IN THE MATTER OF:

THE COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD

BEFORE THE HONOURABLE MR. JUSTICE EDWARD P. MACCALLUM

SUBMISSIONS OF CALVIN TALLIS

Alexander D. Pringle Q.C.,
Marshall Hopkins, Esq.
Pringle & Associates
300, 10150 – 100 Street
Edmonton, Alberta
T5J 0P6

Counsel for Calvin Tallis

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INTRODUCTION

1. From the outset of this inquiry the commitment of the former Mr. Justice Calvin Tallis has been to cooperate fully with Commission Counsel in a non-adversarial way and to move forward with a view to rendering all possible assistance to the Commission.

2. This Commission of Inquiry is mandated ***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.***

3. Submissions from Mr. Tallis will be limited to the circumstances of the trial of David Milgaard and the appeal from conviction as well as submissions in respect of "systemic recommendations" which will relate to suggested changes to the law, which, if made, might reduce the risk of innocent people being convicted.

4. The following submissions will detail the difficulties this trial and subsequent appeal presented to Mr. Tallis. It will be argued that faced with the substantial challenges this case presented his work as counsel was beyond reproach.

UNIQUE DIFFICULTIES PRESENTED IN THIS CASE

5. When analyzing the performance of Mr. Tallis as defence counsel in this trial, one should keep in mind that this was not an easy case to defend. A constellation of unusual features considerably increased the degree of difficulty in mounting the defence of David Milgaard.

a. The motive for why David's friends would lie to incriminate him remained mysterious throughout. The only possible explanation Mr. Tallis was able to work with was that the police somehow manipulated them into creating incriminating evidence against David Milgaard. Given the general esteem in which police were held by members of society in the era of this trial any attempt to defend the case by suggesting police manipulation could very well appear to be "grasping at straws." Such a defence is always difficult to advance, and it is submitted, even more so in 1970 than today.

This is illustrated by a portion of TDR Caldwell's final address to the jury, where he argues the following:

> " Now you recall I think I have already mentioned another…thing and this is that Wilson said he deliberately held back a lot of what he knew about the murder when the policemen initially saw him and only telling the true story fully for the first time on May 22nd or 23rd, and this is getting on towards four months after the murder. I mention this because I think you may agree with me that the police did an excellent job with the material they had to work with and I don't think that you would be too impressed, given all the circumstances, by any representation that…of this poor girl being kept in the cells overnight and that you should pay no attention to what she told Mackie. I don't think I need dwell on that." (p. 30 doc ID 141935)

From this passage, it is clear that Mr. Caldwell is extremely confident that the jury is not going to accept any suggestions of improper police

manipulation of witnesses. This underscores the difficulty that Mr. Tallis faced when he tried to develop this line of defence.

b. The subtlety of the incriminating evidence Wilson provided at the trial enhanced his testimony and made him a difficult witness to discredit. One would ordinarily expect a lying witness to be more blatant in providing false information. However, Wilson didn't state the obvious like, "he told me he killed her," or "I saw him drag a woman into the alley." Rather he stated things like,

   i. When he got back to the car after they were stuck in the alley, Nichol "was pretty well in a hysterical state" and "screaming." (p. 202 trial transcript)
   ii. He then testifies that once he got into the passenger seat that "Nicky kind of came over to my side of the car." (p. 203 transcript)
   iii. He testified that when David came back to the car, he was "breathing heavy." (p. 203)
   iv. He testified that David then stated: "I fixed her – something to that effect." (p. 204)
   v. Wilson testified that he then asked the question: "you what?" He testified that David did not respond to this inquiry. (p. 204)
   vi. Wilson testified that in the bus depot in Calgary that he was alone with David and that David advised him he "hit a girl or got a girl in Saskatoon or words to that effect and that he put her purse in a trash can and he thought that she would be okay."

   This is very intricate false testimony and given its nature, it made cross-examination of Wilson extremely difficult. Given his relative youth and his apparent lack of sophistication at the time of trial it would have been difficult for the jury to discern the "Machiavellian" subtlety we now see in this false testimony.

c. The fact that Wilson and John seemed to know about things which they could only have known about if David was responsible for the killing. For instance, Wilson testified that David told him in Calgary he had put the girl's purse in a garbage can. Nichol John was cross-examined before the jury by Mr. Caldwell on her May 24th 69 statement to Detective Mackie in

which she recalled seeing David put a purse into a garbage can. The fact that the jury heard that Nichol saw this must have enhanced their assessment of Wilson's credibility and also would have made the jury even more likely to conclude that Nichol's un-adopted statement was truthful.

d. Lapchuk and Melnyk's last minute highly dramatic "confession" evidence also obviously made this trial very difficult to defend. Once again, there was no clear motive for Lapchuk and Melnyk to provide this testimony if it were not true. Secondly, given what David Milgaard told Mr. Tallis he could not effectively deny the re-enactment assertions if he were to take the witness stand. Finally, due to the fact that this evidence was disclosed so late in the day, Mr. Tallis was denied the opportunity to test this evidence at the preliminary inquiry.

e. For the reasons expressed by Mr. Tallis in his evidence, there were a number of factors associated with this case that made it improvident for David Milgaard to give evidence in his own defence. This case would obviously have been easier to defend if David Milgaard could have taken the stand and survived cross-examination. However, given the circumstances known to Mr. Tallis it seemed extremely unlikely that he would survive what was expected to be an intense and rigorous cross-examination from Mr. Caldwell. This will be dealt with further below.

f. The defence was hamstrung by a lack of disclosure of significant exculpatory evidence in the possession of the Crown and the police. Had this evidence been disclosed, the defence of this case would have been much easier and an acquittal the likely outcome. This will be dealt with further below.

g. It is submitted that interventions by the trial justice in the course of the testimony of Nichol John resulted in prejudice to the defence. These interventions unfortunately helped foster an impression that Nichol John was telling the truth in the un-adopted portions of her May 24, 1969 statement. This will be dealt with further below.

h. Further, in the unique circumstances of this case, it is submitted that Nichol John's failure to adopt the essence of her May 24th statement probably worked a greater adversity to the defence than if she had adopted the statement and been subject to a normal cross-examination. This will be dealt with further below.

These examples are some of the difficulties that Mr. Tallis faced defending David Milgaard. Any assessment of the quality of the defence Mr. Tallis provided to David Milgaard must take into account the challenges of what at the time was a very difficult case to defend.

PRE-TRIAL PREPARATION BY MR. TALLIS

6. It is respectfully submitted that Mr. Tallis scrupulously prepared for his defence of David Milgaard. This is clear from evidence given by Mr. Tallis at this Inquiry, correspondence he had with Mr. Caldwell after being retained, records of legal aid accounts submitted by Mr. Tallis during the course of his retainer, portions of his missing file that surfaced during this Inquiry and the preliminary inquiry and trial record.

7. Mr. Tallis made significant efforts to ensure he received adequate disclosure from the Crown. His first letter requesting disclosure, dated June 10th, 1969 (doc ID 000801) is polite but makes very clear that he is seeking as much disclosure as he can obtain given the state of the law at the time. He states in the letter that he may not be entitled to copies of witness statements and reports "as a matter of law," but assures the Crown that he would not abuse

the Crown cooperation in disclosure. Obviously he is trying to make use of his good relationship with the Crown in order to obtain more disclosure than would otherwise be obtained at that time.

8. The second disclosure letter, dated August 21, 1969, (doc ID 001508) invokes English case law in support of the proposition that the defence is entitled to disclosure of witnesses potentially favourable to the defence whom the Crown is not intending to call. This letter approaches the issue of disclosure as a matter of right under law rather than as a matter of cooperation from the Crown. The September 9 1969 letter (doc ID 000798) in reply from T.D.R. Caldwell shows that he has a similar view. In the August 21 letter Mr. Tallis also asks the Crown to look into whether the police have turned over all their material to him. This was particularly prescient given subsequent events, for there was considerable exculpatory information in the possession of the police (both the Saskatoon Police Service and the R.C.M.P) which never found its way to the Crown file.

9. It is clear then from the correspondence between Mr. Tallis and Mr. Caldwell that Mr. Tallis was vigorously seeking all the disclosure he could get and his second letter in particular can be seen as an attempt to "push the limits of the disclosure envelop" and advance the law of disclosure in Canada through the use of English precedent. To the extent that disclosure failed in this case it was not for want of any effort on Mr. Tallis' part.

10. Under questioning by Commission counsel Mr. Tallis described how he prepared a defence file. Mr. Tallis' evidence of Feb 2, 2006 (Inquiry transcript p. 23650):

22 A Well, I can just explain it in general terms to
23 you. Fairly early in my career I developed what I
24 would call a defence counsel's checklist. Now,
25 I've looked to see whether I still had a copy of

Transcript Page 23650

1 it, but I haven't been able to find it, but later

that came into pretty common use, but then I would of course set up a file and I had the practice of taking very copious notes in my own handwriting. I wasn't able to do it in shorthand because I didn't have shorthand, but then I would, from those notes, usually dictate a memo and put it in the file, and I did that because if you dictate it from your notes, you get it typed up in very legible form and usually flesh it out a bit better than if you go back and try to read your notes, so that was -- and that of course would be a continuing process as something came up. Now, I'm not saying that I dictated the memo exactly, you know, the same day or something like that, but often the same day.

also...

Mr. Hodson:

Q Would you describe yourself as, or your practice at the time, did you produce a significant number of, if I can call them, internal memorandums with you writing down your thoughts, observations, opinions, things of that nature?
A Yes, that was my practice.
Q And so on -- and again I hate to do this to you, but as far as a number, can you give us some general idea, are we talking 10, 50 memorandums that might have been on this file, 100?
A I would say that by the time I was getting ready for trial, there was probably well in excess of 50.

