



Department of Justice (Canada)

Ministère de la Justice (Canada)

Security
Classification :

Protected B

Prairie Region, Saskatoon Office
10th Floor
123 - 2nd Avenue South
Saskatoon, SK S7K 7E6

Région des Prairies, Bureau de Saskatoon
10^e étage
123 - 2^e Avenue sud
Saskatoon, SK S7K 7E6

Telephone: (306) 975-5992
Facsimile: (306) 975-6240
Internet:

Our File: 2-32417
Notre dossier:

Your file:
Votre dossier:

July 4th, 2006

HAND DELIVERED

Commission of Inquiry into the Wrongful Conviction of David Milgaard
1020 - 606 Spadina Crescent East
Saskatoon, SK S7K 3H1

Attention: Douglas C. Hodson
Commission Counsel

Re: Attorney General of Canada v. The Honourable Mr. Justice Edward MacCallum
Notice of Motion returnable 1 August 2006 at 10:00 am

Please find for service upon you;

1. A copy of the Notice of Motion which is returnable on August 1st, 2006
2. A copy of the Affidavit being filed with in support of the motion.

We would appreciate if you could execute the acknowledgement of service today so that this matter can be filed with the Court.

Once the matter has been filed, a Queen's Bench number will be assigned and you will be advised of the number as soon as possible.

You will note that the matter is presently scheduled for a regular chambers date on the advice of the local registrar. However, I anticipate at least a half day of Court time may be needed for this matter, so it may be that an alternate date or time during that week may be chosen by the presiding chambers judge.

If you have any questions, please call me at 975-4765.

Yours truly,

Mark Kindrachuck, Q.C.
Senior General Counsel

IN THE COURT OF QUEEN'S BENCH
FOR THE PROVINCE OF SASKATCHEWAN
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPLICANT

- and -

THE HONOURABLE MR. JUSTICE EDWARD P. MacCALLUM,
COMMISSIONER OF A COMMISSION INQUIRING INTO ANY AND ALL
ASPECTS OF THE CONDUCT OF THE INVESTIGATION INTO THE DEATH OF
GAIL MILLER AND THE SUBSEQUENT CRIMINAL PROCEEDINGS
RESULTING IN THE WRONGFUL CONVICTION OF DAVID EDGAR MILGAARD
ON THE CHARGE THAT HE MURDERED GAIL MILLER

RESPONDENT

NOTICE OF MOTION

TAKE NOTICE that an application will be made to the presiding Judge in Chambers at the Court House, 520 Spadina Crescent East, Saskatoon, on Tuesday, the 1st day of August 2006 at 10:00 o'clock in the forenoon or so soon thereafter as counsel can be heard on behalf of the Applicant for the following relief pursuant to Section 9(1) of *The Queen's Bench Act, 1998* and pursuant to Rule 664(1) of the *Queen's Bench Rules of Practice and Procedure*:

- a) For an Order, by way of *certiorari*, quashing the ruling rendered by the Respondent on 1 June 2006.
- b) For an Order, by way of prohibition, directing the Respondent to refrain from exceeding his jurisdiction by inquiring into the reasons for actions taken by officials of the Department of Justice of the Government of Canada, including advice provided or received by those officials.

AND FURTHER TAKE NOTICE that the application will be made on the following grounds:

1. The Respondent exceeded his jurisdiction by failing to limit the matters with respect to which officials of the Department of Justice of the Government of Canada ("the Department of Justice") may be required to give evidence to matters properly within the jurisdiction conferred upon the Respondent by the terms of Saskatchewan Order in Council 84/2004 dated 18 February 2004;
2. Further or in the alternative, the Respondent exceeded his jurisdiction by failing to limit the matters with respect to which officials of the Department of Justice may be required to give evidence to matters properly within the jurisdiction of a provincially-constituted commission of inquiry, and in particular, erred in law by failing to recognize that questions about the advice given or received by counsel in the Department of Justice are in substance questions about the actual management and operation of that Department, and are beyond the jurisdiction of a provincially-constituted commission of inquiry.

AND FURTHER TAKE NOTICE that in support of the within application will be read:

1. This Notice of Motion with proof of service thereof;
2. The Affidavit of Christine Elias;
3. The transcript of the proceedings before the Commission on 20 April 2004 and 30 May 2006.
4. Such further and other material as counsel may advise and this Honourable Court shall allow.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 4th day of July, 2006.

THE ATTORNEY GENERAL OF CANADA

Per: Mark Kindrachuk
Mark Kindrachuk, Q.C.

Per: Michael Peirce
Michael Peirce *per curiam*

Solicitor for the Applicant,
THE ATTORNEY GENERAL OF CANADA

NOTICE TO THE COMMISSION OF INQUIRY

You are required by the Rules of Court forthwith to return to the Registrar of this Court at the Court House, 2425 Victoria Avenue, Regina, Saskatchewan, S4P 3V7, the findings and the reasons therefor, together with the process commencing the proceeding, and the warrant, if any, issued thereon.

