

*Commission of Inquiry Into the Wrongful
Conviction of David Milgaard before
The Honourable Mr. Justice Edward P. MacCallum*

Transcript of Proceedings
and
Testimony before the Commission
sitting at the Bessborough Hotel at
Saskatoon, Saskatchewan

On Thursday, January 13th, 2005

Volume 2

RE: An Application for
Standing and Funding for Larry Fisher



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Mr. Jordan P. Hardy, Assistant Commission Counsel
Ms. Candace D. Congram, Executive Director
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Appearances:

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Mr. Aaron Fox, Q.C., **for** Mr. Eddie Karst
and Mr. Chris Boychuk,
Ms. Catherine Knox, **for** Mr. T.D.R. Caldwell
and Mr. Robert Kennedy,
Mr. Richard Elson, **for** the Saskatoon Police Service
Ms. Lana Krogan, **for** Government of Saskatchewan
Mr. James Lockyer, **for** Ms. Joyce Milgaard
Mr. Bruce Gibson, **for** the RCMP
and Ms. Rochelle Wempe,
Mr. Brian A. Beresh, **for** Mr. Larry Fisher
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Transcript of Proceedings

(Proceedings commenced at 10:00 a.m.)

CLERK: This hearing for funding is now in session.

COMMISSIONER MacCALLUM: Ladies and gentlemen, we'll dispense with formal introductions and greetings this morning, that will take place on Monday. I'll get right into the business of the day.

On the 20th of April of 2004, upon application by Mr. Beresh for Larry Fisher, I granted standing to Mr. Fisher because, as I said, he was directly and substantially affected by the Inquiry. I did not say why because, at the time, Fisher was seeking leave to appeal, to the Supreme Court of Canada, his conviction for the murder and rape of Gail Miller.

Pursuant to the Terms of Reference, paragraph 2, I am obliged to conduct the Inquiry, quote:

"... without interfering in any ongoing criminal proceeding ..."
close quote.

The Fisher criminal proceeding was technically, at least, ongoing, so I was



1 careful to refrain from any comment about his
2 case which might be construed as interference.
3 Fisher's application for leave to appeal was
4 denied and, after a period of reflection, I
10:05 5 decided to ask, through commission counsel,
6 Mr. Beresh to restate his reasons in a public
7 hearing in support of Fisher's continued standing
8 in view of what I regarded as a change of
9 circumstances, namely the final determination of
10:05 10 his criminal proceedings.

11 An exchange of correspondence
12 ensued between Mr. Beresh and commission counsel.
13 From it, I understand Mr. Beresh's position to be
14 that there has been no change in circumstances;
10:05 15 that the Commission could not have proceeded with
16 the Inquiry so long as the application for leave
17 to appeal was outstanding, and certainly not if a
18 new trial was ordered; that standing was granted
19 assuming leave to appeal would be denied and the
10:05 20 Inquiry could then proceed without infringing
21 Fisher's rights.

22 Before hearing from Mr. Beresh
23 I will comment on the question of changed
24 circumstances.

10:05 25 In my view it is incorrect to



1 say, as Mr. Beresh seems to imply, that a public
2 Inquiry necessarily interferes with ongoing
3 criminal proceedings, or that it cannot be
4 conducted before or in tandem with criminal
10:06 5 proceedings, without infringing an accused's
6 rights. It is the responsibility of the
7 Commissioner to perform his duties without
8 interfering, and there are examples of that
9 having been done. Whether it is even possible,
10:06 10 in the given case, depends upon the
11 circumstances.

12 In our case, I decided that
13 prudence was called for, and I chose to await the
14 result of the application for leave to appeal
10:06 15 before moving to public hearings. I need not
16 speculate on what course of action I might have
17 taken had a new trial been ordered.

18 This brings me to the reason
19 for granting standing to Fisher in the first
10:06 20 place. The Inquiry had been called after expiry
21 of the time limited for appeal to the Supreme
22 Court of Canada. It would have proceeded at some
23 time irrespective of the result of the
24 application for leave, or of the result of any
10:07 25 appeal. If it had been conducted before a new



1 trial of Fisher, for example, evidence might have
2 been uncovered which would help in Fisher's
3 defence, a direct and substantial effect
4 justifying standing. With the refusal of the
10:07 5 Supreme Court of Canada to hear the appeal, a new
6 trial was no longer possible, so there was a
7 change of circumstance.

8 As I remarked in the case of a
9 different sort of application brought by other
10:08 10 counsel, a public Inquiry is not meant to be
11 adversarial. This presents certain difficulties
12 in hearing applications which raise contentious
13 issues, because the Commissioner does not have
14 the benefit of strong argument on both sides of
10:08 15 the question. It is not the function of
16 commission counsel to be adversarial and it would
17 not be fair to Mr. Beresh to allow other parties
18 to argue against him in this matter.
19 Accordingly, it falls to me to examine this
10:08 20 matter critically in the public interest.

