IN THE MATTER OF THE COMMISSION OF INQUIRY
INTO THE WRONGFUL CONVICTION OF
DAVID EDGAR MILGAARD

HONOURABLE MR. JUSTICE
EDWARD P. MacCALLUM
COMMISSIONER

REPLY

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INDEX

INTRODUCTION

1. In reply to the submissions of other parties, the Milgaards have attempted to respond, as briefly as possible, to the issues raised which are most significant to the findings and recommendations they submit this Commission is mandated to make: the reasons why an innocent David Milgaard was convicted of a horrific crime he did not commit, why it took so long to put things right, and recommendations designed to minimize the risks that others will undergo the experience which David had to endure. Of necessity, not every point raised by other parties is the subject of this reply, and the Milgaards do not thereby adopt any 'unchallenged' submissions made on behalf of other parties. To the extent possible, the reply submissions on behalf of David and Joyce Milgaard are organized under the same headings as the original submission, and reflect a 'joint' response to the submissions of others, although their concerns and perspectives in some areas are of more significance to one than to the other.

THE INVESTIGATION INTO THE DEATH OF GAIL MILLER

The Mackie Summary

2. Despite an awareness that her submissions must be confined to her client's interests, counsel for Mr. Caldwell has repeatedly praised the police investigators and sought their exoneration for any potential allegations of wrongdoing. Mr. Caldwell has denied ever seeing the Mackie summary prior to 1992, and his counsel submits that 'little turns on this document as regards Mr. Caldwell'. Despite this, she goes on to assert, contrary to known facts, that there is no evidentiary basis for characterizing the Mackie summary as proof of deliberate wrongdoing [Caldwell Submissions paras 72-73]. The Mackie summary was dealt with in the main Milgaard submissions, and will not be repeated here except to observe that the 'summary' is not only a slanted and distorted presentation of some of the evidence gathered by the police, but is also, given the absolute innocence of David Milgaard, proof that the witnesses Nichol John and Ronald Wilson were 'fed' information by the police, as acknowledged by Murray Brown in his evidence. More troubling is the assertion that even had he seen the Mackie summary, Mr. Caldwell would not have doubted the integrity of the investigating officers [Caldwell Submissions para 73].

Had he seen it, he should have realized the following:

a) that there was a clear attempt to link David to the rape of [redacted]

b) that all of the evidence pointing away from David Milgaard was omitted, and

c) that there were false assertions of the state of the evidence prior to the recantations of Nichol John and Ron Wilson in May of 1969.

THE CRIMINAL PROCEEDINGS RESULTING IN THE WRONGFUL CONVICTION OF DAVID MILGAARD

Preliminary Hearing and Trial

Non-Disclosure

3 Mr. Caldwell's failure to fulfill his disclosure obligations was dealt with in the main Milgaard submission and will not be repeated here except to note that his failure in this regard does not 'fall far short of misconduct' as asserted by his counsel [Caldwell Submissions para 5]. It amounts to, at the least, gross negligence, and possibly deliberate non-disclosure.

4. As outlined in submissions on behalf of Mr. Caldwell, he was diligent in disclosing all evidence that was potentially useful to the prosecution, and called all of it at trial [Caldwell Submissions paras 51-55]. His counsel seems to acknowledge that Mr. Caldwell's belief in the guilt of David Milgaard caused him to dismiss substantial evidence that undermined the Crown's central Avenue N theory and not see it as potentially exculpatory [Caldwell Submissions para 63]. The alternative explanation, that he overlooked the information simply because it was scattered in various police reports, seems absurd, given his claimed diligence in fulfilling his disclosure duties, and the pointed reminder sent to him by Mr. Tallis.

5. The Supreme Court of Canada did not express the view that they were satisfied that adequate disclosure was given [Caldwell Submissions para 65]. They stated "Nor has evidence been presented that there was inadequate disclosure in accordance with the practice prevailing at the time." It is not surprising that such evidence was not presented to them, as that was not the focus of the reference. While proof of inadequate disclosure or malfeasance may have resulted in a

finding that the trial was unfair, it was the focus of the Milgaard submissions that David Milgaard was factually innocent of the murder of Gail Miller. It was to that end that evidence was called, and submissions made. It did not matter *why* he was not given disclosure so much as it mattered *that* he was not given disclosure helpful to his defence. In the end, the ruling of the Supreme Court was that it would be a miscarriage of justice if David Milgaard remained convicted without being given an opportunity to present fresh evidence to a jury. Of the fresh evidence, the Larry Fisher material was the most egregious example of evidence which would tend to raise a reasonable doubt in the mind of any juror.

008879 (at 008865) Supreme Court Judgment, April 14, 1992

6. Saskatchewan has supplemented representations on behalf of Mr. Caldwell by his own counsel with an endorsement of the propriety of his disclosure [Saskatchewan Submissions Section 1A, page 5], and has made the same error in submitting that the Supreme Court of Canada agreed with Mr. Caldwell that proper disclosure had been made.

Non-disclosure of the serial rapist assaults

7. In March of 1971, Deputy-Chief Corey wrote that Larry Fisher's then claim to have never heard of the assaults on [redacted] espite his admission to the assault on [redacted] is hard to believe as they happened within a three week period in the same area and received wide publicity." It is equally hard to believe the same of Mr. Caldwell, who had information in his file about these very assaults, had regular contact with the police whose original theory was that the unknown rapist [i.e. Larry Fisher] had committed the murder, and was far more likely to have read newspapers than was Larry Fisher [Caldwell Submissions para 67]. In this regard, it is irrelevant whether Mr. Tallis, who diligently but unsuccessfully sought disclosure from the trial prosecutor, can remember, 36 years later, whether or not he knew at that time, that a serial rapist

was operating in Saskatoon in the fall preceding the murder of Gail Miller [Caldwell Submissions para 68]. It adds nothing to answer the question as to why Mr. Caldwell did not disclose to David Milgaard's trial counsel the sexual assault materials he sent to Mr. Williams in 1990 [Caldwell Submissions para 69].