This document was delivered by:

Department of Justice (Canada)
Prairie Region, Saskatoon Office
10th Floor, 123 - 2nd Avenue South
SASKATOON, SK S7K 7E6

Address for service is: same as above
Lawyer in charge of file: Mark Kindrachuk, Q.C.
Telephone: (306) 975-4765
Facsimile: (306) 975-6240
File: 2-32417

TO: Attorney General of Saskatchewan - Lana Krogan
Larry Fisher – Brian Beresh
Serge Kujawa – Garrett Wilson, Q.C.
T.D.R. Caldwell – Catherine Knox
Joyce Milgaard/AIDWYC – Joanne McLean
David Milgaard – Hersh Wolch, Q.C.
Saskatoon Police Service – Pat Loran
Eddie Karst – Aaron Fox, Q.C.
Calvin Tallis – Alexander Pringle, Q.C.
David Asper – Donald Sorochan, Q.C.
R.C.M.P. – Bruce Gibson

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPELLANT

- and -

HONOURABLE MR. JUSTICE EDWARD P. MacCALLUM,
COMMISSIONER OF A COMMISSION INQUIRING INTO ANY AND ALL
ASPECTS OF THE CONDUCT OF THE INVESTIGATION INTO THE DEATH OF
GAIL MILLER AND THE SUBSEQUENT CRIMINAL PROCEEDINGS
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ON THE CHARGE THAT HE MURDERED GAIL MILLER

RESPONDENT

AFFIDAVIT OF CHRISTINE ELIAS

I, Christine Elias, of the Town of Martensville, in the Province of Saskatchewan, public servant, MAKE OATH AND SAY AS FOLLOWS:

1. I am employed as a paralegal in the Civil Litigation and Advisory Services Section of the Department of Justice and as such have personal knowledge of the facts and matters hereinafter deposed to, save and except what is stated to be on information and belief, and where so stated, I verily believe the facts and matters hereinafter deposed to be true.
2. Attached hereto and marked as Exhibit "A" to this my Affidavit is a true copy of Order in Council 84/2004 dated 18 February 2004 which established the Commission of Inquiry into the Wrongful Conviction of David Milgaard ("the Inquiry").
3. Attached hereto and marked as Exhibit "B" to this my Affidavit is a true copy of the transcript of proceedings from the Inquiry dated 20 April, 2004.

4. The Minister of Justice (Canada) is a party which has been granted standing by the Respondent. By a letter dated 14 April 2006, a true copy of which is attached hereto and marked as exhibit "C" to this my Affidavit, counsel for the Minister of Justice requested a ruling from the Respondent with respect to the constitutional limitations on the scope of the Inquiry.
5. As a result of this request, Commission Counsel, Mr. Douglas Hodson, provided all parties with standing at the Inquiry with two documents on 18 May 2006. The first document is a Memorandum setting out the position of Commission Counsel on the constitutional issues, a true copy of which attached hereto and marked as Exhibit "D" to this my Affidavit. The second document is an outline of the proposed areas of testimony to be covered by witnesses from the Department of Justice (Canada), a true copy of which is attached hereto and marked as Exhibit "E" to this my Affidavit.
6. The Respondent received a written submission on behalf of the Minister of Justice (Canada) on 23 May 2006, a true copy of which is attached hereto and marked as exhibit "F" to this my Affidavit. The Respondent then directed all interested parties to provide their views in response to this submission by 30 May 2006.
7. On 30 May 2006, the Attorney General of Saskatchewan responded to the submission made by the Attorney General of Canada. Attached hereto and marked as Exhibit "G" to this my Affidavit is a true copy of the submission of the Attorney General of Saskatchewan.
8. In response to the submission of the Attorney General of Saskatchewan, the Attorney General of Canada filed a reply on 30 May 2006, a true copy of which is attached hereto and marked as Exhibit "H" to this my Affidavit.
9. In addition to the written submissions presented, the Respondent heard oral submissions from the interested parties. Attached hereto and marked as Exhibit "I" to

This document was delivered by:

Department of Justice (Canada)
Prairie Region, Saskatoon Office
10th Floor, 123 - 2nd Avenue South
SASKATOON, SK S7K 7E6

Address for service is: same as above
Lawyer in charge of file: Mark Kindrachuk, Q.C.
Telephone: (306) 975-4765
Facsimile: (306) 975-6240
File: 2-32417

18 February 2004

This is exhibit "A" referred to in the affidavit of Christine Elias sworn before me this 4th day of July, A.D. 2006

TO THE HONOURABLE

THE LIEUTENANT GOVERNOR IN COUNCIL

Stoms
A Commissioner for Oaths in and for the Province of Saskatchewan.

My Commission Expires July 31/11

Being a Solicitor PS

The undersigned has the honour to report that:

1. Sections 2 and 5 of *The Public Inquiries Act* provide as follows:

"2 The Lieutenant Governor in Council, when he deems it expedient to cause inquiry to be made into and concerning a matter within the jurisdiction of the Legislature and connected with the good government of Saskatchewan or the conduct of the public business thereof, or that is in his opinion of sufficient public importance, may appoint one or more commissioners to make such inquiry and to report thereon.

5(1)The commissioners, if thereunto authorized by the Lieutenant Governor in Council, may engage the services of such accountants, engineers, technical advisors or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist the commissioners in the inquiry."

2. It is deemed advisable and in the public interest that an inquiry be made into any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller, for the purpose of making findings and recommendations with respect to the administration of criminal justice in the Province of Saskatchewan.

