

**Commission of Inquiry Into Matters
Relating to the Wrongful Conviction of David Milgaard
Honourable Mr. Justice Edward P. MacCallum,
Commissioner**

**Submissions On Behalf of the Attorney General of
Canada
Representing the Royal Canadian Mounted Police**

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I. Introduction

1. During much of the evidence at the Inquiry, various documents created by and investigations conducted by members of the Royal Canadian Mounted Police (“RCMP”) were referenced. The following submissions focus upon the many tasks that were undertaken by the RCMP and how their efforts impacted upon the evidence available for decision makers over the course of time. It is hoped these submissions will assist the Commission in fulfilling its mandate:
 - (a) 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 Milgaard; and
 - (b) to seek to determine whether the investigation should have been reopened based on the information subsequently received by the police and the Department of Justice.
2. It is respectfully submitted that the Commission’s focus, as it relates to the RCMP, will be upon whether the investigation into the murder of Gail Miller should have been reopened based upon new information. It is, however, important to bear in mind the specific limited roles that were undertaken by the RCMP, which agency had jurisdiction to deal with any subsequent investigation and how the applications to the Federal Minister of Justice and the subsequent Supreme Court of Canada ruling impacted decision makers and tasks undertaken.

II. RCMP Involvement in the Miller Murder Investigation in 1969

3. The evidence throughout the Inquiry, both from members of the RCMP and the Saskatoon Police Service (“SPS”), is that the RCMP was involved only in assisting the City Police in the original investigation and did not take a lead role. There were three RCMP officers that assisted on a part-time basis during the investigation, namely, Inspector Art Riddell, S/Sgt. Stan Edmondson and Cpl. Ed Rasmussen. In addition, members of the RCMP Laboratory assisted the City Police by examining exhibits and preparing laboratory reports. The only member of the RCMP Laboratory (Circa 1969) that testified was S/Sgt. Bruce Paynter. The following paragraphs outline the specific involvement of the RCMP in the original SPS investigation.

- (a) **Inspector Art Riddell**

4. Insp. Riddell is deceased and did not testify at the Inquiry. Cpl. Ed Rasmussen testified and indicated that Insp. Riddell worked out of Headquarters in Regina and was an overseer of various plain-clothed units within Saskatchewan. Officers Rasmussen and Edmondson were members working out of one of those units in Saskatoon (see Transcript p. 11562, Line 1).

5. Insp. Riddell conducted an early interview of Ron Wilson which was reviewed at great length in this Inquiry. This interview with Mr. Wilson was very early in the investigation of the Miller death and did not in any way implicate David Milgaard (see Document #006689).

6. While Insp. Riddell was stationed in Regina, he prepared two reports that were analyzed during the Inquiry. His March 20, 1969, report (Document #065399) indicated that two rapes and one attempted rape employed “similar methods” to the Miller murder and there was “a good possibility that they were all committed by the same individual and that this fact was not being overlooked during the

investigation.” It is evident from the testimony during the Inquiry that the Saskatoon Police Service was aware of this possible connection. Cpl. Rasmussen indicated that the information on the similar rapes, referenced in Riddell’s report, would have come from the Saskatoon City Police (Transcript p. 11570, Line 3). Cpl. Rasmussen also testified that he had no recollection of the theory of the rapes being connected to the Miller murder and did not do any work in this area. Cpl. Rasmussen was the main RCMP officer that assisted the SPS and therefore implicitly the Saskatoon police members developed the theory and were working on a possible connection (Transcript p. 11568, Line 4).

7. Insp. Riddell also prepared a report dated May 21, 1969, that was reviewed at great length in the Inquiry (Document #250609). The document indicated that on April 3, 1969, Insp. Riddell met with the Chief of the SPS and withdrew the full-time assistance of officers Edmondson and Rasmussen. The report also indicated that David Milgaard could be considered as the prime suspect and “further efforts should be made to eliminate or implicate him in the offence.” Due to the fact that officers Edmondson and Rasmussen had been withdrawn from full-time assistance, this task necessarily fell to members of the SPS.

(b) S/Sgt. Stan Edmondson

8. In 1969 S/Sgt. Edmondson was in charge of the RCMP General Investigation Section in Saskatoon and supervised eleven members (Transcript p. 11429, Line 6). Although Insp. Riddell’s report referenced that both officers Edmondson and Rasmussen were working full time on the investigation for a certain period, S/Sgt. Edmondson indicated that because of his supervisory duties he did not work full time on the Miller investigation (Transcript p. 1141, Line 4).
9. S/Sgt. Edmondson had very little involvement in the Miller investigation. He did, however, assist Detective Karst on March 3, 1969, when he interviewed David Milgaard in Winnipeg (Transcript p. 11467, Line 4). S/Sgt. Edmondson gave

testimony and confirmed that Milgaard was a possible suspect because he was in the area and therefore could have had the opportunity to commit the crime. In the end, however, officers Karst and Edmondson did not have sufficient evidence to hold David Milgaard and he was released (Transcript p. 11458-66, Line 13).

10. A good deal of the evidence involving the RCMP dealt with the exchange of information between the RCMP and the SPS during the initial Miller murder investigation. S/Sgt. Edmondson confirmed that it was an SPS investigation (Transcript p. 11435, Line 4). Insp. Riddell's report of March 20, 1969, (document #065399) referenced Officers Rasmussen and Edmondson being assigned to assist in the SPS investigation. While assisting the SPS, there was an exchange of information between the two police forces. The RCMP written reports, summarizing the SPS investigation, did not go to the SPS and the exchange of information was on an informal verbal basis (Transcript p. 11493, Line 2).
11. Information that was gathered by the RCMP was passed on to the SPS (Transcript p. 11526, Line 3). Cpl. Rasmussen's report of March 7, 1969, indicated that he and S/Sgt. Edmondson worked closely with Detectives Mackie and Reid and Supt. Wood and Lt. Penkala. S/Sgt. Edmondson recalled working closely with these individuals (Transcript p. 11443-44, Line 23). The exchange of information between the two police agencies was ongoing as they worked together on a daily basis. S/Sgt. Edmondson confirmed that he would discuss the case with Cpl. Rasmussen and they would pass on the information they obtained to the City Police (Transcript p. 11526, Line 3).

(c) Cpl. Ed Rasmussen

12. Cpl. Rasmussen explained the interaction between the RCMP and the Saskatoon City Police in 1969. The RCMP was hired by the Attorney General's Department, within Saskatchewan, to provide policing in areas that did not have a municipal police force (Transcript p. 11548-49, Line 21). The RCMP would also provide

assistance to municipal police forces at times. It was common to be asked to assist when a municipal police force conducted an investigation outside of their jurisdictional boundaries (Transcript p. 11551, Line 1). Prior to the Miller murder investigation, the RCMP and the SPS had a working relationship and would, on a fairly regular basis, exchange information between the two police forces (Transcript p. 11553, Line 10).

13. The Saskatoon Police Service was in charge of the investigation and Cpl. Rasmussen worked with and accompanied SPS members during the investigation (Transcript p. 11552, Line 14). Most of the tasks that the RCMP would undertake on the Miller investigation would be in conjunction with SPS members. There was only one occasion when RCMP officers Edmondson and Rasmussen went to Flin Flon by police plane when they didn't have an SPS member with them (Transcript p. 11554, Line 8).
14. A good deal of the testimony involving Cpl. Rasmussen also centred on the exchange of information between the RCMP and the SPS. The RCMP members worked out of the RCMP Detachment and had their own Miller file. They received copies of SPS reports (Transcript p. 11555, Line 7). During the course of the investigation, these RCMP officers kept their daily notebooks and prepared internal occurrence reports based upon the information they obtained as well as information provided by the SPS. Reports went to RCMP Headquarters and were then passed on to the Attorney General's Office (Transcript p. 11557-59, Line 11 and 1172-74, Line 20). The information that was exchanged between the SPS and the RCMP was done via meetings and phone calls (Transcript p. 11559, Line 9). In addition, as referenced, the RCMP assisted the SPS members and was rarely operating without a member who was reporting within the City Police structure.
15. Cpl. Rasmussen testified that the information contained in Insp. Riddell's report of March 20, 1969, (document #065399) dealing with similar sex offences, would have come from the Saskatoon City Police (Transcript p. 11570, Line 3). Cpl.

Rasmussen also testified that Officers Penkala, Wood and Karst were involved in the Miller investigation and the RCMP were simply assisting on the file and did not direct the investigation (Transcript p. 11575, Line 20). Furthermore, Cpl. Rasmussen indicated that he had other duties and was spending approximately half of his time assisting the SPS on the Miller file and was not engaged on a full-time basis.

16. The Inquiry focused on Cpl. Rasmussen's report of May 7, 1969 (document #250597). Commission Counsel went through the various paragraphs of the report and Cpl. Rasmussen outlined that the information gathered would not have been based on personal knowledge but would have been gleaned from SPS reports or other information that had been passed along (Transcript p. 11579, Line 9). Furthermore, Officer Rasmussen indicated that he had no personal knowledge of the sexual assaults prior to the Miller murder. It was his belief that the reference to them in his report would have been something that he obtained from SPS reports indicating facts of a similar *modus operandi* (Transcript p. 11580-81, Line 16). He did, however, point out that both the SPS and RCMP members believed there may have been a link between the Miller murder and the previous rapes (Transcript p. 11582-83, Line 22 and 11588).
17. Insp. Riddell's report of May 21, 1969 (document #250609) indicated that Officer Riddell met with the Chief of the Saskatoon Police and withdrew Officers Edmondson and Rasmussen from full-time assistance in April of 1969. Cpl. Rasmussen's notes indicate that following early April of 1969 he had no or very limited involvement in the case (Transcript p. 11591, Line 4). It was Officer Rasmussen's testimony that he played no role in the decision to pursue David Milgaard as a suspect or to charge him with the offence (Transcript p. 11605, Line 9).
18. It is evident from the involvement of Officers Riddell, Edmondson and Rasmussen that this was a Saskatoon City Police investigation and that these RCMP members

were merely assisting on a part-time basis. The investigation was being directed by the SPS and they were well aware of the possible connection between the previous sexual assaults and the Miller murder. Although this "connection" was not catalogued in a detailed report on the Saskatoon Police file, it is evident from all of the testimony that the Saskatoon City Police were clearly aware of that possibility. At that time, no further evidence was uncovered pertaining to a possible connection and the evidence of Albert Cadrain, Nichol John and Ron Wilson began to implicate David Milgaard. Although the RCMP report detailing this connection was not found on the Saskatoon Police files, it is evident that it would have had no impact on the manner in which the investigation proceeded. The Saskatoon Police Service was fully aware of a possible connection between the Miller murder and the previous sexual assaults. Because the evidence of Albert Cadrain, Nichol John and Ron Wilson began to implicate David Milgaard, the investigation took a different direction.

