

**COMMISSION OF INQUIRY INTO THE
WRONGFUL CONVICTION OF DAVID MILGAARD
Rules of Procedure and Practice**

RULES

I. GENERAL

II. STANDING

III. EVIDENCE

A. General

B. Witnesses

C. Order or Examination

D. Access to Evidence

E. Documents

F. Confidentiality

G. In Camera Hearings

IV. NOTICES BEFORE POSSIBLE FINDINGS OF MISCONDUCT

ATTACHMENTS:

Schedule 'A' – Standing and Funding Guidelines

Schedule 'B' – Legal Counsel Funding Guidelines

Schedule 'C' – Witness Funding Guidelines

Schedule 'D' – Expense Reimbursement Guidelines

RULES

I. GENERAL

1. In accordance with the Commission's terms of reference, it will:
 - a) inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller;
 - b) inquire into and report on any and all aspects of the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller;
 - c) seek to determine whether the investigation should have been reopened based on information subsequently received by the police and the Department of Justice; and
 - d) report its findings and make such recommendations as it considers advisable relating to the administration of justice in the Province of Saskatchewan.
2. Public hearings will be convened in Saskatoon to address issues related to the Inquiry.
3. All parties and their counsel shall be deemed to undertake to adhere to these Rules, which may be amended or dispensed with by the Commission as it sees fit to ensure fairness. Any party may raise any issue of non-compliance with the Commissioner.
4. The Commission is committed to a process of public hearings. However, applications to proceed *in camera* on some aspects of its mandate may be made in accordance with paragraph 5 of the Commission's Terms of Reference. Such applications should be made in writing to the Commission at the earliest possible opportunity pursuant to the provisions of Section III (G) below.

II. STANDING & FUNDING

5. Commission Counsel, who will assist the Commission throughout the Inquiry to ensure its orderly conduct, has standing throughout the Inquiry. Commission Counsel has the primary responsibility for representing the public interest at the Inquiry, including the responsibility to ensure that interests that bear on the public interest are brought to the Commissioner's attention.
6. Persons or groups may be granted standing by the Commissioner if they:
 - a) are directly and substantially affected by the Inquiry; or

- b) represent clearly ascertainable interests and perspectives that are essential to the Commission's mandate; or
 - c) the applicant has special experience or expertise with respect to matters within the Commission's terms of reference.
7. The Commission's Standing and Funding Guidelines are attached as Schedule A. The Commissioner will determine those parts of the Inquiry in which a party granted standing may participate, and the extent of that participation.
8. The term "party" is used to convey the grant of standing and is not intended to convey notions of an adversarial proceeding.
9. Funding may be granted to parties with standing in accordance with the Legal Counsel Funding Guidelines which are attached as Schedule B.
10. Subject to Rule 7, a party granted standing has the following entitlements:
- a) access to documents collected by the Commission subject to the Rules of Procedure and Practice;
 - b) advance notice of documents which are proposed to be introduced into evidence;
 - c) advance provision of statements of anticipated evidence;
 - d) a seat at counsel table;
 - e) to suggest witnesses to be called by Commission Counsel, and to apply to the Commissioner to lead the evidence of a particular witness;
 - f) to cross-examine witnesses on matters relevant to the basis upon which standing was granted;
 - g) to review transcripts at the Commission office (a copy of the transcript may be purchased from the court reporter);
 - h) to make closing submissions; and
 - i) to apply for funding.

III. EVIDENCE

A. General

11. In the ordinary course Commission Counsel will call and question witnesses who testify at the Inquiry. Counsel for a party may apply to the Commissioner to lead a particular witness's evidence in-chief, but shall not have the right to use leading questions except with leave of the Commissioner.
12. The Commission is entitled to receive any relevant evidence that might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.
13. The Commissioner may strike any question, remarks or evidence from the record and direct that the question, remark or evidence not be published in any document or broadcast in any way.
14. Parties shall provide to Commission Counsel the names and addresses of all witnesses they want heard at the Inquiry, and shall provide to Commission Counsel copies of all relevant documents relating to that witness, including statements of anticipated evidence, at the earliest opportunity, and in no case later than five days before the commencement of public hearings.
15. Commission Counsel has discretion to refuse to call or present the evidence referred to in Rule 14.
16. When Commission Counsel indicate that all witnesses to be called in relation to a particular issue have been called, a party may then apply to the Commissioner for leave to call a witness whom the party believes has evidence relevant to that issue. If the Commissioner is satisfied that the evidence of the witnesses is needed, Commission Counsel shall call the witness, subject to Rule 11.