The undersigned has the honour, therefore, to recommend that Your Honour's Order do issue pursuant to sections 2 and 5 of *The Public Inquiries Act*:

- (a) appointing The Honourable Mr. Justice Edward P. MacCallum, Edmonton, as a Commissioner of a Commission of Inquiry into any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller;

- (b) establishing the terms of reference of the Commission of Inquiry as set out in Schedule A, attached hereto;
- (c) directing the said Commission to make its report to the Minister of Justice and Attorney General in accordance with those terms of reference;
- (d) authorizing the Commission to engage:
 - (i) the services of such accountants, engineers, technical advisors or other experts, clerks, reporters and assistants as they deem necessary or advisable; and,
 - (i) the services of counsel to aid and assist the Commission; to be paid by the Department of Justice as approved by the Minister of Justice and Attorney General;
- (e) authorizing reimbursement to the commissioner by the Department of Justice for reasonable travelling and sustenance expenses incurred by him in the performance of his duties; and
- (f) Authorizing payment by the Department of Justice of expenses incurred in the administration of the Commission of Inquiry.



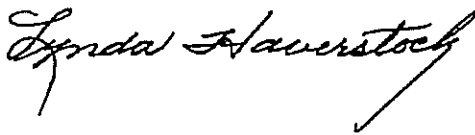
RECOMMENDED BY:

Minister of Justice and Attorney General



APPROVED BY:

President of the Executive Council



ORDERED BY:

Lieutenant Governor
Regina, Saskatchewan

SCHEDULE A to OC 84/2004

TERMS OF REFERENCE

1. The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller. The Commission of Inquiry will also have the responsibility to seek to determine whether the investigation should have been re-opened based on information subsequently received by the police and the Department of Justice. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province of Saskatchewan.
2. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the criminal or civil responsibility of any person or organization, and without interfering in any ongoing criminal or civil proceeding.
3. The Commission shall complete its inquiry and deliver its final report containing its comments, findings, conclusions and recommendations to the Attorney General. The report must be in a form appropriate for release to the public, in accordance with *The Freedom of Information and Protection of Privacy Act* and other laws.
4. To the extent the Commission considers it advisable, it may rely on any transcript or record of any proceedings from any court in relation to the proceedings referred to above and on such other related material it considers relevant to its duties.
5. The Commission shall have the power to hold public hearings but may, at the discretion of the Commissioner, hold some proceedings *in camera*.
6. The Commission shall, as an aspect of its duties, determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commission to have their legal counsel paid for by the Commission, and further, determine at what rate such Counsel shall be paid for their services.

*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 Sheraton Cavalier Hotel at
Saskatoon, Saskatchewan

On April 20th, 2004

Volume 1

RE: Standing and Funding Applications

This is exhibit "B" referred to in the
affidavit of Christine Eliac
sworn before me this 4th day
of July, A.D. 2006

[Signature]
A Commissioner for Oaths in and for
the Province of Saskatchewan.

My Commission Expires July 31/11

Being a Solicitor [Signature]



Commission Staff:

Mr. Douglas C. Hodson, Commission Counsel
Ms. Vanessa Monar Enweani, Assistant Commission Counsel
Ms. Candace D. Congram, Executive Director
Ms. Irene Beitel, Clerk to the Commission

Appearances:

Mr. Hersh Wolch, Q.C., for Mr. David Milgaard
Mr. Aaron Fox, Q.C., for Mr. Eddie Karst
Mr. Silas Halyk, Q.C., for Mr. T.D.R. Caldwell
Mr. Barry Rossmann, Q.C., for the Saskatoon Police
Service
Ms. Sharon Pratchler, for Government of Saskatchewan
Mr. Melvin Green, for The Association in Defence
of the Wrongly Convicted
(AIDWYC)
Mr. James Lockyer, for Ms. Joyce Milgaard
Mr. Bruce Gibson, for the RCMP
Mr. Brian A. Beresh, for Mr. Larry Fisher

Support Staff:

Karen Hinz, CSR and Official Queen's Bench
Donald G. Meyer, CSR Court Reporters
Larry Prehodchenko, Inland Audio Technician



1 (Proceedings commenced at 10:03 a.m.)

2 COMMISSIONER MacCALLUM: Good morning.

3 CLERK: This hearing is now in session. The
4 Honourable Justice MacCallum presiding as
10:03 5 Commissioner.

6 COMMISSIONER MacCALLUM: Welcome to the
7 opening session of the Commission of Inquiry into
8 the Wrongful Conviction of David Milgaard.
9 Today's hearing is limited to a discussion of
10:04 10 which parties will be granted standing and
11 funding meaning who will actively participate in
12 the inquiry and who will have their legal fees
13 paid for doing so. The balance of the public
14 hearings, as I will explain, will not take place
10:04 15 for some time.

16 I will begin with
17 introductions, then make opening remarks about
18 public inquiries in general, and this one in
19 particular, and finally move to the business of
10:04 20 standing and funding.

21 My name is Edward MacCallum, I
22 am a Justice of the Court of Queen's Bench of
23 Alberta. By Order-in-Council dated the 18th of
24 February, 2004, the Lieutenant Governor in
10:04 25 Council of Saskatchewan appointed me to conduct



1 this inquiry. Since then Commission staff has
2 been hired and an office established at
3 1020 - 606 Spadina Crescent East in Saskatoon.
4 The public hearings will be held in this city at
10:05 5 locations to be announced.

