller. It was Saskatchewan's belief, based on information from Federal officials, that the RCMP was conducting a complete investigation to determine whether there was any evidence linking Larry

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<sup>85</sup> Mr. Brown: Transcript Volume 178, page 37176, lines 5 - 24, September 6, 2006

<sup>86</sup> Mr. Brown: Transcript Volume 178, page 37106, lines 17 - 24, September 6, 2006

<sup>87</sup> Mr. Brown: Transcript Volume 178, page 37108, line 24 - page 37109, line 14, September 6, 2006

<sup>88</sup> Mr. Brown: Transcript Volume 179, page 37316, line 24 - page 37317, line 25, September 7, 2006; Volume 182, page 37943, lines 6 - 16, September 13, 2006

Fisher to the offence.<sup>89</sup> Mr. Brown stated:

Q And what about – I would like your comment on, and we'll get into this in a bit more detail, in the application considered by the Federal Minister in the first application, we've heard evidence from Eugene Williams and Sergeant Rick Pearson that one aspect of the Federal Minister's review was to have the RCMP investigate the ground that said Larry Fisher is the killer of Gail Miller and the police investigated that. I think Mr. Pearson and Mr. Williams' evidence was that it wasn't formally a criminal investigation as would be done by the province or a police force, but rather a limited engagement, if I can call it that, or an assist to investigate that. Does that accord with your investigation of what happened?

A Well, they certainly didn't make it clear that it would be a limited engagement. They would simply use the word investigate and that's what we would expect them to be doing.

Q And so let me ask you that, what was Saskatchewan Justice's understanding of the extent to which the RCMP investigated Larry Fisher as the perpetrator of the Gail Miller murder as part of the consideration of the first application?

A It was our assumption that they would have done a proper investigation to determine whether there was any real evidence linking Larry Fisher to that murder.

Q And so it would be similar in nature to what you would expect that a provincial police force investigating it for the purposes of laying a charge against Mr. Fisher would do?

A Yes.<sup>90</sup>

Saskatchewan was also aware that the Federal Minister had sought an opinion from retired Supreme Court Justice Mr. William McIntyre. Saskatchewan officials knew of Mr. McIntyre's reputation as a respected Judge and criminal law counsel. The province was advised that Mr. McIntyre received a full file upon which he based his opinion that

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<sup>89</sup> Mr. Brown: Transcript Volume 179, page 37364, lines 6 - 14, page 37320, lines 11 - 23, September 7, 2006

<sup>90</sup> Mr. Brown: Transcript Volume 178, page 37104, line 2 - page 37106, line 9, September 6, 2006

no miscarriage of justice was established nor was there a basis to grant a remedy pursuant to section 690.<sup>91</sup>

Mr. McIntyre's opinion provided comfort to Saskatchewan that there was no basis to re-open the investigation in to the death of Ms. Miller. Alternatively, had Mr. McIntyre recommended that a remedy be granted, this would have likely prompted a recommendation to the provincial Minister of Justice to re-open the investigation.<sup>92</sup>

Having borne in mind the quality of the information put forward into the media by the Milgaards, the conversations between Saskatchewan and Federal officials, the information obtained regarding the RCMP investigation of Mr. Fisher, Mr. McIntyre's opinion and the explanation provided by Minister Campbell on February 27, 1991, Saskatchewan did not re-open the Miller investigation.<sup>93</sup> Saskatchewan concluded that there was no basis to re-open the investigation in light of the thorough investigation that ostensibly amounted to a re-investigation of the crime<sup>94</sup>, the thorough analysis and the sound resulting conclusions.