8. Mr. Caldwell has admitted that he was aware of Larry Fisher as one of the people spoken to in the neighbourhood canvass [Caldwell Submissions para 101]. He had the report prepared about it. That report clearly identifies Mr. Fisher as a resident of the Cadrain house, and it too should have been disclosed to David Milgaard's trial lawyer, who would undoubtedly have recognized, even if the police did not, that a man wearing a hard hat walking to Gail Miller's bus stop at the time she regularly took it, who lived in the Cadrain house, might have relevant information to give. This is especially so, when combined with the report dealing with Mary Gallucci's observations, which was also not disclosed.

9. Saskatchewan has also supplemented and repeated the claim on behalf of Mr. Caldwell that he made no connection between the Fisher sexual assaults and the murder of Gail Miller [Saskatchewan Submissions Section B.i]. If he did not, he should have. The main Milgaard submissions set out Mr. Caldwell's disclosure obligations in this regard and his failure to meet them, and will not be repeated here.

Tunnel Vision

10. It is symptomatic of Mr. Caldwell's tunnel vision that submissions made on his behalf characterize the failure of the justice system to give justice to David Milgaard as 'honest mistakes made by honest people who acted in a good faith belief that David Milgaard had killed Gail Miller' and that such mistakes were only recognizable in hindsight [Caldwell Submissions para 3, 5, 12]. In particular, the

failure to disclose evidence which undermined the Crown's Avenue N theory (pivotal to a successful prosecution), and the failure to disclose evidence which would tend to connect the murder to the unsolved sexual assaults in the fall of 1968 were failures which quite possibly made the greatest contribution to the wrongful conviction of David Milgaard. Hindsight and absolute proof of innocence by means of DNA exoneration is not required to see that this information ought to have been disclosed to Mr. Tallis at trial.

11 It is not the position of the Milgaards that the police or the Crown knowingly set out to convict an innocent man. The submission on behalf of David and Joyce Milgaard is that tunnel vision prevented them from seeing that that was a likely consequence of an inadequate police investigation and a failure to disclose evidence which would assist the defence [Caldwell Submissions para 4, 10-12, 63, 64]. In the words of Mr. Justice Kaufman, there were "serious errors in judgment, often resulting from a lack of objectivity, rather than outright malevolence." Mr. Caldwell did not deliberately try to convict an innocent man. He simply believed in guilt and refused to see anything else.

12. Mr. Caldwell's failure to see even a tenuous connection between the murder and the rapes of which he had information in his file, and access to more from the police, is excused by Saskatchewan on the basis that he viewed the case against David Milgaard as 'strong' [Saskatchewan Submissions Section B.i)].

- That he unquestioningly accepted Albert Cadrian's increasingly wild stories as honest *and accurate* despite the independent evidence to the contrary,

- That he believed Nichol John's May 1969 statement to be truthful despite its factual impossibility,

- That he believed Ron Wilson's May 1969 statement to have been proved truthful by polygraph testing despite information given to him by Inspector Roberts that only three questions had been asked of Wilson, and

- That the evidence of Mr. Lapchuk and Mr. Melnyk that they heard what they believed to an actual confession to murder and yet continued to party with the professed 'killer' added to the strong case

are all indications that Mr. Caldwell was blind to any theory that David Milgaard did not kill Gail Miller.

13. Mr. Caldwell's tunnel vision caused him to request preservation of the exhibits which were ultimately used for DNA testing. He wanted to use them in a book which would glorify his accomplishments [Caldwell Submissions para 18, 94]. It rings somewhat hollow that now, through his counsel, he is seeking credit for the preservation of the exhibits which yielded the DNA results which cleared David Milgaard [Caldwell Submissions para 8]. Gary Young (1981) and Hersh Wolch (1986) requested the court to preserve the exhibits for scientific testing which would exonerate their client.

WHETHER THE INVESTIGATION SHOULD HAVE BEEN RE-OPENED BASED ON INFORMATION RECEIVED BY THE POLICE AND THE DEPARTMENT OF JUSTICE

Non-disclosure of the RCMP reports

14 It is bizarre that the R.C.M.P. forwarded to Mr. Kujawa's office and attention reports detailing their assistance to the Saskatoon Police in the investigation of the murder of Gail Miller and that neither Mr. Kujawa nor anyone else bothered to read them, although Mr. Kujawa initialed some of them. While it may be, as his counsel suggests, that no one paid attention to them 'for the simple reason that no prosecution had yet been commenced' [Kujawa Submissions Section (1)], the reports of Mr. Riddell and Mr. Rasmussen were completed on May 7 and May 21, 1969 . David Milgaard was arrested within 3 weeks of the earlier of these two reports, and the prosecution truly commenced on June 2, 1969 about a week after the completion of the later report.

15. Saskatchewan repeats the Kujawa submissions concerning not reading the R.C.M.P. reports [Saskatchewan Submissions Section B.ii) c)]. Based on his misunderstanding of the law it would appear he would have disregarded them in any event.

16. Once the prosecution had commenced, the reports should certainly have been read by Mr. Kujawa. It is apparent from their length, and from the first page (on which Mr. Kujawa's initials, when present, appear) that they are far more than 'mere advice' of the R.C.M.P.'s fulfillment of its contractual obligations and that they contain information of great relevance and interest to the prosecution of a sensational murder case [Kujawa Submissions Section 1]. It is incomprehensible that these reports would not have been provided to Mr. Caldwell, who was in

charge of the prosecution of David Milgaard, or that he was not alerted to their existence.

Non-disclosure of Fisher arrest, statements and guilty pleas

17. Detective Karst was one of the main investigators in the Miller murder. He was aware of the serial rapist theory and played a lead role in the investigation. Despite his denials, when he went to Winnipeg, he had to have known that he was apprehending the original suspect in the Miller murder [Karst Submissions para 11,31,47, 64]. Had he brought this connection to the attention of his superiors and justice officials, the matter could have been reviewed and crucial evidence could have been obtained such as Larry Fisher's work records and Linda Fisher would have been interviewed. A search could have taken place of his residence.

