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

1020 - 606 Spadina Crescent East | Saskatoon, Saskatchewan S7K 3H1 | Phone: (306) 933-8306 | Fax: (306) 933-8305 | www.milgaardinquiry.ca

**IN THE MATTER OF**

**THE**

**RULING ON SCOPE OF CROSS-EXAMINATION**

The issue here is the extent of permissible cross-examination of a witness relative to a statement apparently written by a police officer and bearing her, the witness's signature, but which she has no memory of having given.

I. Background

Witness Daniels (Williamson) gave a statement to police on the 20th of March, 1969 (006500). She has been shown the statement and acknowledges her signature but does not recall making the statement nor does she recall meeting with police. She admits some of the contents, but not all. Commission Counsel put some of the statements to her, but not all.

Mr. Fox, for former detective Karst, attempted to put to her parts of the statement not covered by Commission Counsel – not, he says, in an effort to refresh her memory, but to demonstrate that the police had information about Milgaard which made him a legitimate person of interest.

The Milgaard counsel objected that the material gratuitously maligned David Milgaard.

II. Argument

Counsel for the police and the prosecutor argued that reading of the statement should be allowed as demonstrating the type of information which was available to the police and the prosecution at the time - information which justified their interest in Milgaard as a suspect in the Gail Miller murder.

III. Analysis

The arguments for both reading in and declining to do so are soundly based. Gratuitous publication through a public hearing of character damaging references should not be allowed. Relevance is the key. But some of the references

relating to legitimate police interest are relevant and here the question is simply one of reliable verification.

IV. Inquiry Practice

In his introductory remarks, Commission Counsel addressed matters of procedure and practice, and it is worthwhile returning briefly to those subjects at this time. Commission Counsel has the responsibility to present the evidence as completely and impartially as he can. He has the discretion to present the evidence in the order he chooses and, save in exceptional cases, I will not interfere in his plan of presentation. For example, he is free to read in as much or as little of a witness's statement or prior testimony as he deems advisable.

Thus far he has asked witnesses for their present recollection of events and then refers them to statements given by them previously as well as their testimony from earlier proceedings. The witness is given the chance to explain inconsistencies, but is not challenged on them. That is left to counsel for the parties with standing who are expected to confine their cross-examination to matters which engage their own clients' interest.

Commission Counsel will use his best judgment to read in or refer witnesses to material which he considers relevant to the Terms of Reference and which he perceives engages the interest of parties with standing.

It is recognized that the public record contains some character references and accusations of wrong doing which are thought to be irrelevant or false or of little weight. In the interest of thoroughness and fairness, however, such material has not been discarded because relevancy cannot always be predicted. Therefore, the material is available for legitimate use by the parties even though it has not been led in evidence by Commission Counsel, in whole or in part. The reach of such material cuts across the known interests of parties with standing so parties arguing for exclusion from reading in in a particular case are inviting similar treatment when seeking the benefit of evidence which they wish to lead in this manner.

It is important to remember that the document in question is already part of the record because all evidence not subject to publication ban and bearing a document ID is accessible through the electronic record. Thus the public will have a form of access notwithstanding that in a given case the material in question has not been read in during the public hearings. A further factor of practical importance is that almost all of the material comprising the documentary record has been provided to the Commission by parties with standing, and that most of that is in the public domain already, through media publication or court record.

V. Authority

Not surprisingly, no authorities were cited by counsel, the discretion to refer to documentary evidence in a public inquiry being practically unfettered.

The *Saskatchewan Evidence Act* does not assist.

The rules of evidence from trial practice do not apply strictly, although they are based on principles which can guide us. Admissibility is much more relaxed, which accounts for the fact that a commission of inquiry makes no findings of civil or criminal liability, because such findings are made without the safeguards of the rules of evidence which provide the reliability needed for rights based adjudication.

The factors which determine the result of the current application to read in are authenticity and relevance (that is, related to the Terms of Reference).

The first step in determining authenticity is an acknowledgment by the witness of her signature on the document and that it is in her own writing, if such be the case. If the document is not in her own writing and she professes to have no memory of it, then the danger arises that the recording is inaccurate in which case the best person to establish authenticity would be the recorder, in this case the police officer who copied out the answers to questions he put to her.

