

**IN THE MATTER OF THE APPLICATION
ON BEHALF OF DAVID EDGAR MILGAARD
FOR ACCOMMODATION
(January 16, 2006)**

DECISION ON MOTION

1. BACKGROUND

In support of his application for an accommodation to David Milgaard in giving his evidence, Mr. Wolch called two witnesses, Dr. Patrick Baillie, a psychologist, and Mr. Joel Grymaloski, a therapist.

David Milgaard has signed an undertaking (DOCID 332559) stating, in part:

If the Commissioner concludes that I am fit to testify, I undertake to appear and testify before the Commission of Inquiry on the terms directed by the Commission.

The proviso in that undertaking no longer applies. In abandoning his application to be excused, David Milgaard has conceded that he is fit to testify. The question remains, on what terms? The accommodations sought are not based on what I might call logistical factors, such as ability to travel or conflicting commitments. Rather, they go to scope of questioning and the manner of taking evidence, limited, it is said, by Mr. Milgaard's emotional state.

It is worth noting that his stated reluctance to testify at the Inquiry is a very recent thing. I have seen a news report from 1991 in which he is quoted giving cogent and articulate reasons for wanting a public inquiry. None of the symptoms of unease reported in Mr. Milgaard by Mr. Grymaloski relate to the prospect of testifying at the public inquiry until October 2005.

Background on this application reaches back to October of 2004 when Commission Counsel informed Mr. Wolch that he wanted Mr. Milgaard as a witness. To have waited

until October of 2005 to announce his refusal to testify is both presumptuous and discourteous.

Further notable dates and transcript references are:

October 25, 2004 – p.16929 – 16937
November 8, 2005 – p. 18530 – 18534

At p. 18534 condition #3 for a requested adjournment speaks of the motion to be filed by Mr. Wolch asking for Mr. Milgaard to be excused from testifying:

Mr. Milgaard will undertake to abide by the Commissioner's ruling on the above motion. If he is found to be fit he will testify or lose his standing.

January 16, 2006 – p. 21236 - 21238

January 24, 2006 – p. 22309

January 30, 2006 – p. 23004 – 23129 - modified application for accommodation.

Proposed accommodation from other counsel filed.

January 31, 2006 – p. 23135 - 23344

2. WITNESSES – MR. JOEL GRYMALOSKI

Family therapist, Joel Grymaloski, holds a Masters in clinical psychology. He began seeing David Milgaard in 1995 and has had, I find, only sporadic contact with him since, consisting of occasional visits of an informal kind, usually outside the office. Mr. Grymaloski refused to bring his file to the Inquiry, citing confidentiality, although it was made clear to counsel earlier that if the files of treating professionals were not made available, it would affect the weight of their evidence.

The therapist's report is DOCID 332554. It is notable for its lack of clinical detail, not surprisingly, because Mr. Grymaloski did not treat Mr. Milgaard, saying that all his time with him has been spent trying to win his confidence.

The last paragraph of the report reads:

For David Milgaard to appear at this Inquiry at this time, would most probably, undo the last 10 years of his work and effort to stabilize his life and move past his traumatizing past. As such it would throw him back into the dark chasm that was so long a part of his life and that he is so valiantly but slowly, climbing his way out of.

That, I find, is more the plea of advocate rather than the assessment of a treating psychologist. Later in his testimony Mr. Grymaloski acknowledged that he was an advocate for Mr. Milgaard's health and well-being.

The report shows a diagnosis of Post Traumatic Stress Disorder but does little to demonstrate it, relying mainly upon the undisputed ordeal of his long imprisonment. One difficulty I have, in terms of weight, is that the symptoms are described but not documented, leaving counsel with no means to verify or challenge the accuracy of the report. Another problem is that, as Mr. Grymaloski concedes, there is no literature in support of a wrongful conviction as the traumatic event for PTSD.

It is interesting to note that on October 25, 2005, the day after Mr. Milgaard made his appearance before the cameras in this hearing room, he visited Mr. Grymaloski's office in Vancouver to announce that "there was no way he was going to the Inquiry".