18 Detective Karst appears to take the position that the Milgaards should have solved the crime sooner [Karst Submissions paraagraph 64, 65]. The Milgaards tried to solve the crime and in fact had a number of potential leads that were followed to the best of their ability. David Milgaard was incarcerated while Mrs. Milgaard had no funds, a family to support and no police training. She also had what could be called a 'cold case' in that it was more than ten years old. Mr. Carlyle–Gordge's information was not her information but was in England with him. His information was sketchy at best and simply to the effect that Mr. Fisher was a bad character. The information did not disclose that he was convicted but rather had gotten into trouble at a later point in time. This information was coming from a very unreliable source, Albert Cadrain. To compare this to Detective Karst's position as a trained investigator, aware of the serial rapist theory and having Larry Fisher in the Cadrain house during the 1969 investigation and in his personal presence in 1970 is absurd. The real question ought to be: from whom did Cadrain get his information?

19. In a similar vein, Saskatchewan has repeated the assertions on behalf of Mr. Kujawa that he did not make a connection between the four sexual assaults to which Mr. Fisher pleaded guilty and the Miller murder despite handling the two files during overlapping periods in 1971 [Saskatchewan Submissions Section B.ii]. If he did not, he should have. Saskatchewan has submitted a lengthy character reference on his behalf. Mr. Kujawa's evidence at the inquiry that the Fisher evidence is irrelevant to the Milgaard case, and that he still believes this to be so, ought to have been of more concern to Saskatchewan, his former employers. He may well have made the connection and the determination that it was 'irrelevant' to Milgaard in 1971, just as he did in 1990, 1992, and 2006.

20. Mr. Kujawa successfully opposed David Milgaard's appeal on November 6, 1970. Within 6 months of that, he had Deputy Chief Corey's letter which described in great detail the offences to which Fisher intended to plead guilty. That he would not recognize the similarity of those sexual assaults to the laneway knife attack on Gail Miller during which she was raped and murdered is incomprehensible. Mr. Kujawa successfully opposed David's application for leave to appeal to Supreme Court of Canada on November 15, 1971. Within five weeks of that, he was reading the facts of four sexual assaults startlingly similar to the attack on Gail Miller into the record to support a finding of guilt against Larry Fisher. It is submitted that it defies belief that he did not realize that the apprehension of a serial rapist whose pattern was repeated in the Miller murder might have some bearing on the validity of the conviction of David Milgaard. At the very least, he ought to have wondered why there was no application by the defence to bring in the evidence of another suspect, and asked Mr. Tallis about it [Kujawa Submissions Section (2) and (3)].

21. Larry Fisher was sentenced to thirteen years in prison for the rapes of two women in Winnipeg. The Manitoba authorities ensured that Saskatchewan

authorities were aware that the Saskatoon offences had not been raised at all. It remains a matter of concern that, at Mr. Kujawa's request, Larry Fisher received not a day in jail for sexually violating, in a terrifying and degrading manner, at knifepoint, four women in Saskatoon. This concern is not obviated by Saskatchewan's observation that Larry Fisher later got only a ten year sentence for the attempted murder of one woman [Saskatchewan Submissions Section B.ii)Dvi].

22. Counsel for Mr. Kujawa continues to hurl invective at any available Milgaard target, including civil counsel on discovery on the civil suit filed by David Milgaard. The idea that Mr. Fisher had been quietly dealt with in Regina for his Saskatoon offences by the prosecutor who handled David Milgaard's appeals, and at his request received not a day in custody for them were neither 'entirely baseless allegations' nor unique to Milgaard lawyers. They were shared by many lawyers, and when it came to light, the unusual handling of the file was commented on by a number of them, including the lawyer who was later to act for Mr. Kujawa in his defence on the civil suit [Kujawa Submissions Section (2 (ii) and (iii)]. Saskatchewan has made a similar submission, in far more temperate language than did his counsel, on behalf of Mr. Kujawa that the way in which Mr. Fisher's guilty pleas were handled was not problematic [Saskatchewan Submissions Section B.ii) D.].

Failure to Appreciate Similar Fact Evidence Helpful to the Defence

23. Saskatchewan seems to be asserting that as of 1994, there was no evidence linking Larry Fisher to the murder. There was ample evidence, consisting of similar fact evidence, the statements of Linda Fisher, and the fact that he lived in the Cadrain house, to suggest that Larry Fisher was a good suspect in the murder for which David Milgaard was convicted. Mr. Pearson saw it. The twelve investigators involved in Flicker did not. Saskatchewan's position even now

seems to be that its officials were correct in concluding that the Fisher similar fact evidence was not useful for the Crown or the defence.

24. In submissions on behalf of Mr. Williams it is suggested that he played little role in the assessment of the merits of the second application, and that he 'might not' have changed his view even with the accumulation of further materials relating to Mr. Fisher's attacks on the Saskatoon victims [Williams Submissions para 44-45]. One of the few documents which escaped the Department of Justice makes it clear that by October, 1991, Mr. Williams had not changed his opinions one iota, and was advocating that no remedy be granted to David Milgaard. He could not, and still does not, see that Larry Fisher's Saskatoon crimes both before and after Gail Miller's murder, and his subsequent vile attacks on women in Winnipeg and North Battleford, were remarkably similar to the murder of Gail Miller. In his testimony before this Inquiry, the main distinction he drew was the time of day in which Mr. Fisher attacked: he raped victims in the dark of the evening or night, while Gail Miller was attacked in the dark hours of the early morning.

25. The Minister submits that it is 'very important to note' that the decisions in *Arp* and *Fisher* regarding similar fact evidence, on which Mr. Williams was cross-examined, were heard long after Mr. Williams dealt with David's application [The Minister Submissions para 193]. It is a mystery why this is of any significance or importance, given that neither decision changed the law on similar fact from what it was in the 1988-1991 period. It is submitted that the real problem with regard to Mr. Williams' assessment of similar fact evidence was his inclination to view it through the eyes of a prosecutor, and not as an independent assessor of the value of such evidence in defence of a wrongful conviction complainant.

Criticism of the Milgaards

26. The position taken by many of the key players in the Wrongful Conviction of David Milgaard appears to be that while what happened was unfortunate, they did absolutely nothing wrong and if there should be any blame attached to the fact that an innocent man spent 23 years in jail and a serial rapist killer was allowed to go free for 29 years, it should be attributed to the Milgaards for their failure to solve the crime sooner and they should be chastised because only 95% of their reasonable assertions proved to be accurate.