21 I wish to remind Mr. Beresh,
22 perhaps unnecessarily, that my remarks thus far,
23 as well as anything I might say during the course
24 of this hearing, are not motivated by bias or
10:09 25 premature assessment of the evidence to come. I



1 wish only to alert him to my concerns about his
2 client's continued standing.

3 And so, Mr. Beresh, I invite
4 you to explain just why you say that your client
10:09 5 remains directly and substantially affected by
6 this Inquiry?

7 MR. BERESH: Thank you, Mr. Commissioner.
8 I appreciate your frankness this morning.

9 I had assumed the reasons that
10:09 10 you provided for suggesting this application and,
11 as a result, have prepared my comments in light
12 of what I expected would be yours.

13 This Commission has requested
14 that Mr. Fisher make submissions in relation to
10:10 15 continued standing and funding, and I am prepared
16 to do that, My Lord, but at the outset I must
17 indicate my surprise at that request, because I
18 suggest -- and I hope my reasons will support --
19 that Mr. Fisher has an overwhelming interest in
10:10 20 participating in these proceedings, particularly
21 when you hear, this morning, the position that
22 Mr. Fisher will take vis-a-vis these proceedings.

23 And I suggest that that's
24 particularly important given that this is not a
10:10 25 private debate, and Mr. Fisher does not wish to



1 make it that, he does not wish to make it an
2 adversarial debate, but he bears in mind, as I
3 know Mr. Commissioner will, that this is a public
4 Inquiry, that it is the public's right to know,
10:11 5 through your office, that it is, given the
6 Legislature's mandate, both clear and realistic
7 that you consider all perspectives, all voices,
8 whether they read from the same songbook or not.
9 Because at the end of the day there will be a
10:11 10 need for this Commission, I suggest, to establish
11 and retain public confidence in its operation
12 over its extended period, and to establish and
13 maintain a confidence with the inquisitive public
14 who will follow this inquiry's journey.

10:12 15 Mr. Fisher's position today, as
16 it was in April of 2004 and as it was before the
17 Supreme Court of Canada, is consistent in that he
18 has a perspective to provide to this Inquiry, and
19 Your Lordship has commented on this. In April of
10:12 20 2004 we provided a full brief with authorities
21 and at that time he was granted standing without
22 conditions. Unlike the Supreme Court of Canada,
23 Mr. Fisher's standing was accepted without the
24 necessity of argument in this case, and confirmed
10:12 25 by commission counsel's letter to me of April of



1 2004.

2 In our memorandum to you,
3 paragraph 17, we advised that standing was sought
4 whether or not leave to appeal was granted and I
10:13 5 suggest that to suggest, now, that Mr. Fisher's
6 interests has changed is neither accurate nor
7 just. I take the position, My Lord, that this
8 Inquiry could not have proceeded in its proper
9 statutory mandate had Mr. Fisher been granted
10:13 10 leave to appeal, had the appeal proceeded, and
11 had a new trial been granted, because a portion
12 of his appeal dealt with the admissibility of
13 evidence at his criminal trial vis-a-vis David
14 Milgaard. I suggest that it would have clearly
10:13 15 interfered with ongoing criminal proceedings.
16 And, in fact, no other parties before you today
17 were engaged in criminal proceedings and one can
18 only assume that the Legislature, in drafting the
19 Terms of Reference, referred to Mr. Fisher's
10:13 20 ongoing criminal proceedings.

21 I suggest that his interest,
22 Mr. Fisher's interest, has not changed, and
23 specifically has not changed since leave to
24 appeal was granted. And that conclusion, I
10:14 25 suggest, is irrefutably made when we look at the



1 fact of the number of months that has passed
2 since leave was denied. If we look to
3 Mr. Fisher's participation, co-operation with the
4 Commission -- and, for the record, Mr. Fisher has
10:14 5 provided documents which are 39 boxes in amount
6 in excess of 20,000 pages -- Mr. Fisher did that
7 because he had been granted full standing. Had
8 that not occurred he would not have provided
9 those documents.

10:15 10 COMMISSIONER MacCALLUM: But we might have
11 subpoenaed them.

12 MR. BERESH: You might have, but I must
13 tell you that, if standing is refused, he will
14 ask for an order returning those documents
10:15 15 immediately, and a removal from the present
16 system.

17 I turn now, My Lord, to what I
18 suggest is the basis for his continued standing.
19 In order to appreciate my submissions,
10:15 20 Mr. Fisher's position at this Inquiry ought to be
21 made perfectly clear, and it is this: Mr. Fisher
22 adamantly denies that he was involved in the
23 death of Gail Miller. That having been said, he
24 now accepts that David Milgaard was wrongfully
10:15 25 convicted. Mr. Fisher has no intention, at this



1 Inquiry, of either directly or indirectly
2 suggesting Mr. Milgaard was involved. Mr. Fisher
3 has no interest in obstructing or interfering
4 with The Court's process. He is fully aware that
10:16 5 this is not an adversarial process and he does
6 not wish to turn it into one.

