

IN THE MATTER OF AN APPLICATION

BY

LARRY FISHER

FOR

STANDING REVIEW

RULING

[1] At my request, Mr. Brian Beresh, counsel for Larry Fisher appeared before the Commission in Saskatoon on January 13, 2005 on a review of Fisher's standing.

[2] The reasons for my request were stated at the start of the hearing but for the sake of completeness I will repeat them here.

[3] 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.

[4] Pursuant to the Terms of Reference, paragraph 2, I am obliged to conduct the Inquiry,
... without interfering in any ongoing criminal proceeding...

[5] The Fisher criminal proceeding was technically, at least, ongoing, so I was careful to refrain from any comment about his case which might be construed as interference. Fisher's application for leave to appeal was denied and, after a period of reflection, I decided to ask Mr. Beresh, through Commission Counsel, to restate his reasons in a public hearing in support of Fisher's continued standing in view of what I regarded as a change of circumstances, namely the final determination of his criminal proceedings.

[6] An exchange of correspondence ensued between Mr. Beresh and Commission Counsel. From it, I understand Mr. Beresh's position to be that there has been no change in circumstances; that the Commission could not have proceeded with the Inquiry so long as the application for leave to appeal was outstanding, and certainly not if

a new trial was ordered; that standing was granted assuming leave to appeal would be denied and the Inquiry could then proceed without infringing Fisher's rights.

[7] Before hearing from Mr. Beresh I will comment on the question of changed circumstances.

[8] In my view it is incorrect to say, as Mr. Beresh seems to imply, that a public Inquiry necessarily interferes with ongoing criminal proceedings, or that it cannot be conducted before or in tandem with criminal proceedings, without infringing an accused's rights. It is the responsibility of the Commissioner to perform his duties without interfering, and there are examples of that having been done. Whether it is even possible, in a given case, depends upon the circumstances.

[9] In our case, I decided that prudence was called for, and I chose to await the result of the application for leave to appeal before moving to public hearings. I need not speculate on what course of action I might have taken had a new trial been ordered.

[10] This brings me to the reason for granting standing to Fisher in the first place. The Inquiry had been called after expiry of the time limited for appeal to the Supreme Court of Canada. It would have proceeded at some time irrespective of the result of the application for leave, or of the result of any appeal. If it had been conducted before a new trial of Fisher, for example, evidence might have been uncovered which would help in Fisher's defence, a direct and substantial effect justifying standing. With the refusal of the Supreme Court of Canada to hear the appeal, a new trial was no longer possible, so there was a change of circumstance.

[11] As I remarked in the case of a different sort of application brought by other counsel, a public Inquiry is not meant to be adversarial. This presents certain difficulties in hearing applications which raise contentious issues, because the Commissioner does not have the benefit of strong argument on both sides of the question. It is not the function of Commission Counsel to be adversarial and it would not be fair to Mr. Beresh to allow other parties to argue against him in this matter. Accordingly, it falls to me to examine this matter critically in the public interest.

[12] I wish to remind Mr. Beresh, perhaps unnecessarily, that my remarks thus far, as well as anything I might say during the course of this hearing, are not motivated by bias or premature assessment of the evidence to come. I wish only to alert him to my concerns about his client's continued standing.

[13] Mr. Beresh in argument reiterated the grounds which he recited in his Notice of Motion dated April 6, 2004 and the written argument which accompanied it (Schedule 1).

[14] Mr. Beresh reports that his client, now serving a life sentence for Gail Miller's murder, continues to deny any involvement in her death, but now accepts that David Milgaard was wrongfully convicted.

[15] Notwithstanding the refusal by the Supreme Court of Canada to hear his appeal against conviction, Fisher believes that his interest in this Inquiry has not changed; that it continues to meet the three criteria for standing set out in the rules; and that his interest will be engaged throughout all phases of the Inquiry, albeit in varying degrees. The criteria for standing form part of the Standing and Funding Guidelines in the Commission Rules, the first page of which is attached as Schedule 2.

[16] As may be seen from my introductory comments, I thought in April of 2004 that Fisher was directly and substantially affected by the Inquiry because his name was linked with that of David Milgaard to Gail Miller's murder. At the time, Milgaard's conviction had been quashed, and a new trial had been granted but never held. Fisher had applied for leave to appeal his conviction to the Supreme Court of Canada. The Inquiry, I thought, held at least some potential for showing additional or different circumstances surrounding the murder which might assist in Fisher's defence were he to be granted a new trial.