11. Mr. Tallis went on to describe how he prepared detailed briefs for questioning of witnesses and memoranda of law concerning issues which he anticipated could arise at trial (Inquiry transcript, pps. 23654-56, 23659-61.) For instance, his February 2nd 2006 evidence describes his practice for preparing briefs for questioning witnesses at trial:

A My practice was to prepare a draft cross-examination for each witness and -- I don't know how much detail you want here.
Q No, please tell us.
A All right. I took each witness and I prepared a draft cross-examination of them based on the preliminary hearing evidence and any other

Transcript Page 23660

relevant materials I had in my file, so the way I

did it was first of all I would prepare an index and summary of the preliminary hearing which of course would cover each of the witnesses and I actually wrote that out on my own as I was going through it. Then I would have it typed up, and I know significant portions I would personally underline, sometimes in red, sometimes in blue and so on, so really what I had was a trial brief that was subdivided into quite a number of sections, each section being for a witness, and in that section I would have a photocopy of that witness' evidence at the preliminary hearing and I would staple a copy of the portion of the index summary covering that witness to the front of it.

Q Okay.

A And in addition, I would have the various statements, various memoranda that had been prepared earlier with thoughts that pertained to that witness or might pertain to that witness, so that when I was dealing with the witness in Court I had all the information at my fingertips, and in the cross-examination brief I did not just make a reference to crucial areas at the preliminary hearing where I had answers that I considered

Transcript Page 23661

favourable, I actually incorporated the question and answer into my brief to supplement the question that I was going to put and I did that because it allowed one to keep the continuity, and also because I had the exact page reference and question reference there, I could very quickly, if necessary, refer it to the Court and opposing counsel.

12. Unfortunately, most of Mr. Tallis' file is no longer available. However, from file memoranda, which have surfaced at the Inquiry, it is submitted that the extent and detail of his trial preparation is clearly demonstrated. For instance, his memorandum to file dated August 20th, 1969 (doc ID 212231) indicates that Mr. Tallis visited the crime scene and carefully recorded his observations. When we consider that his original file would have contained 50 or more such memoranda it is obvious that he was extremely diligent in his pre-trial preparation of the case.

13. Further, documents obtained by the Commission (document ID 065492 and 065407) show that prior to trial three meetings took place between Mr. Tallis and David Milgaard at the Prince Albert Provincial Correctional Centre.

14. In addition to meetings at the Provincial Correctional Centre in Prince Albert, Mr.Tallis also had earlier conferences with David Milgaard in Saskatoon before he was remanded to Prince Albert and met with him frequently during the preliminary inquiry and trial. Mr. Tallis went so far as to make special arrangements to ensure that a meeting room was available in the courthouse both during the trial and the preliminary inquiry in which he could meet with Mr. Milgaard while these proceedings were ongoing.

15. It is clear, then, from the uncontroverted evidence of Mr. Tallis that there was extensive consultation and discussion between Mr. Tallis and his client prior to and during trial.

16. Mr. Tallis also consulted with medical experts on the serological issues prior to conducting the preliminary inquiry (Inquiry transcript 23704 and 23996).

17. It is submitted that the preliminary inquiry record reveals extensive preparation. Witnesses were thoroughly cross-examined. A further illustration of his preparation for the preliminary inquiry is the fact that in his detailed submissions seeking a discharge, he revealed, among other things, a rich understanding of the serological evidence.

18. Mr. Tallis represented David Milgaard on a legal aid retainer. It is clear from the evidence and the record of proceedings that this in no way compromised a thorough defence. This was canvassed in Mr. Hodson's questioning of Mr. Tallis at the Inquiry:

Q Would the fact that you are being retained and either funded or not funded through Legal Aid have any influence on the manner in which you, as counsel, would put forward a defence on the -- on behalf of your client?

A No. I always took the position that when you undertook a defence you undertook a committed defence regardless of the station in life of an accused person. I felt that anybody charged

deserved as good a defence as I could give them and I didn't, in any way, feel that any other approach was justified. And I think I should say this, in my view, was the culture of the bar here in Saskatoon, one that had been passed along to me.

Q Would there have been any limits at that time, monetary limits or limits on what you could or couldn't do in the defence of Mr. Milgaard, imposed by the Legal Aid Plan? And what I am getting at is was there things that you could have done or would have done but for the fact that the Legal Aid Plan somehow limited you?

A Well I suppose that when you come to the issue of whether -- you know, getting experts, they had to

Transcript Page 23646

be approved. But of course most of us that were involved in the criminal law, you know, had a network of friends in other professions or access to people who -- and I know in my case some of them, even though they weren't lawyers, were committed.

Q If Mr. Milgaard had been a paying client, for lack of a better word, as opposed to being through Legal Aid, would you have defended him any differently or done anything differently in your defence of him?

A No. I think that's a fair way of putting it and the answer is "no".

Q I want to talk generally about --

A I --

Q Okay.

A I should just say this; that whenever I was appointed under the Legal Aid Plan and even before with respect to a case, and particularly one, a serious case, I did not fob off the responsibility to juniors. I may have had them in with me, but I did the work myself, and --

Q And we'll talk a bit more about that, because there was a gentleman by the name of Ian Disbery --

Transcript Page 23647

A Yes.

Q -- who was either an articling student or first-year lawyer that attended the trial with you?

A Yes.

Q And I think we'll see some correspondence where you sought funding from the Legal Aid plan for him, and they refused, and so you, your firm, provided Mr. Disbery at no cost at the time; is that correct?

A That's correct.

19. In addition to providing Mr. Disbery at no cost to Legal Aid, he also had his secretary Myrna Wilson attend at the preliminary inquiry and trial in order to take short hand notes of key witnesses' testimony (Inquiry transcript p. 23992.) It is obvious that the defence did not suffer for want of resources.

PROBLEMS WITH DISCLOSURE

20. Mr. Tallis conducted a thorough and tactically sound defence of David Milgaard. However, he was severely handicapped by inadequate disclosure from the Crown and the police forces involved in the investigation. Particularly, there was significant non-disclosure of exculpatory evidence. It is respectfully submitted that had defence counsel been provided with this information a very different trial would have taken place with the likely result of acquittal.

21. It is clear from the evidence taken at this Inquiry that the Crown file at the time of David Milgaard's trial contained witness statements of a number of women who had been sexually attacked by strangers who to that point in time remained unidentified. Specifically, the Crown file contained the statements of [redacted]

22. A brief review of the circumstances of these complainants makes clear the relevance of their statements to the defence.

a. [redacted] Doc ID171444 and 106111): January 15th 1969 between 8 a.m. 8:15 a.m. was attacked as she walked home from St. Paul's Hosp where she worked as a nurse. She was wearing her nurses unifc In mid-block of avenue Q between 22nd and 21st streets, the attacker approached her and then grabbed her from behind as he passed. He ran his hands over her body but did not try to remove clothing. Ms.

[redacted] then hit her attacker with her elbow and he let her go. She described him as being 5'6" slim build and between 15 and 16 years old.

b. [redacted] Doc ID006486): January 15 or 22 1969, a man came up to her from behind, grabbed her "private part" then tried to expose her breasts. He said, "I don't want to hurt you." These were the only words he said. She screamed as loud as she could. Her assailant then placed an arm around her throat. At this time a man who had been in a nearby car came to assist her. The assailant appeared to have something under his sweater and appeared undecided about whether to confront the man. The assailant eventually ran off. The assailant was described as having large, dark eyes, a darker olive complexion, between 5'2" and 5'6", in his mid 30s and may have had a thin moustache. This occurred in the Greystone area just off 8th street in Saskatoon.

c. [redacted] Doc ID 006400 and 106191): At around 7:25 p.m. on February 3, 1969 she was chased from the St. Paul's nurse's residence to her home by a man 5'9" tall. He did not catch up to her or speak to her.

d. [redacted] Doc ID 006404 and 106110): On the morning of Gail Miller's murder at 7:07 a.m. she was walking north on avenue H (7 blocks from where Gail Miller's body was found.) A man emerged from between a yard and the alley next the CPR railway and walked towards her. He then lunged at her and ran his hand or hands up and down her legs. She screamed, threw down the books she was carrying and started walking away. She looked back and saw that he was following her. She then quickened her pace and when she next looked back he was gone. She described him as not young or old, 5'5" or 5'6", heavy build, dark complexion and dark hair.

23. It is clear from a letter written by J. Penkala to the Crime Index Section of the RCMP, that the Saskatoon Police Service also found a connection between the Gail Miller murder and two unsolved rapes, which had occurred in Saskatoon

in previous months. It appears he is describing the attacks on [redacted] In the February 5th, 1969 letter (Doc ID 052923) J. Penkala states at p. 2:

> "Our Department has two unsolved cases, dating back into October and November of 1968, which involve complaints of rape. In both these cases, the victim was attacked from behind while walking in the late evening, forced into a lane and, under threat with a knife, made to undress and submit to intercourse. The victims were always threatened and forbidden to see the attacker who, after the attack, carried away some of the victim's clothing, usually the outer garment or coat. In these cases, the attacker allowed the victims to replace some of the clothing, usually the outer garment or coat."

24. In the May 7th, 1969 report authored by Cpl. E.A. Rasmussen of the Saskatoon GIS of the RCMP (DocID 250597) at p. 7 the following is stated at paragraphs 19 through 21:

> "19. It is mentioned that during the late fall of 1968 the local police department had reports of two rapes and one attempted rape. These investigations were conducted by the City police with negative results. Persons involved were as follows:
>
> a) [redacted] The offence took place at approximately 8 PM of 31 Oct. 68 in a lane of the 400 block between Avenues G and H.
>
> b) [redacted] This offence occurred at ap[illegible].m. 13 Nov. 68 in a lane of the 500 block Ave E South.
>
> c) [redacted] This offence reportedly took [illegible]imately 10 PM, 29 Nov. 68 in the south lane, 1300 block Temperance St.
>
> In these three instances the M.O. was similar in that the male approached his victim from the rear, covered their mouth with his hand and pointed a knife into their back, forcing them down the lane. The descriptions of the assailant given by all three were very similar and it appeared that the same person was involved. The assailant would force his victim to undress at knife point and always managed to stay in the shadows or behind them in order that his identity would not be detected. He would then have the victim lie on her coat at which time

intercourse would take place. In the [redacted] case, the assailant was scared away as a result of lights of a [redacted] vehicle approaching down the lane.