7 On the other side of the coin,
8 My Lord, the interest that is overwhelming, we
9 suggest, is that he ought not to be made a
10:16 10 scapegoat, in whole or in part, for the
11 conviction of Mr. Milgaard. At page 12 of my, or
12 tab 12 of my authorities that I filed with you in
13 April, at page 154. The learned author, Mr. John
14 Koch (ph), in his article Making Room, New
10:17 15 Directions in Third Party Interventions, referred
16 to the author, Paul Bryden's, enumerated
17 principle called arguments of balance, and in
18 that there is a reference to, as he refers to it,
19 being ganged up on; that there is a need, in this
10:17 20 process, to prevent that scapegoating from
21 occurring. Because I suggest, in whole or in
22 part, there are parties present who may wish to
23 point to Mr. Fisher as having caused, or being a
24 cause of, the wrongful conviction. And let me
10:17 25 give you some examples that arise directly from



1 the evidence.

2 There will be evidence before
3 you that Mr. Fisher was interviewed within days
4 of Gail Miller's death, that he advised the
10:18 5 Saskatoon police that he was at work on the date
6 of the homicide. There are some who have
7 suggested that if Mr. Fisher had been forthright,
8 as they suggest, Mr. Milgaard would not have
9 become the prime suspect. There are many who
10:18 10 have suggested, in a review of the evidence,
11 that, if Mr. Fisher had come forward, admitted
12 his culpability, as they suggest, that
13 Mr. Milgaard would not have been put on trial or
14 would not have been convicted. And there are
10:18 15 many who have suggested that, had Mr. Fisher come
16 forward in the years Mr. Milgaard was in jail,
17 that Mr. Milgaard's term in prison would have
18 been shortened.

19 I expect that there will be a
10:18 20 suggestion to you, on the evidence, that
21 Mr. Milgaard -- that Mr. Fisher was a party to a
22 plan or a conspiracy to conceal his Saskatoon and
23 Winnipeg charges. It has been suggested, and I
24 suspect it might be suggested here, that he was
10:19 25 complicit in having charges dealt with in Regina,



1 as opposed to Saskatoon, so as to avoid the
2 searching eye of the Saskatoon media. Some have
3 suggested that he is -- he was not frank with the
4 Supreme Court of Canada on its reference, and
10:19 5 that -- thereby obstructed the court's process.
6 There are some who suggested that he ought to
7 have volunteered a DNA sample, thereby solving
8 the mystery sooner.

9 I have no doubt, My Lord, that
10:19 10 there are some present in this courtroom who
11 would not want Mr. Fisher's voice to be present
12 for the reasons that I have given. I have no
13 doubt that, either directly or indirectly, there
14 will be a suggestion Mr. Fisher lies at the
10:20 15 bottom of many of the difficulties that
16 Mr. Milgaard faced.

17 COMMISSIONER MacCALLUM: Well, Mr. Beresh,
18 I just want to understand you right. It is, of
19 course, a fact that, had he come forward sooner
10:20 20 and confessed, for example as you say, that
21 Mr. Milgaard wouldn't have spent as much time in
22 prison, but the second question, of course, is
23 should he have been expected to do so.

24 MR. BERESH: But the difficulty is this,
10:20 25 My Lord, you're not dealing with -- and I'm not



1 talking about the legal obligation, --

2 COMMISSIONER MacCALLUM: No.

3 MR. BERESH: -- I'm now talking about a
4 moral obligation, because what you discuss here
10:20 5 the public will assume as being fact, and much of
6 this will not deal with legal obligations, but
7 will deal with moral obligations.

8 And I should add, in the Koch
9 article, that there is reference to that; that it
10:21 10 is the moral obligation that people will take
11 into account, and assume, and will undoubtedly be
12 relied upon for that purpose. And if there is
13 any doubt, My Lord, one ought only to have been
14 present in 1992, when the Supreme Court held its
10:21 15 reference, to see that play itself out in the
16 public theater.

17 I suggest, therefore, that
18 Mr. Fisher has a direct and substantial interest,
19 particularly when the voices that will rally that
10:21 20 cry find support in the fact that there has been
21 a conviction. In many ways Mr. Fisher bears the
22 burden, as Mr. Milgaard did, of trying to refute
23 or rebut an unimpugned court verdict.

24 COMMISSIONER MacCALLUM: Refute what, I'm
10:22 25 sorry?



1 MR. BERESH: An unimpugned verdict.

2 COMMISSIONER MacCALLUM: Oh, okay.

3 MR. BERESH: Appealed at every level,
4 appeals rejected. Like a mirror, he finds
10:22 5 himself in that same position.