[17] But that potential is no longer there.

[18] Mr. Beresh's argument for a continuing interest springs from a concern that Fisher will be made a scapegoat for the wrongful conviction of Milgaard. The argument is not one that turns on legal obligations, but rather on considerations of moral blameworthiness.

[19] Mr. Beresh foresees that Fisher will be blamed by other parties with standing for arranging to plead guilty to other rapes in venues away from the curious gaze of the Saskatoon media who might otherwise have seized upon similarities in those rapes and the murder of Gail Miller; that he will be blamed for remaining silent before Milgaard's trial and through his long years of incarceration; in short, that his reputation is at stake.

[20] Given the savagery of the Gail Miller murder and Fisher's notoriety as a violent sexual offender, I feel compelled to observe that reputation is not his most vulnerable asset. But the argument goes further. The Inquiry, it is urged, might for lack of Fisher's voice being heard become enveloped in an "aura of unfairness": see *Re: Workers' Compensation Act, 1983*, [1989] 2 S.C.R. 334 at 340. That, indeed, is a matter of concern. Procedural fairness is for all, not just the upright.

[21] Without Fisher as a party, it is said, there would be an imbalance of representation. I am not fully convinced of this latter point. To begin with, our proceeding is not adversarial, at least in theory. In reality, of course, competing interests will appear because the parties with standing are affected in different ways. Six of them, by my count, were associated with the prosecution of Milgaard; one was the subject of the wrongful conviction; one campaigned to overturn it, and in the process alleged wrongdoing against the six; one is an advocate for the wrongfully convicted. Even without Fisher, therefore, there will be a rough balance of representation between parties

of dissimilar interests. But I agree that no party except Fisher himself is likely to defend his interest. One cannot predict that the other nine parties will line up to blame him for the way in which the investigation or prosecution was done or that he alone is at fault for the long delay in reopening. On the other hand, Fisher could challenge any other party (with perhaps one or two exceptions) on the basis that their own actions, or failure to act contributed more to the wrongful conviction and long imprisonment than anything he had done. Mr. Beresh argues by analogy to the value of third party intervention in cases involving constitutional interpretation. See Koch, *Making Room New Directions in Third Party Intervention*, Toronto, *Faculty of Law Review* Vol. 48, #1. Such intervention allows for further public participation in the decision making process and lends force and legitimacy to judicial decisions. The argument has appeal in that third party intervention, generally speaking, is a good thing, but the degree of efficacy surely depends upon the quality of the intervenor. Even with inspired advocacy on his side, it will not likely be Fisher the person who lends moral force and legitimacy to the process. Rather the fact and appearance of procedural fairness in allowing standing to such a person might demonstrate that the Commission is determined to protect human dignity and self-respect wherever resident.

[22] I find Mr. Beresh's main argument persuasive. That is, Mr. Fisher, although not the central figure in the Milgaard Inquiry is surely an ubiquitous presence in the record throughout the course of events beginning with the death of Gail Miller and ending with the reopening of the investigation into her death.

[23] We anticipate that some areas of the re-opened investigation will not engage Larry Fisher's interest, remembering that his main argument for standing relies upon his vulnerability to be blamed for Milgaard's conviction and long incarceration. However, one cannot always match witnesses with chronology so it is difficult to fix meaningful limits on a party's participation at this early stage, at least for the fact finding phases of the Inquiry.

[24] I can, however, say with confidence that Fisher does not possess the third criterion for standing,
... special experience or expertise with respect to matters within
the Commission's Terms of Reference.

[25] He has no expertise or special experience known to us which might assist the Commission's work.

[26] The third criterion is aimed at experts or highly experienced persons in criminal investigation, prosecutions, wrongful convictions, and the administration of criminal justice. Merely having been the subject of practitioners of these disciplines does not qualify him.

[27] Larry Fisher's standing in the Inquiry is confirmed except for the final, systemic stage.

ISSUED at the City of Saskatoon, in the Province of Saskatchewan, this _____
day of January, 2005.