6 Let me introduce my staff.
7 Douglas C. Hodson is Commission counsel. Mr.
8 Hodson practices law in Saskatoon as a civil
9 litigator. His associate is Vanessa Monar
10:05 10 Enweani, also a litigation specialist in this
11 city. Candace Congram is our executive director
12 and her regular duties are as manager of strategic
13 communications for Saskatchewan Justice. You find
14 her in Regina. Mel Olsen-Thoen of Viscount is the
10:05 15 Commission secretary. She runs the office in
16 Avord Towers at the address I mentioned. The
17 clerk for the hearings will be Irene Beital. The
18 RCMP will provide security and the recording of
19 evidence will be done by Meyer CompuCourt
10:06 20 Reporting.

21 Several counsel present
22 represent parties seeking standing. I ask them to
23 introduce themselves at the podium and identify
24 their clients. Perhaps I'll just call you up,
10:06 25 gentleman or ladies, in the order in which your



1 names appear on the list of applications. For
2 David Milgaard, Hersh Wolch. Thank you, Mr.
3 Wolch. At the moment it won't be necessary to
4 make your application. I just wanted everybody to
10:06 5 be able to see you.

6 MR. WOLCH: No, I appreciate that. I just
7 indicate that I am here for David Milgaard.

8 COMMISSIONER MacCALLUM: Thank you very
9 much. And then for Mr. Eddie Karst, Mr. Fox?

10:07 10 MR. FOX: Yes.

11 COMMISSIONER MacCALLUM: Mr. Fox, Aaron A.
12 Fox for Mr. Eddie Karst, and for Mr. Caldwell,
13 Mr. Silas Halyk?

14 MR. HALYK: That's correct, sir.

10:07 15 COMMISSIONER MacCALLUM: Representing
16 Mr. T.D.R. Caldwell, and for the Government of
17 Saskatchewan, Ms. Sharon Pratchler?

18 MS. PRATCHLER: Yes.

19 COMMISSIONER MacCALLUM: Thank you. And for
10:07 20 AIDWYC, that's an acronym for The Association in
21 Defence of the Wrongfully Convicted.

22 MR. LOCKYER: James Lockyer. I actually
23 have two hats today.

24 COMMISSIONER MacCALLUM: I believe you
10:07 25 represent Joyce Milgaard as well?



1 MR. LOCKYER: That's correct.

2 COMMISSIONER MacCALLUM: Thank you,
3 Mr. Lockyer. And for the RCMP, Mr. Gibson?

4 MR. GIBSON: Yes, good morning.

10:07 5 COMMISSIONER MacCALLUM: Bruce Gibson?

6 MR. GIBSON: Yes.

7 COMMISSIONER MacCALLUM: And for the
8 Saskatoon Police Services, Mr. David Rossmann?

9 MR. ROSSMAN: Barry Rossman.

10:07 10 COMMISSIONER MacCALLUM: Barry Rossmann,
11 sorry. And for Larry Fisher?

12 MR. BERESH: Mr. Beresh appearing, Mr.
13 Commissioner.

14 COMMISSIONER MacCALLUM: Mr. Brian Beresh.

10:08 15 This inquiry was established
16 under Sections 2 and 5 of *The Public Inquiries*
17 *Act* of Saskatchewan. Section 2 reads:

18 "The Lieutenant Governor in Council, when he
19 deems it expedient to cause inquiry to be
10:08 20 made into and concerning a matter within the
21 jurisdiction of the legislature and connected
22 with the good government of Saskatchewan or
23 the conduct of the public business thereof,
24 or that is in his opinion of sufficient
10:08 25 public importance, may appoint one or more



1 Commissioners to make such inquiry and to
2 report thereon."

3 The public business which
4 concerns us is the wrongful conviction of David
10:08 5 Milgaard for the murder of Gail Miller on the 31st
6 of January, 1969. The circumstances of her death
7 excited great sympathy and outrage at the time and
8 still do. Such emotion could play no part in the
9 criminal investigation and prosecution and we
10:09 10 cannot allow emotion to cloud our judgment in this
11 public inquiry. The Miller family should
12 understand that clinical detachment is necessary
13 in dealing with the evidence and should not be
14 taken by them for lack of sympathy.

10:09 15 A year to the day following the
16 death, David Milgaard was convicted of the murder
17 and sentenced to life imprisonment. His appeal
18 from conviction was dismissed by the Saskatchewan
19 Court of Appeal on the 5th of January, 1971 and
10:10 20 leave to appeal to the Supreme Court of Canada was
21 denied.

22 Pursuant to an application under
23 Section 690 of the Criminal Code by David Milgaard
24 to the Minister of Justice, the matter was
25 referred to the Supreme Court of Canada which held



1 a hearing and considered fresh evidence. The
2 court said in part, I quote:

3 "It is appropriate to begin by stating that
4 in our view David Milgaard had the benefit of
5 a fair trial in January, 1970. We have not
6 been presented with any probative evidence
7 that the police acted improperly in the
8 investigation of the robbery, sexual assault
9 and murder of Gail Miller or in their
10 interviews with any of the witnesses, nor has
11 evidence been presented that was inadequate
12 disclosure in accordance with the practice
13 prevailing at the time. However, fresh
14 evidence has been presented to us. Ronald
15 Wilson, a key witness at the trial, recanted
16 part of his testimony. Additional evidence
17 has been presented with respect to Milgaard's
18 alleged motel room confession. More
19 importantly, there was evidence led as to
20 sexual assaults committed by Larry Fisher
21 which came to light in October, 1970 when
22 Fisher made a confession. In our view, this
23 evidence, together with other evidence we
24 have heard, constitutes credible evidence
25 that could reasonably be expected to have



1 affected the verdict of the jury considering
2 the guilt or innocence of David Milgaard."