The cases dealing with the admission of a past recollection recorded (which describes Daniel's statement) are not easily applied in a public inquiry setting which permits the use of hearsay evidence, the main question being the weight to be given to it. Nevertheless, the usual factors for admitting such evidence offer a useful approach. Therefore, Commission Counsel, in offering documentary evidence as past recollection recorded will consider, although not be strictly bound by the usual factors that:

(a) the witness must have had first hand knowledge of the event;

(b) the document must have been made at or near the time of the event;

(c) the witness must lack of present memory of the event; and

(d) the witness must vouch for the accuracy of the document (*R. v. Williamson* Ontario Court of Justice, 1992 O.J. 2416, p.13 of 16. Thus, for example, if the present disputed document were offered through the police officer who took the statement and wrote it out, those factors would be important. See, as well, *R. v. Meddoui,* Alberta Court of Appeal 61 C.C.C.(3rd) 345 7, 8, and 9 of 24 and *R.v.D.G.*

*[2004]* B.C.J. 1290 p. 5 & 6 of 10, and *Witnesses* (loose leaf) Allen W. Mewett and Peter J. Sankoff p.13-9 to 13-11 inclusive, and *Billie Kinsey v. State of Arizona* Supreme Court of Arizona 49 Ariz. 201, p.9-11 inclusive of 16.

*R. v. Campbell*, Nova Scotia Court of Appeal [2002] N.S.J 120 p.14 of 18

VI. Principles

In this Inquiry witnesses are being called at large and not necessarily for discrete issues. Therefore a witness's testimony may have relevance over a broad range. Because the rule against hearsay does not apply, written material of all kinds is before the Commission, only its weight being in issue.

That is the procedure adopted thus far, but in the exercise of my discretion to consider documentary evidence I should emphasis that although wide scope is permitted in cross-examination, relevance must be demonstrated.

This inquiry is public by definition. It seeks to find answers which could not be revealed through the process of litigation, and to expose error, if any occurred, in the process of litigation. In the matter of admissibility and relevance, inclusion is favored, subject to the exceptional treatment of evidence affecting character or reputation where a higher standard of relevancy is required.

Potential embarrassment alone will not justify refusal to read in, but where prejudicial effect exceeds probative value, the Commissioner in his unfettered discretion may exclude the evidence.

We the Commission should not be seen to facilitate media publication, in the course of a public hearing, of inflammatory or prejudicial material of little or no relevance or probative value.

The best evidence available will be adduced unless it is undisputed. Thus, where documentary evidence is available from more than one witness, it will be led through the witness most conversant with the document.

Counsel seeking to read in parts of a document which demonstrate bad character or which harm reputation must identify the claimed point of relevancy before putting the question. The statement in writing shall then be shown to the witness in a manner which avoids public scrutiny. Where a witness, for lack of memory, cannot confirm having made this statement, the statement speaks for itself and it shall not be read aloud through the witness although application may later be made to read the document aloud through a witness who can vouch for its authenticity. The mischief to be avoided here is the publication, beyond the

official record, of evidence of bad character given in an earlier statement which the witness cannot adopt as hers.

We can do no more than seek to strike a reasonable balance between the public's right to know and the individual's expectation of privacy. These guidelines might need change and improvement as time goes on. They are not immutable.

VII. Disposition

To turn now to the matter at hand, we have a written statement signed by the witness but written, presumably, by a police officer. The witness has no present memory of providing the statement and efforts to revive her memory by showing her the document have been unsuccessful.

Applying these considerations to the statement in question, 006500, there are statements implicating Milgaard in criminal offences which I cannot particularize without rendering nugatory any exclusionary order I might make. (006501, ...502, ..., 503, ...505, ...506, ...507, ...508, ...509, ...512, and ...513) These statements are relevant as supporting legitimate police interest, but because the witness disclaims any memory of making them, she is not the best source to verify the statements and they may not be read in through her.

There is as well some reference to consensual sex (006502, ...504, ...511) which is irrelevant and may not be read in. There is some evidence of non-consensual sex which supports legitimate police interest and which the witness has acknowledged independently of the statement, by reference to the March 22/69 Police Report (009245). The latter references are practically inseparable from the irrelevant material and in view of her direct evidence, of slight probative value. They may not be read in.

The non-consensual sex described at 006506 is relevant to police interest but may not be read in through this witness, who disclaims memory.

ISSUED at the City of Saskatoon, in the Province of Saskatchewan, this 7th day of March, 2005.

COMMISSIONER