COMMISSIONER

SCHEDULE 1

COMMISSION OF INQUIRY
Sitting at Saskatoon, Saskatchewan

IN THE MATTER OF
A COMMISSION OF INQUIRY PRESIDED OVER BY THE
HONOURABLE JUSTICE E. MacCALLUM INTO THE
WRONGFUL CONVICTION OF DAVID MILGAARD, ORDERED
BY THE LIEUTENANT-GOVERNOR IN COUNCIL, FOR THE PROVINCE OF
SASKATCHEWAN, OC 84/2004

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

LARRY FISHER

Applicant

MEMORANDUM OF ARGUMENT

Introduction - Relief Sought

1. The Applicant requests full standing to participate throughout the hearings held by this Commission of Inquiry.
2. The Applicant further requests the appointment of counsel, Brian A. Beresh, Beresh DePoe Cunningham, Barristers, Edmonton, Alberta and alternate counsel to appear and represent the Applicant's interests.
3. The Applicant further requests payment of counsel at a reasonable rate and payment of any all, reasonable disbursements to be confirmed by either certifying Affidavit or

Memorandum of Argument

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review by the Local Registrar at Saskatoon, Saskatchewan and thereafter sealed pending the conclusion of the Commission of Inquiry.

Brief Historical Overview

4. Larry Fisher was interviewed by the Saskatoon Police Force within days of the death of Gail Miller.
5. In the late 1980's he discovered that David Milgaard or individuals on his behalf were publicly suggesting that he, not Milgaard, was responsible for the death of Gail Miller.
6. A Reference to the Supreme Court of Canada was directed in relation to Mr. Milgaard's application pursuant to section 690 of the *Criminal Code*. Mr. Fisher applied for and obtained Intervener status for the purposes of that Reference.
7. Brian A. Beresh and Marvin Bloos were appointed to represent Mr. Fisher's interests and did represent him throughout the proceedings in relation to that Reference.
8. On April 14, 1992, five members of the Supreme Court of Canada issued their decision in relation to that Reference.
9. On July 25, 1997, Larry Fisher was arrested and charged with sexual assault and murder of Gail Miller. Since that date he has remained in custody.
10. Following a lengthy trial, Mr. Fisher was convicted on November 22, 1999 and sentenced on January 4, 2000, to life imprisonment.

11. Mr. Fisher's Appeal to the Saskatchewan Court of Appeal from the conviction was dismissed on September 29, 2003.
12. On March 24, 2004 he filed a Leave to Appeal to the Supreme Court of Canada along with an application to extend time for the filing of the Leave Application. That application is presently pending before the Supreme Court of Canada without a fixed date for decision.

Standing Criteria is Met

13. It is respectfully submitted that Mr. Fisher's applications fulfill the criteria established for standing before this Commission of Inquiry.
14. He represents a unique and fundamental interest. Historically he and David Milgaard have been the only two individuals whose names have been linked to the death of Gail Miller.
15. His interests and perspectives will not be represented by any other potential party to this Commission of Inquiry and his representation is necessary for the successful conduct of the Inquiry.
16. Mr. Fisher was initially considered a potential witness and subsequently an accused in relation to the death of Gail Miller.
17. Mr. Fisher has ongoing interests in the outcome of this matter, whether or not Leave to Appeal is granted by the Supreme Court of Canada. If Leave to Appeal is not granted, Mr. Fisher still faces the prospect of future parole hearings, future applications pursuant to section 696 of the *Criminal Code* and the potential of a "faint hope" hearing in relation to early release.

18. Mr. Fisher has a clear interest in how Gail Miller's death was investigated by the Saskatoon City Police Force and in particular, why the officers chose to investigate the matter in the fashion they did and as to the reliability of their findings. 7
19. The witnesses to be called at the investigative phase of this Commission of Inquiry will likely be the same witnesses called on the "conviction of David Milgaard" phase of the Commission of Inquiry.
20. The Inquiry will necessarily deal extensively with Mr. Fisher, his background and his eventual conviction in determining how the initial investigation resulted in the conviction of David Milgaard and whether the investigation should have been re-opened based on information subsequently received by the police and Department of Justice.
21. Mr. Milgaard's challenges of his conviction, following the dismissal of his appeal by the Saskatchewan Court of Appeal, all made reference to Mr. Fisher as a potential pothor suspect.
22. Mr. Beresh has represented Mr. Fisher on various matters since 1980 and was his counsel before the Supreme Court of Canada on the Milgaard Reference and was counsel for Mr. Fisher in the subsequent criminal proceedings against him. His knowledge of the initial investigation and subsequent proceedings will be of great assistance to the conduct of the Inquiry and to ensuring that the Inquiry fulfills its mandate as required by the Order in Council.
23. It is respectfully submitted that no other potential party to this Commission has a greater interest than Mr. Fisher given the potential affect upon his future.