20. As none of the exhibits obtained in a [redacted] of the above cases had been analyzed by our Laboratory, it was suggested that this be done in order to establish whether or not the person responsible in these incidents was the same one responsible for the MILLER murder. Accordingly, on 20 March 69 exhibits obtained from [redacted] were transported to the [redacted] Regina for examination. These included two smears on microscopic slides, one pair of blue panties and one plaid jacket. Results of this examination indicated agglutinogens of Type "A" were found on the blue panties and plaid jacket. No attempt could be made to determine the agglutinogens on the slide as they did not provide enough sample for the tests. It is not known if [redacted] is a group "A" secretor however, an attempt is being made by Saskatoon City Police to obtain further samples such as saliva for further examination. Statements originally obtained from these girls by Saskatoon City Police are attached.

21. As a result of the foregoing, it is felt there is a strong possibility the three rapes and the murder are directly connected. In view of this, extensive interrogation was conducted with [redacted] with negative results. She, however, did indicate and named a [redacted] son who was later interrogated and submitted to a blood test which indicated he was a member of the "O" Group. These three girls have been interviewed at length to no avail. All stated that they have not seen person described in their statements nor have they any idea who may have been responsible."[Emphasis added]

25. It is clear, then, from this report that in May of 1969, the RCMP were in possession of information which tended to exculpate David Milgaard. This information did not find its way either to Mr. Tallis or to the Crown file.

26. The Rasmussen report was not the only RCMP report which contained this significant exculpatory information, which failed to find its way to either the Crown file or to defence counsel. In a report authored by RCMP Inspector J.A.B. Riddell and dated March 20 1969 report (Doc ID 065399) the following is stated at p. 3:

"Between 21 Oct and 29 Nov 68, two rapes and one attempted rape were committed in the same area where this girl was murdered. To

> date the person responsible has not been identified. In each case the attacker forced the girls down an alley at knife point where he forced them to undress before committing the offence. In the attempted rape, the attacker was scared off by the approach of car headlights. One of the victims claims that she can still identify her attacker while the other two are only able to give a brief description of him. In view of the similar methods used in committing these offence, there is a good possibility that they were all committed by the same individual and this fact is not being overlooked during this investigation."

27. Had Mr. Tallis been provided with the police reports relating to these assaults or the witness statements of the sexual assault victims he would have been in a position to call evidence that there was an alternative suspect and, presumably, alibi evidence that would have excluded David Milgaard as the perpetrator of these other sexual assaults.

28. The policy reasons that have given rise to the stringent standard which the Crown must meet to introduce similar fact evidence do not apply to evidence adduced by the defence of an alternative suspect. Disposition evidence adduced against an accused will generally not be admitted on policy grounds. This rule is concerned with the accused receiving a fair trial. This strict test however, does not apply when the accused calls exculpatory similar fact evidence implicating a third party. The same policy reasons do not apply as, obviously, there is no prejudice to the accused. For instance, in *R. v. Scopelliti* (1981) 63 C.C.C. (2d) 481, the Ontario Court of Appeal stated at p. 493 that:

> "The law prohibits the prosecution from introducing evidence for the purpose of showing that the accused is a person who by reason of his criminal character (disposition) is likely to have committed the crime charged on policy grounds, not because of lack of relevance. There is however, no rule or policy which excludes evidence of the disposition of a third person for violence where that disposition has probative value on some issue before the jury: see *R. v. MacMillan* (1975) 23 C.C.C. (2d) 160 at p. 167, 7 O.R. (2d) 750, 29 C.R.N.S. 191; affirmed, 33 C.C.C. (2d) 360, 73 D.L.R. (3d) 759, (1977), 2 S.C.R. 824; *R. v. Shell and Paquette* (1977), 33 C.C.C. (2d) 422 at p. 426"

29. In *R. v. MacMillan* (supra,) the Ontario Court of Appeal addressed the issue of the relevance of disposition evidence of a third party tendered by the defence

to prove an alternative suspect committed the offence in question. In this judgment Mr. Justice Martin on behalf of the Court stated at p. 167:

> "I take it to be self-evident that if A is charged with murder of X then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X: see Wigmore on Evidence Third Edition (1940), vol. 1, p. 573, s. 139. A may prove that B murdered X either by direct or circumstantial evidence."

30. Mr. Justice Martin went on to indicate later in the judgment at p. 168 the following:

> "Obviously, unless the third person is connected with the crime under consideration by other circumstances, evidence of such person's disposition to commit the offence is inadmissible on the grounds of lack of probative value. For example, if A is charged with murdering X, in the absence of some nexus with the alleged offence, evidence that B has a propensity or disposition for violence, by itself, is inadmissible to prove B is the murderer because standing alone it has no probative value with respect to the probability of B having committed the offence. If, however, it is proved that A, B and X all lived in the same house when X was killed, and that B had a motive to kill X, then evidence that B had a propensity for violence may have probative value on the issue whether B, and not A killed X, and is accordingly admissible."

31. In this case, there are similar acts being perpetrated very close in location and time to where and when Gail Miller was sexually assaulted and killed. As well, there was a similarity of victims; young women, two of whom were nurses. The necessary nexus is clearly made out, at a minimum, with respect to several of these crimes by the similarity of these assaults and their proximity in time and location. Indeed, the nexus is so clear that some of these assaults even passed the similar fact evidence rule for admissibility by the Crown at Larry Fisher's trial (*R. v. Fisher*, (2003) S.J. No. 597.)

32. The [redacted]ssault is particularly compelling evidence of an alternative suspect. [redacted] odds of having two sexual predators committing sexual assaults at that ti[redacted]of day within seven blocks of each other on a bitterly cold day are very lov[redacted]ıe Crown theory at trial precludes David Milgaard committing the

[redacted]assault. Consequently if Mr. Tallis had this information he ur btedly would have introduced it at the trial to raise further doubt of Di Milgaard's guilt.

33. There was other evidence which was not disclosed to the defence that could have made a difference in this trial. For instance, in the report of Cst. Wilton dated February 15, 1969 (doc ID 106547) there is reference to a telephone conversation the police had with one Sidney Sargent. In this telephone conversation, Mr. Sargent apparently indicated that he drove north on Avenue N to 20th street where he had to come to a stop sometime between 7 and 7:05 a.m. on the morning of the Gail Miller murder. This police report went on to indicate that:

> "he[Sargent]observed a woman standing at the bus stop at the south curb wearing a blue or what appeared to be a blue coat similar to a nurse's cape. This woman also wore white nylons, a white dress and may have been wearing a hat. Before proceeding from the stop sign, Sargent states he saw a young male person, age 18-20 years, staggering in a southerly direction on Avenue N towards 20th street. He described the person as approximately 6'2", skinny, blondish hair. He wore blue jeans and a khaki coat. The youth was staggering as though drunk however may have been walking in this manner if he had been wearing leather shoes. Sid Sargent did not pay any more attention to the two persons and then drove away."

34. Subsequently, at this Inquiry, Mr. Sargent identified the woman as Gail Miller whom he had apparently known (Inquiry transcript 451).

35. In his evidence at this Inquiry, Mr. Tallis testified the statement of Mr. Sargent "could well have been very significant" as he felt that this evidence would have compounded the problems the Crown already had on the issue of time. As it was the timeframe within which David Milgaard could have committed the murder was very narrow. This evidence would have narrowed the time still further rendering the Crown's case even more improbable.

36. Further, there were the undisclosed interviews of Mr. and Mrs. Merriman who lived in a house the front of which looked out on the alley in which Gail Miller's body was found. The report of Detective McCorriston (doc ID 106215) indicates that Mrs. Merriman was interviewed and stated:

> "On the morning of January 31/69 she ordered a taxi to be at her home at 6:55 a.m. and watched out her front window for a few minutes while awaiting the arrival of the taxi, however she saw nor heard anything..."

37. A further police report prepared by Detective Sergeant Reid dated March 27th, 1969 (doc ID 025148) indicates that Mr. Merriman was interviewed and advised the police as follows:

> "...on January 31st 1969, they left for work by taxi, leaving at approximately 6:55 a.m. It should be noted at this person's residence they can look down the T-lane rear of Westwood Memorial and Mr. Merriman advises that his eyesight is not too good but they were looking out this window waiting for the taxi to arrive and nothing unusual was observed pertaining to persons or vehicles..."

38. Mr. Tallis testified at the Inquiry that this undisclosed evidence of the Merrimans was "of particular significance" because of the time factor (Inquiry transcript p. 24730). If the defence had known about this evidence it would have been called at the trial to still further narrow the window of opportunity for David Milgaard to attack Gail Miller.

39. The interview of Mary Gallucci was also not disclosed to the defence. In the February 6, 1969 report of Detective Sergeant Reid (doc ID 106234,) the following is indicated:

> "also interviewed was a Mary Gallucci of 1410 20th street We who stated that she takes the bus at Ave. O and 20th street every day. She stated that on Thursday morning, Jan 31st., she recalls a girl get on the bus at the above with her. She describes this girl as follow Younger girl, dark hair, wearing white dress and stockings, dark coat believed cloth and could be brown, no hat and believed to have had a white scarf. She has seen her on the same bus before does not think seen on

> Wed. There was also a young man get on the bus with... who was a construction worker wearing blue jeans and a hard hat, possibly yellow. This man comes from Avenue O south of 20th street. He has been getting on the bus same time since that day. She does not think that she could identify."

40. Obviously, if the defence had the statement of Ms. Gallucci she may have been called to cast further doubt on the Crown's "Avenue N" theory.

41. In the undisclosed police report of Detective McCorriston dated February 5th, 1969 (doc ID 106212), it is clear that the police are following up on suspect males who caught the bus at 20th street and Avenue O at or around the time Gail Miller usually caught the bus. This police report indicates that one of the individuals who interviewed in this regard was none other than Larry Fisher. The report states:

> "6:49 a.m. checked in 300 blk. Ave. O. South, Larry Fisher, 334 Ave. O South. Works at Masonery Contractors at the Education Bldg. U of Sask. Wearing yellow hard hat. Stated last Friday he caught bus at 6:30 a.m. at Ave O and 20th street. He states there was no one else around at that time and that he had no information to offer."

42. Mr. Tallis, at the Inquiry, testified that if he had received disclosure of this interview of Mr. Fisher it "could well have triggered a chain of inquiry" on his part (Inquiry transcript p. 24728.) Mr. Tallis would have been aware of the Cadrain street address. Had this connection been made, it is reasonably possible that a chain of inquiry would have commenced, by the defence, and this, in turn, may have resulted in the real killer becoming a suspect. After all, this may have caused Linda Fisher to be interviewed.