3 The court held that the continued conviction of
4 David Milgaard constituted a miscarriage of
10:11 5 justice and recommended that the conviction be
6 quashed and a new trial was ordered. Saskatchewan
7 declined to further prosecute and entered a stay.

8 A cover-up was alleged and
9 Saskatchewan Justice asked the RCMP to investigate
10:12 10 and report, which it did in January of 1994,
11 concluding that there was no evidence of criminal
12 wrongdoing on the part of Saskatchewan Justice
13 officials or Saskatoon City Police officers. Mr.
14 Milgaard continued to seek complete exoneration
10:12 15 and in 1997 DNA testing of the Gail Miller crime
16 exhibits was conducted. Larry Fisher was arrested
17 and charged for the murder of Gail Miller.

18 The Government of Saskatchewan
19 committed to holding a public inquiry after
10:12 20 criminal proceedings were concluded and both the
21 Federal and Saskatchewan governments participated
22 in a monetary settlement with David Milgaard and
23 his family. On November 22nd, 1999 Larry Fisher
24 was convicted of the murder of Gail Miller. His
10:13 25 appeal to the Saskatchewan Court of Appeal was



1 dismissed on the 29th of September, 2003 and he is
2 currently seeking leave to appeal to the Supreme
3 Court of Canada.

4 In view of all that has passed,
10:13 5 the public might well ask what more could a public
6 inquiry hope to accomplish. The answer to that is
7 to be found in the nature of a public inquiry and
8 in the terms of reference. We are charged with
9 the responsibility of inquiring into any and all
10:13 10 aspects of the conduct of the investigation into
11 the Miller death and the subsequent criminal
12 proceedings resulting in the wrongful conviction
13 of David Edgar Milgaard. The Supreme Court was
14 not presented with credible proof that the police
10:14 15 had acted improperly in the investigation and
16 found that Milgaard had received a fair trial and
17 adequate disclosure. Our direct concern is not
18 the trial, but rather the propriety of the
19 investigation and the prosecution.

10:14 20 Our inquiry also has the
21 responsibility to seek to determine whether the
22 investigation should have been reopened based on
23 information subsequently received by the police
24 and the Department of Justice. The Supreme Court
10:14 25 of Canada ordered a new trial, but did not address



1 its remarks specifically to the reopening of an
2 investigation.

3 The RCMP investigation, on the
4 other hand, was focused on allegations of
10:14 5 wrongdoing by the Saskatoon City Police and
6 Saskatchewan Justice in both the investigation and
7 the prosecution of David Milgaard. As many as 10
8 RCMP investigators worked on the case, thousands
9 of documents were read, hundreds of witnesses
10:15 10 interviewed and a report of some 300 pages was
11 produced.

12 The investigation was led by the
13 Alberta Attorney General's department for the sake
14 of impartiality and the appearance of
10:15 15 impartiality. Nevertheless, the effort was
16 conducted by a police force regarded by some as
17 sympathetic to the prosecution's case and to the
18 Saskatoon police. That might be unfair, but the
19 perception remains.

10:15 20 Although our Commission will go
21 over some of the same ground, we will be taking
22 statements from witnesses followed by sworn
23 testimony at public hearings. We will have, in
24 addition, the benefit of sworn testimony at our
10:16 25 hearings which was not available to the RCMP.



1 Also, we are charged with making such
2 recommendations as we consider advisable relating
3 to the administration of criminal justice in the
4 Province of Saskatchewan. We regard the work we
5 are asked to do as being a culmination of what has
6 gone before rather than simply putting a new face
7 on old news.

8 In light of the terms of
9 reference given to us by the Government of
10 Saskatchewan, it is important to understand what
11 this inquiry is about. It concerns David
12 Milgaard's wrongful conviction. In 1992 the
13 Supreme Court of Canada decided that his continued
14 conviction constituted a miscarriage of justice in
15 view of certain evidence which was before them,
16 but not before the jury at his trial in 1970. The
17 Supreme Court set aside the conviction and ordered
18 a new trial. Had the trial been held, a court
19 might have found him guilty as charged, that is,
20 of murder, not guilty of murder but guilty of some
21 lesser offence, or not guilty, but a new trial was
22 not held because the Government of Saskatchewan,
23 as was their prerogative, decided not to continue
24 with the prosecution.

25 Our task is to discover, if



1 possible, why David Milgaard was wrongfully
2 convicted. Was it because of evidence or the lack
3 thereof flowing from a flawed investigation or
4 prosecution? Should the case have been reopened
10:18 5 when new evidence came to light after the trial?
6 This inquiry is dedicated to seeking out the truth
7 and we will go where the evidence leads and draw
8 conclusions of fact where warranted by the
9 evidence irrespective of the findings of others,
10:18 10 but essentially we are concerned with the
11 integrity of the process of a criminal
12 investigation and prosecution. The Supreme Court
13 of Canada said that Mr. Milgaard received a fair
14 trial, but the concern is did the jury receive the
10:18 15 best evidence available and, if not, why not.

16 The Commission is a fact finding
17 body and not a court. We cannot make findings of
18 criminal or civil responsibility, but we will not
19 shrink from finding personal responsibility for
10:19 20 actions, for political decisions or for systemic
21 failures if that is where the evidence leads. The
22 reach of our Commission is constitutionally
23 limited to matters within the jurisdiction of the
24 legislature. We cannot infringe on federal power
10:19 25 over the criminal law or criminal procedure. We



1 cannot investigate the internal workings of a
2 federal institution. We do have the power to make
3 findings of misconduct against persons and, if the
4 evidence seems to point in that direction, we will
10:19 5 give such persons notice that an adverse finding
6 is possible.