Funding Criteria is Met

24. It is respectfully submitted that Mr. Fisher's application satisfies the funding criteria established by the Standing and Funding Guidelines.
25. It is respectfully submitted that the criteria are met for the following reasons:
- a) Mr. Fisher is presently in indigent circumstances and has been incarcerated since July 25, 1997;
 - b) Mr. Fisher has no independent means of support, directly or indirectly, to fund the appearance of counsel;
 - c) Counsel will not appear unless reasonable funding is granted;
 - d) He is not able to contribute any of his own funds or personnel to participate in the Inquiry;
 - e) A clear and workable proposal for payment and administering of the funds has been proposed by counsel for Mr. Fisher including certification by Affidavit of counsel and/or review for reasonableness by the local Registrar, provided that accounts are sealed until such time as the Commission has concluded its Inquiry.

Authorities

26. The Applicant relies upon the authorities appended hereto for the purposes of seeking standing before this Inquiry.

Conclusion

27. In all of the circumstances, it is respectfully submitted that the Applicant ought to be granted full standing to participate throughout the hearings of this Inquiry and that Brian A. Beresh and his alternate be appointed as counsel and that an order for funding of counsel at a reasonable rate and payment of all reasonable disbursements ought to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Brian Beresh
BERESH DEPOE CUNNINGHAM
Counsel for Larry Fisher

Conclusion

27. In all of the circumstances, it is respectfully submitted that the Applicant ought to be granted full standing to participate throughout the hearings of this Inquiry and that Brian A. Beresh and his alternate be appointed as counsel and that an order for funding of counsel at a reasonable rate and payment of all reasonable disbursements ought to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Brian Beresh
BERESH DEPOE CUNNINGHAM
Counsel for Larry Fisher

**COMMISSION OF INQUIRY
Sitting at Saskatoon, Saskatchewan**

**IN THE MATTER OF
A COMMISSION OF INQUIRY PRESIDED OVER BY THE
HONOURABLE JUSTICE E. MacCALLUM INTO THE
WRONGFUL CONVICTION OF DAVID MILGAARD, ORDERED
BY THE LIEUTENANT-GOVERNOR IN COUNCIL, FOR THE PROVINCE OF
SASKATCHEWAN, OC 84/2004**

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

LARRY FISHER

Applicant

NOTICE OF MOTION

TAKE NOTICE that an application will be made by counsel on behalf of Larry Fisher before the Honourable Mr. Justice E. MacCallum, Commissioner, at the Top of the Inn, Sheraton Cavalier, 612 Spadina Crescent East, Saskatoon, Saskatchewan on April 20, 2004 at 10:00 o'clock in the forenoon or so soon thereafter as the same may be heard, for an Order granting Larry Fisher full standing to appear through counsel at all stages of the Commission of Inquiry and to be heard through counsel in this matter.

AND FURTHER TAKE NOTICE that the Applicant will apply for an Order that Brian A. Beresh, Barrister and Solicitor, of Edmonton, Alberta, and his alternate, be appointed by this Commission of Inquiry to represent the interests of the said Larry Fisher throughout the proceedings.

AND FURTHER TAKE NOTICE that an application will be made for funding of counsel and for the payment of any and all reasonable disbursements incurred in the representation of the Applicant herein before this Commission of Inquiry.