43. Police reports that would have assisted in cross-examination of Albert Cadrain were not disclosed to Mr. Tallis. In particular, it would have been helpful if Mr. Tallis had received the April 18th, 1969 report of Detective Karst (doc ID 009255). In that report, it states the following about Mr. Cadrain:

> "...it now appears that further questioning of Cadrain is warranted with regards to the blood as both youths Milgaard and Wilson along with the girl, Nichol John deny that Milgaard had any blood on his clothing while Cadrain emphatically states that he observed this blood. There is also the fact to take into consideration that when the Cadrain youth first attended at the police station some weeks ago to advise us of his information he denied that he knew anything of this murder in Saskatoon until he returned home approx. one month later when his mother advised him of same. However, this was found to be untrue when speaking to the Regina City Police we were advised by them that they had advised Cadrain of this murder and in fact questioned about same when they had him in custody at that point some two weeks prior to coming to Saskatoon. Also it should be noted that the dead girl's wallet were found near the Cadrain residence which could be implicating for either Cadrain or Milgaard in that case as they were both known to be in the area."

44. In this same undisclosed report, there is reference to the police interviewing one Leonard Wytowich who also contradicted Mr. Cadrain:

> "It is also known that through inquiries made to 218 Ave. D South where I interviewed Leonard Wytowich, that contrary to Cadrain's story he was in fact smoking pot or weed on the night prior to the murder which Cadrain denied when I originally interviewed him. A statement was taken from Wytowich to this effect and he himself states at approximately 10 on the evening prior to the murder when he was associated with Cadrain they were both very high in fact he himself was stoned. Investigations continue with regards to this particular aspect of his file."

45. If Mr. Tallis had been aware of these apparent contradictions by Mr. Cadrain, "it would have opened up a much greater scope for cross-examination" of him (Inquiry transcript p. 24714.)

46. Police reports that would have assisted in the cross-examination of Ron Wilson also were not disclosed to Mr. Tallis. In particular, it would have been helpful if Mr. Tallis could have had available to him the full history of Mr. Wilson's ongoing discussions with police leading to his May 23rd and 24th statements. It appears Wilson's developing story was revealed to the police incrementally in response to intense questioning of him from May 21st through to May 24th, 1969. Much of this history is contained in the May 25th,

1968 report of Detective Karst (doc ID 009264). If Mr. Tallis had access to this police report, he would have learned the following:

a. When Mr. Wilson was interviewed on May 21st, 1969 the conversation was taped and the tape recording of this conversation was in Detective Karst's possession. This audiotape was never disclosed to Mr. Tallis and could have been a fertile source for cross-examination of Mr. Wilson.

b. When Wilson was taken to Saskatoon, he was taken to the area where Gail Miller's body was found, first on May 21st and then again on May 22nd by Detective Karst. On both occasions he could not point out the location where they had approached the woman to ask for directions and where their vehicle had become stuck on the first occasion.

c. This report indicates that Constables Chartier and Morrison were present in the next room when Mr. Wilson was being interviewed by Inspector Roberts at the Cavalier Hotel on May 23rd, 1969. Had Mr. Tallis been aware of Chartier and Morrison's presence he could have made inquiries of these two officers and determined that Inspector Robert's interrogation was being recorded. He then could have sought disclosure of the audiotape – which subsequent events have revealed would have been very interesting.

47. Police reports were not disclosed that would have assisted Mr. Tallis in understanding the circumstances that led up to Nichol John providing a statement to Inspector Roberts May 23rd and which apparently resulted in her May 24th written statement given to Detective Sergeant Mackie.

48. For instance, it would have been helpful for Mr. Tallis to learn that Nichol John was re-interviewed by Detective Karst on April 14th, 1969 and at that time Detective Karst found her to be very truthful when she provided her

account which did not implicate David Milgaard. In his April 18th, 1969 report (doc ID 009254) Detective Karst describes this interview. He comments:

> "Further investigation of this girl when she was interviewed gave one the feeling that she was telling the truth and she emphatically stated that she could not recall any time while they were in the City of Saskatoon during the morning of the murder at which time Wilson or Milgaard had left the vehicle in which they were driving long enough to commit this offence... ...Although there are many unanswered questions with respect to Milgaard's activities on that particular morning, if one is to believe the girl, Nichol John, and it appears that she is very convincing with her story, then there is no way in which Milgaard can be connected with this crime."

49. Also very helpful to Mr. Tallis would have been the undisclosed report of Detective Sergeant Mackie, dated May 29th 1969 (doc ID 025176). In this report Mackie states the following about what occurred after he took Nichol John to the scene of Gail Miller's murder:

> "Shortly after this I returned to the Police Station where Nichol John was interviewed in regard to LSD trips she had been on and nightmares she had been having since this offence occurred. At this time it appeared that Nichol John had forgotten a great deal of what had happened possibly due to shock at what she had witnessed."

50. It is clear from these two police reports that Saskatoon City Police detectives found Nichol John to be truthful yet believe that she may have forgotten critical events surrounding Gail Miller's murder. Also, it appears that by the end of the day of May 22nd, 1969, the Saskatoon Police were not going to get anything further from Nichol John as she had been adamant up to that point about what had occurred and appeared to be truthful in this regard. It is with this background that Inspector Roberts enters the picture. Interestingly, Detective Mackie's May 29th, 1969 report does not chronicle anything that occurred on May 23rd, even though Detective Karst's report of May 25th, 1969 seems to indicate that he was in the next room at the Cavalier Hotel when Wilson and John were interviewed by Inspector Roberts.

51. Had these reports been disclosed to Mr. Tallis, at the very least, it would have been clear that there was a total vacuum of information concerning what occurred between Nichol John and Inspector Roberts.

52. As it turns out, Nichol John did not adopt the critical portions of her May 24th, 1969 statement. This development did not change the fact that these reports were very relevant and should have been disclosed to the defence. Had Mr. Tallis received these reports, they may given him deeper background when he conducted his interview of Inspector Roberts pre-trial and may have assisted him in unraveling what led John to provide her statement to Inspector Roberts.

53. Mr. Tallis also did not receive disclosure of the so-called "script" document or "Mackie Summary" (doc ID 006799). Mr. Tallis testified that had he received this document it would have assisted him. Specifically, he testified as follows on this issue (Inquiry transcript pp. 24815-6):

> "...if there had been a *voir dire* with respect to the s. 9(2) application and the circumstances under which that statement were give, this certainly would have furnished a great deal of background information dealing with potential circumstances that might have been dealt with on that *voir dire*, if one had been held."

54. It is expected that other counsel will make extensive submissions concerning the significance of the non-disclosure of this document. Thus our submissions are confined to the above.

55. Though we have not exhaustively enumerated each relevant item which was not disclosed to Mr. Tallis during the conduct of his defence of David Milgaard, the above examples make clear how severely handicapped he was by lack of disclosure.

PROBLEMS WITH SS. 9(1) AND 9(2) OF THE CANADA EVIDENCE ACT

56. At trial, Mr. Tallis argued that cross-examination of Nichol John in respect of the circumstances surrounding her May 24 1969 statement should initially have been conducted in the absence of the jury. As it turns out he was correct in making this assertion (*R . v. Milgaard* (1971) 2 C.C.C. (2d) 206 Sask. C.A.) Had Mr. Tallis been allowed to cross examine Nichol John in the absence of the jury he would have been able to conduct a more searching and probing cross examination as to how this statement was created. The Crown would have likely have been obliged to produce the police witnesses involved in the taking of the May 24th statement, including Inspector Roberts.

57. At this Inquiry Mr. Tallis testified, as follows, when asked about the areas he would have canvassed had he been allowed to cross-examine Nichol John in the absence of the jury:

Mr. Tallis
17 A Well, in general terms, it would have been safe to
18 conduct a much more wide-ranging cross-examination
19 and, in particular, to deal with her contact with
20 the polygraph operator and the circumstances there
21 as well as with respect to -- as well as with
22 other police officers. Now, that sums it up
23 because this would be consistent with the position
24 I took, and which I think the judgment on appeal
25 recognized, that the judge should, on this

Transcript Page 24415

1 Inquiry, have an opportunity to consider all of
2 the circumstances, and that would include all the
3 background to the giving of the statement that is
4 in question.
5 And if it were done in the
6 absence of the jury, as it ought to be done, I'm
7 quite sure that I would have taken the position
8 that the onus was on the Crown to call the
9 evidence of other law enforcement people that were
10 involved, either directly or indirectly, in the
11 taking of this statement. That would include, of
12 course, Mr. Roberts as well as some of the other
13 witnesses that you have mentioned, and if there
14 was a recording of the interviews, then of course
15 I would contemplate that those recordings could be
16 produced and played.
17 Now, I don't want to be too long
18 winded about this, but the circumstances under
19 which the statement was given might well be

analogous, and I'm sure I would have argued this, to the taking of a confession, and at that time, if my recollection is correct, there was, I think, very respectable authority for the proposition that on a voir dire, to determine the admissibility of a statement, there is a duty or

Transcript Page 24416

burden on the Crown to call all the witnesses who had anything to do, either directly or indirectly, with the taking of that statement, and that includes, in some cases, quite a number of witnesses, and unless there's a very good reason for the absence of such a witness and failure to call a witness, then that was the principle that was applied and could, in some circumstances, result in an inference being drawn that if the witness, police witness had been called, he or she would not support the position advanced with respect to admissibility of the confession.

Q And what would be your objective, and we'll go through in a bit more detail, Mr. Tallis, about who might be called and specific approaches, but in this scenario what would be your objective, what would you be trying to establish in front of the judge with respect to the circumstances under which Nichol John gave her previous inconsistent statement?

A Well, to raise the question as to whether or not she had been pressured in any way or whether she had been led into believing certain things, and here in the light of what I now know about some of it from what you have told me, I think the

Transcript Page 24417

polygraph operator, particularly if, you know, particularly if the discussions with him had been monitored and recorded even though no polygraph test was administered, that could be very relevant and material.

Now, I appreciate that I'm speculating here because I don't have all of that information, but I think that I draw the analogy between that and the rule with respect to confessions as I recall it. You will understand what I'm talking about.