B. Witnesses

17. Anyone interviewed by or on behalf of Commission Counsel is entitled, but not required, to have his or her own counsel present for the interview to represent his or her interests.
18. Witnesses will give their evidence at a hearing under oath or affirmation.
19. Witnesses may require that the Commission hear evidence pursuant to a subpoena in which case a subpoena shall be issued.
20. Witnesses who are not represented by counsel for parties with standing are entitled to have their own counsel present while they testify. Counsel for such witnesses may make any objections thought appropriate.
21. Witnesses and their counsel are entitled to apply for funding from the Commission in accordance with the Witness Funding Guidelines which are attached as Schedule C.
22. Witnesses may be called more than once.

C. Order of Examination

23. The order of examination will be as follows:
 - a) Commission Counsel will adduce the evidence from the witnesses. Except as otherwise directed by the Commissioner, Commission Counsel is entitled to adduce evidence by way of both leading and non-leading questions;
 - b) parties granted standing to do so will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination will be determined by Commission Counsel and the parties entitled to cross-examination and if they are unable to reach agreement, by the Commissioner;
 - c) Commission Counsel will have the right to re-examine.
24. Except with the permission of the Commissioner, no counsel other than Commission Counsel may speak to a witness about the evidence that he or she has given until the evidence of such witness is complete. Commission Counsel may not speak to any witness about his or her evidence while the witness is being cross-examined by other counsel.

D. Access to Evidence

25. All evidence shall be categorized and marked P for public sittings and, if necessary, C for sittings *in camera*.
26. Hard copies of the P transcript may be ordered from the Court Reporter by anyone prepared to pay the cost. The original P exhibits of the public hearings will be made available for review by the media and the public in the hearing room only. The P transcript will be published on the Commission website at www.milgaardinquiry.ca. Copies of P exhibits shall not be available as of right but may be applied for to the Commissioner.
27. Only those persons authorized by the Commission in writing shall have access to C transcripts and exhibits, but the Commissioner may order publication of the evidence pursuant to Rule 46.

E. Documents

28. Subject to Rule 30, every party shall disclose to the Commission and make available for copying all documents, electronic records or exhibits in that party's possession, power or control, which may be relevant to the Inquiry. The fact that a document is disclosed to the Commission by a party does not necessarily mean that the document is relevant for tendering as an exhibit at the hearings.
29. Upon the request of Commission Counsel, each party shall deliver to the Commission an affidavit confirming that all relevant documents, electronic records and exhibits in that party's possession, power or control have been disclosed to the Commission.
30. A party is not required to disclose or produce to the Commission any document for which is privileged is properly claimed. Where privilege is claimed with respect to any document(s), the party shall provide the Commission with a general description of the document(s) and the basis of the privilege claimed.
31. Originals of disclosed relevant documents are to be produced to Commission Counsel for review upon request.

32. Documents received from a party, or any other organization or individual, shall be treated as confidential by the Commission unless and until they are made part of the public record or the Commissioner otherwise declares. This does not preclude the Commission from using such documents as part of the investigation, including showing them to proposed witnesses and providing copies of the documents to parties and witnesses subject to the undertaking referred to in Rule 33.
33. Counsel to parties and witnesses will be provided with documents and information, including statements of anticipated evidence, only upon giving an undertaking that all such documents or information will be used solely for the purpose of the Inquiry and, where the Commission considers it appropriate, that its disclosure will be further restricted. The Commission may require that documents provided, and all copies made, be returned to the Commission if not tendered in evidence. Counsel are entitled to provide such documents or information to their respective clients only on terms consistent with the undertakings given, and upon the clients entering into written undertakings to the same effect. These undertakings will be of no force regarding any document or information once it has become part of the public record. The Commission may, upon application, release any party in whole or in part from the provisions of the undertaking in respect of any particular document or other information.
34. All relevant documents, electronic records or exhibits received by the Commission pursuant to Rule 28, and any other relevant document, electronic record or exhibit obtained by the Commission from any other source shall be compiled in an electronic database (the "Commission Database").
- 34A. Commission Counsel shall disclose the Commission Database to all parties and provide access to an electronic version of every document. Hard copies of the documents in the Commission Database may be inspected by the parties at the Commission Office.
35. Subject to relevance, any document in the Commission Database is admissible and may be tendered by Commission Counsel or any party as evidence before the Commission without the requirement of formal proof, subject to the following:
- (a) In the absence of proof to the contrary:
 - (i) the document will be deemed to be proven as to authenticity and/or execution;

- (ii) in the case of correspondence or other written or electronic communication, the document will be deemed to be sent and received by the author and recipient;
 - (iii) photocopies and/or scanned images will be deemed to be accurate reproductions of the original and are admissible in the place of the original document.
- (b) The veracity, weight or effect of a document admitted as evidence shall depend upon the evidence received.