6 And I suggest, therefore, he
7 meets the first criteria. But because the
8 criteria are disjunctive, as Your Lordship is
9 aware of, I suggest he also meets the second
10:22 10 criteria, which is that of having an interest and
11 a perspective essential for the successful
12 conduct. Although he need not satisfy this
13 ground, I suggest that it is present. Mr. Fisher
14 has intimate knowledge of the proceedings to be
10:22 15 examined throughout this Inquiry, some of those I
16 have alluded to already, he has a unique interest
17 and perspective, and no other party --

18 COMMISSIONER MacCALLUM: But what
19 perspective is he going to express when his
10:22 20 position, as you say, is simply that he had
21 nothing to do with it?

22 MR. BERESH: Well, the perspective that he
23 ought not to be considered the scapegoat for
24 this, that this Inquiry ought to look deeper into
10:23 25 the causes for this problem. This is not the man



1 who turned on the valve for the bad water, at
2 best the analogy might be that he sat back and he
3 made records of what went on. It matters not,
4 you ought to hear that perspective, and
10:23 5 perspective on particular issues; his involvement
6 in the investigation or lack thereof, his
7 involvement in the criminal charges in
8 Saskatchewan and in Manitoba. And he has the
9 right to put that perspective before you.
10:23 10 Whether you accept the perspective at the end of
11 the day matters not, --

12 COMMISSIONER MacCALLUM: Hmm.

13 MR. BERESH: -- but it will assist you, or
14 it may assist you, and I suggest that that is the
10:23 15 test.

16 There is, we suggest, in
17 relation to the second criteria, the need for you
18 to hear, as the expression is, the perspective of
19 different parties -- interesting that that would
10:24 20 be the term of reference -- and it's important
21 for you to hear what his perspective is in
22 relation to how the charges of sexual assault
23 were dealt with, why they were dealt with in that
24 fashion, his perspective on whether or not those
10:24 25 allegations are similar, or not, to the death of



1 Gail Miller.

2 COMMISSIONER MacCALLUM: Well what does it
3 matter though? The man stands convicted of
4 murder and rape of the same victim that
10:24 5 Milgaard -- in respect of whom Milgaard was
6 wrongfully convicted?

7 MR. BERESH: Well it's going to be argued
8 to you that, because of the similarity of these
9 acts, that there ought to have been some
10:24 10 connection by the investigating authorities, --

11 COMMISSIONER MacCALLUM: That's right.

12 MR. BERESH: -- and we take the position
13 that there isn't a similarity in the act, and we
14 can point to Mr. Justice Albright's finding that,
10:25 15 on at least three of those, there was no
16 similarity, or not such similarity that one would
17 try to identify them as having been committed by
18 the same person. So he has a perspective on
19 that. In addition --

10:25 20 COMMISSIONER MacCALLUM: So are you, in
21 effect, saying that it would follow, therefore,
22 that the Saskatoon police had no reason to link
23 the two?

24 MR. BERESH: I'm not saying whether they
10:25 25 should or not. He has a perspective for it.



1 COMMISSIONER MacCALLUM: That's the
2 perspective of -- we're interested in the
3 Milgaard Inquiry, not in the result, and not what
4 happened to Fisher.

10:25 5 MR. BERESH: Absolutely. And I'm saying
6 the perspective will assist you in determining,
7 in your own mind, whether or not there is
8 similarity and they ought to have acted upon it.

9 COMMISSIONER MacCALLUM: Okay.

10:25 10 MR. BERESH: Further, he has a perspective
11 in relation to evidence to be called by --
12 through the witness, Linda Fisher, in relation to
13 the so-called admissions made by -- made to her;
14 in relation to the alleged admissions made to the
10:26 15 witness Patterson who is listed to be a witness;
16 he has a perspective to provide to you about the
17 attempts by Linda Fisher to obtain incriminating
18 evidence from him while he was in jail, and these
19 are all aspects that this Commission ought
10:26 20 properly to inquire into and to determine.

21 COMMISSIONER MacCALLUM: But we're
22 concerned about the investigation, at that stage,
23 and I'm just having a little trouble relating
24 that to any Fisher interest in the matter. Does
10:26 25 it not follow, from what you are saying, that



1 Fisher will be taking the position that he should
2 have been caught earlier than he was?

3 MR. BERESH: I'm sorry, 'that he is taking
4 the position?'

10:26 5 COMMISSIONER MacCALLUM: Might I conclude,
6 from what you say, that Fisher should have been
7 caught earlier than he was?

8 MR. BERESH: I'm not saying that or not,
9 but I am saying that there will be that argument
10:27 10 to you that that ought to have occurred, that
11 there ought to have been a broader investigation
12 which would have led to his detection, and we
13 have a perspective on that.