Q Right. In fact, I think if we, apart from that law, the Court of Appeal judgment says you would have the right to call evidence as to factors relevant to obtaining the statement for the purpose of attempting to show the cross-examination should not be permitted because the Court says it may be able, that you will be able to establish that there were circumstances which would render it improper for the learned trial judge to permit the cross-examination,

22 notwithstanding the apparent inconsistencies, and
23 so I think what you are telling us is that yes,
24 the objective would be there to put forward all
25 the circumstances under which the statement was

Transcript Page 244 18

1 obtained and then you would urge upon the trial
2 judge to say notwithstanding the inconsistencies,
3 it's not proper to allow the statement?
4 A That's right.

58. The sixth "rule" enunciated by the Saskatchewan Court of Appeal in *R. v. Milgaard,* supra, with respect to the procedure to be followed under s. 9(2) of the *Canada Evidence Act* is as follows:

> "(6) If the witness admits making the statement counsel for the opposing party should have the right to cross-examine as to the circumstances under which the statement was made. A similar right to cross-examine should be granted if the statement is proved by other witnesses. It may be that he will be able to establish that there were circumstances which would render it improper for the learned trial judge to permit the cross-examination, notwithstanding the apparent inconsistencies. The opposing counsel, too, should have the right to call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted."

59. A fuller cross-examination, in the absence of the jury, could then have led the Court to find that the circumstances under which the statement were taken were such as to deny the Crown's application to have her declared adverse. Notwithstanding the Court of Appeal's finding that there was no prejudice resulting from the trial judge failing to follow the proper procedure, it is submitted, with the benefit of hindsight, that there could very well have been prejudice. If, in the absence of the jury, Mr. Tallis had been free to conduct a wide-ranging cross-examination of Nichol John and police witnesses involved in the taking of her statement, he may well have uncovered serious issues relating to the reliability of the statement and the fact that it may have been taken in oppressive circumstances. This may have resulted in two beneficial effects to the defence of David Milgaard:

a. The trial judge may have denied the Crown's application to cross examine Nichol John on the May 24th statement and thus the jury would not have been made aware of its contents.

b. If Mr. Tallis had been able to uncover oppressive circumstances in the taking of Nichol John's statement this may well have had the effect of tainting Ron Wilson evidence in turn, as his incriminating statement was taken by the same police officer on the same date with probably the same interviewing techniques. Also, it is submitted that the jury would have been less inclined to believe Wilson's testimony if they had not heard the contents of Nichol John's May 24th statement when she was cross-examined on it at trial, for many aspects of the un-adopted portions of her statement corroborate Wilson's trial evidence in material respects.

60. Unfortunately, the trial judge after denying Mr. Tallis the right to cross-examine concerning the taking of the statement in the absence of the jury, also went on to make a finding, without hearing argument on this issue, that Ms. John was not just an adverse witness but a hostile witness. This finding by the trial judge in the presence of the jury (which should not have occurred) would have reinforced the jury arriving at the impression that Ms. John was trying to avoid providing incriminating evidence against David Milgaard because she was either his friend or afraid of him.

61. This impression would have been further reinforced when the trial judge questioned Ms. John in front of the jury in such a way that the jury undoubtedly would have thought the trial judge was of the view that she was withholding incriminating evidence. These interventions by the trial unfortunately helped foster the impression that Nichol John was telling the truth in the un-adopted portions of her May 24th, 1969 statement.

62. There was very little that Mr. Tallis could do as counsel to minimize the damage done as a result of this approach being taken by the trial judge.

63. Mr. Tallis, in his testimony, discussed the effects of these events on the jury. He described his personal assessment of the 9(2) cross-examination that took place in front of the jury as "a devastating turning point" in the trial (Inquiry transcript p. 24428.) It is respectfully submitted that one cannot get the full flavour of how this cross-examination would have been received by the jury from just reading the transcript. Mr. Tallis, at the time a highly experienced trial lawyer, was there and in a very good position to assess the reaction of the jury to this portion of Ms. John's testimony.

64. This situation was exacerbated by Crown counsel's final argument to the jury. (See doc ID 020487-90 of TDR Caldwell's address to the jury.) In this portion of his argument Crown counsel is essentially asking the jury to disbelieve Ms. John when she testified she did not remember highly inculpatory events set out in her May 24th statement. It is submitted that this had the unfortunate effect of reinforcing in the jury's mind evidence it would subsequently be instructed to disregard.

65. All of these above discussed events involving Nichol John's testimony likely created a prejudice which could not be overcome by an instruction to the jury to disregard the contents of her prior un-adopted statement.

66. Further, researchers have determined that when jurors are instructed by a trial judge to disregard incriminating evidence, this instruction often has an opposite effect. Benjamin Berger, in a very comprehensive article entitled: *Peine Fort et Dure:* Compelled Jury Trials and Legal Rights in Canada at (2004) 48 C.L.Q. 205, concluded, after reviewing jury research studies, as follows at p. 222:

> "...studies have further indicated that 'if jurors are instructed to disregard incriminating evidence they are more likely to find the defendant guilty; if instructed to disregard exculpatory evidence, they are more likely to acquit.' Judicial instructions are apt to have the opposite of their intended effect upon a jury."

67. Mr. Berger, in his article, cites the studies he is relying upon and in the quotation cited above quotes from one of these studies. He is not the only Canadian writer who has expressed a concern about these type of admonitions to juries. See also: Hrycan, "The Myth of Trial by Jury" (2006) 51 C.L.Q. 157 at pps. 163-4; see also Knazan "Putting Evidence out of Your Mind" (1999) 42 C.L.Q. 501.

68. A leading American text by Neil Brewer and Kipling Williams entitled *Psychology and Law: An Empirical Perspective* (New York, The Guilford Press, 2005) also indicates that empirical research with respect to American juries has determined:

> "judge's admonitions are not successful in preventing jurors from using inadmissible evidence when deciding the verdict and may increase juror reliance on the inadmissible evidence." (p. 392)

MR. TALLIS' APPROACH TO THE SEROLOGICAL EVIDENCE

69. Mr. Tallis elected not to tender defence expert evidence at the trial based on the advice of his expert advisors (Inquiry transcript pp. 24542, 24559.)

70. One of the recommendations made by Kaufman J. in his report following the Morin Inquiry (at p. 346) was that forensic scientists should work to disprove hypotheses rather than to prove them.[1] This did not happen with Dr. Emson at the trial. Rather it appeared that he was formulating an unproven hypothesis, which had the effect of patching up a hole in the crown's case. There was no evidence tendered that David Milgaard would have secreted blood into his semen. Yet Dr. Emson testified that such occurrences were common.

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[1] In *Daubert v. Merrell Dow Pharmaceuticals* (92-102), 509 U.S. 579 (1993) Justice Blackmun delivered the opinion of the court and on this point of attempting to "disprove hypotheses" invoked K. Popper in Conjectures and Refutations: The growth of Scientific Knowledge 37 (5th ed. 1989) who there stated: "(T)he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").

71. There is a dreadful irony in this case. The one trial "fact" which should have led the jury to acquit, was something which later proved to be false: that is, that David Milgaard was a non-secretor. There was no evidence of blood in the semen sample found in the snow. The jury had before them evidence of Sergeant Paynter that the semen found in the snow came from a type A secretor and, in contradistinction, the uncontroverted evidence before the jury was that David was a non-secretor. As Mr. Tallis argued in his address to the jury (document ID 212178 at pp. 40-41):

> "if in fact the donor of the seminal fluid was an "A" group secretor, and there was no blood, as such, in the seminal fluid from that person with that "A" grouping, it cannot have been, the man could not have been the..."

Here we should substitute for the ellipses the words "accused" or "defendant." Mr. Tallis went on in his address to the jury to argue that other explanations for the presence of blood in the sample were more likely than that the blood came from David Milgaard. He further argued, quite correctly, that there was no evidence that David Milgaard was someone "afflicted with a condition which caused blood to be in his seminal fluid." Mr. Tallis was perfectly correct to argue that the expert opinion of Dr. Emson had to be completely disregarded on this issue because the fundamental fact supporting this opinion, i.e. blood in Milgaard's urinary tract, was not proven.

72. MacWilliams, in his text *Canadian Criminal Evidence,* (4th Edition, Canada Law Book) states the following at p. 12-73:

> "All testimonial evidence must be fact-based. While an expert may offer a packaged opinion, he or she must be prepared to share the data, facts and assumptions relied upon. The worth of an expert's opinion depends on the validity of the facts stated or assumed by the expert to be true of accurate. As a general rule, the party advancing expert opinion must make reasonable efforts to disclose and prove those facts upon which the opinion is based by admissible evidence. Logically, failure to establish by admissible evidence sufficient underlying circumstances for the opinion to be afforded any weight means the opinion testimony is superfluous and irrelevant."

73. The Supreme Court of Canada in *R. v. Abbey* (1982) 68 C.C.C. (2d) 394 is the leading Canadian case confirming this principle of evidence. The reasons for judgment of Dickson J., who delivered the judgment of the Court, indicate that this principle had been the law for quite sometime, citing cases such as *Wilband v. the Queen,* (1967) 2 C.C.C. 6 (S.C.C.) and *R. v. Turner,* (1974) 60 Crim.App.R. 80. In *Turner,*supra, Lawton L.J. spoke of an "elementary principle" about opinion evidence provided by experts at p. 82:

> "Thereupon the judge commented that the report contained 'hearsay character evidence' which was inadmissible. He could have said that all the facts upon which the psychiatrist based his opinion were hearsay save for those which he observed for himself during his examination of the Appellant such as his appearance of depression and his becoming emotional when discussing the deceased girl and his own family. It is not for this Court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the acts upon which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked."

74. Unfortunately, the evidence of Dr. Emson, which he subsequently recanted, may have impermissibly led the jury to conclude that the semen may been contaminated by David Milgaard's blood and thus did not necessarily exclude him as the perpetrator, despite the evidence he was a non-secretor. Although the trial judge had commented during the course of the trial that there was no evidence of blood in the frozen semen found at the scene this was not specifically addressed in his charge to the jury.