27 The submission on behalf of the Government of Saskatchewan opens with the disclaimer that it is meant to 'analyze the actions of Saskatchewan officials in light of all the events that occurred and is not meant as a criticism of any actions or decisions undertaken by other parties' [Saskatchewan Submissions page 4]. What follows is an endorsement of the actions of Saskatchewan officials, and echoes the submissions made by counsels for Mr. Kujawa and Mr. Caldwell, in much more temperate language, but without an analysis. Where there is criticism, it is unfailingly directed at the Milgaards.

Criticisms of the Milgaard Efforts: Failure to obtain undisclosed material

28. Counsel for Mr. Caldwell is critical of counsel for David Milgaard who could have received disclosure of the material he did not give to Mr. Tallis 'had they taken the time to look at his file'. [Caldwell Submissions para 71, 94-98]. It is submitted that they had no reason to assume that obviously relevant material would be found, undisclosed, in the trial prosecutor's file. As it happened, they were wrong, as the writer Mr. Carlyle-Gorge, in an appeal to Mr. Caldwell's vanity, had received more disclosure than had David Milgaard's trial counsel. Mr. Carlyle-Gordge was not, as has been accused, *pretending* to write a book, he *was* writing a book, and along the way, sought to assist Mrs. Milgaard. Unfortunately

for David Milgaard, Mr. Carlyle-Gorge moved to England in 1983, taking with him the raw data he had accumulated. As of 1986, counsel for David Milgaard had none of it.

29. It is extremely troubling that counsel for the trial prosecutor suggests that if counsel for David Milgaard had done a better job of ferreting out undisclosed exculpatory evidence from Mr. Caldwell's files the s.690 application would have been successful and that this Inquiry would have been unnecessary. At paragraph 100, she writes "his file was a virtual goldmine of historical record as to the witnesses; disclosure and trial issues had anyone on behalf of Mr. Milgaard taken the time to look at it". It is submitted that his file was indeed a goldmine of undisclosed evidence which tended to exculpate David Milgaard and which should have been disclosed at trial and was not. To blame David Milgaard's representatives for not divining this and demanding access to the file, criticizes them for their original belief that Mr. Caldwell would have fulfilled his trial obligations [Caldwell Submissions paras 98-100].

30. It is submitted that had counsel for David Milgaard accessed Mr. Caldwell's file, the accusations would have been stronger. It was never contemplated that major witnesses such as the Merrimans, Galluchi and [redacted] would have been withheld. The idea that a woman could be attacked blocks away, the same morning, within about 15 minutes of the murder and it not be disclosed is incomprehensible. [Caldwell Submissions para 108] Mr. Caldwell may welcome the opportunity to clear his name but the evidence disclosed at the Inquiry shows that while some allegations were not accurate, many were and there are many that have come to surface.

31. Having acknowledged that the re-opening phase of the inquiry does not engage his client's interests, counsel for Mr. Kujawa nonetheless seeks to blame

Milgaard counsel (and only Milgaard counsel) for the failure to secure David Milgaard's release prior to 1992 [Saskatchewan Submissions Section 3(1)]. His submissions in this regard are outrageous, misleading and factually incorrect.

- In 1981, Gary Young was advised that the police files would only be made available to the Attorney-General's office if the Attorney General was satisfied that the case should be re-opened. Disclosure could then be made through the Crown's office at the Crown's discretion. As of 1981, the Milgaards had no evidence which could convince the Attorney General that the case should be re-opened. Mr. Young was not 'suddenly replaced on the file'. Funds were provided by a former employer of David's to employ Tony Merchant to attempt to get the case re-opened. Mr. Merchant advised (correctly) that it would require a 'bombshell', which they did not then have, to get the case re-opened.

- There is no evidence that opening the Saskatoon police files in January 1981 would have disclosed the Linda Fisher statement. The police considered it of no importance, did no follow up on it, and did not disclose it to anyone until its existence was relayed to Milgaard counsel by Linda Fisher in March, 1990. Inquiries made in 1981 for assistance in locating witnesses or interviewing police officers were met with stonewalling. It is extremely doubtful that the Linda Fisher statement would have been disclosed.

- The file materials delivered by Joyce Milgaard to the law offices of Hersh Wolch were not 'handed off' to an articling student. Although a mere review of the trial transcript alerted him that there were significant problems with the case, and that there ought to be grave doubts about the guilt of David Milgaard, that articling student worked under the direction of very experienced counsel, and had the benefit of consulting with leading members of the bar including a future Judge of the Court of Appeal, the future Chief Provincial Judge, the future Director of Constitutional law for the Province and two past

presidents of the Law Society of Manitoba. This was all done *pro bono* with much expense, time and effort.

- At the end of the day, even with the DNA, Mr. Kujawa was not prepared to acknowledge that Larry Fisher had committed the crime and David Milgaard did not. It is fanciful to suggest that an approach to him in 1981 would have resulted in co-operation and a willingness to re-open the case.

- It is worse than idle speculation to suggest that it was the fault of the Milgaard lawyers that the case was not re-opened prior to the 1997 DNA result. It flies in the face of all of the evidence heard at this Inquiry (and others) as to the almost insurmountable hurdles faced by a wrongful conviction claimant. It ignores the evidence given at this inquiry that every person in authority was unable to appreciate that the evidence eventually developed (as a result of the extensive publicity) pointing to Larry Fisher as the killer was in fact evidence pointing to Larry Fisher as the killer.

CRITICISMS OF MILGAARD EFFORTS: THE CONDUCT OF THE REINVESTIGATION

32. Criticisms of those who struggled to free David Milgaard from what would eventually amount to nearly 23 years of wrongful imprisonment are the subject of much of the submissions on behalf of Mr. Caldwell [Caldwell Submissions paras 1-8, 76 to 91]. The most oft-heard complaint, the dissemination of the mistaken belief that Mr. Caldwell had not provided Mr. Tallis with Ron Wilson's first statement, was a conclusion reached after reading the trial transcripts wherein there was no cross-examination on its contents. It was a misunderstanding shared by members of the Supreme Court, who had the same impression on their review of the transcript. The apologies by Joyce Milgaard, Paul Henderson and David Asper, on the record at this Inquiry, for any good-faith, but mistaken assertions they made against anyone in authority in their quest to free their son, their client, or their fellow citizen, are offhandedly dismissed by his counsel as insufficient to undo the harm caused to Mr. Caldwell's reputation because of a lack of media coverage of the Inquiry hearings [Caldwell Submissions paras. 7-8]. That lack of coverage has also ensured that correct assertions, about which substantial evidence was heard at this Inquiry, have also not been widely disseminated:

a) that Mr. Caldwell had in his possession numerous documents that would have helped David Milgaard gain an acquittal at trial,

b) that he was specifically requested by Mr. Tallis to ensure that he had everything from the police file that could help David Milgaard,

c) that he failed to disclose that which he had, failed to request from the police the additional evidence in their possession,

d) that he failed to objectively assess the Crown case or the police conduct,

e) that he deliberately sought to avoid a warning to the jury regarding Ron Wilson,

f) that he bragged about the jury hearing the entirety of Nichol John's unadopted statement,

g) that he falsely claimed to the Miller family that he had represented the Crown in successful opposition of David's Supreme Court of Canada leave application,

h) that he misled the parole board in efforts to keep David Milgaard permanently incarcerated, and

i) that he gratuitously offered assistance to Larry Fisher's counsel on the Supreme Court Reference. Mr. Caldwell has been spared the 'media frenzy' which should accompany those revelations.

33. By contrast, Mr. Caldwell's enormous contribution to David's wrongful conviction and lengthy imprisonment, is, according to his counsel, completely negated by an assertion that he now knows he made 'mistakes', and that he apologized (albeit through his counsel) at a press conference he attended after the DNA proved to him that he had prosecuted an innocent man. [Caldwell Submissions paras 2-5, 9]

34. With regard to the submissions made on behalf of Mr. Caldwell at paragraph 89, it is not accepted that Joyce Milgaard, David Apser, Peter Carlyle-Gordge and Paul Henderson 'now agree' to items 3, 5, 7, 8 and 10.

35. It is not for Mrs. Milgaard or anyone who acted on behalf of or for the benefit of David Milgaard to give Mr. Caldwell a 'wash' [Caldwell Submissions para 91] While not every accusation that was made over the years was correct, there were many very valid accusations that could have been made that were not. The much maligned press conference which took place on September 18, 1992, was an attempt to draw public attention to the plight of David Milgaard who was living in legal limbo, denied an inquiry into how he was imprisoned for nearly 23 years while the real killer went free, and subject to public comments from judicial officials, that he was a vicious rapist and murderer. In the course of that press conference, information was released that a 'source' had come forward with certain allegations (of which Caldwell was not the subject), which allegations Mrs. Milgaard then believed to be true. Prior to the press conference, a private investigator had established that Breckenridge was in fact a former employee of the Saskatchewan Attorney-General's office. The allegation was not made again after it was learned that Breckenridge was not employed in the office during the time frame that the Larry Fisher and David Milgaard matters were dealt with. It is interesting to note that Mr. Caldwell has no similar concerns about inaccuracies in the materials he presented to the parole board, or the reliance placed on Mr. Dozenko, Mr. Stickle and Kenny Cadrain by the Saskatchewan Attorney-General's representatives at the Supreme Court Reference which would determine whether or not David Milgaard was ever released from the penitentiary, Serge Kujawa's characterization of the Supreme Court of Canada's judgment as 'silly' (based on his demonstrated ignorance of the law of similar fact evidence) or Kim Campbell's misapprehension (in her published book) of the actual evidence given by Nichol John at the preliminary hearing.

36. In his submissions, counsel for Mr. Kujawa continues to impute improper motives to Milgaard counsel by the outrageous allegation that the assertion that Mr. Kujawa was consulted by Mr. Caldwell during the trial "was based upon no

evidence whatsoever and, presumably, was motivated only to elevate the publicity attack being directed against Saskatchewan Justice" [Kujawa Submissions Section (1)]. In fact, Mr. Caldwell's report on completed cases and his file notes refer to the strategy he developed in consultation with Mr. Kujawa to avoid a warranted accomplice witness warning in respect of Ron Wilson, and to have Nichol John declared an adverse witness should she repeat her preliminary inquiry failure to 'remember' seeing a murder. The allegations that were made by counsel for David Milgaard were made in good faith, in an attempt to get the case re-opened and properly investigated, which investigation would have seen the killer of Gail Miller taken off the streets.

37 Saskatchewan has made the same error in regards to Mr. Kujawa's role in the trial of David Milgaard as did his counsel [Saskatchewan Submissions Section 1B ii) b)].

Breckenridge

38. Michael Breckenridge was an employee of the Attorney General's office. He came to the Milgaard lawyers with his allegations. A private investigator determined that he had indeed been an employee, as were several people he named in his allegations as potential witnesses. As Joyce Milgaard testified, the identity of one of the sexual assault victims, as a relative of Romanow, provided some reason why he might have wanted to keep the Larry Fisher evidence out of the public arena, out of sensitivity for her feelings. In the efforts to have the case re-opened, and in the face of allegations from the Minister of Justice for Saskatchewan that he was guilty of the murder for which the Supreme Court had quashed his conviction, statements from authorities that the Supreme Court ruling had vindicated them, the denial of an inquiry into how he came to be wrongly convicted and how and why Larry Fisher's crimes and apprehension were never disclosed, the Breckenridge allegations were presented as part of a

press conference demanding that there be an inquiry into the case [Kujawa Submissions Section 2(iv)]. It was not, as characterized by Mr. Kujawa's counsel, an 'outrageous accusation ... made recklessly and wantonly, without the slightest attempt to ensure its accuracy, with absolutely no concern for its impact upon the reputations of three outstanding members of the Canadian legal community, and for the single and only purpose of advancing the Milgaard claim for compensation.' While David Milgaard rightfully wished to be partially compensated for his ordeal (there being no amount of money that could actually compensate him), he would hardly get it by making false and baseless accusations against those with the power to give him compensation. That counsel for Mr. Kujawa continues to make accusations that Milgaard counsel were only after money is itself an outrageous accusation to make against counsel who worked *pro bono* for years to achieve the release and eventual exoneration of a teenager who disappeared into the prison system for 23 years for Larry Fisher's crime.

