COMMISSION OF INQUIRY INTO ANY AND ALL ASPECTS OF THE CONDUCT OF THE INVESTIGATION INTO THE DEATH OF GAIL MILLER AND THE SUBSEQUENT CRIMINAL PROCEEDINGS RESULTING IN THE WRONGFUL CONVICTION OF DAVID EDGAR MILGAARD ON THE CHARGE THAT HE MURDERED GAIL MILLER

REPLY SUBMISSIONS OF DAVID ASPER

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COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD

REPLY SUBMISSIONS OF DAVID ASPER

Response to the Submissions of the Attorney General of Canada for the Minister of Justice (Canada)

In the submissions of Justice Canada, the federal Department of Justice seek immunity from any criticism by the Commission of the federal employees involved in the Milgaard applications to the Minster while inviting the Commission to conducting an inquiry into the involvement of Mr. Asper and others in their conduct with federal employees. If there is no jurisdiction for the Inquiry to inquire into and report on a "federal matter", that jurisdictional limitation should be apply to all aspects of the matter, not just the federal government.

As previously submitted to this Commission and to the Saskatchewan Court of Queen's Bench in the Judicial Review proceedings brought by Justice Canada, Mr. Asper submits that this Inquiry is to "inquire into and report on" the matters set out in the Terms of Reference. It is the submission of Mr. Asper that the Commissioner cannot, within the constitutional limitations of a provincially constituted inquiry, inquire into and report on the matters that relate to "federal aspects" and that the Commissioner may not, with respect to any witness or party – not just Justice witnesses - inquire into and report on matters outside the jurisdiction in the Terms of Reference and outside the constitutional parameters of a provincially constituted inquiry.

It is, therefore, submitted that in assessing the jurisdictional appropriateness of the Inquiry the focus should be on the context of the appropriateness of the Commissioner's findings in the Inquiry's report which flows from the evidence.

As Chief Justice Laing decided in the judicial Review proceeding, *MacKeigan v. Hickman,* [1989] 2 S.C.R. 796 is specific authority that it is not open to a provincial inquiry to investigate the work of a federal department for the specific purpose, as here, of making findings on the conduct of the department.

At page 17 of the judgment, the Chief Justice Laing states: "...a provincial commission of inquiry cannot inquire into the conduct, or job performance of a federal employee with respect to the employee's activities on behalf of his or her employer". In support of his finding, Chief Justice Laing relied upon *A.G. Alta. v. Putnam,* [1981] 2 S.C.R. 267, where it was held that the province has no authority to inquire into the conduct of R.C.M.P. officers who were performing provincial police duties under contract with the province of Alberta. In *Putnam* the following constitutional question was posed to the Supreme Court of Canada:

> Is it constitutionally open to the Province of Alberta to apply its Police Act, 1973 (Alta), c. 44 to members of the R.C.M.P. in respect of inquiries hereunder into the conduct and performance of duty of those who perform policing and law enforcement functions in the Province?

The majority (Laskin C.J. delivered the judgment of himself and Martland, Ritchie, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.) held that the constitutional question must be answered in the negative. Dickson J. alone dissented. The decision in *Putnam* makes it clear that it is not constitutionally open to a province to inquire into the conduct and performance of duty of those who perform federal functions. In the context of this inquiry, this includes the employees of Justice Canada and the members of the R.C.M.P. involved in the Milgaard matter.

It is, therefore submitted that the Commissioner may not inquire into nor make findings with respect to the Respondent Asper and his interaction with federal Department of Justice or the R.C.M.P. For example, it is not appropriate for Justice Canada to invite the Commission to make findings that "the efforts of the Minister's staff were hindered in many ways by the actions of those who advocated on behalf of Mr. Milgaard or Mr. Milgaard himself" as is asserted in paragraph 252 of Justice Canada's submissions.

While submitting to the Commission that federal conduct is beyond the jurisdiction of the Commission, Justice Canada submits in paragraph 254 of their submissions that "despite serious, unfounded allegations being leveled directly at the Minister, Federal Investigators or other Federal Justice Lawyers by learned counsel in the press, the Minister's staff continued to work diligently on Mr. Milgaard's matter". Justice Canada submits that the Commission has no constitutional authority to criticize federal agents, but that the Commission can report praising them and criticize others who were seeking to have them properly perform their duties. This is not appropriate.