14 COMMISSIONER MacCALLUM: Okay.

10:27 15 MR. BERESH: And I suggest that the test
16 that you ought to apply is that enunciated by
17 Justice Sopinka on his article on intervention
18 which was contained in tab 9 of my materials, and
19 at page 885, under tab 9 in his article in The
10:27 20 Advocate, albeit referring to a challenge of
21 legislation and the intervention therein, refers
22 to the *Borowski case* and makes this observation
23 in the middle of the page:

24 "A person need only to show that he is

10:28 25 affected by it directly, or that he has a



1 genuine interest as a citizen in the
2 validity of the legislation and there is no
3 other reasonable and effective manner in
4 which the same issue might be brought before
5 The Court."

6 So I find some solace in that, and that is in the
7 genuine interest, albeit again I acknowledge it's
8 in the context of challenge of legislation.

9 So I suggest, on the secondary
10 ground, that Mr. Fisher has an interest and a
11 perspective. And I acknowledge, My Lord, that
12 there may be parties here who have a greater
13 interest, but the legislation and the Terms of
14 Reference to you do not delineate a degree or
15 variation of interest.

16 COMMISSIONER MacCALLUM: Well, they do, it
17 says 'substantial'.

18 MR. BERESH: That's all.

19 COMMISSIONER MacCALLUM: 'Substantial
20 interest', yes.

21 MR. BERESH: That's all. But, within
22 that, I acknowledge that there are some parties
23 who have a greater interest.

24 COMMISSIONER MacCALLUM: Yes.

25 MR. BERESH: And the guideline that has



1 been given to you is this; if you find that a
2 party doesn't have an interest, you can control
3 their involvement in the process by way of
4 control of cross-examination. So the
5 legislation, or the Legislature, must have
6 contemplated that there will be parties before
7 you with varying degrees of interest.

8 COMMISSIONER MacCALLUM: Oh yes.

9 MR. BERESH: And I don't say Mr. Fisher is
10 at the top of that, I don't say that for a
11 minute, but I say that he does fits within that
12 range which you are allowed to consider.

13 I add as well,

14 Mr. Commissioner, that, under criteria 3, that
15 Mr. Fisher has special experience with respect to
16 the matters coming before you. This appears to
17 be -- have been included as sort of a catch-all
18 criteria, again read disjunctively, and I suggest
19 that, next to Mr. Milgaard, no one else's life
20 has been so intertwined in this matter than that
21 of Mr. Fisher, and I suggest that it may well
22 have been Mr. Fisher's involvement, and the
23 acceptance of his status before the Supreme Court
24 of Canada reference, which is caught by or
25 contemplated by this criteria.



1 COMMISSIONER MacCALLUM: Well how is he
2 going to help the Commission by reason of his
3 experiences?

4 MR. BERESH: Well, because he has been
10:30 5 involved in the process, because his counsel is
6 well aware of the entirety of all the
7 proceedings.

8 COMMISSIONER MacCALLUM: Well that makes
9 you a fit counsel to represent his interests,
10:30 10 that's for sure.

11 MR. BERESH: But what else --

12 COMMISSIONER MacCALLUM: But what does
13 Mr. Fisher have?

14 MR. BERESH: Well what else does 'special
10:30 15 experience' mean then?

16 COMMISSIONER MacCALLUM: Well I suppose
17 somebody like AIDWYC, for example, who has
18 specialized in wrongful convictions.

19 MR. BERESH: Well, I disagree, but Justice
10:30 20 Sopinka tells us what it means at tab 8, My Lord,
21 if we can go to that quickly. Page 340 in the
22 *Worker's Comp. case*, he talks about that under a
23 heading Useful and Different Submissions, and he
24 states as follows --

10:31 25 COMMISSIONER MacCALLUM: Sorry, page what?



1 MR. BERESH: 340, My Lord.

2 COMMISSIONER MacCALLUM: 340?

3 MR. BERESH: Please. Under 2, Useful and
4 Different Submissions:

10:31 5 "This criteria is easily satisfied by an
6 applicant who has a history of involvement
7 in the issue ...,"

8 "... a history of involvement in the issue,
9 giving the applicant an expertise that can
10:31 10 shed fresh light or provide new information
11 on the matter."

12 In that same paragraph he refers to Mr. Crane's
13 article in Practice and Advocacy in the Supreme
14 Court as a fresh perspective or an important
10:31 15 approach, fresh information or fresh perspective,
16 it doesn't mean somebody who has a million years
17 of practice, it means somebody who can bring a
18 different perspective.

19 And I suggest that Mr. Fisher's
10:32 20 involvement, and that perspective, was recognized
21 by Chief Justice Lamer in 1992, and at that time
22 Mr. Fisher's interest was even less than it is
23 now because, at best, he could have been
24 described as a witness, a potential suspect,
10:32 25 nothing more. Yet the Supreme Court of Canada



1 recognized his interest, and I say accurately did
2 so, and granted him standing throughout the
3 entire process, not just when he was a witness.
4 And I add this. There were individuals --

10:32 5 COMMISSIONER MacCALLUM: Sir?