7 I am expected to be, and I am,
8 both impartial and independent. Commission
9 counsel is my agent and he and his associate will
10:20 10 gather and present evidence impartially. They are
11 advocates only for truth and not for the interests
12 of any party. Our inquiry will seek to be fair,
13 to be effective, to be speedy and to be
14 economical. It will be driven by evidence, not by
10:20 15 theories. I will not allow our hearings to serve
16 as a platform for the propagation of baseless
17 assertions about persons or organizations. I
18 expect that any allegation of wrongdoing will be
19 backed by evidence. The public inquiry will only
10:21 20 be successful to the extent that the public is
21 informed. The role of the media is important.

22 The Commission of Inquiry has
23 two functions; one is to ascertain facts, the
24 other is to give advice. The Commission's
10:21 25 position statement on the meaning of the terms of



1 reference will be circulated to parties with
2 standing as soon as possible. Any party disputing
3 the positions expressed will have 45 days from
4 receipt of the statement to make its objections
10:21 5 known. A hearing will be set to settle
6 objections, if any.

7 The Commission expects that some
8 witnesses' evidence will relate to one or all of
9 the investigation, the prosecution and the
10:22 10 reopening aspects of the terms of reference. For
11 that reason, it might not be possible to treat
12 those aspects as discrete subjects in separate
13 hearings. We propose that the fact finding part
14 of the inquiry dealing with those subjects will
10:22 15 take place no sooner than 60 days after the Fisher
16 criminal proceedings are finished to be followed
17 by the hearing of expert or other evidence
18 touching systemic or public policy issues.

19 We have settled on this time
10:22 20 frame with the following factors in mind. First
21 of all, there's a great deal of work to be done by
22 Commission staff before the start of hearings.
23 Secondly, the reservation of hearing venues
24 requires significant time. Thirdly, summer
10:23 25 holidays in July and August would make holdings of



1 public hearings difficult to arrange in those
2 months, and finally, we must allow a reasonable
3 period for the Fisher criminal proceedings to
4 reach finality. This last point requires
10:23 5 amplification.

6 We are obliged by our terms of
7 reference to carry on our work, "...without
8 interfering with any ongoing criminal proceeding."
9 At present, Larry Fisher is seeking leave from the
10:23 10 Supreme Court of Canada to appeal his conviction
11 for the murder of Gail Miller. If he is granted
12 leave and does appeal, it might be argued that the
13 public inquiry cannot proceed without interfering
14 with that ongoing criminal proceeding. In the
10:23 15 meantime, the Commission intends to carry on with
16 its investigations and preparatory work in a
17 manner which will not interfere with the Fisher
18 proceedings.

19 In the case of parties funded
10:24 20 through the Commission, we have a duty to ensure,
21 insofar as possible, that they do not use their
22 funding for activities which might interfere with
23 the Fisher criminal proceedings. Therefore, until
24 further notice, such parties will be funded only
10:24 25 for legal work which is approved in advance by



1 Commission counsel on the basis that, (a), it is
2 necessary in the representation of their clients'
3 interests and essential to the successful conduct
4 of the inquiry, and (b), the work will not
10:24 5 interfere with the Fisher proceedings.

6 In the exercise of its duty to
7 oversee costs, the Commission will be vigilant.
8 We are confident that counsel for publicly-funded
9 parties will use restraint. Some counsel present
10:25 10 have been involved with the Milgaard and Fisher
11 cases for many years, a fact which should help to
12 cut down on preparation time.

13 I will now deal with
14 applications for standing and funding in the order
10:25 15 in which they are received. Only one class of
16 standing will be offered on the terms set out in
17 the rules which have been provided to applicants.
18 Without going through those rules, let me say just
19 this. In the interests of saving time and money,
10:25 20 I might from time to time limit the degree of
21 participation of counsel for a party in a phase of
22 the inquiry which does not engage its interest.

23 The criteria for standing are as
24 follows: The Commissioner will determine who has
10:25 25 standing to participate in Commission proceedings



1 and the extent of such participation; the
2 Commissioner will determine applications for
3 standing based on the following criteria; (a), the
4 applicant is directly and substantially affected
10:26 5 by the inquiry, or (b), the applicant represents
6 interests and perspectives essential to the
7 successful conduct of the inquiry, or (c), the
8 applicant has special experience or expertise with
9 respect to matters within the Commission's terms
10:26 10 of reference.

11 The following persons or
12 organizations have applied: David Milgaard,
13 Mr. Eddie Karst, Mr. T.D.R. Caldwell, the
14 Government of Saskatchewan, The Association in
10:27 15 Defence of the Wrongly Convicted, Joyce Milgaard,
16 the RCMP, the Saskatoon Police Services, Larry
17 Fisher.

18 On the basis of the materials
19 submitted, I am prepared to grant standing, and in
10:27 20 some cases funding, to all those applicants
21 according to the rules of practice and procedure
22 of the Commission. All applicants have received
23 copies of these rules and they are published in
24 the Commission website www.milgaardinquiry.ca. I
10:27 25 will go through the list briefly asking for



1 comment only from counsel for the party in
2 question.