Evidence was led by Commission Counsel from Mr. Asper about the conflicts with Mr. Williams in his performance of his role on behalf of the Minister of Justice. Since, however, the Commission cannot comment, one way or another, upon Mr. William's conduct, no response will be made in these submissions to the rationalizations and justifications (by criticizing others, including Mr. Asper) of that conduct set forth in the Justice Canada submissions.

Mr. Asper did his duty for Mr. Milgaard as was appropriate at all relevant times. Justice Canada criticizes Mr. Asper for failing to interview Justice Tallis before the filing of the first application. Mr. Asper has explained why this was not done.

Mr. Asper has also testified why it was necessary to bring the media into the Milgaard case. Mr. Asper was examined in detail about each step of the process and the context in which his actions occurred. Justice Canada's submissions express angst about erroneous facts being published and the effect these errors had on members of the federal bureaucracy. As Mr. Asper has testified, he regrets errors. He regrets the angst of federal bureaucrats. But that angst is nothing compared to what Mr. Milgaard suffered.

If Mr. Asper had not performed his duty as he did, acknowledged mistakes and all, Mr. Milgaard would still be sitting in a prison cell.

Response to the Submissions of Mr. Caldwell

Mr. Caldwell, in his submissions, states:

> 108. Mr. Caldwell welcomed the opportunity afforded through this Inquiry to clear his name which has been besmirched by the many erroneous and sometimes intentionally false allegations against him. We hope that this goal has been reached by the evidence presented in the documents and through witness testimony.

The Terms of Reference of the Commission, however, do not authorize the Commission to act as an arbiter of civil disputes between Mr. Caldwell and others with whom he believes he has a grievance. The civil courts are there for that purpose but Mr. Caldwell has chosen not to resort to the courts. Instead, he seeks to advance his personal position by asking the Commission to, in effect, grant a declaratory judgment "to clear his name" and to adjudicate if "allegations against him" are false.

The Terms of Reference provide:

> 2. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the criminal or civil responsibility of any person or organization, and without interfering in any ongoing criminal or civil proceeding.

Mr. Asper did not seek party status in this Commission with a view to using the Commission's processes to advocate the soundness of any criticisms that he may have made about Mr. Caldwell, or anyone else involved in the Milgaard matter, as part of his duty as advocate for Mr. Milgaard. Mr. Asper has not litigated these issues before this Commission. In essence, Mr. Asper attended as a witness and answered questions put to him in direct examination by Commission Counsel and in cross-examination by counsel for other parties.

It is submitted that it is inappropriate for Mr. Caldwell to ask this Commission to make findings purportedly aimed at "clearing his name" that affect Mr. Asper about matters which no notice has been provided to Mr. Asper, either in the Terms of Reference or otherwise, that he should be litigating in these proceedings. Had such notice been provided, it would have been necessary for Mr. Asper to apply to the Commission to recall many witnesses, including Mr. Caldwell, who testified prior to Mr. Asper being granted party status and were not cross-examined by his counsel.

Mr. Caldwell's submissions are essentially an attack on defence counsel doing theit duty on the basis of the information, and resources, available at the relevant time. Mr. Caldwell's submission states of Mr. Milgaard's counsel:

> 6. . . . They must act with honor and integrity to ensure that the process of review does not get consumed by and potentially derailed by mis-statements of fact, reckless allegations and red herrings. The harm that misrepresented facts and often baseless accusations cause to the professionals in the justice system is harm that is extremely hard to undo and in some cases can never be truly undone. When it is unwarranted harm, it is also harm that undermines public confidence and faith in the justice system when it does not deserve to be undermined.

As it turned out it was the Milgaard prosecution that was the ultimate in mis-statements of fact and unfounded allegations – a flawed process that cost Mr. Milgaard many years in prison. Whether the flawed process was "just one of those things that happens" (as is being suggested in

the submissions of the parties responsible for that process) or whether there are systemic issues or individual actions that caused or contributed to this miscarriage of justice is for this Commission to decide. One thing is clear however, Mr. Asper did nothing to cause or contribute to any cause of the flawed process. He responded vigorously as counsel, not with all of the resources of the state (including police investigators, forensic labs and lawyers paid by the state) but with the limited resources that were available to him.