75. In his evidence before this Inquiry, Dr. Markestyn confirmed the approach Mr. Tallis took to the serological evidence at trial. That is if the semen found at the scene was uncontaminated by blood or other possible contaminants, it excluded David Milgaard as the donor and if so, he could not be the perpetrator (Inquiry transcript pp. 33731):

9 Q And so if the evidence at trial was that the
10 sample was uncontaminated, and Mr. Milgaard was a
11 non-secretor, --

12 A Right.
13 Q -- then that evidence, at trial, would have
14 excluded Mr. Milgaard as the donor of the sample;
15 is that fair?
16 A Exactly.

76. When we consider the serological evidence as presented at trial it is abundantly clear that Mr. Tallis maximized its value to the defence. He recognized that the Crown's own witnesses in effect excluded his client and but for the incorrect evidence that Dr. Emson unfortunately provided and has since recanted, this would have been a compelling argument for the defence. Since this portion of Dr. Emson's evidence was never proven it is clear that Mr. Tallis correctly decided that it was unnecessary and potentially dangerous to call a defence expert with respect to this issue.

MR. TALLIS' ADVICE TO DAVID MILGAARD NOT TO TESTIFY

77. From the evidence at this Inquiry it is clear that David Milgaard maintained his innocence to his counsel throughout (Inquiry transcript pps. 23662-3).

78. It is also clear from the evidence called at this Inquiry that Mr. Tallis advised David Milgaard not to testify. It is the responsibility of a defence lawyer to provide an accused with advice as to whether or not to testify. This is often a very difficult decision because advice in this regard is obviously not science and depends to a large extent on instinct and experience. At this Inquiry Mr. Tallis articulated why he advised David Milgaard not to testify. It is submitted that the rationale for making this recommendation is extremely reasonable and unassailable. In fact, counsel for David Milgaard at the Inquiry stated the following concerning trial decisions made by Mr. Tallis, which included the decision to advise David not to testify:

17 Let me at the outset say that I
18 don't intend to be overly long hopefully with you,
19 but I would like to say at the beginning that
20 nothing I'm going to ask you will in any way have
21 anything to do with your credibility, your

integrity or question you in any sort, there's
nothing in my questions that should be considered
as having anything by faith in your answers.
The second point I would make at

Transcript Page 24970

the outset, that there is nothing in my questions
which is in any way suggesting anything regarding
the handling of the trial, any questions I may
have had you've answered totally to my
satisfaction. There will be no second guessing of
judgment calls, that all of which appear
reasonable, so I'm not going down that road at
all, so I just say at the beginning so you can
appreciate, the questions aren't coming from that
area at all.

79. It is not surprising that Mr. Wolch took this position as clearly one should pay deference to an experienced trial lawyer's recommendation as to whether or not an accused should testify in a trial. A defence lawyer has the opportunity to assess first hand in pre-trial interviews how good a witness the accused would be and how well he would perform under cross-examination. After someone is found guilty it is not uncommon for a defence lawyer to be criticized for not calling (or for that matter calling) the accused as a witness. This type of criticism is "armchair quarterbacking" after the result of the trial is known. It is easy to make these kind of statements after a criminal trial is lost, but would such critics be taking the same point of view at the time the decision had to be made – probably not. In this case, Mr. Tallis, in his evidence provided compelling reasons as to why he recommended David Milgaard not testify. (Inquiry transcript pp. 24583-90, 24597-615).

80. It is submitted that, for these same reasons, appellate courts have been reluctant to review where an appellant argues that his defence lawyer at trial incorrectly advised him not to testify in his own defence. For instance in *R. v. Newman* (1993) 20 C.R. (4th) 370 (Ont. C.A.), Mr. Justice Finlayson, for the Court, stated at p. 381:

> "I do not think it is our function to second-guess counsel at trial. Functioning as a trial counsel necessitates the assumption of the most onerous responsibilities. If we are to give substance to the role of counsel in our adversarial system, we should not denigrate that role by substituting our tactical decisions for his simply because we have the benefit of hindsight."

81. In his recent article entitled "Safeguarding Accused's Opportunity to Decide to Testify" (2006) 51 C.L.Q. 508, Professor Ives makes the following comment at p. 519:

> "As appeal courts have recognized, advising an accused whether to testify is one of the toughest tasks given to trial counsel. In formulating this advice trial counsel must consider a multitude of factors including confidential communications with the accused, the strength of the Crown's case, the exact nature of the defence and the ability to put this defence to the court through cross-examination of Crown witnesses and defence witnesses other than the accused, and the accused's likely performance as a witness particularly in cross-examination. In many cases it will not be obvious whether the best option is to testify or stay silent; rather, it will be a matter of finely tuned judgment."

82. It is well known in the criminal law community how testimony by the accused can result in the case against him getting stronger. In this case, there was a real risk that this would occur. For example, not being able to deny the so-called "motel room re-enactment" would have enhanced the credibility of Lapchuk and Melnyk's evidence, in the eyes of the jury. Not being able to deny the fact that he threw a "cosmetic case" out the window – not only supported the evidence of Ron Wilson and Nichol John but it also provided circumstantial support to the inference it likely came from Gail Miller and at the very least from the victim of crime. It is almost unthinkable that a competent defence counsel would put on the stand someone who within hours of the murder of a young woman is discarding a cosmetics case and unable to say where it came from – especially when that accused has also advised his counsel that he had given serious thought to robbing a woman earlier.

83. It is submitted that there is no cogent evidence before this Inquiry which would suggest that Mr. Tallis' recommendation was wrong in the circumstances in which he was operating at the time this advice was provided. In fact, it is submitted, his advice was the right advice in the circumstances.

CHARGE TO THE JURY

84. It is respectfully submitted that the charge to the jury was favourable overall to the defence. It would have been difficult for Mr. Tallis to advance criticisms of the charge. Even so, Mr. Tallis' was able to demonstrate his subtlety as a trial counsel when he successfully persuaded the trial judge to recharge the jury on a number of issues (doc ID 006219-30). TDR Caldwell commented on this aspect of the case at this Inquiry:

8 Q And he was able to convince the trial judge to put
9 those matters to the jury that he suggested when
10 he's giving this request for a recharge and he was
11 able to convince the judge to do that and the
12 judge then put those matters to the jury and that
13 would be something that would be favourable to the
14 defence; would it not?
15 A Oh certainly, certainly, because the judge put
16 credit in what Mr. Tallis suggested and went ahead
17 and added those various recommendations or -- to
18 his original charge which must clearly be in the
19 favour of the defence.
20 Q Yeah. So the last words that this jury hears when
21 they go out is points in favour of the accused,
22 and not just one, but a few --
23 A Yes.
24 Q -- points in favour of the accused that are put to
25 them by the judge rather than defence counsel.

Transcript Page 18109

1 A That's right, sir, and that should be helpful to
2 the defence by any measure I would say.
3 Q That was a good piece of barrister work wasn't it?
4 A It was, and it's also impressive that he could, if
5 you will, not necessarily compile, but restate
6 those three or four or five things in very short
7 order the way he did.

85. To the extent that the charge to the jury presented problems for the defence, it is respectfully submitted that the trial justice corrected these shortcomings as a

result of Mr. Tallis' skillful extemporaneous submissions which had the effect that the jury heard about matters exculpatory to the accused, shortly before retiring to deliberate.

CONCLUSIONS CONCERNING MR. TALLIS' DEFENCE OF DAVID MILGAARD

86. The defence that Mr. Tallis provided David Milgaard was put under a microscope at this Inquiry. Mr. Tallis testified during eight days of this Inquiry and provided a detailed and comprehensive account of his efforts as trial counsel on Mr. Milgaard's behalf. After he provided his account of how he had defended David Milgaard, it is not surprising that he was not really challenged in cross-examination by any of the parties to this Inquiry. It is submitted that there is no evidence before this Inquiry which contradicts his evidence on any essential matter involving his defence of David Milgaard.

87. It is submitted the evidence at this Inquiry reveals that David Milgaard received a very thorough, subtle and tactically sound defence in the face of many unusual obstacles. Whatever went wrong in this trial certainly cannot be attributed in any way to Mr. Tallis.

APPEAL

88. It is respectfully submitted that Mr. Tallis identified and argued the correct grounds of appeal before the Saskatchewan Court of Appeal. There is no evidence that he missed a litigable ground of appeal. It is respectfully submitted that the failings in the appeal process with respect to this case did not flow from shortcomings in appeal advocacy. Systemic features certainly played a part. For instance, it was and is still difficult to make an unreasonable verdict argument in Canada due to appellate court deference to the courts charged with trying the facts of a case. This presents an almost insuperable obstacle to the factually innocent but lawfully convicted accused.

89. Indeed, Mr. Tallis was successful in establishing an error of law on appeal. Regrettably, the Saskatchewan Court of Appeal saw fit to invoke the curative provision in what is now the s. 686(1)(b)(iii) of the *Criminal Code of Canada.*

SYSTEMIC CONSIDERATIONS

Retention of Exhibits for 30 years

90. The lesson to be learned from David Milgaard's case is that an application to remedy a wrongful conviction may be advanced or only receive consideration many years after the conviction. Unfortunately, Canada does not appear to have in place any uniform laws governing the preservation of evidence or potential evidence in serious criminal cases once the trial and appellate proceedings have been completed.

91. But for a decision by TDR Caldwell that the trial exhibits should not be destroyed, Mr. Milgaard would never have been exonerated by DNA testing and his wrongful conviction would have remained generally unknown and un-remedied.

92. It is respectfully submitted that a recommendation be made that uniform laws be passed establishing a system of exhibit retention and preservation which ensures that exhibits which at present cannot be usefully tested are available for future testing when technology and science have advanced to the point that such testing is possible.

93. The *Sophonow Inquiry* recommended that all exhibits or potential exhibits, whether filed at trial or gathered in the course of the investigation be stored for at least 20 years from the date of the last appeal or the expiry of the time limit to file that appeal. David Milgaard's case presents a compelling

argument for making this period of time even longer and we respectfully submit the period should be for at least 30 years.

94. In addition to preserving exhibits it is obvious from the Milgaard case that all documentation that was generated by the police, Crown counsel and defence counsel in the course of an investigation and prosecution leading to a conviction may become relevant in a future wrongful conviction investigation. Consequently, there also should be some uniform legislation that requires police, prosecutorial agencies and defence lawyers in serious cases to retain this documentation for a lengthy period of time, which we suggest should also be for at least 30 years.