19. Former Saskatoon City Police Chief Joe Penkala testified that the initial investigation into the Gail Miller murder was a Saskatoon Police investigation with assistance rendered by the RCMP (Transcript. 9390-91, Line 8). Former Chief Penkala reviewed Cpl. Rasmussen's report of May 7, 1969 (Document #250597). Officer Penkala took the view that the Saskatoon City Police officers working on the file would have been aware of the information contained in the report (Transcript p. 9394, Line 6). The report comments on the possible connection between the 1968 sexual assaults and the Gail Miller murder. Former Chief Penkala acknowledged that the SPS would have made that connection on their own. He conceded that a number of documents that were reviewed in the Inquiry dealt with Saskatoon City Police requests for the RCMP Laboratory to do an analysis of certain exhibits from the previous sexual assault files and to have those compared with samples from the Miller investigation (Transcript p. 9397, Line 4).
20. Former Chief Penkala reviewed the May 21, 1969 report of Insp. Riddell (Document #250609). In that report Insp. Riddell referenced a May 16th meeting where various

aspects of the Miller murder investigation were discussed. It is evident that the RCMP did not share this document with the Saskatoon City Police. Former Chief Penkala acknowledged that the information contained in this report would have been within the knowledge of the Saskatoon City Police and the City members that were identified in the report would have been at the meeting and certainly would have been privy to that information. He conceded that the SPS investigation would not have benefited if the RCMP written reports had been shared with the SPS. (Transcript p. 9400, Line 10).

21. Furthermore, the documentary evidence prepared by former Chief Penkala shows that on February 27, 1969, the Saskatoon Police Department was looking at the similarity between previous rape occurrences and the Miller murder investigation (Document #105520). In addition, former Chief Penkala wrote a letter to the RCMP Crime Index outlining the circumstances of the Gail Miller murder and referenced two unsolved rapes prior to the murder involving similar circumstances (Document #009299 at 003900).
22. Some parties at the Inquiry have asserted that there may have been some benefit had the RCMP shared their internal reporting documents with the Saskatoon City Police. It is, however, questionable whether this would have had any impact. There was no guarantee that such a report would have been passed on by the Saskatoon City Police over to the Crown Prosecutor. It is also unlikely that a Crown Prosecutor in 1969 would have disclosed such a report to defence counsel. Furthermore, there was evidence at the Inquiry that already on the Saskatoon police Service file was a City Police report and a letter to the RCMP Crime Index, both prepared by former Chief Penkala, referencing a possible connection between the previous rapes and the murder of Gail Miller (Document #009299 at 009300). Nevertheless, disclosure practices have changed significantly since 1969 and clearly police reports are readily shared among police agencies and made available to all counsel today (Transcript 35539-541, Line 21). It is, however, the position of the RCMP that there was

limited or no value in 1969 in having the RCMP regurgitate information that was already on another police agency's investigation file.

23. It is manifestly clear from all the evidence at the Inquiry, that the Saskatoon Police Service explored the possibility of a connection between the Miller murder and previous sexual assaults. This connection was later discounted as the evidence of Albert Cadrain, Ron Wilson, and Nicole John was gathered by the SPS. The referenced RCMP reports were prepared based upon SPS information for the sole purpose of informing superiors within the RCMP on the progress in the City Police investigation and relaying the status of the same to the provincial attorney general's office.

III. Secretor Issue

1969

(a) S/Sgt. Bruce Paynter

24. Initially during the investigation it was thought that the perpetrator of the Miller crime was an individual with an "A" blood grouping and having a secretor status. Cpl. Rasmussen testified at the Inquiry that this information changed part way through the investigation and police weren't positive whether or not the perpetrator was a secretor (Transcript p. 11567, Line 10).
25. S/Sgt. Bruce Paynter worked at the Regina RCMP Crime Laboratory in 1969. He examined numerous exhibits from a serology perspective (Transcript p. 11005, Line 4). On February 7, 1969, SPS Officer, Thor Kleiv, delivered a number of exhibits to S/Sgt. Paynter including a nurse's uniform, black cloth coat, panties, and two plastic vials of an unknown yellowish substance (Document #084974 and Transcript p. 11008-11009, Line 13). S/Sgt. Paynter testified that he used a visual examination method both with ordinary light and, on occasion, an ultra-violet light, as well as general touching or feeling of the garment itself to try and locate any suspect stains (Transcript p. 11014, Line 13). He indicated that he was able to locate seminal fluid

in the crotch area of the panties. S/Sgt. Paynter testified that even when a visual examination did not disclose any suspect stains it was common practice to chemically test the panties as that would be an area one would suspect seminal fluid could be found in cases of this nature (Transcript p. 11016, Line 24). S/Sgt. Paynter then conducted a chemical test called an acid phosphatase test which, in this case, gave a positive result for seminal fluid. He then conducted a microscopic examination of part of the extract to determine whether or not he could locate human spermatozoa (Transcript p. 11016, Line 19). S/Sgt. Paynter indicated that through a microscopic analysis it was not difficult to identify and differentiate human spermatozoa from other animal forms (Transcript p. 11017-18, Line 23).

26. S/Sgt. Paynter also conducted tests on two frozen lumps of liquid material that was found near the body of Gail Miller. The one sample tested positive for spermatozoa using the acid phosphatase test. In addition, the microscopic examination of this material was positive for human seminal fluid. This indicated to S/Sgt. Paynter that the probable donor of the seminal fluid was from a person probably of a Group "A" blood group (Transcript p. 11037, Line 11).

27. S/Sgt. Paynter testified that carrying out secretor tests was not routine and that such testing would not have been done on very many cases (Transcript p. 11051, Line 3). He did, however, indicate that such testing would be conducted to assist the investigator and to provide that investigator with another investigative tool. Through secretor tests, the number of male donors could be narrowed down to a population of individuals that had a particular blood type, where "A" antigens had been found in the fluid. S/Sgt. Paynter indicated that he probably had been asked by an investigator if there was anything else that could be done to narrow down the possible grouping of suspects. He further indicated that it was a test that was available and he would be willing to conduct but would not positively commit to the results because of the lack of a confirmation test (Transcript p. 11041-42, Line 2).

28. S/Sgt. Paynter's testing of the frozen sample eventually led to the conclusion that the donor of the sample was "highly probably" an a Group "A" secretor but he could not be definitive on that conclusion (Transcript p. 11049, Line 22).
29. S/Sgt. Paynter received correspondence (Documents #009259 and #031373) from Lt. Penkala requesting him to examine blood and saliva samples from David Milgaard in order to determine his blood type and secretor status (Transcript p. 11057, Line 10). The liquid blood sample from Mr. Milgaard indicated that he was Type "A" (Transcript p. 11060, Line 7). The absorption inhibition test conducted on a saliva sample contained in a piece of cloth found no antigens of either Group A or B (Transcript p. 11061, Line 24). S/Sgt. Paynter testified that this either meant that the donor was a non-secretor or that the antigens had been destroyed (Transcript p. 11062, Line 1). S/Sgt. Paynter also indicated that conducting such tests were somewhere between uncommon and very uncommon (Transcript p. 11061, Line 16).
30. S/Sgt. Paynter's results indicated that Mr. Milgaard was probably not the donor of the frozen seminal fluid found near the body (Transcript p. 11065, Line 18). Lt. Penkala (Document #105534) on June 2, 1969, resubmitted the frozen sample for additional testing (Transcript p. 11067, Line 18). S/Sgt. Paynter indicated that he was likely aware, through discussions with the investigator, that his results on the frozen sample did not match the results obtained from the person they suspected (Transcript p. 11068, Line 12). Consequently, S/Sgt. Paynter conducted a hemostix test as he was checking to see if there could be another reason for A antigens to appear in the seminal sample, other than coming from a person of A secretor status. The test conducted by S/Sgt. Paynter gave a strong indication that blood was present but S/Sgt. Paynter advised that this was not a completely positive confirmation test and that not enough blood was present in the sample to validate the preliminary finding (Transcript p. 11076-77, Line 19).
31. S/Sgt. Paynter's evidence at the trial of David Milgaard was reviewed during the Inquiry. At trial, he testified that because there was the possibility the frozen

seminal sample was contaminated with blood, the donor might not have been a secretor (Transcript p. 11160-61, Line 23). Because the evidence at trial did not indicate that the sample was from either an A blood-type secretor or non-secretor, it was S/Sgt. Paynter's view that the evidence did nothing to either link Milgaard to the crime or exclude him from it (Transcript p. 11196, Line 15).

32. S/Sgt. Paynter gave evidence that the vaginal aspirate that was destroyed during the autopsy would have been a more valuable piece of evidence than the frozen snow bank sample because of the location of the evidence. The evidence would have been of better quality. Furthermore, if the aspirate had been retained, he would have been in a position to conduct further testing including blood grouping and hemostix testing (Transcript p. 11139, Line 18). He indicated that the assumption at the time was that the best evidence in a sexual assault case would have been the seminal fluid found in the vaginal aspirate and the second best would have been seminal fluid on the clothing from that immediate area (Transcript p. 11222, Line 17). He went on to testify that once he had determined that there was seminal fluid on the panties, it would not have added anything to the body of evidence if he could also have indicated that he found seminal fluid on the dress, coat or any other clothing as it related to the sexual assault (Transcript p. 11223, Line 3).
33. The crucial piece of current evidence from S/Sgt. Paynter was that it would be extremely unlikely for any forensic laboratory to now carry out secretor status and blood grouping tests on blood and seminal samples with DNA testing being available. It was S/Sgt. Paynter's opinion that there would be no point in conducting such tests as DNA testing would provide much more definitive evidence (Transcript p. 11238-39, Line 16).
34. An RCMP Laboratory Memo (Document #278893) dated March 22, 1993, confirmed that in January of 1992 tests were conducted on saliva samples obtained from both David Milgaard and Larry Fisher. It was determined that both individuals were A blood-type secretors. This information was put to S/Sgt. Paynter at the

Inquiry and he testified that in 1969 if you had two individuals that were both A type secretors there was no other testing that could have been done to try and differentiate between the two individuals (Transcript p. 11235-36, Line 16).