Notably, Saskatchewan specifically concluded that there was no evidence to implicate Mr. Fisher in the attack of Ms. Miller and certainly no evidence with which to charge him of the offence<sup>95</sup>, no evidence that justice officials were involved in any impropriety<sup>96</sup> and

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<sup>91</sup> Mr. Brown: Transcript Volume 179, page 37307, line 1 - page 37310, line 8, September 7, 2006

<sup>92</sup> Mr. Brown: Transcript Volume 179, page 37310, line 9 - page 37311, line 13, September 7, 2006

<sup>93</sup> Mr. Brown: Transcript Volume 179, page 37354, line 16 - page 37356, line 14, September 7, 2006

<sup>94</sup> Document 026675, March 6, 1991 letter from the Honourable Gary Lane to Ms. Sharon Jones

<sup>95</sup> Mr. Brown: Transcript Volume 179, page 37322, lines 2 - 11, September 7, 2006

<sup>96</sup> Mr. Brown: Transcript Volume 179, page 37323, lines 3 - 24, September 7, 2006

that the allegations in the media were "all flash and no substance"<sup>97</sup>.

**B. Dismissal of the First Application to the Matter being Referred to the Supreme Court (February 27, 1991 - November 28, 1991)**

The dismissal of the first application saw an increase in the Milgaard media activity. The stories contained allegations of frame and coverup by Saskatchewan police and officials as well as corruption in Federal ranks.<sup>98</sup>

On August 21, 1991, for example, a story contained the allegation that Mr. Melnyk and Mr. Lapchuk were paid to provide false testimony.<sup>99</sup> As a result, Saskatchewan officials searched Mr. Caldwell's file for evidence to substantiate or refute the allegation. No evidence to substantiate the allegation was found.

Further, on August 30, 1991, the *Star Phoenix* carried a story alleging that the Saskatoon Police Service destroyed Larry Fisher files in order to hide them from the Milgaards.<sup>100</sup> In response to this allegation, Saskatchewan officials requested an investigation to be overseen by the Saskatchewan Police Commission. On November 29, 1991, R.D. Laing, Chairman of the Commission released his report concluding that no wrongdoing had occurred.<sup>101</sup>

The allegations published in the media were not believed by Saskatchewan during this

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<sup>97</sup> Mr. Brown: Transcript Volume 179, page 37366, lines 10 - 19, September 7, 2006

<sup>98</sup> Mr. Brown: Transcript Volume 179, page 37396, line 24 - page 37397, line 21, September 7, 2006; Document 004826, August 16, 1991 article "*Milgaard framed, group contends*"

<sup>99</sup> Document 026000, August 21, 1991 article "*Two Milgaard witnesses paid, lawyer suggests*"

<sup>100</sup> Document 004592, August 30, 1991 article "*Vanishing files 'unbelievable': lawyer*"

<sup>101</sup> Document 330778, November 29, 1991 Report of R.D. Laing, Chairman, Saskatchewan Police Commission

time. Officials viewed this as a public relations campaign mounted to sway the Federal Minister.<sup>102</sup>

Ironically, while the Milgaards were in the midst of claiming that Saskatchewan officials were involved in a coverup, provincial officials were supportive of and in fact, promoting, a public airing of the entire matter.<sup>103</sup>

On August 8, 1991, by correspondence, Saskatchewan was contacted by the Milgaards for the first time regarding their section 690 applications.<sup>104</sup> The Milgaards were seeking an endorsement that some type of remedy should be granted by the Federal Minister.<sup>105</sup> At the time of receipt of the letter, Saskatchewan was aware that a second application was forthcoming.<sup>106</sup> That indeed occurred on August 14, 1991.

It was on August 20, 1991 that Federal officials provided Saskatchewan with a copy of the second Milgaard application.<sup>107</sup> By this time, it was Saskatchewan's understanding that some type of public airing of the matter would be undertaken by the Federal Government rather than a departmental review of the application.<sup>108</sup> In light of this approach, Saskatchewan awaited the commencement of the proceedings, participating in preparatory discussions with interested parties and co-operating in moving the matter

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<sup>102</sup> Mr. Brown: Transcript Volume 179, page 37397, line 22 - page 37398, line 7, September 7, 2006

<sup>103</sup> Document 004322, undated Memorandum of Ms. Ellen Gunn, Director of Saskatchewan Public Prosecutions

<sup>104</sup> Document 010080, August 8, 1991 letter of Mr. Wolch to Ms. Gunn

<sup>105</sup> Mr. Brown: Transcript Volume 179, page 37374, lines 5 - 12, page 37400, lines 6 - 15, September 7, 2006

<sup>106</sup> Mr. Brown: Transcript, volume 179, page 37374, line 23 - page 37375, line 12, September 7, 2006

<sup>107</sup> Mr. Brown: Transcript Volume 179, page 37408, lines 7 - 12, September 7, 2007

<sup>108</sup> Mr. Brown: Transcript Volume 180, page 37428, line 20 - 37431, line 9, September 11, 2006

forward. Saskatchewan was confident that the outcome of this process would provide direction for Saskatchewan, if action was required. Re-opening the investigation at this juncture would only mean that the work undertaken in the court process would be duplicated.