What the report proves, if more proof were needed, is that Mr. Milgaard was determined not to give evidence at this Inquiry. Mr. Grymaloski testified that Milgaard has "quite an issue with people in authority".

I accept that. It explains his determined effort to avoid testifying.

Also of interest is his evidence that after reading the report, Mr. Milgaard was not pleased with the diagnosis of PTSD. Mr. Grymaloski said that Mr. Milgaard does not like to think that this has affected him in any way. Why then is he asking, through counsel, for special treatment on the basis that he has a trauma induced illness?

Mr. Grymaloski said that he opened a file on David Milgaard but did not record clinical findings, just observations. I suspect that there were no clinical findings. He admitted

that he did not follow the common protocol of subjective history, objective findings, assessment and plan. And he has withheld his file, I find, without adequate excuse, relying on confidentiality when agreeing to testify on behalf of Mr. Milgaard at the request of the latter's counsel. He says, of his file, "I'm not sure it would have helped".

That, in the first place, is not for him to say, but it is revelatory in that it is an admission that his file contains nothing useful. His report is based only on observations made of Mr. Milgaard during informal visits. Asked when these were, Mr. Grymaloski said:

1995 – 5 visits
1996 – 4 or 5 visits
1997 – 1 or 2 visits
1998 – none
1999 – 1 visit
2000 – perhaps 3 visits
2001 – perhaps 1 visit
2002-2004 – none

We know that since then and prior to the preparation of his report, Mr. Milgaard visited him only once, on October 25, 2005, and then only to express his determination not to attend the Inquiry.

Mr. Grymaloski has never had hospital records, or even admission or discharge summaries. That explains why Mr. Wolch has never produced any, despite his assertion that Mr. Milgaard has been hospitalized every time he has been required to speak about his experiences.

3. WITNESSES – DR. PATRICK BAILLIE

Dr. Baillie has suggested that both the manner of taking testimony and the scope of questioning are limited by Mr. Milgaard's psychological frailty and he is at risk of being harmed by having to recall traumatic events.

The applicant seems to be saying, as I understand Dr. Baillie:

I am fit to testify, but not in a formal setting and only in response to questions which do not suggest any personal responsibility for my own conviction.

Before considering Dr. Baillie's evidence, let me say that I expected an assessment based upon current medical records and interviews with the applicant, who, as stated, had a year to make known to us his unwillingness to testify or to justify his need for accommodation.

And the applicant has withheld from us vital evidence, namely his medical records (which Commission Counsel and others requested in writing December 5, December 13, and December 16, 2006 (filed) which we had every right to expect (see p. 16820 of the transcript)) and has declined to be interviewed by Dr. Baillie.

As a result, Dr. Baillie has not been able to provide an assessment, as such, but has offered a commentary or opinion in his letter of January 13, 2006 (filed as DOCID 335359). At page 7:

In short, if other sources of information were available to me, including more recent medical records and, possibly, Mr. Milgaard's own words if he was willing to meet with me, then I could be in a better position in terms of providing the assessment needed by the Commission.

Dr. Baillie is eminently qualified for our purposes, both by experience and training, and his report, which he was led through in direct examination, makes the best of the information he had. He spoke to Mr. Grymaloski, Milgaard's therapist, who diagnosed his patient with PTSD. Dr. Baillie agrees, based on a reading of historical documents, including medical records pre-dating 1994. His evidence is not persuasive being both derivative (from Mr. Grymaloski) and dated.

Let us be clear that Dr. Baillie did not diagnose PTSD, Mr. Grymaloski did, based not on a "forensic-style assessment", but on the basis of "clinical observation and professional experience."

“Nonetheless” says Dr. Baillie, “I have no quarrel with the diagnosis in this case”.

At pp. 4 & 5 of the report, Dr. Baillie describes the four core features of PTSD. The first of these is:

...exposure to a traumatic event that involved death or serious injury or threat to physical integrity, and the person’s response to the event involved intense fear, helplessness or horror...