95. It is further submitted uniform legislation should be passed which requires that trial transcripts, court reporters notes or digital records of proceedings in serious criminal matters also be retained for a lengthy period which again we suggest should be for at least 30 years.

Broadening the Powers of Courts of Appeal

96. One of the grounds of appeal that David Milgaard advanced was that his conviction was unreasonable and could not be supported by the evidence. This ground of appeal has a statutory basis under s. 686(1)(a)(i) of the Criminal Code of Canada.

97. Appellate courts in Canada have attempted to interpret this sub-section and in so doing have debated the meaning of the concept of an "unreasonable verdict." Some courts have equated it to a verdict which is "unsafe" or "unsatisfactory." Other courts have described this concept as a verdict which leaves the appellate court with a "lurking doubt." Another interpretation of "unreasonable verdict" is whether the verdict was one that "a properly instructed jury acting judicially could reasonably have rendered." Ultimately

the Supreme Court of Canada in *R. v. Yebes* (1987) 59 C.R. (3d) 108 settled upon the latter definition of "unreasonable verdict."

98. The Supreme Court of Canada in *R. v. Biniaris* (2000) 32 C.R. (5th) 1 was asked to revisit this question and in so doing reconsidered its decision in *R. v. Yebes.* In *Biniaris*, Justice Arbour speaking for the court stated at p. 23:

> "The exercise of appellate review is considerably more difficult when the court of appeal is required to determine the alleged unreasonableness of a verdict reached by a jury. If there are no errors in the charge, as must be assumed, there is no way of determining the basis upon which the jury reached its conclusion. But this does not dispense the reviewing court from the need to articulate the basis on which it finds the conclusion reached by the jury was unreasonable. It is insufficient for the court of appeal to refer to a vague unease or lingering or lurking doubt based on its own review of the evidence. This "lurking doubt" may be a powerful trigger for thorough appellate scrutiny of the evidence but it is not without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of the jury."

99. Justice Arbour added the following at p. 24 of the judgment:

> "...it is imperative that the reviewing court articulate as precisely as possible what features of the case suggest the verdict reached by the jury was unreasonable, despite the fact that it was not tainted by any erroneous instructions as to the applicable law."

100. Later in the judgment, though, Justice Arbour adds that

> "the test in *Yebes* continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable and cannot be supported by the evidence."(p. 25)

101. The Morin Commission of Inquiry considered this issue as to how s. 686(1)(a)(i) should be interpreted. Mr. Justice Kaufman at p. 1187 of the report reached this conclusion:

> "this is a difficult issue. I appreciate that appellate courts are reluctant to usurp the triers of fact, who are said to be better situated to assess a criminal case, particularly one which spins on credibility...however, I am also of the view that an appellate court can overestimate the importance of seeing or hearing the witnesses. A substantial part of any assessment of credibility is the internal consistency of a witness' testimony (however well or badly that witness presents) and its consistency with other known facts. If the record produces a lurking doubt or a sense of disquiet about the verdict of guilt should an appellate court not be empowered to act upon that sense after fully articulating those aspects of the record that produced that doubt?

102. In *Biniaris* the Supreme Court distinguishes between an unreasonable conviction and one in which there remains a "lurking doubt. According to the test in *Yebes,* upheld by the S.C.C. in *Biniaris,* a reasonable verdict is one which a jury renders judicially. This gives the appellate court some room to re-weigh the evidence. But this is only for the purpose of determining whether the verdict was *judicially* rendered. We respectfully submit, however, that a jury could render a judicially a guilty verdict on the evidence which still gave rise to an articulable lurking doubt. For example, an appellate court judge may find that the jury, acting judicially, could reach a guilty verdict, yet this same appeal court judge could have an articulable lurking doubt as to the guilt of the accused.

103. Let us examine an unreasonable verdict appeal from the David Milgaard trial using the Yebes/Biniaris test. The key evidence implicating Milgaard at his trial came from Wilson, Lapchuk and Melnyk. The jury, acting judicially, could reasonably have reached a guilty verdict if some or all of these witnesses were believed. However, an appellate court, reviewing the trial transcript, through the lens of judicial experience could very well have had a sense of disquiet which led to an articulable lurking doubt.

104. We respectfully submit that any recommendation made should make clear that an appeal court ought to have the power to overturn a conviction about which there remains a lurking doubt, not only one which is unreasonable and therefore not rendered judicially. It is respectfully submitted that any broadening of appellate court powers include a statement to the effect that

"where, in respect of a conviction, there lies a lurking doubt articulably grounded in a judicial assessment of the evidence, that conviction is unsafe."

105. It is respectfully submitted that broadening the powers of appellate review should include appellate power to re-weigh evidence under review, through "an experienced judicial lens."

Admissibility of the Accused's Prior Exculpatory Statements

106. It is respectfully submitted that this Commission endorse Recommendation 77 of the *Morin Report,* recommending the admissibility of an accused's exculpatory statement upon arrest, at the instance of the defence, when the accused testifies at trial (pp. 1148-1155.)

107. We would ask this Commission to go further and not limit admissibility of exculpatory statements only to those made upon arrest but also include those made when an accused is first questioned by the police concerning the accusation.

108. The utterances of an accused person when first confronted with the accusation is relevant and useful evidence for the trier of fact. It is respectfully submitted that the rule against admissibility of exculpatory statements is archaic law which will tend to work an injustice against the factually innocent accused – if for no other reason than a jury may not even know that this bar to admissibility exists and wonder why the defence did not call evidence of early protestations of innocence.

An Independent Conviction Review Tribunal

109. It is respectfully submitted that this Commission of Inquiry should recommend the creation of an independent tribunal to review cases of possible wrongful conviction. Such a tribunal should have the power and resources

necessary to conduct its own investigations into allegations of wrongful conviction.

110. The United Kingdom has established the Criminal Cases Review Commission (CCRC) constituted under Part II of the *Criminal Appeal Act of 1995* (The Act). This Inquiry heard the evidence of Mr. David William Kyle, a Commissioner with the CCRC. He gave evidence about the nature and mandate of the CCRC as well as the relationship between the CCRC and the Court of Appeal.

111. Of note is s. 8(2) of Part II of the Act which provides:

> 8(2) The Commission shall not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and the Commission's property shall not be regarded as property of, or held on behalf of, the Crown

112. In his evidence, Mr. Kyle observed, at Inquiry transcript p. 40107, that this section of The Act "serves to demonstrate and underpin its [CCRC] independence from…the government."

113. Also of note is s. 8(6) of the Act, which requires that at least two thirds of the members of the CCRC be persons who have knowledge or experience of the criminal justice system.

114. The CCRC has the power to refer a conviction on indictment to the Court of Appeal and such a reference shall be treated as an appeal against conviction.

115. Under Part I, section 2 of the Act, the Court of Appeal "shall allow an appeal against conviction if they think that the conviction is unsafe."

116. It is respectfully submitted that Part I and Part II work together so as to allow the investigations and findings of the CCRC to be the subject of a decision to allow an appeal from an "unsafe" conviction.

117. As was clear both from Mr. Kyle's evidence and s. 8(6) of the Act, the Commission operates as an independent tribunal. That is, independent from the arm of government which is responsible for prosecuting cases at first instance as well as responding to appeals from convictions in the ordinary course of things.

118. In his evidence Mr. Kyle described the genesis of the CCRC in the 1993 Royal Commission report of Lord Runciman (Inquiry transcript at p. 40055). In that report (doc ID 340178), Lord Runciman concluded that it was not desirable to have the Home Secretary responsible for law and order and the police and also responsible for investigating miscarriages. That this could lead to "a reluctance on the part of the Home Office to enquire deeply enough into the cases put to it" (Inquiry transcript p. 40082).

119. As an independent tribunal, the CCRC receives applications from individuals complaining of wrongful convictions who have exhausted all avenues of appeal. Its mandate is to review those complaints, investigate as far as necessary to determine whether the matter should be referred to the Court of Appeal and under certain circumstances to make such a reference. Once the reference is made, the applicant becomes an appellant before the court of appeal and files a notice of appeal seeking leave to bring fresh evidence to the Court of Appeal.

120. Such a consideration of fresh evidence will be governed by s. 4(2) in Part I of the Act which lays out the what the Court of Appeal shall consider in respect of any evidence. It is, essentially, a fresh evidence test – i.e. it is capable of belief; it may afford a ground of appeal; it would have been admissible at trial; and there is a reasonable explanation for it not being adduced at trial.

121. The CCRC is staffed by professionals knowledgeable of and experienced in the criminal justice system. They have the power to investigate and have their

own investigators as well as the power to appoint police investigators if the need arises.

122. It would appear that, essentially, the CCRC is an independent government agency which will assist an individual who is claiming to be wrongly convicted by reviewing his or her conviction, investigating and if this results in new evidence and making a reference where the CCRC is of the view that there is a reasonable possibility that this fresh evidence will lead the Court of Appeal to find that the conviction is unsafe. It appears decisions of the CCRC are subject to judicial review.

123. Canada also has a mechanism by which an individual who feels he is wrongly convicted can seek a remedy once his appeals have been exhausted. Under s. 696.1 (1) – 696.2 (3) of the Criminal Code, the Minister of Justice for Canada may receive and review an application by or on behalf of a person convicted of an offence under an act of Parliament who has exhausted his or her rights of appeal. In respect of investigations, the Minister has the powers of a commissioner under Part I of the Inquiries Act and the powers that may be conferred by s. 11 of that Act.

124. Under s. 696.3(3) The Minister of Justice for Canada has the power where he is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred to direct a new trial. Also, the Minister may refer to the court of appeal for its opinion, any question on which the Minister desires the assistance of the court. There is no appeal from a decision of the Minister of Justice under s. 696(3).

125. This Commission of Inquiry had heard extensive evidence on the nature and function of the CCRC and it is respectfully submitted that this evidence supports a recommendation that Parliament establish an independent commission of review whose mandate would be to review, on application by or on behalf of, individuals convicted of criminal offences, who have exhausted their rights of appeal. It is further submitted that such a commission

be staffed by persons knowledgeable and/or experienced in the criminal justice system. The commission would have the powers of investigation and the power to appoint police investigators where necessary.