AND FURTHER TAKE NOTICE that the basis for the application for standing will include the following:

- a) the Applicant is directly and substantially affected by the Inquiry; ?
- b) the Applicant represents interests and perspectives essential to the successful conduct of the Inquiry; ?
- c) the Applicant's counsel has special experience, expertise and knowledge of the matters within the Commission's Terms of Reference;
- d) that no other potential party before this Commission will properly, adequately, or in any way, represent the interests of the Applicant;
- e) that the Applicant has ongoing and future interests which may be affected by the evidence adduced or findings of this Commission, unlike any other potential party to the Commission; ?
- f) that the position of David Milgaard throughout has been to implicate the Applicant in the death of Gail Miller;
- g) the Applicant had previously received standing in the section 690 *Criminal Code* Reference held before the Supreme Court of Canada in 1991-1992;
- h) that Brian A. Beresh was appointed to represent Mr. Fisher's interests throughout that Reference;
- i) that Brian A. Beresh was appointed to represent Mr. Fisher at his criminal trial and on the appeal;
- j) that it would be contrary to the interests of justice not to permit the Applicant to have full standing before the Commission of Inquiry given the unique circumstances of this case;
- k) such further and other grounds as may be advanced in the application Argument appended hereto and as may be advanced before the Commission at the hearing of the application.

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AND FURTHER TAKE NOTICE that the grounds upon which the Applicant relies for funding includes, but is not limited to the following:

- a) the Applicant has been incarcerated since July 25, 1997 (almost 7 years) and as such has not been employable;
- b) the Applicant has no savings from which counsel could be paid;
- c) there is no reasonable expectation that the Applicant will have any funds available before or during the hearing of this Commission;
- d) the Applicant is not able to contribute from his own funds in any fashion in order to participate in the Inquiry;
- e) the Applicant cannot be represented and will not be represented before this Commission if reasonable funding is not granted;
- f) the Applicant received funding for two lawyers and reasonable disbursements and expenses during his participation before the Milgaard Reference in the Supreme Court of Canada in 1991-1992;
- g) the Applicant was the recipient of a special funding order by the Honourable Mr. Justice Milliken, pursuant to his decision of September 9, 1997 in relation to his criminal trial;
- h) the Applicant was the recipient of a funding Order granted by Chief Justice Bayda on May 12, 2000, granting funding for the purposes of the Applicant's appeal to the Saskatchewan Court of Appeal;
- i) that it would be contrary to the interests of justice to not permit proper funding for representation of the Applicant's interests;
- l) such further and other grounds as may be advanced in the application Argument appended hereto and as may be advanced before the Commission of Inquiry at the hearing of the application.

AND FURTHER TAKE NOTICE that the Applicant will apply for an Order directing that the method of payment for legal services and disbursements be that, upon Affidavit by participating counsel certifying the provision of legal services. That funds be paid to Beresh DePoe Cunningham, Barristers, Edmonton, Alberta or alternatively that upon a review of any and all statements of accounts rendered by the Local Registrar for the Court of Queen's Bench, Saskatoon, Saskatchewan upon a review, for reasonableness, that monies be paid to Beresh DePoe Cunningham, Barristers, Edmonton, Alberta.

DATED at the City of Edmonton, in the Province of Alberta, this 6th day of April, 2004.

~~BERESH DEPOE CUNNINGHAM~~

Per: _____

BRIAN A. BERESH
Solicitors for Larry Fisher

TO: COMMISSION OF INQUIRY
Att. Mr. Douglas Hodson
TO: SASKATCHEWAN JUSTICE

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STANDING AND FUNDING
FOR THE COMMISSION OF INQUIRY
INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD
ON BEHALF OF LARRY FISHER

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COMMISSION OF INQUIRY
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SASKATCHEWAN, OC 84/2004

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

LARRY FISHER

Applicant

AFFIDAVIT OF BRIAN M. J. HURLEY

I, BRIAN M. J. HURLEY, Barrister, of the City of Edmonton, in the Province of Alberta, MAKE OATH AND SAY:

1. That I am a partner at Beresh DePoe Cunningham, Edmonton, Alberta and as such have personal knowledge of the matters referred to herein, except where stated to be based upon information and belief and where so stated, verily believe the same to be true.
2. That I have been engaged in the practice of law since 1993 and presently specialize in the practice of criminal law.
3. That I practice law with Brian A. Beresh who has represented Mr. Larry Fisher's interests since 1979-1980 including representation of him in Saskatchewan 1979-1980, representation of him at the time of the Milgaard Reference in the Supreme

Court of Canada and more recently, representation of him at his criminal trial, appeal to the Saskatchewan Court of Appeal and the present leave application to the Supreme Court of Canada.