**C. Supreme Court Reference to Decision of the Supreme Court  
(November 28, 1991 - April 14, 1992)**

Saskatchewan participated in the organizing meetings and continued full co-operation. Open box disclosure was offered to all parties. Provincial officials were willing to assume any role in the proceedings that was required. It was for that reason Saskatchewan ultimately assumed the role of advocating the case against Mr. Milgaard. As explained by Mr. Brown:

Q And when and how did you learn about the role that Saskatchewan Justice would have to play in the reference?

A Well, ultimately that didn't sort of settle down entirely until the end of February and after we had been to the Supreme Court several times, it wasn't until then that the Court actually decided what we were expected to do. But earlier on in December or in November when this came out, it was essentially that we were going to be advocating the case against David Milgaard, and Mr. Wolch/Mr. Asper would be advocating the case for him.

Q With respect to whether or not a miscarriage of justice had occurred or the continued conviction would constitute a miscarriage of justice?

A That's right, yes.

Q And so you were -- you were told then that you would be the adversary of Mr. Milgaard before the Supreme Court?

A Essentially, yeah.

Q And who told you that?

A That would have been Ellen Gunn.

Q But who told – who told Saskatchewan Justice?

A Oh, Federal Justice I believe decided to follow the precedent of the Steven Truscott hearing before the Supreme Court some 20 odd years earlier and I believe in that hearing in Ontario, the Ontario Department of Justice had argued the contrary case.<sup>109</sup>

No issue was taken by the Milgaards that Saskatchewan would fulfil the role of adversary. On November 30, 1991, a newspaper article carried these comments:

"You can't just walk in (to the Supreme Court), have a love-in and say 'we all agree David is innocent'," Wolch told the Star Phoenix Friday.

"Somebody will have to say 'No. David is guilty.'

"And that will undoubtedly have to be Saskatchewan."<sup>110</sup>

In a memorandum dated December 12, 1991, Mr. David Asper wrote to his client Mr. Milgaard as follows:

It is the view of the Department of Justice that the proceeding should be "adverse" in nature, meaning that there will be two sides to the argument. This is not surprising since one of the basic principals of the criminal justice system is that truth somehow is more likely to emerge as the result of the testing of witnesses through the adversarial process. Consequently, Saskatchewan will be taking the view that your conviction was safe.

It would appear that the role of the Department of Justice will essentially be neutral, bearing in mind that it is they who have after all sought an opinion.<sup>111</sup>

Despite this assumed adversarial role, Saskatchewan was prepared, in the event that a miscarriage of justice was identified in the course of the Reference, to act upon it or to

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<sup>109</sup> Mr. Brown: Transcript Volume 180, page 37502, line 17 - 37503, line 21, September 11, 2006

<sup>110</sup> Document 077760, November 30, 1991 article "*Province to play 'major role' in Milgaard review*"

<sup>111</sup> Document 213342 at 213343, December 12, 1991 Memorandum of Mr. Asper to Mr. Milgaard



advise the Federal Government officials that a particular remedy would be appropriate.<sup>112</sup> This position exemplified Saskatchewan's willingness to remedy an impropriety or miscarriage if credible evidence demonstrated that this had occurred.