126. It is further submitted that this Commission of Inquiry should recommend to Parliament that the provisions of the Criminal Code of Canada be amended so as to grant this commission of review the power to refer a conviction to the court of appeal when the commission of review thinks it is reasonably possible the court of appeal would find it is an unsafe conviction.

127. It is respectfully submitted that s. 686(1)(a)(i) of the Criminal Code of Canada be amended so as to require a court of appeal to quash a conviction which it thinks is unsafe.

Right to Elect Judge alone in a Murder case

128. In Canada, where an accused is charged with a s. 469 offence (murder is one these offences) and wishes to be tried a judge alone, he must obtain the consent of the Attorney General who has the right to refuse his consent to this election, and thus force the accused to be tried by a judge and jury.

129. Historically the jury system has been the object of praise, perhaps even reverence. Blackstone referred to the jury as "the most transcendent privilege which any subject can enjoy." However, the jury system has in recent years come under scrutiny by social scientists primarily in the United States, but also in England. These social scientists have conducted empirical experiments and studies the findings of which reveal some hitherto under-appreciated problems with juries.[2]

[2] Some of these studies are referred to in the following articles – Berger, "Piene Forte et Dure: Compelled Jury Trials and Legal Rights in Canada" supra; Hrycan, "The Myth of Trial by Jury" supra; Nathanson, "Strengthening the Criminal Jury: Long Overdue" (1996) 38 C.L.Q. 217

130. Among other things, these studies have expressed a concern that juries may be confused or misled by complicated expert evidence. The Supreme Court of Canada seems to have recognized this problem in *R. v. Mohan* (1994) 89 C.C.C. (3d) 402. The Court held, at p. 411, that where juries are faced with complicated expert evidence:

> "There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and presented through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves."

131. More recently, Mr. Justice Major in *R. v. D.(D.)*, (2000) 148 C.C.C. (3d) 41 reiterated this concern about juries being overly impressed by expert evidence when he stated at p. 63 the following:

> "Faced with an expert's impressive credentials and mastery of scientific jargon jurors are more likely to abdicate their role as fact-finders and simply attorn to the opinion of the expert in their desire to reach a just result."

132. In the David Milgaard case, with hindsight, it seems likely the jury may have been confused by the serological evidence, whereas a judge sitting alone would have seen the shortcoming of the expert opinion concerning blood in the semen and in all likelihood would have found that the serological evidence as a whole, tended to exculpate the accused.

133. Another area which these studies have cast some light on is the area of a judge's limiting instructions to juries to disregard inadmissible evidence. This was previously discussed in paragraphs 66 through 68 of this submission.

134. If these empirical findings are accurate and we have no reason to believe they are not, then the jury in David Milgaard's case may well not have understood or properly applied the limiting instruction that Chief Justice Bence provided concerning the use that could be made of the un-adopted portions of Nichol John's May 24th 1969 statement to the police.

135. In some cases, then, an accused may validly want to have a judge alone trial because he wants a trier of fact who will understand and properly evaluate the evidence. Such an accused is not seeking to obfuscate or confuse issues. He is simply trying to obtain justice, not avoid it.

136. Also, it is submitted that some cases, because of the buildup of publicity or the notoriety of the crime within the community, call for a trier of fact who is dispassionate and whose judicial experience brings with it the requisite detachment. This is yet another reason why the Milgaard case could be viewed, retrospectively, as an example of a case where the accused would receive a fairer trial before a judge alone.

137. The accused's right to a fair trial seems to dictate that in some circumstances he should be allowed to be tried by a judge alone rather than a judge and jury. This decision should rest with the accused. This is expounded more fully and persuasively in Benjamin Berger's article, referred to above.

138. It should be added that many, if not all of the notorious wrongful conviction cases in Canada have been guilty verdicts handed down by juries.

139. It is respectfully submitted that this Commission recommend that Parliament amend the Criminal Code to confer an absolute right on an accused to elect to have his trial before a judge without a jury.

Allowing Jury Research

140. Justice Nathanson of the Nova Scotia Supreme Court in his article, "Strengthening the Criminal Jury: Long Overdue" supra, outlines several studies concerning jury deliberations that have been undertaken by social scientists in the United States, England and Australia. He argues, effectively, that these studies contain very useful information which could form the basis

for implementing changes that would improve the jury system. Unfortunately, s. 649 of the Criminal Code seems to prohibit such studies being conducted in Canada.

141. Justice Nathanson recommends in his article that s. 649 of the Code be amended to permit reputable scholars access to jurors after the conclusion of a case and in such a way as not to interfere with the administration of justice, for the purpose of legitimate research. Justice Nathanson states the following at p. 244 of his article after putting forward this recommendation:

> "To ignore existing studies and fail to implement improvements while, at the same time, declining to admit scholarly inquiry, is to encourage a system based progressively less on fact and truth and more on fiction and prejudice."

142. A similar recommendation was made by Kaufman J. in the *Morin Report.*

Mandatory Recording of Suspect and Witness Interviews in Serious Cases

143. At p. 1199 of the *Morin Report* a detailed recommendation relating to police videotaping suspect statements is laid out. We respectfully submit that the substance of this recommendation should be adopted in the present Inquiry.

144. It is also respectfully submitted that this Inquiry adopt Recommendation 98 made by Commissioner Kaufman at p, 1207 of the *Morin Report.* The police should videotape the statements of all witnesses who it is reasonable to think will be significant witnesses in trials of serious charges and especially "unsavoury, highly suggestible or impressionable witnesses whose anticipated evidence may be shaped, inadvertently or advertently by the interview process." It is respectfully submitted that had the May 23 69 interviews of Ron Wilson and Nichol John by Inspector Roberts been recorded this could have been of great assistance in preventing the wrongful conviction of David Milgaard.

145. A similar suggested recommendation was considered in the Royal Commission report authored by Lord Runciman in 1993. That suggestion (doc ID 340178 at 340188) was as follows:

> "when witnesses are interviewed, the interview and any subsequent witness statements should be tape-recorded or video-recorded if the evidence seems likely to be contentious at trial. This would, it is suggested, remove any room for argument over whether the witness has made the statement under pressure or inducement and, in identification cases, it would enable the initial reactions of the witnesses as to whether they had or had not obtained a clear view of the suspect, or felt they could or could not identify him or her with certainty, to be recorded and made available to the defence."

146. This did not become a recommendation by Lord Runciman for it was considered unworkable on a wide scale and costly and impracticable. However, it is respectfully submitted today video technology is inexpensive and ubiquitous and thus we ask this Commission to make this recommendation for police investigations involving serious criminal charges.

Change to the Law Respecting Adverse Witnesses (s. 9(2) of the Canada Evidence Act)

147. With respect to an application by the Crown to cross-examine one of its own witnesses under s. 9(2) of the Canada Evidence Act, it is submitted that the Milgaard trial demonstrates a potential flaw in the procedure which was laid out in the Saskatchewan Court of Appeal decision.

148. If it is clear on the *voir dire* that the witness is not going to recant and adopt the prior statement which is the subject of the Crown's cross-examination then it is respectfully submitted that the trial judge should have a discretion not to allow cross-examination on the statement in the presence of the jury.

149. If the cross-examination before the jury would do little other than place inadmissible evidence before the jury then it should not be allowed as the

prejudicial effect would necessarily outweigh the very limited probative value of such evidence in respect of assessing the credibility of the witness.

150. This is particularly so given the difficulty inherent in understanding a charge which will distinguish between the use that can be made of the adopted portions of the statement versus the use that can be made of those portions that remain un-adopted. In the decision of *Asaro v. Parisi* 297 F. 2d 849 (1st Circuit, 1962) at p. 864 the Court stated:

> "...one can hardly expect jurors, however conscientious, to perform the mental gymnastics of distinguishing sharply between using a witness' prior statement for testimonial purposes and using it only to contradict. The orthodox rule is not realistic."

151. Both courts and commentators have expressed similar sentiments about the inability or unwillingness of jurors to follow limiting instructions on the use of prior inconsistent statements.[3] Some contend that these instructions may actually compound the problem. In *Rowe v. Farmer's Insurance Company* 699 S.W. 2d 423 at p. 426, the Court stated:

> "The repetitive effect of calling attention to the prior inconsistent statement by the instruction probably cannot do other than highlight the matter in the minds of the jurors thereby making them more inclined to rely on the statement than to disregard it."

152. There is a lower court decision from Ontario which articulates the law as we respectfully submit it should be. In *R. v. Morgan*, C.F. 0659/94J the Ontario General Division Court, after a *voir dire* was conducted, ruled against allowing the Crown to cross-examine one of their own witnesses before a jury on a prior inconsistent statement. The Court made the following comment at p. 2 of the judgment:

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[3] *United States v. DeSisto*, 329 F. 2d 929 (2d Cir.,1964) at p. 933, certiorari denied, 377 U.S. 979; *Beavers v. State* 492 P. 2d 88 (Alaska, 1971) at p. 94, *R. v. McInroy* (1978) 42 C.C.C. (2d)481, at p. 507, McCormick On Evidence, 3d Edition (St. Paul, West Publishing Co. 1984, p. 746, Murphy, "Previous Inconsistent Statements: A Proposal to Make Life Easier for Juries" (1985) Crim. L. Rev. 270 at pp. 272-7

> "I am satisfied that this witness will never adopt one word of his prior statement and, accordingly, to permit him to be cross-examined on the statement will serve no other purpose but to elicit hearsay evidence against the accused which is gravely prejudicial, but which will have no probative value whatsoever. The witness will not adopt the statement and, therefore, the statement cannot be used against the accused but the jury will have heard the statement and would, no doubt, have some difficulty in following instructions to completely ignore it. The risk is high, the benefits negligible."

153. It is respectfully submitted that s. 9(2) should be amended to make it clear that trial judges, when presiding at jury trials, after conducting a *voir dire,* in cases where it is clear that the witness will not adopt a prior inconsistent statement, have the discretion to refuse to allow the Crown to cross-examine its own witness on that statement in the presence of the jury. This discretion should be exercised when the prejudicial effect of the cross examination would outweigh whatever evidentiary value could attach to the witness continuing to not adopt the prior statement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Edmonton, Alberta this 14th day of November, 2006.

_____
Alexander D. Pringle Q.C.
Counsel for Calvin Tallis

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Marshall Hopkins Esq.
Counsel for Calvin Tallis