35. The evidence of S/Sgt. Paynter indicated that he did not find any seminal stains on either the coat or the uniform as they were not visible to the naked eye. He advised the Inquiry that the test used to identify seminal stains wherein the whole garment was subjected to an acid phosphatase test was not in use in 1969 but later became an option for an examiner to employ in approximately 1973. S/Sgt. Paynter also indicated that other people that looked at the garments, since his review in 1969, also did not observe the additional seminal staining on the garments (Transcript p. 11221-22, Line 13).
36. In dealing with the forensic evidence, Former Saskatoon City Police Chief Penkala agreed that the vaginal aspirate should have been saved during the Miller autopsy. He acknowledged that there was no DNA testing in 1969. The frozen seminal fluid that was obtained from the crime scene allowed for blood grouping to be done and secretor tests to be conducted. Officer Penkala agreed that all of the tests that could have been done were done at that time and no other testing existed if more semen had been found or retained. Nevertheless, he acknowledged that had the vaginal aspirate been retained it could possibly have led to solving the crime sooner once DNA testing was available (Transcript p. 9412-14, Line 22). He further indicated that he had a good working relationship with the RCMP Laboratory and was comfortable picking up the phone to discuss a case with Laboratory personnel.
37. S/Sgt. Paynter gave evidence that he had no recollection of other rape cases in connection with the Gail Miller murder. He was asked to conduct tests on certain exhibits from other cases and to find if there were any A-B antigens on those exhibits (Transcript p. 11119-11121, Line 3). S/Sgt. Paynter testified that he assumed that the City Police were checking to see if the same person was involved in the two or three different offences besides the Miller murder. He drew that

conclusion at the Inquiry from reading the report and not from any knowledge or any recollection of conversation that he may have had with an investigator. He did, however, concede that he may have had a discussion that the police were looking at a possible connection (Transcript p. 11122, Line 1).

38. S/Sgt. Paynter testified on the serological testing that was available in 1969. The seminal sample tested indicated that the donor was probably an A blood group secretor. The testing initially done on David Milgaard indicated that he was probably an A blood group non-secretor. Eventually the seminal sample was retested and indicated that the sample may have come from a person that was an A type secretor or a non-secretor. This did not implicate or eliminate David Milgaard in the murder of Gail Miller. In essence, the serological evidence at trial was of little or no consequence. The tests that were available to S/Sgt. Paynter at the time were not definitive and did not serve to implicate an individual in a crime but only assisted in determining whether that individual could be eliminated based on the blood grouping and secretor status. The development of DNA analysis has virtually eliminated serological testing and consequently it is extremely unlikely that such testing would be a part of the evidence used to convict anyone of a crime in the future.

(b) Mr. Justice Calvin Tallis (Retired)

39. Justice Tallis gave evidence at the Inquiry indicating that he was familiar with S/Sgt. Paynter as an expert witness and indicated that it would be unlikely that S/Sgt. Paynter would present a conclusion that the frozen snow bank sample was human semen unless, as a scientist, he was sure of that result (Transcript p. 24541, Line 17).
40. Justice Tallis advised the Inquiry that going into both the Preliminary Hearing and the Trial he viewed the frozen semen sample as being helpful to David Milgaard's case and was, in fact, exculpatory (Transcript p. 24538, Line 2). In acting on behalf of Mr. Milgaard, he proceeded on the footing that there was an evidentiary basis

indicating that he was a non-secretor and that the donor of the frozen seminal fluid sample was a secretor. It was therefore an advantage to have the seminal fluid introduced into evidence at trial (Transcript p. 24533, Line 12). In essence, Mr. Justice Tallis took the view that the evidence of S/Sgt. Paynter was more helpful than harmful for David Milgaard.

1988 – 1992

(c) Dr. James Ferris

41. At the Inquiry, Dr. James Ferris indicated that he had reviewed all of the forensic evidence at trial to see if there was anything in the evidence that might assist David Milgaard's application (Transcript p. 23415, Line 15).
42. In his review he agreed that it would be normal protocol to try and establish that the stain or sample being analysed was probably semen. The screening tests involved to make such a determination would have included checking for staining with ultraviolet lighting, acid phosphatase testing and identifying sperm heads or sperm tails under a microscope (Transcript p. 23370-72, Line 8).
43. At the time of rendering his opinion in September of 1988 (Document #028652) Dr. Ferris testified that he was not aware of the unreliability of saliva testing for secretor status (Transcript p. 23545, Line 7).
44. He agreed that the evidence at trial from S/Sgt. Paynter was that the "snow bank sample" was identified as coming from an A blood-type secretor and that David Milgaard had been identified, at the time, as an A blood-type non-secretor. Dr. Ferris further agreed that S/Sgt. Paynter's evidence was that he was not able to positively identify blood in the sample and the judge specifically stipulated at trial that there was no evidence of blood whatsoever. It was on the basis of this evidence at trial that Dr. Ferris concluded that the evidence was more exculpatory of David

Milgaard than inculpatory. It was Dr. Ferris' opinion that it can be difficult to make a jury understand scientific evidence. However, after reviewing the statements and addresses to the jury, it was his opinion that the judge certainly understood the import of the evidence but suspects that the jury disregarded the evidence that exculpated David Milgaard (Transcript p. 23478, Line 14 and 23489, Line 1).

45. Dr. Ferris was not aware that S/Sgt. Paynter had not attended at the crime scene. He agreed it would have been beneficial had S/Sgt. Paynter had the opportunity to observe what contamination the "snow sample" may have been subjected to (Transcript p. 23552-553, Line 22). Dr. Ferris acknowledged that the scientific community became more aware of possible contamination at crime scenes even 20 years following the Miller murder investigation. He indicated that by 1988 protective clothing was being worn at crime scenes and this was not done in 1969 because there was no realization that individuals attending at the crime scene had the potential to contaminate (Transcript p. 23431-32, Line 22). He, however, acknowledged that the integrity and the continuity of the sample were not in issue at the trial. Sample analysis was in issue at the trial. Dr. Ferris was of the view that this evidence reasonably excluded David Milgaard from the crime scene and agreed that it was the individual defence counsel's decision on how to best utilize such evidence (Transcript p. 23446-47, Line 21 and 23557-58, Line 11).
46. Dr. Ferris was of the opinion that the vaginal aspirate would have been a better sample to test than the "snow bank" sample and that scientists don't always get to choose the sample available for analysis (Transcript p. 23553, Line 2).
47. Dr. Ferris agreed that once S/Sgt. Paynter identified a sample as coming from an A blood-type secretor that no further or different procedures were available in 1969 to conduct any more precise testing had further samples been located (Transcript p. 23559, Line 7).

48. It was Dr. Ferris' testimony that he likely examined Gail Miller's uniform with an ultraviolet light in 1988 but was unable to locate a stain that was later discovered by Dr. Barber when DNA testing was done in 1997. Dr. Ferris also conceded that in attempting to conduct DNA testing in 1988, he destroyed a portion of the panty material that could have afforded more current testing at an earlier date (Transcript p. 23560-63, Line 9). Furthermore, it was established at the Inquiry that Dr. Ferris failed to retain the excised portion of the panty material which may have allowed for earlier DNA testing.

(d) Dr. Colin Merry

49. Dr. Colin Merry testified at the Inquiry with respect to the forensic evidence and, more specifically, regarding the frozen specimen sample that was found by Lt. Penkala in the snow bank adjacent to where the body of Gail Miller was located. Dr. Merry gave testimony with respect to the work undertaken by S/Sgt. Paynter who had previously testified at the Inquiry.

50. It was S/Sgt. Paynter's evidence that in 1969 he used a hemostix test as a screening test used on suspect stains (Transcript p. 11076-77, Line 16). He indicated to the Inquiry that this was a presumptive test and did not identify something as being positively blood but gave an indication that blood was present. S/Sgt. Paynter further indicated that it was then appropriate to undertake a confirming test such as the haemochromogen test. However, there was not enough sample available to determine whether, in fact, blood was present (Transcript p. 11081, Line 18). S/Sgt. Paynter also indicated that there were other materials that could have been present in the sample that would have given a false positive test on the hemostix test such as leather and some vegetable material (Transcript p. 11097-98, Line 14).

51. Dr. Merry agreed that the evidence in 1969 was that David Milgaard was identified as an A blood group type non-secretor. He also agreed that S/Sgt. Paynter identified the frozen sample as coming from an A blood group type secretor which arguably

was favourable to Mr. Milgaard. The trial judge ruled there was no evidence that blood had been identified in the frozen sample (Document #041925 at 041945-7). Dr. Merry, at this Inquiry, agreed that the evidence of S/Sgt. Paynter wrongfully identifying David Milgaard as an A blood group type non-secretor and the frozen sample being from an A blood type group secretor was favourable to Mr. Milgaard in the sense that there wasn't a link necessarily made between David Milgaard and the sample in the snow (Transcript p. 22104-5, Line 18). Furthermore, Dr. Ferris in his correspondence to Mr. Wolch on September 13, 1988, concluded that he had no reasonable doubt the serological evidence presented at the trial failed to link David Milgaard with the offence and that, in fact, could be reasonably considered to exclude him from being the perpetrator of the murder (Document #028652 at 658).

52. Dr. Merry agreed that if the pubic hair found in the frozen sample was correctly identified as being of human origin that it would have been more reasonable for S/Sgt. Paynter to conclude that the frozen sample that he eventually identified containing spermatozoa was also of human origin (Transcript p. 22108, Line 18).
53. Dr. Merry gave evidence at the Inquiry that scientists would no longer conduct blood group testing on a sample. If one was able to obtain a seminal sample, it would be prudent to proceed straight to DNA analysis and thus eliminate any questions pertaining to blood grouping analysis as conducted by S/Sgt. Paynter (Transcript p. 22112, Line 10).
54. S/Sgt. Paynter gave evidence at the Inquiry that he conducted morphology testing which he indicated was the identification of the human spermatozoa using a microscope. He gave evidence that the morphology of human spermatozoa is distinguishable from that of dog spermatozoa and he was able to identify that difference (Transcript p. 11017, Line 18 and 11207, Line 6).
55. Dr. Merry disagreed with the evidence of S/Sgt. Paynter that he would be able to identify the difference between canine versus human spermatozoa although Dr.