Mr. Asper's duty was to focus on providing advocacy for Mr. Milgaard. He has testified as to the rationale for his actions throughout and, it is submitted, there was always a sound and reasonable basis for those actions. Nothing in the evidence suggests recklessness in the performance of Mr. Asper's duties. Where events have developed and Mr. Asper has been shown to have been wrong he has acknowledged his error. However, defense counsel is entitled in advocacy on behalf of a client to be wrong. If, as is suggested by Mr. Caldwell, advocates for accused persons hold back in their advocacy out of a concern for the effect their submissions might have on police or prosecutors, counsel will not be doing their duty as advocates.

We repeat the words (cited in Mr. Asper's initial submissions) of Brett MR in the Court of Appeal in *Munster v Lamb* (1883) 11 QBD 588 (at 603-4) where it was said:

> A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform.

Rather than defence counsel being pressured to hold back in their advocacy, it is submitted that the more appropriate course is to recognize what the Privy Council stated in *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 (at 355), that:

> Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

Much of Mr. Apser's advocacy on behalf of Mr. Milgaard focused on forensics and disclosure. Forensics will be addressed below in these submissions. Both areas are frequently the key factors in wrongful conviction cases throughout the world. See, for example, the High Court of Australia decision in *Andrew Mark Mallard v The Queen* (a case of striking similarity to the Milgaard case) [1] where Kirby, J. stated (emphasis added):

> The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial, of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.

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[1] *Andrew Mark Mallard v The Queen*, [2005] HCA 68 (15 November 2005); http://www.austlii.edu.au/au/cases/cth/HCA/2005/68.html

> The obligation imposed by the law is to ensure a fair trial for the accused, remembering the special requirements that descend upon a prosecutor, who represents not an ordinary party but the organised community committed to the fair trial of criminal accusations and the avoidance of miscarriages of justice.
>
> Ultimately, where there has been non-disclosure or suppression of material evidence, which fairness suggests ought to have been provided to the defence, the question is whether the omission has occasioned a miscarriage of justice. This is so both by the common law and by statute (and in some jurisdictions by constitutional mandate). The courts are guardians to ensure that "justice is done" in criminal trials. Where the prosecutor's evidentiary default or suppression "undermines confidence in the outcome of the trial", that outcome cannot stand. A conviction must then be set aside and consequential orders made to protect the accused from a risk of a miscarriage of justice. At least, this will follow unless an affirmative conclusion may be reached that the "proviso" applies – a conclusion less likely in such cases given the premise.
>
> In a case of very limited non-disclosure which the appellate court concludes affirmatively to have been unlikely to have altered the outcome of the criminal trial, the proviso may be applied as it was in *Lawless*. However, in a case where the non-disclosure could have seriously undermined the effective presentation of the defence case, a verdict reached in the absence of the material evidence (and the use that the defence might have made of it) cannot stand.

It has been suggested that disclosure was made in accordance with the applicable standards of the time and that, therefore, Mr. Asper's criticisms of disclosure were unwarranted. This argument seems to be based on the premise that the Crown's duty of disclosure was not clear until the *Stinchcombe* [2] case in 1991. The *Stinchcombe* case set the legal parameters of a full and complete defence, as guaranteed by section 7 of the Canadian Charter of Rights and Freedoms, but, as is set forth in the Milgaard submissions where Sopinka, J., for the Court, relied upon the 1955 Supreme Court of Canada decision in decision in *Boucher* :

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. The Queen*, [1955] S.C.R. 16, Rand J. states, at pp. 23-24:
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> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.
>
> I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

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[2] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

It is submitted that in his advocacy on behalf of Mr. Milgaard Mr. Asper's criticisms of Mr. Caldwell's disclosure were appropriate. The Milgaard submissions summarize the evidence before the Commission and the law with respect to the deficiencies in the disclosure by the Crown to the defense. [3] It is submitted that those deficiencies are not excusable by any purportedly lesser standards at the relevant times.

Response to the Submissions of Mr. Kujawa

To the extent that Mr. Kujawa's submissions relate to the Breckenridge allegations, Mr. Asper repeats the submissions made in his original submissions that Mr. Asper's involvement as counsel to the Milgaard's had ceased by June 1992 and that his involvement in relation to the Breckenridge allegations was very limited. Mr. Asper testified that he did not believe Mr. Breckenridge's allegation that Roy Romanow was involved in any cover-up because he knew him and had a "huge amount of respect for him" (transcript page 27420). Mr. Asper was unwilling to advance the allegations made by Mr. Breckenridge (transcript page 27490).