6 MR. BERESH: -- there were individuals
7 before the Supreme Court who were granted
8 standing only vis-a-vis their capacity as a
9 witness, and funding only in their capacity as a
10:33 10 witness.

11 COMMISSIONER MacCALLUM: But surely
12 Fisher's case for standing there was stronger,
13 because that was before he was tried for this
14 crime, and the Supreme Court of Canada was going
10:33 15 to consider evidence in respect of the very
16 murder while he stood in jeopardy of being tried
17 for it?

18 MR. BERESH: I'm not sure it was stronger.

19 COMMISSIONER MacCALLUM: Well anyway --

10:33 20 MR. BERESH: He was one of a number of
21 potential suspects.

22 COMMISSIONER MacCALLUM: Yeah.

23 MR. BERESH: I, with the greatest respect,
24 I suggest it wasn't stronger.

10:33 25 COMMISSIONER MacCALLUM: Well if you are



1 suspected of a crime, Mr. Beresh, surely you have
2 a very strong interest in protecting your rights.

3 MR. BERESH: No doubt. He had an interest
4 there, it was recognized, I suggest that he has
10:33 5 one here as well.

6 COMMISSIONER MacCALLUM: Yeah. And in
7 contrast, of course, I must state the obvious;
8 that what more could possibly happen to him? He
9 is serving a life sentence for imprisonment, now,
10:33 10 for murder and rape.

11 MR. BERESH: But I don't think that's the
12 issue.

13 COMMISSIONER MacCALLUM: Perhaps not.

14 MR. BERESH: You can impugn individuals'
10:33 15 reputations, and you may say "well what
16 reputation does he have", but you have to be
17 sensitive to that. An Inquiry can easily, and
18 has in the past, impugned individuals'
19 reputations unfairly. But his conviction does
10:34 20 not remove his citizenship.

21 I suggest with respect, My
22 Lord, that he has in fact satisfied all three
23 criteria, that there has been no material change,
24 particularly given his commitment not to suggest
10:34 25 that Mr. Milgaard was culpable in this death.



1 COMMISSIONER MacCALLUM: As he did during
2 his trial.

3 MR. BERESH: As he did during his trial.
4 And I shouldn't -- just add, suggested
10:34 5 culpability of others as well, so it wasn't
6 limited to Mr. Fisher. But that's a material
7 change from the position we took even at the time
8 we applied for standing before this court.

9 So I say, with the greatest
10:34 10 respect, he fits within that range of individuals
11 who have an interest. He is not at the top rung,
12 he is not at the bottom rung, but he is somewhere
13 in that range.

14 And I conclude by suggesting,
10:35 15 My Lord, that, to revoke his standing after
16 having had it for a period of 9 months, would not
17 only be unfair, but would create an aura of
18 unfairness.

19 Justice Sopinka, in the
10:35 20 *Worker's Compensation case*, made this interesting
21 observation at page 340:

22 "There's an aura of unfairness about this
23 which would be remedied by granting this
24 application unless the other criteria
10:35 25 dictate the contrary conclusion. This



1 unfairness is exacerbated by the imbalance
2 of representation in favour of those
3 supporting the constitutionality of the
4 legislation which would occur if the
10:35 5 applicant were denied the right to
6 intervene."

7 COMMISSIONER MacCALLUM: Yes, and that's
8 under tab what?

9 MR. BERESH: 340, *Worker's Comp.*, please,
10:36 10 middle of the page just above Useful and
11 Different Submissions.

12 COMMISSIONER MacCALLUM: Oh yeah. Just
13 give me a second, please.

14 MR. BERESH: Thank you.

10:36 15 COMMISSIONER MacCALLUM: Okay, thank you.

16 MR. BERESH: Thank you. Finally, My Lord,
17 I ask you to consider accepting my submissions
18 that Mr. Fisher's right to continued standing has
19 an impact on this Inquiry beyond its day-to-day
10:36 20 operations.

21 I suggest that this inquiry's
22 title, and the nature of the issues this Inquiry
23 will consider, will attract substantial public
24 interest, dissection, and debate. To establish
10:37 25 and maintain public confidence over its extended



1 life, this Inquiry cannot appear to be a closed
2 shop, or a proceeding in the Breaker Morant style
3 of dealing with foregone conclusions. It must
4 have, I suggest, and must be seen to have, moral
10:37 5 force and legitimacy for it to earn and retain
6 that public respect.

7 The author Koch, in his article
8 which I referred to before at page 152, made this
9 observation: --

10:37 10 COMMISSIONER MacCALLUM: Tab what, please?