Merry himself did not have the opportunity to examine the sample analysed by S/Sgt. Paynter. Dr. Merry was not able to comment on whether S/Sgt. Paynter was able to make the differentiation between human versus animal spermatozoa because he had never looked at the sample himself (Transcript p. 22116, Line 5). Dr. Merry also disagreed with a comment by Dr. Markestyn made in correspondence with Mr. Asper on June 4, 1990 (Document #004773 at 778, Transcript p. 22114-15, Line 16). Here Dr. Markestyn agreed with S/Sgt Paynter that one of the ways of excluding this semen sample from being of non-human origin would have been through conducting morphology tests. Dr. Merry also disagreed with the statement of the Chief Scientist of Serology for the RCMP in 1990, Patricia Alain, wherein she indicated that the morphological differences of human spermatozoa and canine spermatozoa were several and that the experienced examiner would not have any problems in distinguishing between human and canine spermatozoa (Document #002511, Transcript 22117-18, Line 24). Dr. Merry also disagreed with Ms. Cathy MacMillan of the RCMP Biology section wherein on March 22, 1993; she indicated that the test used to differentiate types of seminal fluid has not changed significantly. If a suspect stain is found initially to be positive the area is examined microscopically for spermatozoa. She indicated that human spermatozoa are morphologically different (as seen microscopically) than animal spermatozoa and that it is only at this stage that a conclusion can be drawn as to the origin of the semen (Document #278893 at 94, Transcript 22120-21, Line 7). It should also be noted that on September 13, 1988, Dr. James Ferris wrote Mr. Wolch and indicated that on the basis of the forensic testing that was done he had no doubt that semen was recovered. He did not indicate that he had questions as to whether the semen recovered was of animal origin (Document #028652 at 655). Furthermore, it should be noted that Larry Fisher, who was eventually convicted on DNA evidence of the crime, was found to be an A blood group type secretor which, in essence, was the same initial identification of the sample found in the snow bank as identified by S/Sgt. Paynter.

56. The mandate of the Commission of Inquiry is to delve into what led to the wrongful conviction of David Milgaard. It is respectfully submitted that the testimony of both Dr. Merry and Dr. Ferris supports the view that the forensic evidence led at the Milgaard trial went more towards exculpating David Milgaard than inculpating him. S/Sgt. Paynter's testified truthfully at trial as to the results of his forensic testing. It rested with counsel how to utilize that evidence and it was up to the judge and jury what weight should be attributed to it.

(e) Dr. Peter Markestyn

57. In 1990 Dr. Markestyn was the Chief Medical Examiner for the Province of Manitoba and was consulted by the Milgaard effort. He gave evidence at the Inquiry that in 1990 he was of the opinion that the "frozen seminal sample" that was located near where the body of Gail Miller had been found may well have been dog urine. Dr. Markestyn proffered this opinion without the benefit of reviewing S/Sgt. Paynter's notes with him and therefore did not know what tests were, in fact, carried out. (Document #004772 at 778).

58. It became evident at the Inquiry that Dr. Markestyn was not provided with a complete "picture" which would have enabled him to provide a more informed opinion. The RCMP laboratory report of Cpl. Molchanko was not provided to him which indicated that seven pubic hairs matching Gail Miller were found in the frozen sample. (Document #025562) Furthermore, Dr. Markestyn was not provided with Cpl. Molchanko's evidence at David Milgaard's Preliminary Inquiry. There Cpl. Molchanko described locating the pubic hairs in the frozen sample and explained that testing was done to confirm whether it was human or animal hair. Dr. Markestyn readily agreed that the provision of this information, which was available and not provided by the Milgaard effort, would certainly have assisted him in rendering his opinion. (Document #008311 at 323 and Transcript p. 33717-721, Line 1).

59. In his evidence, Dr. Markestyn also indicated that he was not provided with transcripts from the Milgaard trial of *a voir dire* where the admissibility of Cpl. Molchanko's evidence was ruled upon by the court. He indicated that if he had been provided with such information he would have remembered it because it would have weakened his opinion that the frozen sample could be dog urine (Transcript p. 33749 – 51, Line 9). Following the review of various media reports, Dr. Markestyn disagreed with Mr. Asper's characterization that the frozen samples "were in fact Fido's urine". Dr. Markestyn indicated he just raised that as a possible issue but it was not a fact. (Transcript p. 33692, Line 19).
60. Dr. Markestyn indicated that had Cpl. Molchanko's evidence been provided he would have been of the opinion that it was more probable than not that the frozen sample was of human origin and not dog urine (Document #003688 at 704 and Transcript p. 33657-59, Line 24). Further, he readily agreed that urine could have drained from the body of Gail Miller, upon her demise, and mixed with the seminal sample to give the frozen material a yellowish discolouration. (Transcript p. 33722, Line 5).
61. Dr. Markestyn also gave evidence wherein he agreed with the RCMP's Chief Serologist, Patricia Alain, who indicated that by examining spermatozoa under a microscope an experienced serologist could tell the difference between human and animal spermatozoa (Document #185365 and Transcript p. 33726-27, Line 17).
62. In Dr. Markestyn's report of June 4, 1990, he questioned the accuracy of secretor tests conducted on David Milgaard in 1969. He indicated that despite including this information in his report, he was never requested by Mr. Asper or Mr. Wolch to retest David Milgaard's secretor status (Document #004772 at 779 and Transcript p. 33753).
63. It became evident at the Inquiry that the possibility that the frozen sample was dog urine was utilized extensively by the Milgaard effort as a way in which to garner

sensational headlines and to discredit anyone that was involved in the original investigation and prosecution of David Milgaard. From an RCMP perspective, it became apparent that the information that was being provided by the Milgaard effort, at times, was not as accurate as it could have been. This resulted in distorted and inaccurate opinions based upon incomplete information. It is apparent that in 1990 the Milgaard effort knew that there was a possibility David Milgaard was a secretor and chose to not have that point clarified through further testing. It was not until January of 1992 that further secretor tests were conducted on David Milgaard. (Document #278893) Some of the information provided by the Milgaard effort had become suspect during the Section 690 investigation that S/Sgt. Rick Pearson assisted in and also the 1993 criminal investigation conducted by the officers under the direction of then Insp. Murray Sawatsky. Although jurisdiction for the investigation of Gail Miller's death rested with the Saskatoon Police Service, the misinformation provided by the Milgaard effort was counter-productive to the work being carried out by the RCMP and government officials. This resulted in them expending time and resources on areas that were of no benefit to any legitimate investigation of the matter and certainly were of no assistance in furthering the query as to whether the investigation into Gail Miller's death should have been re-opened.

IV. The Milgaard Effort

(a) Mr. Paul Henderson

64. Mr. Henderson was an investigator with Centurion Ministries and worked closely with Joyce Milgaard. He had concerns about Mrs. Milgaard's approach to some witnesses and disagreed, in part, with the extensive use of the media. In particular, Mr. Henderson had reservations about the fact that Mrs. Milgaard would try to convince witnesses to see things her way. This occurred during her interviews of [REDACTED] and Linda Fisher (Transcript p. 29050 -29053, Line 4, and p. 29067-29069, Line 20 and Document #050396 and #301887). He further acknowledged that this approach to witnesses would cause difficulties for the RCMP in '93 when

looking into allegations of police pressure and prosecutorial misconduct. He conceded it would be reasonable for the RCMP to have concerns about the accuracy of information being passed on by Joyce Milgaard and Centurion Ministries (Transcript p. 29066, Line 3, 29069-70, Line 23).

65. Mr. Henderson acknowledged that the Milgaard effort would put information to witnesses as if it were fact without necessarily verifying accuracy (Document #050412 & Transcript p. 29211-292113, Line 12). Mr. Henderson told Dennis Cadrain that Ron Wilson, Nichol John, and Albert Cadrain were manipulated, coerced and threatened by police, despite the fact that no independent evidence of that existed. Mr. Henderson also told Dennis that they had heard Larry Fisher confessed to the Miller murder and rape when this was not true. He admitted that he did not take any steps to verify whether this was accurate or not. Mr. Henderson further conceded that as an investigative body, it would have been incumbent upon Centurion Ministries to verify whether their information was accurate. He agreed that they could have checked the Crown's file, witnesses' original statements and investigation reports but neglected to do so (Transcript p. 29220-29223, Line 21). Even though Mr. Henderson alleged that police pressured and coerced Albert Cadrain into giving a statement, he admitted that he made no efforts to look at Albert's statement and that he was unaware that Albert contacted the police on his own (Transcript p. 29227-29229, Line 19). When dealing with Ron Wilson, Mr. Henderson admitted that he never took any steps to verify any of the allegations about police misconduct. He never checked investigation reports, looked at the original statements, or talked to Mr. Wilson's mother (Transcript p. 29232-233, Line 22).
66. Mr. Henderson testified it would be improper for police subsequently investigating allegations of police pressure and prosecutorial misconduct not to test the veracity of the allegations they put forth. He agreed police need to ensure that reasonable and probable grounds exist to support such assertions before any such charges could be preferred (Transcript p. 29114-29116, Line 3). Mr. Henderson also readily agreed

that although there was a great deal of suspicion surrounding Larry Fisher; suspicion and evidence sufficient to take a matter to court are very different things (Transcript p. 29116- 29120, Line 4).

67. While being examined by Commission Counsel, Mr. Henderson made allegations that the RCMP members, during their '93 investigation, manipulated Albert Cadrain into making negative comments about Mr. Henderson (Transcript p.22868 – 22871, Line 2). Under cross-examination, however, Mr. Henderson conceded that it was possible Albert Cadrain was a “notorious flip flopper” and changed his story first to suit Mr. Henderson and then later changed it again when speaking with the RCMP (Transcript p. 29101 – 29103, Line 11). He further agreed it was possible Albert Cadrain “flip flopped” on his own without any pressure or manipulation from the RCMP (Transcript p. 29108, Line 2, 29111, Line 7 and see '93 RCMP interview of Albert Cadrain Document #326611 at 326687).