39. Saskatchewan repeats the complaints made on Mr. Kujawa's behalf regarding Breckenridge [Saskatchewan Submissions Section B.ii) C.]. At the time the press conference demanding an inquiry and raising the allegations of Brekenridge was held, the position of the authorities was that everything should be at an end. David Milgaard should have been in jail, but was released on a technicality. Larry Fisher should remain free of the taint that he was an unprosecuted and unpunished murderer. This state of affairs was untenable to the Milgaards. Mr. Breckenridge was an avenue along with other evidence and arguments which had been accumulated over the years which could have given the authorities a chance to solve the crime. They fumbled the ball. The case was not re-investigated by the R.C.M.P. They simply accepted the May 1969 statements of Mr. Wilson and Ms. John, and David Milgaard's guilt as a starting point and accordingly, based on that false premise, the R.C.M.P. investigation 'cleared' everyone in authority of any wrongdoing, and left David Milgaard worse off than he had been in 1992. Even Larry Fisher's position improved. In 1990,

Mr. Pearson determined that Fisher was a very good suspect in the case. The twelve involved in the Flicker investigation saw no reason to consider him a suspect.

40. Saskatchewan criticizes the release of the Breckenridge allegations, the source of which Saskatchewan officials were 'soon able' to identify and dismiss once they 'readily established' from his employment records that he did not commence his employment with them until 'two years after the date the Milgaards claimed he was'. In this regard, it was Mr. Breckinridge who claimed to the Milgaards that he was employed at the relevant time. It is unfortunate that other Saskatchewan officials who argued to uphold David's conviction, were not so readily able to dismiss the claims of Mr. Dozenko, Mr. Stickle and the 5 year old Kenny Cadrain, but thought them worthy of inclusion at the Supreme Court Reference [Saskatchewan Submissions Section B.ii)C.].

41. The Supreme Court of Canada hearing was to determine whether or not David's continued incarceration would amount to a miscarriage of justice. The focus, on behalf of David Milgaard, was his innocence and the destruction of the Crown theory which had been occasioned by subsequent disclosure. The importance of the non-disclosure of relevant evidence was the *fact* of its non-disclosure, not the *reason* for its non-disclosure. It is unfair to suggest that counsel on behalf of the Milgaards should have thrown into the pot every conceivable allegation for determination of whether or not it might amount to a miscarriage of justice [Saskatchewan Submissions Section B.ii) C.]. It is similar to the repeated statements of Murray Brown in his evidence that counsel for David Milgaard had ample opportunity to prove misconduct at the Supreme Court of Canada. Under cross-examination, he was unable to identify one thing which counsel could then have tendered as proof, although he acknowledged that given David's innocence, the Mackie 'summary' is proof that the witnesses Nichol John and Ronald Wilson were improperly dealt with in May 1969.

The Suggestion that multiple thorough re-investigations of the case were conducted

42. Saskatchewan has misunderstood the character and scope of the three 're-investigations' and 'reviews' of the Milgaard case, with specific reference to the Department of Justice, the Supreme Court Reference and the R.C.M.P. Flicker investigation [Saskatchewan Submissions page 4 and Section B.ii) C.]. None of them were a re-investigation of the case.

- It has been the position of the Milgaards since David's arrest in 1969 that the case against him was wrong, and based on lies told to the police by his former friends.

- Since the evidence led at his trial was disclosed, it has been the position of the Milgaards that the objective evidence (for example, the forensic evidence, independent witnesses such as the Danchuks and Rasmussen, and the original statements of his friends) pointed to David's innocence, and that the Crown theory advanced at trial was factually impossible (for example, Nichol John 'witnessing' a murder in which Gail Miller's clothing was not removed, nor was she sexually assaulted prior to being stabbed, the time factors involved in a purported encounter with Gail Miller at a time when she must have already boarded her bus, and the preposterous suggestion that David Milgaard would have left the area of the murder in order to go to the motel and get a map in order to find his way to the area of the murder).

- Once further evidence was uncovered during their unsuccessful attempt to have the case re-opened (for example, the statement of Ron Wilson recanting his May 1969 recantation of his March 1969 statement, the statements of Ron Wilson and Albert Cadrain that the police pressured them to implicate David Milgaard, the evidence that there were four sexual assaults within blocks of the murder which were alarmingly similar to Gail Miller's murder and that

Larry Fisher, a resident of the Cadrain house was responsible for them) the position of the Milgaards has been that there was police impropriety in dealing with the teenage witnesses in 1969, and impropriety with respect to Mr. Fisher.

- As a consequence of evidence disclosed for the first time in the weeks prior to the Supreme Court Reference, it has been the position of the Milgaards that there was substantial evidence which was not disclosed to him at trial, that would have assisted him in obtaining his rightful acquittal (for example, the statements of Gail Miller's housemates as to her route to the bus stop, and the wealth of information which indicated that the murder was committed by the Saskatoon serial rapist) or would have been tendered by him as fresh evidence on an appeal (for example, that Larry Fisher had been convicted of the rapes which preceded the murder and the rape which occurred immediately after David's conviction, that he resided in the Cadrain house, and that Larry Fisher's former wife had contacted the police with her suspicions that he was also responsible for the murder).

43. Until he was exonerated by DNA testing, David Milgaard was not in a position to 'prove' any of these propositions. Initially, David Milgaard sought only a re-opening, and a re-investigation of the case, on the basis that he was not the killer of Gail Miller and was being punished for someone else's crime. When the previously undisclosed evidence was revealed, and allegations were made by the trial witnesses against the police, and despite his release by the Supreme Court, no-one was interested in re-opening the investigation; the Milgaards sought a public inquiry to examine the case. It is against this background that the three 're-investigations' of the case fall short.

44. The investigation conducted by the Department of Justice officials was confined to a 'testing' of the validity of the fresh evidence presented in the application, an

attempt to bolster the Crown case against David Milgaard, and a complete disregard for any arguments or positions that were presented at trial. Saskatchewan knew, or ought to have known, that the 'investigation' was so confined, and could not, then or now, be described as 'thorough'. [Saskatchewan Submissions page 4].

45. The re-investigation by the Supreme Court was confined to a determination of whether or not the continued conviction of David Milgaard would amount to a miscarriage of justice. They concluded, based in large part, on the non-disclosure of relevant and exculpatory evidence that ought to be presented to a jury, that it would, and quashed the conviction.