11 MR. BERESH: Tab 10 please, page 152, in
12 the middle the page in dealing with the arguments
13 vis-a-vis the value of third party intervention:

14 "The second argument is based on concerns
10:38 15 about the moral force and legitimacy of
16 judicial decisions. Intervention allows for
17 fuller public participation in the
18 decision-making process. This both fosters
19 the dignity of the participants and creates
10:38 20 a moral obligation on them to accept the
21 legitimacy of this decision."

22 I suggest, for this Commission to have that moral
23 force and authority, you ought to hear from all
24 voices, you ought to hear from all relevant
10:38 25 parties, and I suggest that Mr. Fisher's position



1 and standing ought not to alter, that he is one
2 of those legitimate voices that you have to hear
3 from.

4 Those are my submissions, My
10:38 5 Lord.

6 COMMISSIONER MacCALLUM: Thanks
7 Mr. Beresh, just stay there for a second, please,
8 I have written down a few things that have
9 occurred to me and I just want to check that, my
10:38 10 notes, to see if you have covered off those
11 items.

12 You didn't, today, mention the
13 potential benefit he might gain in respect of
14 evidence gathered for the purposes of a section
10:39 15 617 application or a faint hope hearing?

16 MR. BERESH: I include that in my
17 submissions. They were in my written authorities
18 so let me ask this; what is in my written
19 authorities or material I ask that you consider
10:39 20 as it was submitted to you in April, please.

21 COMMISSIONER MacCALLUM: Yes, thank you,
22 yeah. But might I ask you this; even if we admit
23 that he is so interested, that is for
24 evidence-gathering purposes, does that mean is he
10:39 25 affected by the Inquiry? Because, after all, the



1 evidence will be produced in the Inquiry, and it
2 will be a matter of public record, so it will be
3 available to him.

4 MR. BERESH: No doubt. I don't disagree.
10:40 5 But his inquiries might, in that regard, might be
6 different from other parties --

7 COMMISSIONER MacCALLUM: Yes?

8 MR. BERESH: -- given the knowledge of the
9 past proceedings, given his different
10:40 10 perspective.

11 COMMISSIONER MacCALLUM: And I think I
12 interjected to ask this; is there any potential
13 bad effect, that is to say what more could happen
14 to him as a result of the Inquiry evidence? You
10:40 15 have pointed out that, well, perhaps he stands
16 convicted, true enough, but his reputation might
17 further suffer or his -- am I being fair about
18 that comment?

19 MR. BERESH: Yes. And I suspect, given
10:40 20 the information or evidence that a parole board
21 might consider, that if he is found to be at
22 fault for this conviction, that that may well
23 affect his right to early parole.

24 COMMISSIONER MacCALLUM: Oh, at fault from
10:40 25 the Milgaard conviction?



1 MR. BERESH: That's right.

2 COMMISSIONER MacCALLUM: I'll just make a
3 note of this, please.

4 MR. BERESH: Thank you. And that might,
10:41 5 My Lord, be found to be under the category of
6 lack of remorse, which a parole board considers
7 to be a legitimate factor in terms of release,
8 and that is not only lack of remorse, but the
9 situation exacerbated by the fact that someone
10:41 10 was wrongfully convicted for the crime.

11 COMMISSIONER MacCALLUM: I suppose you
12 have answered this already, it's just sort of a
13 general question, one of public perception: Why
14 should Fisher claim advantage from an Inquiry
10:42 15 called to find out why David Milgaard was
16 wrongfully convicted and why it took so long to
17 free him?

18 MR. BERESH: I don't look at that as this
19 is claiming an advantage whatsoever. I say you
10:42 20 have the right to have your interest represented
21 if, in every second sentence used at the Inquiry,
22 your name arises. So I must say I don't think he
23 is trying to take advantage of this proceeding,
24 and his co-operation to date, My Lord, I don't
10:43 25 think, suggests that he is trying to take



1 advantage of it.

2 COMMISSIONER MacCALLUM: Yes, and I did
3 look at your arguments before, and argument
4 number 14, if you just wanted to turn to that:

10:43 5 "He represents a unique and fundamental
6 interest. Historically he and David
7 Milgaard have been the only two individuals
8 whose names have been linked to the death of
9 Gail Miller."

10:43 10 And it occurred to me to ask, Mr. Beresh, the
11 fact that Fisher's name was linked to Gail
12 Miller's death gave him an interest so long as
13 the potential for Inquiry evidence severing that
14 link existed, but is that any longer possible;
10:43 15 has not Fisher's involvement been conclusively
16 proved by the refusal of the Supreme Court of
17 Canada to hear any more appeals?