(b) Mr. David Asper

68. David Asper testified about his involvement as counsel for David Milgaard and his assistance to the Milgaard group's efforts in preparing the section 690 applications to the Federal Justice Minister.
69. Mr. Asper agreed that it was reasonable for the RCMP, during their investigation into police and prosecutorial misconduct, to have concerns about the information and allegations being passed on by the Milgaard group (Transcript p. 27547, Line 11). Mr. Asper testified that from the outset Paul Henderson held the view that there had been police misconduct, despite having no evidence to support that allegation (Transcript p. 27550, Line 7). He further conceded Mr. Henderson's strategy, when approaching witnesses, was to provide the witness with an explanation as to why they lied. Mr. Henderson simply accused the police of misconduct (Transcript p. 27551, Line 8). This allowed witnesses to “save face” by blaming the police for any wrong doing, rather than taking responsibility for their own actions. Mr. Asper

agreed that this technique made it very difficult for RCMP investigators in '93 to discern what had in fact occurred (Transcript p. 27555- 57, Line 25).

70. Mr. Asper also admitted to withholding information from Federal Justice Officials and agreed that this approach would have caused problems and raised concerns for the RCMP during the investigation associated with the section 690 applications (Transcript p. 27559 – 561, Line 1).

(c) Mrs. Joyce Milgaard

71. Mrs. Milgaard gave evidence at the Inquiry wherein she acknowledged that the RCMP 1993 investigation into allegations of police and prosecutorial misconduct was a criminal investigation and she had wanted something more broad to be conducted (Transcript p. 31887, Line 18). Murray Sawatsky testified that when he met Mrs. Milgaard in 1993 he got the impression she wanted a public inquiry (Transcript p. 35088).

72. When the RCMP criminal investigation was completed Mrs. Milgaard called the report a “white wash” and indicated that this, in essence, was what you get when you have police investigating their “bosses”. (Document #147954 and Transcript p. 31896 – 898, Line 10).

73. Mrs. Milgaard conceded that the report was not helpful in clearing her son’s name or moving towards obtaining possible compensation and that is why she felt it was a “white wash”. (Transcript p. 31897, Line 14).

74. Mrs. Milgaard went on to concede that the RCMP was not a part of the Government of Saskatchewan (Transcript p. 31898, Line 1) and that Alberta Justice was also not part of the Government of Saskatchewan. They were an outside agency appointed to review the RCMP criminal investigation (Transcript p. 31899, Line 15). Although Mrs. Milgaard agreed Alberta Justice’s view of the RCMP report was

different than hers, she conceded that in the area of whether criminal charges should be laid and pursued, they were more knowledgeable than herself (Transcript p. 31899-900, Line 20). Mrs. Milgaard also agreed with Mr. Wolch in his correspondence to then Saskatchewan Justice Minister Mitchell that if an innocent person is convicted of a crime and given a fair trial a miscarriage of justice could still occur without culpability and without any wrong doing (Transcript p. 31900, Line 4).

(d) Dr. Neil Boyd and Dr. Kim Rossmo

75. Doctors Rossmo and Boyd published a report in October of 1991 which was submitted to Justice officials on behalf of David Milgaard during the Section 690 process. The report was also filed in the Supreme Court of Canada in 1992. They reviewed the original investigation and trial of David Milgaard and expressed various opinions (Document #030493 at 494). Dr. Rossmo indicated in his evidence that they didn't find any police wrong-doing during the initial investigation of the Miller murder (Transcript p. 28255, Line 1).
76. Dr. Rossmo is currently a geographic profiler at Texas State University. Although his expertise is not in the area of psychological or behavioural profiling, he was asked to give his opinion on the 1993 report authored by RCMP Inspector Ron McKay and Ontario Provincial Police Superintendent Kate Lyons. Dr. Rossmo disagreed with their opinion that the Miller crime could have started out as a purse snatching which progressed into a sexual assault. Under cross-examination Dr. Rossmo agreed that their report may have been based on different information. He also agreed that the information Drs. Rossmo and Boyd were provided with by the Milgaard effort, may not have been the same information which officers McKay and Lyons were provided with and thus different conclusions could be reached (Transcript p. 28209-213, Line 1 and 28234 – 238, Line 3).

77. Dr. Rossmo indicated that he had a huge amount of respect for both Inspector Ron McKay and Superintendent Kate Lyons and that he agreed with the majority of their report. He further indicated there could be differences of opinion among behavioural profilers and that a profiler would be willing to change their opinion when new information is gathered (Transcript p. 28245 – 247, Line 5).
78. Dr. Rossmo commented on his experience as a police officer and indicated that he disagreed with the manner in which Paul Henderson approached witnesses with the theory that Larry Fisher had committed the crime and attempted to get witnesses to agree with him. Dr. Rossmo indicated this was problematic because the investigator then only looks for evidence that supports their theory. He also disagreed with putting specific suggestions to witnesses as when Mrs. Milgaard suggested to Linda Fisher that her missing knife was maroon in color (Transcript p. 28251, Line 2, 28267 – 68, Line 11 and 28274 – 275, Line 23).

(e) Summary

79. Despite allegations to the contrary, Neil Boyd, Kim Rossmo, David Asper, Paul Henderson and Joyce Milgaard were unable to uncover any evidence that the Saskatoon City Police had coerced or manipulated any witnesses during the original police investigation. This was later confirmed by the RCMP during their criminal investigation into police and prosecutorial misconduct. Because no such evidence was uncovered and there was also no substantive evidence linking Larry Fisher to the murder of Gail Miller, it was reasonable in the circumstances that the investigation into the death of Gail Miller was not re-opened by any police agency during or following the section 690 applications. Although a thorough investigation into the allegations against Larry Fisher was conducted by S/Sgt. Pearson, the questionable accuracy of much of the information put forward by the Milgaard effort may subsequently have influenced authorities as to whether the investigation into the death of Gail Miller should have been reopened.

V. Assistance Rendered on Applications Pursuant to Section 690 of the *Criminal Code*—Former RCMP Staff Sergeant Rick Pearson

80. Former RCMP S/Sgt. Richard Pearson testified for eight days at the Inquiry. It is not the intent of these submissions to summarize all of the investigative tasks that he undertook in assisting the Federal Department of Justice. A synopsis of some of the work carried out by S/Sgt. Pearson can be found in his Continuation Report spanning the pertinent time periods (Document #056743).

(a) Role

81. S/Sgt. Pearson assisted the Federal Minister of Justice, on David Milgaard's section 690 application, primarily as it pertained to the assertion that Larry Fisher was responsible for the murder of Gail Miller (Transcript 18871, Line 16). He took direction from Eugene Williams but was allowed the liberty to investigate on his own (Transcript p. 18886, Line 9). S/Sgt. Pearson indicated that the section 690 process was not something that police were very familiar with, but he saw his role as assisting Mr. Williams by passing on any evidence that he uncovered (Transcript p. 18914, Line 3 and 19556, Line 3).

82. In meeting with Eugene Williams to discuss the section 690 process, he understood that their efforts were to try to establish a link between Mr. Fisher and the murder of Gail Miller. This was to be in the form of hard evidence as opposed to suspicion (Transcript p. 19082-84, Line 13). S/Sgt. Pearson only worked on part of the section 690 investigation. There were other aspects of the review that he was not familiar with and he did not see his role as being one to decide whether Mr. Fisher should be charged with the murder of Gail Miller (Transcript p. 19094-95, Line 6). He also felt that he never had sufficient grounds to go out and arrest Mr. Fisher (Transcript 19556, Line 6). In essence, there was a review process in place and a decision would be made on Mr. Milgaard's fate by the Federal Minister of Justice and not the RCMP.

83. S/Sgt. Pearson testified that he had a good working relationship with David Asper and that they communicated back and forth during the application (Transcript p. 18916, Line 5 and 20443-44, Line 23).

(b) Media Impact

84. While S/Sgt. Pearson was assisting the Federal Department of Justice, an issue arose concerning the negative publicity surrounding allegations that Larry Fisher was the true killer of Gail Miller. S/Sgt. Pearson testified that this influenced how Mr. Fisher could be dealt with (Transcript p. 18950, Line 11). S/Sgt. Pearson was of the view that there was no “up side” to the publicity around Fisher in developing the investigation (Transcript p. 19305-306, Line 5). It was his opinion that it was improper to publicly name any individual before there were charges laid. There was a concern that Mr. Fisher would refuse to cooperate if he was unfairly suspected, accused, or made subject of a press release and subsequent stories (Transcript p. 19240-42, Line 18).

(c) Locating Fisher Assault Files

85. At the outset of S/Sgt. Pearson’s assistance to the Minister of Justice, it was believed that Mr. Fisher had committed rapes in Regina. S/Sgt. Pearson indicated that the fact all parties were initially under this impression didn’t affect the early stages of his investigation into Mr. Fisher. The previous rapes, regardless of location, raised a suspicion that Mr. Fisher could have been responsible for the Miller murder (Transcript p. 20435-37, Line 8). S/Sgt. Pearson was initially only able to obtain the criminal record of Mr. Fisher and didn’t have access to police files. When it was determined where the Fisher offences took place, there were only partial police files available (Transcript p. 19351, Line 11).

86. There was no record of Mr. Fisher with the Saskatoon Police Service, and when S/Sgt. Pearson did check his criminal record there was no focus, at that time, on doing a similar fact analysis. Furthermore, the file material on all the sexual assaults was not available. In addition, S/Sgt. Pearson gave evidence that Mr. Williams indicated there had to be a link made between Mr. Fisher and the Miller murder before a similar fact analysis would be of any assistance (Transcript p. 20196-200, Line 4).

87. The missing or incomplete files impacted on when or if a similar fact analysis could be carried out. As more file material was located that became more of a possibility (Transcript p. 20441-42, Line 8).

(d) Investigation

88. S/Sgt. Pearson wanted to interview Larry Fisher's sexual assault victims, as he felt Centurion Ministries and Mrs. Milgaard had used a biased approach with witnesses and he was concerned about the accuracy of the details (Transcript p. 19654-55, Line 24). S/Sgt. Pearson also gave evidence that Eugene Williams was of the view that unless one could draw an association between Larry Fisher and the Miller murder there was no merit in interviewing the assault victims (Transcript p. 19649, Line 15).