3 I am satisfied that David
4 Milgaard is directly and substantially affected by
10:28 5 the inquiry and that he represents interests and
6 perspectives that are essential to the successful
7 conduct of the inquiry. He is offered both
8 standing and funding for those reasons. Mr.
9 Wolch, do you have any comment?

10:28 10 MR. WOLCH: Thank you, My Lord. I will be
11 extremely brief in view of your comments.

12 I first of all, on behalf of
13 David, would thank you for the remarks you have
14 made this morning. They are very helpful and
10:28 15 very encouraging that this Commission will
16 fulfill its very important mandate which we see,
17 of course, as accountability and guidelines for
18 the future, that nobody else will have to endure
19 what David went through, and, for that reason we
10:28 20 are very grateful for AIDWYC and all their help
21 as well. And I simply thank you for the remarks.

22 COMMISSIONER MacCALLUM: Thank you, sir.

23 I am satisfied that Eddie Karst
24 is directly and substantially affected, that as a
10:29 25 former detective he represents interests and



1 perspectives essential to the successful conduct
2 of the inquiry, and that he has special
3 experience and expertise with respect to matters
4 within the Commission's terms of reference. He
10:29 5 is offered both standing and funding. Mr. Fox,
6 do you have any comments?

7 MR. FOX: My Lord, nothing specific, other
8 than we appreciated the extensive nature of the
9 guidelines on the funding and requirements and
10:29 10 the funding that's available. I appreciate that,
11 and I believe certainly it will be acceptable,
12 and we'll proceed from there. Thank you.

13 COMMISSIONER MacCALLUM: Thank you.

14 Mr. T.R.D. Caldwell is directly
10:30 15 and substantially affected. As a retired Crown
16 Prosecutor, he represents interests and
17 perspectives essential to the conduct of the
18 inquiry, and he has special experience and
19 expertise relating to the terms of reference.
10:30 20 He, too, qualifies for standing and funding. Mr.
21 Halyk, do you have any comments?

22 MR. HALYK: Mr. Commissioner, thank you
23 for that on behalf of Mr. Caldwell, and we look
24 forward to a productive inquiry in light of your
10:30 25 assistance so far.



1 COMMISSIONER MacCALLUM: Thank you for
2 coming.

3 The Government of Saskatchewan
4 is granted standing, meeting all three criteria.
10:31 5 Ms. Pratchler, do you have any comments?

6 MS. PRATCHLER: No, My Lord, I don't.
7 Thank you.

8 COMMISSIONER MacCALLUM: Thank you.

9 AIDWYC is directly affected and
10:31 10 represents interests and perspectives essential
11 to the successful conduct of the inquiry and has
12 special expertise relating to the terms of
13 reference. It meets all four criteria for
14 funding and is, therefore, offered standing and
10:31 15 funding subject to this qualification; for the
16 fact-finding stage of the inquiry AIDWYC and
17 Joyce Milgaard's interests are the same, so only
18 one counsel representing both parties will be
19 offered funding for that stage, including both
10:32 20 preparation and hearing. Are there any comments
21 from you, Mr. Lockyer?

22 MR. LOCKYER: Speaking as a director of
23 AIDWYC, Mr. Commissioner, we're very grateful for
24 the position that you have taken, which reflects
10:32 25 what we requested as an organization. This will



1 be the fourth inquiry that our organization has
2 been involved in and we hope, insofar as
3 possible, we can help provide a common thread
4 between the previous inquiries and this inquiry,
5 and see this inquiry as a very important
6 development for the Canadian justice system as a
7 whole. Thank you very much.

8 COMMISSIONER MacCALLUM: Thank you.

9 Joyce Milgaard is directly and
10 substantially affected by the inquiry, and she
11 represents interests and perspectives essential
12 to the successful conduct of the inquiry, she is
13 offered standing. As well, she meets the
14 criteria for funding with the same proviso
15 applying to AIDWYC, namely that she share the
16 services of one counsel for the fact-finding
17 stage of the inquiry, both preparation and
18 hearing. Mr. Lockyer, anything additional to
19 point out?

20 MR. LOCKYER: May I just say, Mr.
21 Commissioner, that Mrs. Milgaard plans to be a
22 dynamic part of this inquiry. Thank you very
23 much.

24 COMMISSIONER MacCALLUM: Thank you. The
25 RCMP, I find, are directly and substantially



1 affected. They represent interests and
2 perspectives essential to the successful conduct
3 of the inquiry and have special experience or
4 expertise with respect to matters within the
10:33 5 Commission's terms of reference. They are
6 offered standing and do not seek funding. Any
7 comments, Mr. Gibson?

8 MR. GIBSON: No, thank you.

9 COMMISSIONER MacCALLUM: Thank you.

10:34 10 The Saskatoon Police Services
11 are offered standing, meeting, as they do, the
12 same criteria as the RCMP. Also, they seek and
13 are offered funding in accordance with the
14 arrangements discussed with Commission counsel.
10:34 15 Are there any comments, Mr. Rossmann?

16 MR. ROSSMANN: No, Mr. Commissioner,
17 thank you very much.

18 COMMISSIONER MacCALLUM: Thank you.

19 Larry Fisher, I find, is
10:34 20 directly and substantially affected by the
21 inquiry. He requires funds to adequately
22 represent his interests, and Mr. Beresh asks that
23 his application materials be sealed for the time
24 being, so as not to interfere with the ongoing
10:35 25 appeal process. I so order. Do you have any



1 comments, Mr. Beresh?