Asked where such an experience was had by David Milgaard (who has said that he was not at the scene of the Miller murder, and could not therefore have been exposed to it), Dr. Baillie explained (as I understand him) that the definition was wide enough to comprise Milgaard’s conviction and what happened to him as a result. While conceding that the literature contained no example of a conviction, per se, as the “traumatic event”, Dr. Baillie said that the event was not discrete – but rather a series of bad experiences which flowed from it.

Dr. Baillie frankly conceded that his opinion was limited by the lack of an assessment. He says (by way of reminder to me, I suppose) that a balancing test must be performed – one which weighs the potential value of his evidence against the risk of damaging his mental health.

I find that Dr. Baillie was seriously hampered in his work by lack of information he should have had from David Milgaard’s medical records and from interviewing him. One example was the assumption he worked on that over the past ten years Mr. Milgaard was hospitalized as a result of recounting his experiences. There is no evidence of this. And the fact is that David Milgaard successfully gave evidence under oath on examination for discovery in 1996 (DOCID 198515) and pronounced himself healthy. Dr. Baillie did not read the transcript.

Mr. Milgaard also testified before the Supreme Court of Canada in 1992, not, to be sure, without some discomfort, but he did it. (DOCID 182051)

Although aware of David Milgaard's televised press conference in the Inquiry hearing room on October 24, 2005, Dr. Baillie did not view it. He relied on Mr. Wolch's assurance that Mr. Milgaard was reading from a prepared script. That helped, I suppose, but he also took questions from reporters about this Inquiry and answered emphatically and apparently with no difficulty. Had Dr. Baillie seen this, as I did in the broadcast, I wonder if he would be as apprehensive about Mr. Milgaard's fragility. In the absence of a formal assessment, and with the lack of recent evidence, I would be reluctant to accept the label of Post Traumatic Stress Disorder as a condition currently applying to Mr. Milgaard.

Dr. Baillie, I think, has been persuaded that nothing of value remains to be learned from Mr. Milgaard who has already answered "thousands of questions". Possibly he is correct, but it is not for him to say. The second half of the test is more in his line – the probable harm to Mr. Milgaard. Here, his opinion is forcefully expressed in saying that if questioning goes beyond general inquiries of knowledge of an event and seeks to find out why a certain thing happened or if it happened, Mr. Milgaard might conclude that he is being asked to share the blame, at least in part, for his conviction and will be devastated. But one must acknowledge the obvious. The point of the questions will not be whether Mr. Milgaard killed Gail Miller, but whether his words or actions led the authorities to believe he did, or at least to suspect him; and secondly whether they should have led to an earlier reopening of his case.

As to Mr. Milgaard's possible devastation, that is a matter for the exercise of the Commission's discretion. By analogy to court proceedings, complainants or plaintiffs, often deeply traumatized children or women, are asked hard questions about intensely personal matters. Proof of a civil claim requires it and in criminal cases, the public interest demands it. If the witness cannot answer, discretion is exercised to alleviate the pain and embarrassment of testifying in public. Sometimes, the testimony does not come and the Court then must decide if the onus has been met.

We would not have required Mr. Milgaard's testimony if we did not believe that the public interest required it (see pp. 16822 and following).

4. ACCOMMODATION

In his report, Dr. Baillie suggested accommodations which might permit the reception of Mr. Milgaard's evidence without causing him to bolt.

Amongst these is an audio/video examination by Commission Counsel in the presence of Mr. Wolch. Referred to the method suggested by other counsel with standing, Dr. Baillie agreed that it was a reasonable middle ground. I observe, however, that it would permit, subject to my discretion, questions to be put to Mr. Milgaard which call upon him to explain alleged words or actions which put him under suspicion or which might have affected the reopening. If he did not say or do what is alleged, he can say so. If he did or said what is alleged, he can, if he wishes, offer an explanation. But let him be under no illusion. That which is relevant to the terms of reference may be asked.