With respect to other arguments advanced by Mr. Asper during his advocacy of Mr. Milgaard, Mr. Asper repeats his submissions herein in response to Mr. Caldwell's submission. Mr. Asper's advocacy on behalf of Mr. Milgaard was justified by his knowledge at the relevant times. Further, this Commission is not the appropriate forum for Mr. Kujawa to litigate any private grievances he may have.

In Mr. Kujawa's submissions make allegations of unprofessional conduct against Mr. Milgaard's counsel. No Law Society having authority to do so has seen fit to bring any disciplinary proceedings against any of Mr. Milgaard's counsel for anything done in the course of their representation of Mr. Milgaard. Both Mr. Kujawa and his counsel have been noisy about their criticism of Mr. Milgaard's counsel in these proceedings and elsewhere. It is not within the mandate of the Commission to make any findings with respect to the professionalism of Mr. Milgaard's counsel. Therefore, the submissions of Mr. Kujawa with respect to professionalism are outside the mandate of the Commission and should be ignored.

Response to Submissions of the RCMP – Forensic Issues

As is illustrated by his testimony, Mr. Asper does not take issue with respect to many of the submissions of the RCMP. Mr. Asper agreed that the techniques of the non-police investigators the Milgaard team was forced to use (not having the resources of the state at its disposal) made it very difficult for RCMP investigators. Although, Mr. Asper agreed that RCMP investigators did not establish any police misconduct where witnesses changed their evidence, the extent and circumstances of the changed evidence, it is submitted, justifies Mr. Asper's concerns and the appropriateness of his advocacy on behalf of Mr. Milgaard.

The main area of continuing concern about RCMP involvement is in the area of forensics, since the RCMP was the agency responsible for much of the initial forensics and the follow-up forensics up to and following the Supreme Court of Canada decision. Mr. Asper has been criticized for being inaccurate in his forensic criticism – the "dog urine" example playing large in

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[3] Milgaard Submissions: pages 30 – 40, 49 – 60, 74 – 77.

this regard. It must be remembered, however, that Mr. Asper based his criticism upon facts that he believed to be trustworthy at the time.

In addressing the issue of forensics, Mr. Asper is mindful that under the authority of the *Putnam* case referred to earlier, this provincially constituted inquiry has no jurisdiction to inquire into or report upon the conduct of the RCMP generally or any of its members in particular. Further, whatever the deficiencies in the forensics, there is no suggestion in the evidence that anyone involved willfully or recklessly went about their duties. On the other hand, forensics ultimately not only exonerated Mr. Milgaard and provided the basis for apprehending and convicting the very dangerous killer – a killer who was at times at large and posing a continuing threat for years after the murder of Gail Miller.

It is a valid question for this Commission, without affixing any blame, to consider whether available forensics could have achieved this result earlier. By "available forensics" we do not mean the forensic techniques that the RCMP bureaucracy had decided through their "protocols" to implement in various regions of the country, depending upon whether staff or facilities was available, we mean "available forensics" available to knowledgeable well-trained forensic scientists.

This Commission has made extensive efforts to explore these areas with respect to DNA evidence and the development of the relevant techniques over the relevant time period. It is submitted, however, that the state of evidence before the inquiry relating to serological testing possibilities is not as satisfactory. All of the serological evidence comes from actual actors in the events relating to the Milgaard forensics. They have testified as to their beliefs as to the state of forensics and how those beliefs caused them to act in certain ways. It is submitted, however, that independent expert evidence should have been led so that the Commission has serological evidence from experts that were not involved in the case itself, as it has done with respect to the DNA evidence.

Counsel for Mr. Asper had hoped that these issues would be addressed the forensic pathologist, Dr. John Butt, which was provided by Commission Counsel to the parties on November 29, 2006. The report, however, does touch upon the issue as to whether non-DNA serological blood typing could have eliminated Mr. Milgaard at an earlier time.

The Commission has the reports of the forensics experts Anne-Elizabeth Charland and Michael Barber. Both reports deal with forensic analyses that linked the true killer, Larry Fisher, to the deceased, Gail Miller.

In retrospect, we now know:

- both Larry Fisher and David Milgaard are blood type A;

- both Larry Fisher and David Milgaard are "secreters".

Blood group substances are not only present in blood. Secreters constitute approximately 80% – 85% of the population and have their blood group substances in their body fluids (saliva, tears, perspiration, semen and gastric contents). In fact, the literature discloses that the quantity of

blood group antigen in semen and saliva is much greater than that found in red blood cells. [4] The remaining 15% - 20 % of the population do not secrete their blood group substances.