18 MR. BERESH: Well without answering the
19 latter question, because that's the same burden
10:44 20 that Mr. Milgaard faced for years, --

21 COMMISSIONER MacCALLUM: Yes?

22 MR. BERESH: -- the fact is that these two
23 mens' lives have been inextricably intertwined,
24 and I think that's where it comes from, and that
10:44 25 paragraph 14 arises directly from the comments of



1 Chief Justice Lamer in granting Mr. Fisher
2 standing.

3 COMMISSIONER MacCALLUM: Well I quite
4 agree, of course, the fact that Milgaard and
10:44 5 Fisher were both convicted of murdering the same
6 person introduces a strong element of
7 commonality, we can't get over that.

8 MR. BERESH: Sure does. Sure does. And
9 underlying all of this --

10:44 10 COMMISSIONER MacCALLUM: I just --

11 MR. BERESH: Underlying all of this, My
12 Lord, appears to be, but for Mr. Fisher not
13 coming forward, but for Mr. Fisher's other
14 conduct, but for the way the charges were dealt
10:45 15 with, Mr. Milgaard would not have (a) been
16 convicted, (b) spent as much time in jail, or (c)
17 not have faced first refusal on Section 690, it
18 all underlies it.

19 COMMISSIONER MacCALLUM: That's a major
10:45 20 concern of yours I take it?

21 MR. BERESH: Absolutely, absolutely, and
22 it's a perspective we want to put to you and
23 assist you with. And at the end of the day you
24 might not accept our perspective, or you might
10:45 25 accept some of our perspective, but at least you



1 and the public will have the benefit of that
2 perspective in what I believe to be a helpful
3 way.

4 COMMISSIONER MacCALLUM: And, finally, do
10:46 5 you say that Mr. Fisher is directly, or will be
6 directly and substantially affected at every
7 stage of the Inquiry, and I speak of the
8 investigation, the prosecution, whether it should
9 have been re-opened in the face of fresh
10:46 10 evidence, and finally whether there are any
11 recommendations to be offered to improve the
12 administration of justice in this province?

13 MR. BERESH: Thank you, My Lord, I
14 apologize. I should have addressed that.

10:46 15 I say that his interest in some
16 of those phases is clearer than in others.

17 I suggest that, at the
18 investigative stage, his interests are crystal
19 clear.

10:46 20 In relation to the prosecution
21 of Mr. Milgaard, they become a little less clear,
22 but there may still be the suggestion that that
23 prosecution would not have occurred had
24 Mr. Fisher done certain things or been truthful
10:47 25 with the police, as has been suggested.



1 In relation to the Section 690
2 application, I think it becomes less clear, in
3 terms of his interest.

4 But finally, in relation to the
10:47 5 systemic issue, I thought about this and I'm not
6 sure that any party has a real interest in it. I
7 think the public has a real interest and I think,
8 there, the more perspectives you can receive the
9 better. So I say, yes, Mr. Fisher has some
10:47 10 interest, clearly, in that phase of it. But in
11 the initial phases I suggest, clearly, he has an
12 interest.

13 COMMISSIONER MacCALLUM: Mr. Beresh, thank
14 you very much for coming and offering these
10:48 15 comments.

16 MR. BERESH: Thank you for your patience.

17 COMMISSIONER MacCALLUM: I don't intend to
18 keep you waiting long for a decision, Mr. Beresh,
19 it will be produced in writing, and it will be
10:48 20 brief, and it will be delivered to you sometime,
21 through the web and by fax, before tomorrow
22 evening; would that be all right?

23 MR. BERESH: Thank you.

24 COMMISSIONER MacCALLUM: Addressed to your
10:48 25 office, is that okay, in Edmonton?



1 MR. BERESH: Before tomorrow evening in
2 Alberta or Saskatchewan?

3 COMMISSIONER MacCALLUM: Are you going to
4 leave here tomorrow?

10:48 5 MR. BERESH: Yes.

6 COMMISSIONER MacCALLUM: So you will be
7 back in Alberta?

8 MR. BERESH: I will.

9 COMMISSIONER MacCALLUM: It will go to
10 your office in Edmonton.

11 MR. BERESH: Thank you, sir.

12 COMMISSIONER MacCALLUM: Mr. Hodson, do
13 you have any more matters to bring up in the
14 public forum?

10:48 15 MR. HODSON: No, My Lord, those are all
16 the matters.

17 COMMISSIONER MacCALLUM: Okay. We're
18 adjourned, then, for -- until Monday morning at
19 10:00. Thank you.

10:49 20 *(Adjourned at 10:49 a.m.)*
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23
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OFFICIAL QUEEN'S BENCH COURT REPORTER'S CERTIFICATE:

I, Donald G. Meyer, RPR, CSR, Official Queen's Bench Court
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that the foregoing pages contain a true and correct
transcription of my shorthand notes taken herein to the
best of my knowledge, skill, and ability.

_____, RPR, CSR

Donald G. Meyer, RPR, CSR

Official Queen's Bench Court Reporter



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