89. S/Sgt. Pearson testified that he was not asked by either Eugene Williams or Hersh Wolch to do a similar act or fact analysis during the first application. Mr. Pearson doubted very much that Crown counsel would authorize any charges based solely on similar fact evidence (Transcript p. 19343-46, Line 10). Crown Prosecutor Murray Brown gave evidence at the Inquiry and indicated a prosecution would be unlikely unless police were able to locate some direct evidence linking Larry Fisher to the Miller murder. Furthermore, the evidence from the Milgaard prosecution was largely intact and the fact that the case had been through a Supreme Court reference, it was likely that defence counsel could raise a reasonable doubt about the guilt of

Larry Fisher. By preferring charges against Larry Fisher on the basis of the similar fact “evidence”, one stood the risk of perhaps never being able to successfully prosecute Larry Fisher once DNA advances were made. Mr. Brown was of the firm view that no evidence was uncovered by anyone that could link Larry Fisher to the murder of Gail Miller and the only prospect of a successful prosecution rested with DNA technology. (Transcript p. 38543-45, Line 9).

90. S/Sgt. Pearson disagreed with assertions by Mr. Wolch that the Crown was not doing anything to exonerate Mr. Milgaard during their first application. He indicated that he had been trying to obtain Mr. Fisher’s blood type and convene a legal deposition with him (Transcript p. 19349-50, Line 13).
91. Throughout his testimony, S/Sgt. Pearson indicated that Mr. Fisher was considered a very good suspect. There was, however, nothing in S/Sgt. Pearson’s mind that formed a substantial link between Mr. Fisher and the Miller crime (Transcript p. 20287, Line 12). S/Sgt. Pearson concluded that after such a lengthy passage of time there were no additional investigative avenues available that could have tied Mr. Fisher to the Miller murder (Transcript p. 19103-104, Line 3). In the end, it was the DNA analysis that solved the crime (Transcript p. 20447-48, Line 21). Any further investigation into the death of Gail Miller, at that time, would not have uncovered any more evidence.
92. Former S/Sgt. Pearson, like the Supreme Court of Canada, struggled with the case. There was no clear answer. There was no evidence to eliminate or confirm either Mr. Milgaard or Mr. Fisher (Transcript p. 20030-31, Line 21). Following the Supreme Court’s decision, it was up to the provincial Attorney General’s office as to whether they would re-try David Milgaard and consequently direct any further investigation be undertaken into the Miller murder.

(e) Report Availability

93. S/Sgt. Pearson acknowledged that during his investigation, he did not have some of the 1969 RCMP reports. He felt that these reports could have had an impact on his investigation (Transcript p. 20223-25, Line 12). It was Mr. Pearson's opinion that the reason he never had the 1969 RCMP reports was likely because they would have been part of a routine file destruction (Transcript p. 20456, Line 8). Former S/Sgt. Pearson did acknowledge, however, that he didn't recall that the Saskatoon Police Service in 1969 was in fact looking at the possible connection between the Miller murder and the sexual assaults in the area and such documentation was on their files.

(f) Manner of Questioning of Witnesses

94. S/Sgt. Pearson raised a concern about the manner in which witnesses should be questioned. He indicated that there is the possibility that an interviewer could interpret information in a way that would influence the witness, rather than getting the information purely from the witness themselves (Transcript p. 19013, Line 5). He indicated that he was concerned that there was different information contained in the statement that he obtained from Linda Fisher and the statement that Mrs. Milgaard and Mr. Henderson obtained from her (Transcript p. 19027, Line 1). Furthermore, in his contact with [REDACTED] she advised that she was extremely upset by the manner in which she was treated by Mrs. Milgaard and Mr. Henderson (Transcript p. 19729, Line 1). Mr. Pearson concluded that Mrs. Milgaard used a biased approach with [REDACTED] and this raised a concern about her approach with other witnesses, and whether she had influenced Larry Fisher's previous sexual assault victims to say things that were not accurate. He also had the same concern about Mr. Henderson's approach with witnesses (Transcript p. 19749-51, Line 3). This further complicated former S/Sgt. Pearson's task of obtaining accurate information to assist in the section 690 process.

(g) Systemic Issues

95. S/Sgt. Pearson indicated that the fact he was reporting to Mr. Williams in Ottawa was an obstacle. Due to this simple geographic fact, they were not available to have daily face to face discussions (Transcript p. 20180, Line 9). Although S/Sgt. Pearson gave evidence that he was able to pass on all pertinent information to Mr. Williams, he felt that it would have been advantageous to work out of the same geographic location on future applications (Transcript p. 20153, Line 15).
96. S/Sgt. Pearson felt that all parties should sit down at the outset of any section 690 application and discuss the case and try to understand each other's viewpoint better (Transcript p. 20242, Line 3 and 20245, Line 7). He testified that section 690 applications should be more open, but there also had to be safeguards put in place so that people didn't take advantage of the system as this would create chaos (Transcript p. 20246, Line 7).

(h) Summary

97. As outlined above, the limited evidence that S/Sgt. Pearson was able to gather on Larry Fisher precluded any criminal charges being preferred against Mr. Fisher. Over twenty years later, there were no avenues, short of scientific advancements in DNA testing, which realistically remained open for further investigation into the death of Gail Miller. In addition, in light of the SCC decision on the Milgaard reference, it was unrealistic to expect a police agency would take any further investigative steps without some direction from the provincial attorney general's office.

VI. 1992 – 1994 Criminal Investigation into Alleged Police and Prosecutorial Misconduct--Former RCMP Inspector Murray Sawatsky

(a) RCMP Role/Jurisdiction

98. These submissions will not reiterate the lengthy evidence of former RCMP Inspector Murray Sawatsky and his comments in relation to the detailed RCMP report into alleged criminal wrongdoing by police and prosecutors (Document # 023167). The following paragraphs deal with portions of his evidence that relate to the manner in which the RCMP investigation was conducted and the difficulties that were present as a result of the lengthy delay, the numerous contacts of witnesses by various individuals over the course of time and how this may have impacted on any reopening of the investigation into the death of Gail Miller.

99. At the outset, Insp. Sawatsky indicated that it was not the RCMP's role to re-investigate either the Miller murder or the guilt or innocence of Larry Fisher or David Milgaard (Transcript p. 35022-23, Line 15). Nevertheless, substantial information was gathered from many of the witnesses that may have assisted in determining such questions. This information was gathered for background. There was, however, an expectation that the RCMP would provide some comment as to whether anything new surfaced that pointed towards the guilt or innocence of either Mr. Milgaard or Mr. Fisher (Transcript p. 35023-24, Line 3). If the RCMP came across any evidence that would have provided a basis for criminal charges this information would have been referred to Alberta Justice for investigation by the police service having jurisdiction (Transcript p. 35271-72, Line 15). This was a decision to be made by others outside the RCMP.

(b) Proper Witness Approach

100. In conducting the investigation the RCMP used an open approach with witnesses. The style was non-aggressive in an attempt to determine what a witness could inform the investigators of on their own (Transcript p. 35650-51, Line 14). The best

approach with a witness was to get a pure version statement being one taken from the witness without interruption or suggestion (Transcript p. 35654, Line 8). When interviewing people that had previous contact with others, Insp. Sawatsky testified that an investigator would want to find out the nature of previous contacts the witness had encountered and what may have been suggested and whether any inducement, promise, or threat had been utilized. In essence, to determine the “voluntariness” of the statement (Transcript p. 35652-53, Line 1).

(c) Centurion Ministries Dealings with Witnesses

101. Insp. Sawatsky also testified that there appeared to be a difference between what witnesses told the RCMP and other authorities and what they told Centurion Ministries. A concern arose about the manner in which interviews were being conducted. In some cases it was evident, while in other cases there was not enough information provided by Centurion Ministries to allow the RCMP to address the question of whether witnesses had been unduly influenced (Transcript p. 35672-73, Line 14).
102. It appeared to the RCMP that the Centurion Ministries’ approach involved trying to convince witnesses that David Milgaard was innocent and Larry Fisher was guilty of the murder of Gail Miller (Transcript p. 35674, Line 3). Difficulties arose during the RCMP investigation due to the fact that the police were unable to meet with and interview Ron Wilson. Furthermore, Mr. Henderson did not provide the RCMP with any transcript, tape recording, outline of questions or areas of discussion that were undertaken by Mr. Henderson with Mr. Wilson. It became difficult for the RCMP to discern the veracity of Mr. Wilson’s recantation and allegations of police misconduct. In addition, the RCMP was aware that Mr. Wilson had lied before and that the Supreme Court of Canada had questioned the truthfulness of his evidence (Transcript p. 35675-76, Line 17).

103. The RCMP became aware of some of Paul Henderson's approaches with witnesses, wherein he lied indicating that "the RCMP was convinced that Larry Fisher was guilty" (Transcript p. 35518-21, Line 3). Furthermore, it became apparent that Paul Henderson would not interview with the RCMP concerning his interactions with Mr. Wilson (Transcript p. 35527-28, Line 14).
104. The RCMP was unable to verify the recantation of Ronald Wilson and his allegations of police misconduct. Consequently, they were unable to give such assertions very much weight. They tested parts of the recantation against some of the known facts and found them to be inconsistent (Transcript p. 35528-31, Line 7). It appeared incongruous that the very person to complain about being a victim of inappropriate police questioning did not want to participate in an interview with a police agency that was criminally investigating those very allegations.

(d) Passage of Time

105. The fact that Paul Henderson was lying to witnesses about the RCMP's view of Larry Fisher could have impacted on the information people were willing to provide to Centurion Ministries and whether, in fact, that information was truthful (Transcript p. 35511-12, Line 13). The RCMP had concerns that a witness could simply adopt an untruthful statement put forward by Centurion Ministries and begin to doubt their own recollection of events because of the passage of time (Transcript p. 35514-18, Line 24).
106. Insp. Sawatsky indicated that the difficult task for the RCMP, during the 1993 investigation, was to determine how all of the previous witness contacts impacted or affected their evidence. It was difficult to discern what the witness actually recalled from memory versus what they may have adopted through the hearing of events over time (Transcript p. 35662-64, Line 5).