4. That I am advised by Brian A. Beresh that on March 24, 2004 leave to Appeal to the Supreme Court of Canada was filed in relation to the dismissal of Mr. Fisher's appeal by the Saskatchewan Court of Appeal in 2003. In addition, an application for an extension of time was also filed.
5. Mr. Beresh advises that the Crown Respondent now has 30 days in which to reply to Mr. Fisher's application and Mr. Fisher will have 20 days thereafter in which to file a reply. Following that, the Supreme Court of Canada will consider the Leave Application. In Mr. Beresh's experience, there may be as much 4 or 5 months before a decision on the leave application is granted by the Supreme Court of Canada.
6. Mr. Beresh advises that within 3 days of the Saskatchewan Court of Appeal's decision dismissing Mr. Fisher's appeal that he, by written correspondence advised the prosecution of Mr. Fisher's intention to appeal to the Supreme Court of Canada. Attached hereto and marked as Exhibit "A" to this my Affidavit is a photocopy of Mr. Beresh's correspondence. An intention to appeal is a prerequisite for the granting of an application for an extension of time for filing the Leave Motion. Mr. Beresh advises that seeking an extension of time is not uncommon on Applications for Leave to Appeal to the Supreme Court of Canada.
7. That I assisted Mr. Beresh as second counsel in relation to Mr. Fisher's criminal jury trial. That trial commenced in the Spring of 1999 in Saskatoon, Saskatchewan and was concluded on November 22, 1999, when Mr. Fisher was convicted. He was not sentenced until January 4, 2000 when he was sentenced to life imprisonment on a charge of first degree murder.
8. That I spoke to Larry Fisher on April 7, 2004 and as a result, Mr. Fisher provided to me the following information which he confirms to be correct and which is contained herein.

9. Mr. Fisher advises that within a day or two of the announcement of the death of Gail Miller in Saskatoon, Saskatchewan, that he was stopped by the Saskatoon City Police and interviewed and that he provided information as to his whereabouts to the police for the period of time during which the police suggested that Gail Miller was killed.
10. That he was not subsequently interviewed the Saskatoon City Police Force in relation to the death of Gail Miller.
11. Mr. Fisher advises that in the late 1980's, he became aware that David Milgaard or individuals on his behalf, were publicly suggesting that he was responsible for the death of Gail Miller.
12. Mr. Fisher further advises that he discovered from Mr. Beresh that Mr. Milgaard's second section 690 *Criminal Code* application relied heavily upon the assertion that he was responsible for the death of Gail Miller.
13. Mr. Fisher advises that he denies any involvement in the death of Gail Miller.
14. That I am advised by Brian A. Beresh and verily believe the same to be true that on Mr. Fisher's behalf, he on December 20, 1991, sought leave to permit Larry Fisher to intervene in the Supreme Court of Canada Reference, before the Supreme Court of Canada as ordered by Order in Council PC 1991-2376. Standing was granted by the Supreme Court to permit Mr. Fisher to cross-examine witnesses, lead evidence, retain experts and to fully represent Mr. Fisher's interests.
15. That I am further advised by Brian A. Beresh that he and Marvin Bloos appeared before the Supreme Court of Canada and represented Mr. Fisher's interests throughout the Reference.
16. The Supreme Court of Canada released its decision in relation to the Reference on April 14, 1992. It is attached hereto and marked as Exhibit "B" to this my Affidavit.

I am further advised by Larry Fisher that on July 25, 1997, he was arrested by the MP and charged with sexual assault and murder of Gail Miller.

Fisher advises that he, at that time, qualified for Legal Aid who refused to appoint Mr. Beresh who was then, and is now, a member in good standing of the Law Society of Saskatchewan to represent him during the criminal proceedings.

Fisher advises that he did not have confidence in any lawyer, other than Mr. Beresh, to represent him and as a result requested Mr. Beresh to make an application for funding to the Court of Queen's Bench of Saskatchewan. Attached hereto and marked as Exhibit "C" to this my Affidavit is a photocopy of Mr. Beresh's Affidavit, without attached Exhibits (the Exhibits are not relevant to this application but are available should the Commission wish to view them).