46. The re-investigation by the R.C.M.P. was conducted on the presumption that David Milgaard was the killer of Gail Miller, and confined to a determination of whether or not there was evidence to support criminal charges against any of the authorities involved in the case. It is hardly surprising that the conclusion was that there was not. The investigation operated on the presumption that the witnesses who inculpated David Milgaard told the truth to the police in May 1969, and the police denied pressuring them to falsely implicate David Milgaard. On this assumption, the Mackie prediction of what Ron Wilson and Nichol John would say if they told the 'truth' was seen to be merely good police work. Now that it is demonstrable that Ron Wilson and Nichol John did not tell the real truth, but instead told the 'truth' that had been predicted by Sergeant Mackie, it is beyond question that the questioning of Ron Wilson and Nichol John was not good police work, but was the foundation for a horrific miscarriage of justice.

47 Detective Karst submits that he was just a junior officer in the Gail Miller investigation, but, went to Winnipeg to interview Larry Fisher because he was a senior experienced interrogator. Detective Karst put on a pair of blinders very early on. Ron Wilson's May 1969 statements clearly dovetail with Nichol John's May 1969 statement. Detective Karst had to have realized that Ron Wilson was tailoring his recall to not contradict Nichol John. This should have caused him considerable concern over the veracity of what was happening. Knowledge of the taking of the Wilson-John statements and other reservations he expressed should have made the apprehension of Larry Fisher, the original suspect, more meaningful to Detective Karst. There is little merit to his suggestion that he forgot about Larry Fisher or treated it as a routine matter. Larry Fisher is possibly one of the, if not the, most significant serial rapists in Saskatchewan history. What Detective Karst did do, at best, was simply close his eyes and enter down the tunnel.

48. The Milgaards do not accept that 'the trial transcripts contain nothing that would alert even an experienced counsel (which Mr. Kujawa certainly was) to the thought that an imperfect verdict had been rendered' [Kujawa Submissions Section (2)]. A review of the trial transcripts alerted lay people, journalists, forensic experts, criminologists, articling students and junior lawyers that the trial was imperfect and that there were serious problems with the Crown's case.

49. Mr. Kujawa was not 'unfortunately ... drawn into the public controversy' as a member of the Saskatchewan Legislature [Kujawa Submissions Section 3(1)]. He was drawn into the public controversy as a result of his own actions and outrageous statements. These included referring to David as a 'guilty kook', his potential innocence less important than the system's reputation, his lawyers who were working *pro bono* as 'prostitutes', and the media covering the case or

investigating it as 'whores'. His propensity to shoot from the lip was apparently well known to his colleagues, and was regrettably seen as an endearing quality. Mr. Kujawa's public remarks, outrageous in and of themselves, also demonstrated an ignorance of the law on essential matters, culminating in his calling the Supreme Court of Canada's decision 'silly'. His inquiry evidence demonstrated the same ignorance of the law, and a lack of dedication to the job which was entrusted to him.

50. Saskatchewan asserts that despite their 'assumed adversarial role' they remained prepared to suggest a remedy to the Supreme Court in the event that the evidence heard demonstrated that a miscarriage of justice had occurred. The fact that they did not, and the Supreme Court of Canada nonetheless found a miscarriage, demonstrates that their ability to evaluate the claims of wrongful conviction was likely coloured by the same tunnel vision and dedication to achieve convictions as their employees Mr. Caldwell and Mr. Kujawa.

51. The Minister's continuing concern with the circumstances (and lack of a tape recording) of Paul Henderson's interview with Ron Wilson wherein Ron Wilson recanted his trial evidence [The Minister Submission para 164, 175], while expressing no concern with how the police came to obtain in May 1969 a recantation of Ron Wilson's original March 1969 statement which recantation (i.e. the May statement) is now proven false, is symptomatic of continuing tunnel vision, and an approach which seeks to maintain a conviction, rather than investigate whether or not an applicant may be innocent.

52. Written submissions of the Saskatoon City Police and the R.C.M.P. have not been specifically addressed in this reply. The problems with the Saskatoon City Police have been addressed in the review of the conduct of its police officers and the problems with its investigation in the main Milgaard submission. The

R.C.M.P. was simply concerned with trying to find flaws in the Milgaard approach. Both police forces had ample opportunity to rectify a terrible wrong. What they did, however, was designed to maintain the status quo. When the Supreme Court directed the Minster of Justice to quash David Milgaard's conviction, it should have sent a clear message to these forces that there was a real problem to be addressed. They were content to leave things in limbo and let the killer go free

RECOMMENDATIONS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE IN SASKATCHEWAN

The Recommendations of the parties in positions of authority

53. It is tremendously ironic that Mr. Caldwell specifically declines to make systemic recommendations for improving the Justice system [Caldwell Submissions para 15, 107], yet the Introduction to submissions on his behalf contains little but criticism of, and recommendations for the future conduct of those who advocate on behalf of the wrongly convicted. [Caldwell Submissions paras 1 to 8, particularly at para. 6] He submits that he has apologized for his 'mistakes' and the 'part he unwittingly played' in David's wrongful conviction, and that there is no more he can do except to say that he is sorry for what happened to David Milgaard and his family [Caldwell Submissions para 9]. From the Milgaards' perspective, it is unfortunate that he does not see fit to give future prosecutors of innocent persons the benefit of his experience of the horrendous consequences that can result from 'mistakes' by making recommendations that might avoid future miscarriages of justice.

54. It is also not without irony that the only recommendations made by counsel for Mr. Kujawa are a lengthy excerpt from 40 years ago, cautioning against putting too many safeguards in place to protect the innocent lest there be miscarriages of justice occasioned by the acquittal of the guilty [Kujawa Submissions Section 4]. It harkens back to the sentiments expressed by Mr. Kujawa in regard to David's factual innocence being of less importance than the system's reputation.