Their has been considerable emphasis by the Commission on DNA evidence since it established that David Fisher murdered Gail Miller and David Miller did not. The progressive development of DNA analysis as a forensic tool after the murder of Gail Miller meant that it was not immediately available as an investigative procedure. There is a good body of evidence before the Commission as to when certain DNA analytical processes became available as an investigative tool.

There has not, however, been much focus upon whether or not Larry Fisher could have been linked to the crime, or David Milgaard excluded as the perpetrator of the crime, had semen and blood stained exhibits been analyzed for identifying blood group substances right at the outset of the investigation or in the years between the murder of Gail Miller and the ultimate release of David Milgaard.

Physical Evidence

The physical evidence which may have identified the "true killer" consists of:

- the seminal fluid which was taken from the deceased's vagina (but then destroyed);

- the seminal fluid which was found in the lumps of snow in the alley;

- the seminal fluid which was on the deceased's underwear;

- the seminal fluid which was on the deceased's dress;

- the seminal fluid which was on the deceased's coat;

- the fluid identified as Mr. Fisher's (whether blood or otherwise) which was mixed with blood from the deceased on the deceased's glove;

Non-DNA Testing of the Physical Evidence

There has been considerable evidence led about the DNA testing of the "samples". The key problem with the DNA testing is that not all of the "samples" were detected, with the result that a small "sample" from the underwear was focused on while much more substantial samples on the dress and coat remained un-detected and unexamined. There was also reluctance to attempt to further examine the small "sample" on the underwear because doing so might destroy the evidence and make it unavailable for analysis in the then future when techniques improved. The existence of the much larger "samples" on the dress and coat were not focused on at that time.

The point of this submission is not the DNA samples, however, but rather to raise the issue as to when other (non-DNA) forensic serological testing of the physical evidence could have excluded David Milgaard as the perpetrator of the murder and implicated Larry Fisher as the "true killer".

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[4] Moenssens, Moses and Inbau, Scientific Evidence in Criminal Cases, The foundation Press, 1973, page 258.

Much of the present state of the evidence was led before the counsel for Mr. Asper involvement in the Inquiry from witnesses who have an interest in the issue. Counsel for Mr. Asper sought to have discussions with Ms. Charland before her report was prepared, but that request was not granted. Ms. Charland's report, itself is carefully worded so that it does not directly address the point.

Ms. Charland's evidence (including her report dated September 19, 2006 (doc id 339765) evidence from the Fisher preliminary inquiry (doc id 315815) and trial is (doc id 312924) :

> And then onto the next page -- actually, go to page 768, the question was asked that assuming that the substance on the glove was blood, could it have been typed in 1969 using the ABO system, and:
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> > "Assuming the stain was typed as "A", could scientists in 1969 have gone further and sub-typed or sub-grouped this stain in such a way that one could eliminate other type "A" persons as donors based upon the fact that their blood showed a different sub-type or sub-grouping?"
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> And the answer provided that:
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> > "Item P28 ... was not submitted to the RCMP forensic laboratories for analysis until November 1997."
>
> And it wasn't examined.
>
> > "The area of staining identified on the glove was limited in quantity and quality. The condition of the sample would therefore have seriously hampered any typing efforts using the techniques in use at the time (ABO typing). It is my opinion that based on the poor quality of the sample as well as the limitations of the ABO typing techniques available at the time, the material found on the glove would not have been typed had it been found in 1969. Other typing techniques such as enzyme typing did not become routine in the RCMP forensic laboratories until the mid to late 1970's but considering the quality of the sample, it is doubtful that any testing would have been attempted."
>
> And then goes on to talk about the sub-grouping techniques and indicates that -- yeah, sub-grouping techniques:
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> > "...were not in use in the RCMP forensic laboratories at the time and were never implemented into routine casework to process forensic samples. Please keep in mind that clinical laboratories usually work with liquid blood samples where the quantity and quality are not in issue. As such, techniques that are routinely used in a medical laboratory setting may not be appropriate for forensic use."

With respect, Ms. Charland is not an independent expert. She did not detect the large semen stains on the dress and coat when she examined them, and may have a personal interest in diminishing the importance of the issue of earlier forensic examination of the stains. Further, the language she uses in her responses does not address the specific issues. Ms. Charland states that the sample "would not have been typed had it been found in 1969" when the issue is could it have been typed had it been found in 1969. Ms. Charland also states "other typing techniques such as enzyme typing did not become routine in the RCMP forensic laboratories until the mid to late 1970's" but the question is not what was routine in RCMP labs but rather what was possible given the state of forensic knowledge at the time.