35A. Unless otherwise ordered by the Commissioner, a document shall become a public exhibit upon being tendered and admitted as evidence. A document tendered and admitted as evidence before the Commission shall be identified by its Document ID.

36. Parties shall, at the earliest opportunity, provide Commission Counsel with any documents that they intend to file as exhibits or otherwise refer to during the hearings which are not in the Commission Database, and in any event shall provide such documents to the Commission no later than five days before the document will be referred to or filed.

37. Subject to Rule 33, and to the greatest extent possible, Commission Counsel will endeavor to provide in advance to both witnesses and the parties with standing:

- a) a statement of anticipated evidence; and
- b) identification and/or copies of documents that will likely be referred to during the course of a witnesses testimony.

38. Counsel shall strive through early production of relevant documents to avoid surprise to witnesses. A party who believes that Commission Counsel has not provided copies of relevant documents must bring this to the attention of Commission Counsel at the earliest opportunity. A decision by Commission Counsel not to tender a document as being irrelevant does not preclude the document from being used in cross-examination by any of the parties. Before such a document may be used for the purposes of cross-examination, a copy must be made available to all parties by counsel intending to use it not later than five days prior to the testimony of the related witness, subject to the discretion of the Commissioner.

F. Confidentiality

39. If the proceedings are televised, applications may be made for an order that the evidence of a witness not be televised or broadcast.
40. Any witness may apply to the Commissioner to be granted "Confidentiality" which shall be at the discretion of the Commissioner. For the purposes of the Inquiry, Confidentiality shall include the right to have his or her identity disclosed only by way of non-identifying initials.
41. A witness who is granted Confidentiality will not be identified in the public records and transcripts of the hearing except by non-identifying initials. Any reports of the Commission using the evidence of witnesses who have been granted Confidentiality will use non-identifying initials only.
42. Media reports relating to the evidence of a witness granted Confidentiality shall avoid references that might reveal the identity of the witness. No photographic or other reproduction of the witness shall be made either during the witness' testimony or upon his or her entering and leaving the site of the Inquiry.
43. The name of a witness who is granted Confidentiality may be disclosed to counsel participating in the Inquiry in order that counsel can prepare to question the witness. The Commission and counsel shall maintain confidentiality of the names revealed to them. No such information shall be used for any other purpose either during or after the completion of the Commission's mandate.
44. Any witness who is granted Confidentiality may either swear an oath or affirm to tell the truth using the non-identifying initials given for the purpose of the witness's testimony.
45. All parties, their counsel and media representatives shall be deemed to undertake to adhere to the rules respecting Confidentiality. A breach of these rules by a party, counsel to a party or a media representative shall be dealt with by the Commissioner as he sees fit, and may result in loss of the privilege of further participation in the inquiry.

G. In Camera Hearings

46. *In camera* hearings may be allowed in exceptional circumstances on the basis of necessity or in the public interest but at the discretion of the Commissioner testimony given in such hearings may form part of the public record suitably recorded so as to protect confidentiality if required.

47. Failure to comply with these rules may result in loss of the privilege of further participation.
48. Where the Commissioner determines it necessary to conduct part of the hearing in camera, he will determine who may attend and the conditions to be imposed upon anyone in attendance.

IV. NOTICES BEFORE POSSIBLE FINDINGS OF MISCONDUCT

49. Notices will be delivered by the Commission after information about alleged misconduct has come to the Commission's attention which may give rise to findings of misconduct. These will be delivered on a confidential basis to the persons or parties to whom they relate. Supplementary notices may be delivered from time to time by the Commission as warranted by the information before it. Notices may be issued to persons who are not called as witnesses before the Commission.
50. At a specified phase of the Inquiry to be determined by the Commission, if any party believes that it is necessary to adduce documentary evidence or to call evidence to respond to allegations of possible misconduct for which a Notice has been received, then that party may apply for leave to call that evidence or may request that Commission Counsel call such evidence. If relevant and responsive to issues raised in the Notice, leave will be given. Cross-examination of the witness by counsel for other parties shall be limited to matters adduced in evidence during the examination in chief of the witness except with leave of the Commissioner.