Saskatchewan wanted the Supreme Court to thoroughly review all of the Milgaards' allegations, particularly whether provincial officials were involved in a coverup. Consideration of this issue would, of course, be of great value to Saskatchewan. To this end, the province advocated for the inclusion of the phrase "continued conviction" in the wording of the Reference document. Without this phrase, the boundaries of the Reference would have ended with the conviction of Mr. Milgaard. Mr. Brown stated "there wouldn't have been any point in having a reference if all these things [allegations] weren't dealt with."<sup>113</sup>

Saskatchewan thought it was the Milgaards' responsibility to put forward relevant evidence to demonstrate the validity of their allegations.<sup>114</sup> Despite post Reference protestations that they were limited in the evidence they could call, there was no reason whatsoever that they could not have attempted to advance evidence that Saskatchewan was involved in a coverup or other impropriety.<sup>115</sup> These issues fell within the scope of the terms of reference.<sup>116</sup> There was no reason that both Mr. Kujawa and Mr. Caldwell were not produced as witnesses to respond to questions regarding their conduct.<sup>117</sup> In fact, the Milgaards were not disallowed from calling any

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<sup>112</sup> Mr. Brown: Transcript Volume 181, page 37654, line 4 - page 37655, line 11, September 12, 2006; Volume 180, page 37506, line 1 - page 37508, line 2, September 11, 2006

<sup>113</sup> Mr. Brown: Transcript Volume 180, page 37513, line 8 - page 37515, line 23, September 11, 2006

<sup>114</sup> Mr. Brown: Transcript Volume 181, page 37605, lines 19 - 25, page 37627, line 20 - page 37628, line 13, September 12, 2006

<sup>115</sup> Mr. Brown: Transcript volume 181, page 37628, lines 5 - 25, September 12, 2006

<sup>116</sup> Mr. Brown: Transcript Volume 180, page 37523, line 17 - page 27524, line 5, September 11, 2006

<sup>117</sup> Mr. Brown: Transcript Volume 181, page 37609, lines 7 - 25, September 12, 2006

witnesses they desired to call other than Mrs. Milgaard due to the view of the court that she did not have any evidence relevant to their considerations.<sup>118</sup>

Saskatchewan believed the reason the Milgaards chose not to call evidence relating to coverup on behalf of provincial officials was that no such evidence existed.<sup>119</sup> In fact, no such evidence other than the readily dispelled Breckenridge allegations has actually been advanced in any context.

The Milgaards also protested that they were not able to call any evidence that the Crown did not provide adequate disclosure. This, too, was not accurate. In Mrs. Milgaard's affidavit submitted to the Court, she stated her belief that the Court was interested in determining what disclosure was made available to Mr. Tallis.<sup>120</sup> This issue was also included in Mr. Wolch's written submissions to the Supreme Court.<sup>121</sup>

In the course of the Reference preparations and proceedings, Saskatchewan maintained the view that the Larry Fisher information was not sufficient enough to call into the question the conviction of Mr. Milgaard. Sufficient evidence meant that the information had to go beyond evidence that might be relevant or might raise a reasonable doubt to evidence that would demonstrate the probable innocence of Mr. Milgaard. This was the test on all fresh evidence applications before an Appellate Court. Fresh evidence must be of real substance and it was Saskatchewan's view that the Fisher evidence did not meet this standard in light of the Ron Wilson evidence as well as the Craig Melnyk and George Lapchuk evidence, none of which had been

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<sup>118</sup> Mr. Brown: Transcript Volume 181, page 37544, lines 4 - 16, September 12, 2006

<sup>119</sup> Mr. Brown: Transcript Volume 181, page 37606, lines 1 - 20, September 12, 2006

<sup>120</sup> Document 010127 at 010130, February 29, 1992 affidavit of Mrs. Milgaard

<sup>121</sup> Document 218223 at 218228, Undated submission to the Supreme Court on behalf of Mr. Milgaard

shown to be false.<sup>122</sup>

The similar fact evidence itself did not withstand the scrutiny of Saskatchewan officials who were of the view that the details of the Miller offence were not sufficiently similar to Larry Fisher's other offences to be of assistance either to the Crown or defence in a trial.<sup>123</sup>

In the final analysis, Saskatchewan held the belief that the Supreme Court considered all issues of misconduct presented to it respecting provincials officials, despite the Milgaards efforts to convince the public otherwise.