There is academic and text literature as to the state of forensic serology from 1969 onwards. P.L. Kirk and B.L. Grunbaum wrote a treatise in the 1969 volume of the Legal Medicine Annual entitled *Individuality of Blood and its Forensic Significance.* [5] The article outlines the numerous possibilities of individual characteristics of nine blood group factors and examines the extent to which the then literature (some going back many years) found that the various test could be utilized on dried blood or other body fluids of secreters.

Other forensic literature from the time period is also suggestive of the *possibility* that further testing in 1969 and the following years *might* have been useful in eliminating David Milgaard as the killer of Gail Miller:

- (1956) Nickolls, L.C. *The Scientific Investigation of Crime.* Butterworth, London: 1956, pp.165-195.

- (1972) O'Hara, Charles E. *An Introduction to Criminalistics.* Indiana University Press, Bloomington/London: 1972, pp.399-425. (**Note:** the chapter on blood serology was published identically in the 1949 edition).

- (1973) Moenssens, Andre A. *Scientific Evidence in Criminal Cases.* Foundation Press, New York: 1973, pp.247-261.

- (1974) Wilber, Charles G. *Forensic Biology for the Law Enforcement Officer.* Thomas Publishing, Springfield: 1974, pp.242-266.

- (1977) Saferstein, Richard. *Criminalistics: An Introduction to Forensic Science.* Prentice-Hall, New Jersey: 1977, pp.247-262.

- (1977) Boorman, Kathleen E. *Blood Group Serology: Theory, Techniques and Practical Applications.* Churchill Livingstone, Edinburgh: 1977, pp.393-419 (**Note:** the chapter on blood serology was published identically in the 1968 and 1970 editions, with the exception that the 1977 edition includes an extra passage. The extra passage runs from p.403 at "IDENTIFICATION OF STAINS ..." to p.405 at "(Culliford, 1964).")

Obviously, if the vaginal sample had been retained, there would be more to work with than a dried blood stain but the literature indicates that more forensic use may have been made of dried stains than is indicated in the present evidence from interested parties (who it is not disputed are testifying as to what they believe to be the case).

Ms. Patricia Alain also testified as the last witness on the inquiry. She touched upon this issue at (transcript page 40467) where she testified that in 1989 when she was asked to make a comment on the documents she received (not the actual exhibits),"looking at secretor status of the stains at that time, after 25 or more years it would be impossible to do secretor status testing on any of these stains"

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[5] (1969) Kirk, P.L. "Individuality of Blood and Its Forensic Significance" *Legal Medicine Annual,* 1969, pp.289-325.

Later (transcript page 40480), Ms. Alain testified that she was "was very limited, really, in what I could say about what could be done with the stains, because I was not aware of what was present and what the exhibits would look like and, therefore, also depending on the age of the samples and how much of the stains that were there, it was going to have a direct influence as to what could be done with them".

Ms. Alain testified (transcript page 40501) that because of the fact that Bruce Paynter "did not identify any other semen stains present, perhaps in the back of my mind subconsciously it may have influenced how I looked at some of these exhibits". Ms. Alain's own visual examination of the dress and her random testing of the dress, did not detect the presence of seminal stains. She stated (transcript page 4052):

> "I have to admit that, you know, hindsight being best, that yes, if I'd have really considered it and -- that would have been the way to go would have been to have used the full mapping procedure on that, and -- and I admit that that was something that may have cost -- it may have sort of crossed my mind. But again, if I am sort of subconsciously aware of the fact that these other individuals had examined it, and, you know, and as a result of that what are my chances of finding something, so I would just do a random method or a mat."

Further Report Should be Obtained

Near the conclusion of the evidence before the Commission, Commission Counsel, Mr. Hodson advised that an independent report would address forensic issues but the report does not do so. Counsel for Mr. Asper does not know the answer to the question Mr. Asper raised during his representation of Mr. Milgaard and we are raising in these submission. The questions, however, should be answered by an independent expert. It is not too late to obtain such a report. It is submitted that the record of the Commission should not be closed with this issue not fully explored

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

This 30th day of November 2006

Donald J. Sorochan, QC
Counsel to David Asper