(e) Media Impact

107. Insp. Sawatsky testified that it's generally not appropriate to comment on an investigation in the media so that public reporting does not influence your findings (Transcript p. 34989 – 90, Line 6). The investigators had a concern about misinformation in the public domain and how that also could impact on a person's willingness to talk to investigators (Transcript p. 35341-42, Line 21). The ongoing concern was that witnesses could have been influenced by past media reports to such an extent that they began to adopt what they had heard in the media and started to doubt their own recollection of events (Transcript p. 35665-66, Line 15).

(f) Misinformation

108. Insp. Sawatsky testified that it was the media coverage of the allegations against police and prosecutors that was somewhat responsible for the Flicker Investigation commencing (Transcript p. 34988-89, Line 13). It was his view that Mrs. Milgaard's suspicions in some areas arose due to the fact that she didn't have all of the documentation. Insp. Sawatsky saw it as the role of the RCMP to gather all that information in order that many of Mrs. Milgaard's concerns could be answered (Transcript p. 35360-61, Line 13).

109. The first draft of the RCMP report into police and prosecutorial misconduct was prepared in January of 1994 and was based upon numerous interviews and documents that were gathered from all sources. This was the first time that all of the documentation had been gathered and was, without question, one of the most comprehensive reviews of the document collection that was undertaken. It was on the basis of this vast undertaking that the RCMP were able to address, in detail, the 68 issues/allegations that were put forth by the Milgaard effort. Once all of the information was gathered, reasonable explanations were documented pertaining to the assertions put forth (Transcript p. 35581-83, Line 20). Although the RCMP were not specifically addressing the guilt or innocence of David Milgaard or Larry

Fisher, the vast areas investigated by the RCMP and their detailed report impacted upon whether Saskatchewan Justice would direct police to reopen the investigation into the death of Gail Miller.

(g) Sgt. Bill Simington / Mr. Bruce Lefreniere

110. Former Sergeant Bill Simington was an RCMP officer stationed in Shellbrook, Saskatchewan from 1979 to 1987. Mr. Bruce Lafreniere testified at the Inquiry that sometime in 1986 he attended the Shellbrook Detachment and spoke to Sgt. Simington about Larry Fisher possibly being responsible for the Gail Miller murder rather than David Milgaard (Transcript p. 14066-14068, Line 21). Mr. Lafreniere testified at the Inquiry that Arnold Poitras told him that the morning of the murder; Linda Fisher observed blood on Larry Fisher's clothes. The assertion that this information was passed on to the RCMP sometime during 1986, came to light during the 1993 investigation into police and prosecutorial misconduct and was followed up on by the RCMP.
111. Sgt. Simington gave evidence at the Inquiry that he did not recall Mr. Lafreniere ever coming into the Shellbrook detachment. He testified that he knew the name David Milgaard and was 100% certain that if Mr. Lafreniere had mentioned the name Milgaard, he would have passed such information on to the Prince Albert subdivision of the RCMP (Transcript p. 14852, Line 2). Sgt. Simington testified it was this subdivision that would have been responsible for any follow up on such information with the Saskatoon City Police (Transcript p. 14838-39, Line 10).
112. During their 1993 investigation, the RCMP concluded that if there had been an RCMP assistance file generated in or around 1986 at the Shellbrook Detachment or the Prince Albert Subdivision, the file would have already been destroyed in accordance with normal file destruction policy (Document #035665 at 666 and Transcript p. 35501-502, Line 19). In essence, there was no way to determine what follow up may have been undertaken by the RCMP. In 1993 the RCMP also

concluded that Mr. Lafreniere's information was third-hand information and was inaccurate (Document #035694 at 703 and #051320). Mr. Lafreniere never actually spoke to Linda Fisher and Linda Fisher had never indicated she saw blood on Larry Fisher (Document #051320 and Transcript p. 35502-503, Line 23). Consequently, any subsequent follow up on Mr. Lafreniere's information would have discovered his information was inaccurate. Furthermore, it was well established in this Inquiry that Linda Fisher attended at the Saskatoon City Police station on August 28, 1980 and provided a signed statement more directly implicating Larry Fisher in the murder of Gail Miller (Document #103521).

(h) Reopening

113. In February of 1990 S/Sgt. Rick Pearson of the RCMP undertook an in depth investigation into Larry Fisher's culpability while rendering assistance to the Federal Department of Justice during David Milgaard's section 690 application under the *Criminal Code* (Document #056743). S/Sgt. Pearson testified that even after examining all the evidence, including Larry Fisher's record of offences, there was no evidence to place him at the scene of the murder until the DNA testing was successfully completed in 1997 (Transcript p. 20447, Line 7 and 20448).
114. The very thorough nature of the RCMP's 1993 investigation likely impacted on whether a new investigation into the murder of Gail Miller would take place. Officers Pearson and Sawatsky both testified that following such a lengthy period of time it was only through DNA analysis that the crime was able to be solved. Jurisdiction for the crime rested with the Saskatoon Police Service but in light of the Supreme Court ruling, the decision to reopen the Miller murder investigation likely rested with the provincial Attorney General's office.

(i) Systemic Issues

115. Insp. Sawatsky gave evidence that after a trial, the average police officer wouldn't question the validity of a conviction based on rumour or hearsay and would need something more substantive in order to take steps to reopen an investigation (Transcript p. 35704-5, Line 11).
116. The passage of time also influenced what steps would be available to a police agency. If Linda Fisher had come forth with her concerns in 1969 the police could have followed up and investigated those concerns. This became more difficult years later. (Transcript p. 35762-63, Line 10).
117. In hindsight, Linda Fisher's 1980 complaint could have been investigated in more detail by the Saskatoon Police Service. Currently, complaints now have to be signed off by a supervisor who may direct more investigation into a complaint before it is concluded and the complainant would be informed of the steps taken (Transcript p. 35767, Line 1 and 35770-71, Line 5).

VII. DNA – Analysis and Connected Issues

(a) Ms. Patricia Alain

118. During the 1990's Patricia Alain was employed with the Directorate of the Central Forensic Laboratory with the RCMP in Ottawa. Her curriculum vitae, filed with the Commission, was current up to 1997 (Document #287591) (Transcript p. 40454, Line 3). At the time that Ms. Alain received the request to conduct an analysis of the Gail Miller exhibits in 1992, she was the Chief Scientist of Serology at the Central Forensic Laboratory. (Transcript p. 40456, Line 14). In this capacity, she was responsible for the training and introduction of any new serological techniques as well as scientific reviews of each of the various sections. In addition, at that time, she was assisting with the implementation of DNA testing (Transcript p. 40456-57, Line 21).

119. The focus of Ms. Alain's evidence related to the work she conducted in February of 1992 at the request of the Federal Department of Justice. She was asked to review a number of exhibits for the purposes of identifying stains or samples that potentially could be suitable for DNA testing (Transcript p. 40462, Line 14). Ms. Alain first became involved with the Milgaard file in 1989 when she and some of her colleagues were asked to review a number of documents, for various purposes, including exploring the possibility of DNA testing being conducted on some of the exhibits. On the basis of the documents reviewed, Mr. Barry Gaudette, the Chief Scientist of Biology within the RCMP laboratory, was of the view that current technology would not allow for DNA testing. (Document #002479 and #002480). (Transcript p. 40464-66, Line 10). On the basis of this background, Ms. Alain had the impression that there would be a very limited amount of staining available on exhibits for testing purposes. This was also tempered with a concern about the age and quality of the staining and the impact this could have on any testing procedures that might be undertaken. (Transcript p. 40467, Line 6).
120. It became evident that in order to conduct any DNA testing on the Miller exhibits it was necessary to first obtain a control sample from the victim. (Document #334413). (Transcript p. 40473-75, Line 12).
121. Ms. Alain gave evidence that she was asked by Eugene Williams to look at the Miller exhibits for possible semen staining. These items included the panties, the girdle and the half-slip. It was her recollection that she was asked to look at the dress (uniform) and the bra and any other items from Gail Miller to determine whether or not there was a blood stain that would be sufficient to submit for DNA typing analysis as a control sample. (Transcript p. 40481, Line 5).
122. Although Ms. Alain was in an administrative position in the laboratory at the time the request for analysis came in, she was tasked with the job. She had not been routinely carrying out laboratory work for approximately three years but felt

comfortable taking the task on as she had over twenty-one years of experience in conducting such analyses. (Transcript p. 40482, Line 12).

123. Due to the fact that the Supreme Court of Canada hearing was already underway, the request from Mr. Williams was that the testing occur in Ottawa. Ms. Alain indicated in her evidence, that the Central Forensic Laboratory did not have a serology section, but such sections existed outside of Ottawa within the RCMP laboratory system. The personnel in Ottawa that had previously been in the serology section were now working in the molecular genetics' section and were presently adjusting to work with DNA technology. No scientist was currently conducting serological examinations in the Ottawa laboratory and the task fell to Ms. Alain in order that the testing could be carried out in Ottawa. As referenced, Ms. Alain felt comfortable carrying out such work because of her previous experience examining exhibits for blood and semen testing. (Transcript p. 40482-85, Line 21).
124. The focal point of Ms. Alain's evidence was with respect to her report of February 17, 1992 (Document #002090). In her evidence, she indicated that she examined all exhibits visually and tactilely. She also carried out presumptive testing for blood and random acid phosphatase testing for the presence of semen. (Transcript p. 40497-500, Line 15). Applying the normal protocol for such testing, Ms. Alain found one small stain on the panties which appeared to be an uncontaminated semen stain. This was identified, in part, as a result of conducting a random "fast blue test" which was utilized in order to identify the presence of acid phosphatase, an enzyme that is found in extremely high quantities in semen. (Transcript p. 40499-500, Line 21). Ms. Alain continued to conduct random "fast blue testing" on the panties, but was not able to locate any other stains. The problem she encountered was that the crotch area of the panties was non-existent at the time when she examined them. Ms. Alain was of the view that S/Sgt. Paynter had removed some of the crotch area of the panties for his tests and she was aware that he did not identify any other semen stains being present. (Transcript p. 40501, Line 1).