The Supreme Court concluded that:

It is appropriate to begin by stating that in our view David Milgaard had the benefit of a fair trial in January 1970. We have not been presented with any probative evidence that the police acted improperly in the investigation of the robbery, sexual assault and murder of Gail Miller or in their interviews with any of the witnesses. Nor has evidence been presented that there was inadequate disclosure in accordance with the practice prevailing at the time...At the conclusion of the first trial, there was ample evidence upon which the jury, which had been properly instructed, could return a verdict of guilty.<sup>124</sup>

They also stated that although they were recommending that the Minister of Justice set aside Mr. Milgaard's conviction and direct a new trial, this was not to be taken as a finding of guilt against Mr. Fisher nor that sufficient evidence existed to charge him.<sup>125</sup>

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<sup>122</sup> Mr. Brown: Transcript Volume 180, page 37516, line 11 - page 37522, line 12, September 11, 2006

<sup>123</sup> Mr. Brown: Transcript Volume 182, page 37839, line 7 - page 37841, line 11, page 37856, line 8 - page 37859, line 1, September 13, 2006

<sup>124</sup> Document 003975 at 003981 - 003982, April 14, 1992 Decision of the Supreme Court

<sup>125</sup> Document 003975 at 003982, April 14, 1992 Decision of the Supreme Court

Further the court stated that they were not satisfied either beyond a reasonable doubt or on a preponderance of evidence that Mr. Milgaard was innocent of the murder.<sup>126</sup>

The decision confirmed for Saskatchewan that disclosure both during the trial and during the appeal proceedings was indeed adequate according to the standards of the day.<sup>127</sup> This meant that there was no error on the part of Mr. Caldwell or Mr. Kujawa nor was this evidence of a conspiracy to suppress evidence.<sup>128</sup>

Based upon significant amount of evidence received from all parties in the course of the Reference proceedings and based also on the decision reached by the Supreme Court, Saskatchewan was satisfied that no miscarriage of justice had been identified and that there was no identifiable reason to re-open the Miller Investigation.<sup>129</sup>

**D. Decision of the Supreme Court to Report of Alberta Justice (April 14, 1992 - August 15, 1994)**

Subsequent to the Reference decision, Saskatchewan expected that the Milgaard media campaign would resume, this time targeting Saskatchewan in order to get either compensation or an inquiry.<sup>130</sup> However, by this time Saskatchewan did not believe any of it was valid. Saskatchewan believed the Milgaards were generating publicity in order to force Saskatchewan to respond.<sup>131</sup>

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<sup>126</sup> Document 003975 at 003982 - 003983, April 14, 1992 Decision of the Supreme Court

<sup>127</sup> Mr. Brown: Transcript Volume 182, page 37947, line 24 - page 37949, line 16, September 13, 2006

<sup>128</sup> Mr. Brown: Transcript Volume 182, page 37947, lines 12 - 23, September 13, 2006

<sup>129</sup> Mr. Brown: Transcript Volume 181, page 37675, line 14 - page 37678, line 1, September 12, 2006; Volume 182, page 38000, lines 9 - 15, September 13, 2006

<sup>130</sup> Mr. Brown: Transcript Volume 182, page 37995, lines 7 - 24, September 13, 2006

<sup>131</sup> Mr. Brown: Transcript Volume 182, page 38025, lines 2 - 11, September 13, 2006

Saskatchewan would not consider these allegations as the Milgaards had been given every possible opportunity during the Reference to call evidence on any of these issues and in some cases, simply chose not to. The more these allegations of wrongdoing were made publicly, the less credibility the Milgaards had, thought Saskatchewan.<sup>132</sup>

Such was the case with the Breckenridge information. The Milgaards had been aware of Mr. Breckenridge's statements during the Reference and chose not to allow the Court to consider their veracity. This led Saskatchewan to believe that the Milgaards did not think too highly of the value of this information themselves.<sup>133</sup>

The Milgaards needed new information to generate some traction in the media and they believed that Breckenridge filled the void. However, some Saskatchewan officials immediately identified it as a meritless claim and concluded that any allegation made by the Milgaards, including this one, was not to be believed.<sup>134</sup>