55. Saskatchewan's position at the end of the day is that the Milgaards misled the media, the police investigation and dealings with the witnesses was without fault, Mr. Caldwell's work and conduct was exemplary, Mr. Kujawa's work and conduct

was exemplary, the Department of Justice investigation and dismissal of the application was full, fair and exemplary, the position taken by the Saskatchewan counsel at the Supreme Court of Canada reference was exemplary and fully justified on the evidence, and the R.C.M.P. Flicker investigation and conclusions were exhaustive, fair and balanced. Yet somehow, an innocent 16-year-old boy went to prison in 1969 and came out a 39-year-old man in 1992, over the objections of all of those in authority and all those involved in his prosecution (with the sole exception of Detective Karst). Through his own efforts, and those of unpaid counsel, he was able to secure his exoneration 5 years later. It is submitted that David's wrongful conviction and lengthy incarceration was neither his fault, nor a giant cosmic accident. It is rooted in systemic problems and failures of individuals which have been identified and argued in the main Milgaard submissions. This Commission's mandate is to investigate and make findings with regard to all aspects of David Milgaard's lengthy wrongful conviction and to make recommendations to improve the delivery of justice in Saskatchewan. It is disappointing that Saskatchewan has chosen to make submissions critical of the media and of the Milgaards and laudatory of the authorities' handling of all aspects of the case, while declining to make a single recommendation for reform.

56. Mr. Williams submits that Section 690 was created in recognition of the fact that the justice system will make mistakes, and to address circumstances where a conviction had been maintained after the exhaustion of all appellate remedies, to provide 'a means to have the original conviction reviewed' and allow applicants 'the opportunity to have their case adjudicated by the courts' [Williams Submissions para 10]. The process of conviction review as it has developed within the Department of Justice, as described by Mr. Williams, starts 'with the presumption that the applicant's conviction was properly obtained' [Williams Submissions para 10]. It is submitted that this presumption undermines Parliamentary intention.

57. The requirement, created not by Parliament, but by the Department of Justice, that only those applicants who displace the presumption of guilt and convince the Minister that 'it was more probable than not there was a miscarriage of justice' [Williams Submissions para 14] will be granted the 'opportunity to have their case adjudicated by the courts' further undermines Parliamentary intention, despite the awareness that Section 690 applications 'represent the last available avenue to rectify a miscarriage of justice' [Williams Submissions para 15].

58. Submissions on behalf of Mr. Williams state that the 'important changes' which are codified in section 696.1 mean that had they been in place at the time of David's two applications to The Minister, the applications 'may have proceeded somewhat differently'. If this is meant to suggest that the outcome would have been different, the Milgaards strongly disagree. As Joyce Milgaard testified before the Standing Committee on Justice and Human Rights back in October of 2001, the changes would not have saved David Milgaard one day in jail [Williams Submissions para 63 to 68].

59. The assertion that the power of compulsion which would have allowed Mr. Williams to force Larry Fisher and Ron Wilson to submit to an interview with him several months sooner than they did would only have resulted in Mr. Williams reaching his conclusion (conveyed to The Minister) that David's case for wrongful conviction was unmeritorious faster than he did [Williams Submissions para 69]. Presumably, this means that The Minister could have reached her decision to dismiss the application sooner than she did, and David Milgaard could have received the news by Christmas 1990 instead of February 1991.

60. The suggestion that the 'direction and detail' offered to applicants in the 'new' legislation might have resulted in David Milgaard making a 'full application from the outset rather than an application by installments' which in turn 'might have

generated an earlier conclusion and a faster remedy' [Williams Submissions para 70-74] is absurd. It took two years for counsel to develop *any* 'fresh evidence' which *might* result in a successful review of David's claim of wrongful conviction, and it was immediately presented to the Department of Justice. From 1988 until 1991, evidence was turned over to the Department of Justice as soon as practicable after its discovery. The *coup de grace* of the Milgaard application was the Larry Fisher evidence. Mr. Fisher's existence as a potential suspect in the case was not known to David's counsel until February, 1990. The Department of Justice was notified the same day. None of the evidence was satisfactory to The Minister, or to her employees so as to entitle David to an opportunity to have his case reviewed by a court. The submission on behalf of Mr. Williams amounts to a suggestion that the lawyers working to free David Milgaard should have made no application until late 1990 (when the Fisher evidence was developed), that The Minister could have dismissed that application (after a 'thorough review') earlier than February 1991, and that somehow this would have resulted in David's case being reviewed by the Supreme Court earlier than it was. The 'changes' which are embodied in Section 696.1 in no way would have had a 'beneficial impact' on David's applications.

61. On behalf of Mr. Williams, it is submitted in conclusion that 'once all of the requisite information was gathered, the section 690 process operated in accordance with its design' [Williams Submissions para 74]. The 690 process did not operate in accordance with its design. It was meant by Parliament to be a mechanism to acknowledge that the system makes mistakes, and to allow those who may be the victims of wrongful conviction an opportunity to have their cases reviewed by a court. It was not designed to create a virtually insurmountable hurdle over which an applicant can clamber only if he can generate sufficient public pressure to force The Minister of Justice to refer the case to a court. If it had been left to Mr. Williams, the case would never have been referred to the Supreme Court. It is very telling that to this day, he still believes that Nichol John witnessed the murder.

Submissions made by other parties

62. David and Joyce Milgaard have not responded to the submissions of David Asper, Justice Tallis and A.I.D.W.Y.C. in the body of this submission. The Milgaards adopt most, if not all, of what was submitted by those parties.

63. The Milgaards particularly adopt Justice Tallis' position on the lack of disclosure and how it hampered him in his defence and find his recommendations quite reasonable.

64. The Milgaards are in concurrence with David Asper's position as to the problems faced by counsel and find his suggestions helpful as well.

65. A.I.D.W.Y.C. has taken a very in-depth look at the entire process of post-conviction review and the detection and correction of miscarriages of justice, and their analysis and recommendations are favoured by the Milgaards.

66. The Milgaards also favour the suggestions made on behalf of Detective Karst. In regard to the recommendation that witness statements be taped, in this case pivotal interviews were taped, but the tapes were never transcribed or disclosed, and not preserved. All three requirements must be met in all serious cases.

CONCLUSION

67. David Milgaard's conviction for the murder of Gail Miller and his incarceration for 23 years is a blight on the Canadian justice system.

68. It appears throughout, even up until today, those who represent the prosecution in the Criminal Justice System are only concerned that the Milgaards and their supporters did not play within their rules and failed to understand that what was done was necessitated by the fact those very people in the Justice System had not played within the rules of Court and justice, leading to a horrible miscarriage of justice.

69. This crime was solved, and this miscarriage was ended, by amateurs without resources who not only did not have the help of those within the system, but they were met with resistance every step of the way.

All of which is respectfully submitted.

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