I am advised by Mr. Beresh that on September 9, 1997 Justice Milliken, by fiat, appointed both he and myself to represent Mr. Fisher with a direction of compensation. Attached hereto and marked as Exhibit "D" to this my Affidavit is a photocopy of Justice Milliken's fiat.

I am further advised by Mr. Beresh that Chief Justice Bayda issued an endorsement on May 12, 2000 assigning Mr. Beresh to act on Mr. Fisher's behalf in relation to the appeal and delegated the task of fixing a reasonable legal fee to the Registrar of that Court. Attached hereto and marked as Exhibit "E" to this my Affidavit, is a photocopy of that endorsement.

I am advised by Mr. Fisher that he has been incarcerated since his arrest on July 25, 1997 and as a result he has not been employable since that date. He presently has no means of income, whatsoever.

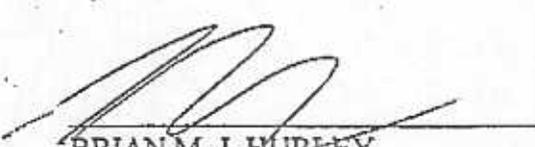
Mr. Fisher further advises that he has no savings and no other source from which to obtain funds to reimburse counsel for legal services rendered in relation to his preparation for and attendances at the Commission for the purposes of protecting his interests.

- 24. That I am further advised by Mr. Beresh that neither he, nor anyone from his office is prepared to represent Mr. Fisher's interests at the Commission unless appropriate compensation is awarded.
- 25. That I am advised by Mr. Beresh that he proposes that fees be paid upon certification by way of Affidavit by counsel providing the services along with a statement of account provided that the statement of account is sealed and not opened for public inspection until the conclusion of the Inquiry.
- 26. Mr. Beresh further advises that during the criminal proceedings prior to the appeal that he was required to provide his statements of account to the Local Registrar, of the Court of Queen's Bench, Saskatoon, Saskatchewan for a review as to reasonableness, but without taxation, and on the further understanding that following review, the accounts were sealed. Attached hereto and marked as Exhibit " F" is the Order of Mr. Justice Milliken dealing with this issue. In relation to the fees on the appeal, that the accounts were taxed by the Registrar of the Court of Appeal and thereafter sealed.
- 27. That I am advised by Mr. Beresh that he sincerely believes that it would be contrary to the interests of justice not to permit Mr. Fisher standing and funding in relation to the work of this Commission.
- 28. That I make this Affidavit in support of the Notice of Motion filed with this Honourable Court which motion is returnable on April 20, 2004.

SWORN BEFORE ME at the City of
 Edmonton, in the Province of
 Alberta, this 7th day of
 April A.D. 2004.

A Commissioner for Oaths in and for
 Province of Alberta

CHRISTIAN P. BANKS
 Barrister and Solicitor



BRIAN M. J. HURLEY

Commission of Inquiry Into the Wrongful Conviction of David Milgaard

Schedule 'A' - STANDING AND FUNDING GUIDELINES

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; and
- c. Seek to determine whether the investigation should have been reopened based on information subsequently received by the police and the Department of Justice.

I. PRINCIPLES

1. Commission counsel has the primary responsibility for representing the public interest at the Inquiry including the responsibility to ensure that all interests that bear on the public interest are brought to the Commission's attention.
2. Parties are granted standing for the purpose of ensuring that particular interests and perspectives that are considered by the Commission to be essential to its mandate will be presented; these include interests and perspectives that could not be put forward by Commission counsel without harming the appearance of objectivity that will be maintained by Commission counsel and which the Commission believes are essential to the successful conduct of the Inquiry.
3. The aim of the funding is to assist parties granted standing in presenting such interests and perspectives but is not for the purpose of indemnifying interveners from all costs incurred.

II. CRITERIA FOR STANDING

1. The Commissioner will determine who has standing to participate in Commission proceedings and the extent of such participation. The Commissioner will determine applications for standing based on the following criteria:
 - a. the applicant is directly and substantially affected by the Inquiry; or
 - b. the applicant represents interests and perspectives essential to the successful conduct of the Inquiry; or
 - c. the applicant has special experience or expertise with respect to matters within the Commission's terms of reference.