However, there were others in the Department such as the Minister and Deputy Minister of Justice, who determined that the matter should be referred to the RCMP for an investigation followed by an independent review of the RCMP findings. That task was taken on by Alberta Justice.<sup>135</sup> Saskatchewan was prepared to follow any resulting recommendations.<sup>136</sup>

After an exhaustive investigation, Inspector Murray Sawatsky prepared a report on

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<sup>132</sup> Mr. Brown: Transcript volume 182, page 38032, line 11 - page 38034, line 5, September 13, 2006

<sup>133</sup> Mr. Brown: Transcript volume 182, page 38086, lines 6 - 20, September 13, 2006

<sup>134</sup> Mr. Brown: Transcript Volume 182, page 38079, line 11 - page 38080, line 14, September 13, 2006

<sup>135</sup> Mr. Brown: Transcript Volume 182, page 38072, lines 9 - 17, September 13, 2006

<sup>136</sup> Mr. Brown: Transcript Volume 183, page 38136, line 21 - page 38137, line 3, September 14, 2006

behalf of the RCMP.<sup>137</sup> Inspector Sawatsky concluded that Saskatchewan officials were not involved in any criminal wrongdoing. He also stated that:

There is no new evidence which would exonerate David MILGAARD, or that would inculcate any other person, including Larry FISHER.<sup>138</sup>

These conclusions came after such a thorough investigation that it amounted to a re-investigation of the entire matter. As Mr. Sawatsky stated:

Q And can you tell us, I think you've said on a number of occasions that the purpose of your investigation was not to re-investigate the murder of Gail Miller, is that correct?

A That's correct.

Q Is it fair to say, though, that in the course of investigating the many allegations of criminal wrongdoing, that effectively your investigators investigated pretty much everything that they would have investigated if that had been their mandate?

A I think that's fair to say, yes. We interviewed most of the witnesses, examined the same evidence, yes, so I think that's fair to say.

Q And so, although that may not have been your purpose, the information gathered from witnesses would be very similar, if not identical, to what you would investigate if you had investigated the murder of Gail Miller?

A Yes, that's a fair statement.<sup>139</sup>

Of course, after reviewing the RCMP report, Saskatchewan understood that the RCMP had re-investigated the entire matter.<sup>140</sup>

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<sup>137</sup> Document 023167, January 13, 1994 RCMP report of Inspector Sawatsky

<sup>138</sup> Document 023167 at 023407, January 13, 1994 RCMP report of Inspector Sawatsky

<sup>139</sup> Mr. Sawatsky: Transcript Volume 175, page 36532, lines 3 - 22, August 30, 2006

<sup>140</sup> Mr. Brown: Transcript Volume 178, page 37140, lines 11 - 21, September 6, 2006

Once the RCMP investigation was complete, Alberta justice officials provided an opinion as to whether any criminal wrongdoing occurred and concluded that none had occurred. Alberta officials also echoed the RCMP finding by determining that Mr. Milgaard was not exonerated as a result of the investigation nor was Mr. Fisher implicated.<sup>141</sup>

After consideration of this extensive information, Saskatchewan concluded:

- A Well, certainly once the RCMP Flicker report became available, we were of the view that there was no substance whatsoever to the Breckenridge allegations, that indeed there was even more evidence that David Milgaard was probably responsible for that murder and there was no reason to re-open or to call an inquiry.<sup>142</sup>

Because the matter had just been re-investigated, no further investigation could be undertaken.

**E. Flicker Decision to DNA Results (August 15, 1994 - July 18, 1997)**

With the section 690 review, the Reference and Flicker, the Milgaards' numerous allegations had been analyzed and adjudicated. Nothing fresh and of substance had been advanced that could be considered by Saskatchewan officials. Saskatchewan, in fact, was of the view that with the information the Milgaards had provided to that point, they could neither prove Mr. Milgaard's innocence nor could they establish a miscarriage of justice.<sup>143</sup> Then, the focus turned again to the prospect of DNA analysis.