125. Throughout the course of her evidence, Ms. Alain indicated that her approach to all of the exhibits was to examine them visually, tactilely and carry out random “fast blue testing” looking for the presence of acid phosphatase. Ms. Alain adopted her testimony at the Larry Fisher preliminary inquiry (Document #287452) wherein she outlined the steps she took to examine the uniform of Gail Miller. (Transcript p. 40509-512, Line 18).
126. Ms. Alain explained the “apparent inconsistency” between her actual analysis of the uniform and the purposes outlined in the forensic laboratory report of February 17, 1992. She indicated that upon receipt of an item, regardless of what the actual purpose of the examination would be, it was her normal routine in sexual assault cases, not just to examine the underwear but all of the clothing items that had been submitted from the victim. She also indicated that in this particular case, she would be looking at the stains for a possible standard sample of Gail Miller. Consequently, she would want to know whether the blood staining was pure and not contaminated by semen, urine or other unknown possible materials. This she indicated was why she would have also conducted random “fast blue testing” on the uniform in order to search for the presence of acid phosphatase. (Transcript p. 40513-514, Line 12). Ms. Alain explained why her report did not indicate that she had examined the uniform for stains suitable for DNA typing analysis. Her evidence was that it was most likely not entered because it was not one of the items that she had been asked to look at definitely for seminal fluid, but rather to examine for blood stains to be used as a standard sample. (Transcript p. 40515-516, Line 9).
127. Ms. Alain indicated that the methodology she employed in examining the exhibits for stains was in line with the protocols in use by the RCMP laboratory at that time. (Document #335730). (Transcript p. 40518-21, Line 2).
128. Ms. Alain gave evidence that she was aware of the full mapping technique to look for the presence of acid phosphatase. She indicated that the reason it was not utilized in this case, and on a general basis, was that the facilities were not amenable

for such testing. This required using a large amount of a particular chemical spray which raised health concerns in that one would end up breathing the chemicals in. Ms. Alain candidly admitted that in hindsight she wished that she would have considered the full mapping approach, and that she was perhaps subconsciously influenced by the fact that both Dr. Ferris and S/Sgt. Paynter had previously examined the items and had not found samples suitable for testing. (Transcript p. 40521-22, Line 4).

129. Ms. Alain did give evidence that the RCMP laboratory protocol changed as a result of the Miller case and that the laboratory procedures manual was re-written directing all laboratories to conduct full mapping for the presence of semen where appropriate. (Transcript p. 40522-23, Line 17).
130. It is submitted that it was the forensic work of Patricia Alain that kept “alive” the quest for possible DNA testing as a result of her locating the small seminal stain on the panties. This led to an unsuccessful attempt at DNA testing by Roche Diagnostics in the United States. (Transcript 40529-31, Line 1).
131. Eventually, negotiations began between the Federal Department of Justice and counsel for Mr. Milgaard in an attempt to reach an agreement to conduct DNA testing on the Miller exhibits. Unfortunately, this delayed the actual testing for a number of years. Ron Fainstein gave evidence at the inquiry that it would have been possible to have conducted DNA testing to eliminate Mr. Milgaard as a suspect as early as February of 1995 (Transcript p. 39856-57, Line 9). Nevertheless, Mr. Fainstein testified at the Inquiry that had it not been for Pat Alain locating the small DNA sample on the panties, it was quite possible that no further testing on the exhibits would ever have been conducted and Mr. Milgaard would never have had his name cleared. (Transcript p. 40005, Line 1).
132. As previously referenced, Ms. Alain gave evidence that the entire crotch area of the panties was missing. She was unaware to what extent S/Sgt. Paynter would have

removed any portion of the panties. She was, however, aware that Dr. Ferris had removed significant portions of the panties in the late 1980's in an attempt to conduct DNA testing and that he had not retained the excised portion of panties which would have been the protocol at the time. This protocol stipulated that the excised portion was to have been stapled to an index card indicating what item the removed portion was taken from and what forensic testing had been conducted on it. This would then be returned with the other exhibit material. (Transcript p. 40538-40, Line 2).

133. It is respectfully submitted that had the vaginal aspirate been collected, DNA testing could have been conducted sooner. It is likely that such a sample would have been retained because the samples recovered from the snow bank adjacent to the body of Gail Miller were retained over the years. Furthermore, it is apparent that had Dr. Ferris retained the excised portion of the crotch area from the panties, it is also likely that DNA testing could have been conducted sooner. It is logical to conclude that because some seminal staining was discovered on the panties it is likely that significant staining for testing purposes would have been located on the crotch portion of the panties.

(b) Mr. Michael Barber

134. On July 18, 1997, Mr. Michael Barber a DNA analyst with Forensic Science Services in England, provided a report (Document #231438) confirming that DNA profiles were obtained from semen stains removed from Gail Miller's panties and dress. He concluded that the samples located could not have originated from David Milgaard and that Larry Fisher could not be excluded as a source of the staining. Mr. Barber explained in his report of September 18, 1997 (Document #231077 at 081) that the semen stains were located as a result of the exhibits being examined using an acid phosphatase mapping process.

135. A current report was received from Mr. Barber on September 26, 2006 (Document #340172). He commented on what would likely have occurred concerning DNA testing and possible results, if the additional semen staining had been located in 1988 by Dr. Ferris or in 1992 by Patricia Alain. The technical explanation is found in his report. He, however, indicated that due to the likely degradation of the samples, accurate DNA testing may not have been accomplished in 1988. This was as a result of the limitations on the testing procedures and the necessity of having large samples without degradation. In 1992, a more sensitive based testing method was available which targeted shorter sections of the DNA molecule. This DQ-alpha testing would likely have been successful had it been carried out in 1992. The DQ-alpha testing was, however, considerably less discriminating than other testing and would have only indicated that the semen samples found on the exhibits were not David Milgaard's. Such testing could not, however, definitively point to the staining having originated from Larry Fisher. The DQ-alpha testing could produce a coincidental match between unrelated samples between one in five and one in fifty (Document #340172 at 174).

(c) Summary

136. It is submitted that had Patricia Alain not located the additional samples the best that could be said, in accordance with Michael Barber's evidence, is that Mr. Milgaard's name could have been cleared a number of years earlier than it was, however, it would not have advanced the prosecution of Larry Fisher to any large degree. Evidence was heard from Insp. Murray Sawatsky and S/Sgt. Rick Pearson who indicated that they had exhausted all avenues of investigation into the crimes of Larry Fisher. They also indicated it was doubtful that a successful prosecution could have been mounted against Larry Fisher based upon the less discriminating DQ-alpha testing. Without definitive testing, it could have been argued that the seminal stain found on the Miller exhibits may have resulted from a consensual sexual partner, which may still have kept alive the question as to who was the perpetrator. It is fortunate that Patricia Alain located a small seminal stain on the

panties in order to keep alive the prospect of further DNA analysis being conducted. In addition, had the crotch area of the panties, removed by Dr. Ferris, been retained it is possible that earlier testing could have been conducted as well. We do know that the seminal samples located in the snow bank adjacent to the body of Gail Miller were retained. If the vaginal aspirate had been retained by Dr. Emson, it is also possible that DNA testing may have occurred at an earlier time.

137. As referenced, it was July of 1997 before definitive results implicated Larry Fisher and cleared David Milgaard. Ron Fainstein indicated at the Inquiry that it was likely DNA testing that would have cleared David Milgaard's name and implicated Larry Fisher could have been conducted in 1995. This would have occurred had the parties acting on behalf of David Milgaard and the Federal Department of Justice been able to reach a consensus on the type of testing that should be conducted and the location for the same. (Transcript p. 39856-57, Line 9). (Document #032749).

VIII. Submissions on Possible Recommendations

138. During the Inquiry, reference was made to RCMP internal reports that were prepared in 1969 and were eventually forwarded on to the provincial Attorney General's office. The evidence indicated that copies of such reports were not provided by the RCMP to the Saskatoon Police Department because they were based upon information obtained directly from Saskatoon Police while the RCMP was assisting in their investigation. Although these redundant reports would not have assisted the SPS in their original investigation, it is conceded that such reports could have been shared with Saskatoon police. Later these reports may have assisted the Saskatoon Police Department in revisiting the possible connection they had previously made and documented between a number of unsolved sexual assaults and the murder of Gail Miller. This, in turn, could have lead to greater disclosure by the Saskatoon police in what they provided to Mr. Caldwell and again may have furthered the possibility of a connection being made. Where the RCMP and a municipal police force work cooperatively in an investigation all such reports ought

to be shared. It is submitted that this Inquiry should reinforce the police practice of sharing of all information and reports generated, where an investigation involves more than one police agency and where such sharing is appropriate given all of the circumstances.

139. It is submitted that, where practicable, an initial meeting between representatives for the applicant, the Federal Department of Justice and any police agencies involved should be held in order to foster a climate of cooperation and information exchange during wrongful conviction review applications. This would allow the parties to explore areas of concern, including guidelines on whether media commentary could have an adverse impact upon any investigation into the issues at play.
140. It is submitted that parties to a wrongful conviction application should establish a practice on how best to exchange and share information in order that the most accurate expert opinions, based on the most complete information, can be obtained. Thus, public resources won't be utilized to follow up on spurious claims and cause delays in dealing with the more meritorious aspects of a wrongful conviction application.
141. It is submitted that in all future reviews of wrongful convictions, trial exhibits should, where appropriate, be re-examined and if necessary, retested with the latest in forensic advancements in order to have the best scientific evidence available to assist in rendering a decision.
142. It is submitted that the province should be encouraged to continue with their plans to expand the number of forensic pathologists within the province, which would have the benefit of better assisting police agencies in gathering the best evidence during pertinent investigations.
143. It is submitted that proper interviewing techniques should always be utilized when gathering information from witnesses, particularly when dealing with "cold cases".

Deliberately providing witnesses with inaccurate and misleading information only serves to complicate a wrongful conviction review and thus delay such applications.

144. It is submitted that where practicable police agencies should continue to employ video and audio tape recordings of interviews for both complainants and witnesses in serious cases.
145. It is submitted that that police agencies should be encouraged to foster awareness training for their members on the possibility of wrongful convictions and lessons learned on how to avoid the same.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Saskatoon, this ____ day of November, 2006.

THE ATTORNEY GENERAL OF CANADA

Per: _____
BRUCE GIBSON
Counsel for the Royal Canadian
Mounted Police

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