Commission Counsel has gone to some pains to disclose his areas of interest. They are relevant. I am happy to say that he enjoys the confidence of all counsel for his tact and sensitivity to witnesses' concerns. As well, he has successfully met with Mr. Milgaard in recent months, so I am satisfied that he would cover the ground for all counsel were he to examine Mr. Milgaard under some form of accommodation.

It appeared from cross-examination that David Milgaard, during the 1990's, gave paid presentations about his story to various groups including schools and universities. Dr. Baillie was not aware that since his release, Milgaard had also made public accusations against Saskatchewan Justice.

It has not been satisfactorily explained to me why David Milgaard, who has functioned adequately in other venues, both public and legal, should find it so upsetting to testify at this Inquiry that he would suffer emotional harm or perhaps bolt.

I understand from Mr. Wolch's re-examination of this witness that although he could agree to the suggested accommodation, his client will not. That is an uncomfortable

position for counsel. Mr. Milgaard has already undertaken to testify on terms set by the Commission. Mr. Wolch has no argument to present against the suggested terms and his own witnesses support them.

In argument, Mr. Wolch proposed acceptance of past testimony by Mr. Milgaard as his evidence with counsel to suggest questions on any remaining, uncovered areas.

That would be a departure from our practice. We necessarily make use of past testimony where a witness is dead or simply cannot testify for some other reason. But the best evidence is potentially, at least, to be had viva voce. It helps me observe the witness, and it affords the chance to cross-examine. These are not advantages to be foregone simply because a witness does not want to testify, saying that he has nothing to add. That is our decision to make before calling him, not his. Furthermore, the scope of questioning in the first instance is within the Commission's exclusive domain. Where there is cross-examination, counsel for parties with standing, of course, choose their own questions. If an accommodation were to be extended which did not allow for cross-examination, such as the one suggested here, it would be reasonable to allow counsel to have questions put by Commission Counsel which had not been asked at the first session, subject to vetting by the Commissioner.

One counsel, although he favored the proposed accommodation, asked for the right to cross-examine personally if unsatisfied with aspects of Commission Counsel's examination. This has the potential to render nugatory the curative effect of the accommodation, so I would not permit personal cross-examination. The proposal, as it stands, appears to meet the possible need for further questions after the first session.

Mr. Wolch's witnesses, both psychologists, approved of the proposal. Mr. Wolch reported that his client would not agree. The best he would do involved written questions and answers, but for reasons stated, I will not accept that.

The onus of showing the need for accommodation lies with Mr. Milgaard. He alleges that testifying will make him sick and even proving the allegation by attending upon his

own expert will make him sick. He has refused, without any reason, to the release of hospital records by means of which we could test his allegation (as expressed by Mr. Wolch) that speaking about his experiences in the past has caused him to be hospitalized. His onus of proof has not been met by the evidence of Dr. Baillie and Mr. Grymaloski.

Accordingly, the need for special terms for testifying has not been made out. Were it not for the accommodation to which other counsel would still consent, I would dismiss the application and call upon Mr. Milgaard to appear before the Commission to be sworn and to testify, as he undertook to do. But the suggested accommodation is still open and there is no dispute among all counsel, including Mr. Wolch, that I could order it within the ambit of the Notice of Motion.

I will do so, but lest there be uncertainty about the consequences of non-compliance, I have already indicated that refusal to testify will cost Mr. Milgaard his standing. If he continues to refuse even the proposal to receive his evidence by audio/visual recording, he will lose standing.

My order is that he appear at Vancouver on the 6th day of March, 2006, at a place to be designated by Commission Counsel, and to remain there to give evidence until its completion according to the terms of the proposal DOCID 335366.

Mr. Wolch may be present as counsel for the witness but shall not be entitled to suggest answers or put questions to the witness.

Any objections to questions may be dealt with by the Commissioner by telephone.

Given at the City of Saskatoon, in the Province of Saskatchewan, this _____ day of February, 2006.

COMMISSIONER