During the course of the Supreme Court Reference, Federal officials provided an

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<sup>141</sup> Document 032805 at 032819 - 032820, August 15, 1994 report of Alberta Justice

<sup>142</sup> Mr. Brown: Transcript Volume 178, page 37141, lines 8 - 14, September 6, 2006

<sup>143</sup> Mr. Brown: Transcript Volume 181, page 37719, line 9 - page 37720, line 1, September 12, 2006

undertaking to the Court that they would monitor the advancements being made respecting DNA analysis capabilities and would submit the Miller exhibits for testing when appropriate.<sup>144</sup>

From the time of the Reference, when a DNA test was attempted, until the DNA testing was successfully performed, Saskatchewan was supportive of the testing. In December 1991, Mr. Murray Brown wrote to Mr. Eugene Williams conveying this sentiment. Mr. Brown, stated that "we at least owe that effort to Mr. Milgaard."<sup>145</sup> Further in 1995, Mr. Brown again indicated to Federal officials that Saskatchewan was in favour of pursuing the testing.<sup>146</sup> The issue that remained to be settled, however, was the type of testing procedures to employ.

Saskatchewan and Federal officials were given to understand that only a small spot of human sample remained on the exhibits upon which to conduct the testing. It was Saskatchewan's belief that Ms. Patricia Alain, forensic expert with the RCMP, had examined all the Miller exhibits prior to arriving at this conclusion.<sup>147</sup> Because of this belief that only a small stain remained, protracted discussions between the Milgaards and provincial and Federal government officials ensued. Discussions between the parties went on for approximately two and a half years until an agreement was ultimately reached.<sup>148</sup>

On July 18, 1997, the DNA results were available and confirmed that semen samples

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<sup>144</sup> Mr. Brown: Transcript volume 181, page 37661, line 1 - page 37662, line 2, September 12, 2006

<sup>145</sup> Document 002663, December 20, 1991 letter from Mr. Brown to Mr. Williams

<sup>146</sup> Document 289651, April 7, 1995 letter from Mr. Brown to Mr. Ronald Fainstein

<sup>147</sup> Mr. Brown: Transcript Volume 183, page 38125, line 16 - page 38126, line 4, September 14, 2006

<sup>148</sup> Mr. Brown: Transcript volume 182, page 37930, line 13 - page 37933, line 6, September 13, 2006; Volume 183, page 38121, line 16 - page 38122, line 20, September 14, 2006; Document 032431, May 14, 1997 Briefing note prepared by Mr. Brown



on Ms. Miller's clothing originated from Mr. Fisher and not Mr. Milgaard. The matter was immediately re-opened by Saskatchewan.

### **III. Recommendations**

Given that Saskatchewan has sought recommendations from the Commission that the Commission considers advisable relating to the administration of criminal justice in this province, no recommendations have been included in this submission.

### **IV. Conclusions**

The evidence heard at the Inquiry has been exhaustive. Great care has been exercised by Commission Counsel to introduce information respecting the many issues raised by the Milgaards from January 31, 1969 to present. This information has been subjected to examination and cross examination by the various parties. All existing, relevant evidence now forms part of the extensive record. Such an extensive record is important in order to identify how and why an innocent David Milgaard was prosecuted, convicted and spent twenty-three years in custody for an offence that he did not commit.

Although Mr. Milgaard was wrongfully convicted, with great respect, it is submitted that an examination of the record revealed that there was no evidence to support the allegations that Saskatchewan officials were involved in any inappropriate conduct.


The record also revealed that the murder of Ms. Gail Miller was re-investigated on three separate occasions. All investigations disclosed that there was evidence to support the conviction of Mr. Milgaard, that there was no evidence linking Mr. Fisher to the offence and that there was no evidence of impropriety.

One of these investigations, Flicker, was undertaken at the request of the province of Saskatchewan and resulted in an entire re-investigation by RCMP.

Aware of all investigations and knowing the results of each, with respect, there was no further investigation that could have been sought or pursued without resulting in the duplication of previous efforts. Until the results of the DNA tests in 1997, there was no identifiable reason to re-investigate the matter .

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Regina, in the Province of Saskatchewan, this 14<sup>th</sup> day of November, A.D. 2006.



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