2 MR. BERESH: Just briefly, Mr.
3 Commissioner, I echo the words of other counsel
4 thanking you for your opening comments. We will
10:35 5 offer our assistance throughout this matter. I
6 have no doubt that your many years on the Bench
7 will assist you in what will be a difficult task.

8 I conclude by thanking you for
9 the sensitivity expressed in relation to Mr.
10:35 10 Fisher's ongoing appeal process and I'll keep
11 Commission counsel advised as to the progress of
12 that appeal. Thank you.

13 COMMISSIONER MacCALLUM: Thank you.

14 Mr. Hodson, just so people
10:36 15 won't think you are being left out gratuitously,
16 do you have any comments to make on what has
17 passed?

18 MR. HODSON: No, I don't, Mr.
19 Commissioner.

10:36 20 COMMISSIONER MacCALLUM: Thank you.

21 The Rules of Practice and
22 Procedure are, as I said, posted on the website.
23 They are rather extensive and should be read
24 carefully by interested parties.

10:36 25 For the sake of emphasis,



Prairie Region, Saskatoon Office
10th Floor
123 - 2nd Avenue South
Saskatoon, SK S7K 7E6

Région des Prairies, Bureau de Saskatoon
10^e étage
123 - 2^e Avenue sud
Saskatoon, SK S7K 7E6

Telephone: (204) 983-2252
Facsimile: (204) 983-3636
Internet:

Our File: 2-32417
Notre dossier:

Your file:
Votre dossier:

April 14, 2006

VIA FACSIMILE

Commission of Inquiry into the Wrongful Conviction of David Milgaard
1020 - 606 Spadina Crescent East
Saskatoon, SK S7K 3H1

Attention: Douglas C. Hodson
Commission Counsel

Dear Sir:

Re: Outline of Privileged Documents which the Minister of Justice Objects to Producing

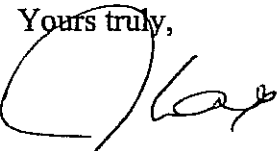
Further to my undertaking given on February 21st, 2006, attached to this letter as Appendix A is a general description of the documents which the Minister objects to producing to the Commission of Inquiry and the grounds upon which the Minister so objects.

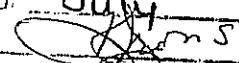

Most of the documents the Minister objects to producing are protected by solicitor-client privilege. In addition to being privileged, the Minister also takes the position that production of these documents takes the Milgaard Inquiry beyond the mandate of a Provincial Inquiry.

Given the Minister's concerns over the Constitutional boundaries of a Provincial Inquiry, perhaps this would be an appropriate time to seek a ruling from the Commissioner on this issue.

If you have any further questions, please do not hesitate to contact me.

Yours truly,


for David G. Frayer, Q.C.
General Counsel
JLC

This is exhibit "C" referred to in the affidavit of Christine Elias sworn before me this 4th day of July, A.D. 2006

A Commissioner for Oaths in and for the Province of Saskatchewan.
My Commission Expires July 31/11
Being a Solicitor 

7. Firstly, the Terms of Reference require the Commission to inquire into any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Milgaard. To the extent that federal justice lawyers and the Minister have information garnered through the s. 690 process that is relevant to the conduct of the original investigation and criminal proceedings, the information is relevant to the Commission's Terms of Reference.

8. The term "criminal proceedings" includes David Milgaard's original trial and his appeals to the Court of Appeal and Supreme Court of Canada. If the applications to the Minister under s. 690 and the disposition of those applications (including the Supreme Court Reference) by the Minister are considered part of the "criminal proceedings" as used in the Terms of Reference, then the Commission is entitled on this further basis to inquire into the conduct of the s. 690 applications and the Minister's disposition of the applications. The Commission will determine the meaning of "criminal proceedings" in its ruling on the constitutional issues. However, given the Commission's interpretation of the provisions of its Terms of Reference (above and below), it does not appear that the interpretation of "criminal proceedings" to include/exclude the s. 690 proceedings will significantly affect its ability to inquire into these proceedings.

9. Secondly, the Terms of Reference require the Commission to seek to determine whether the investigation into the death of Gail Miller should have been re-opened based on information subsequently received by the police and the Department of Justice (Saskatchewan). In order to fulfill this aspect of its mandate, the Commission must identify post conviction information relevant to the re-opening that was made available to police and Saskatchewan Justice, and inquire into the source and reliability of such information.

10. One of the functions of federal justice officials and the Minister in responding to the s.690 applications was to gather and assess information relevant to the applications. To the extent that the information gathered and assessed by federal justice officials was information relevant to the re-opening of the investigation and was received by police and Saskatchewan Justice, the information (source and reliability) is relevant to the Commission's Terms of Reference.

11. The investigation of and responses to the s. 690 applications by the Minister and the decision of the Supreme Court of Canada in the Reference case were, to some extent, relied upon by the police and Saskatchewan Justice in their decision not to re-open the investigation. The Minister's investigation of and response to the two applications and the Supreme Court Reference case are therefore relevant to this aspect of the Terms of Reference.

12. Thirdly, the Terms of Reference require the Commission to make recommendations regarding the administration of criminal justice in the Province of Saskatchewan.

13. The prosecution and conviction of an individual for a criminal offence is a matter that falls within provincial jurisdiction over the administration of criminal justice. While

the remedy for a wrongful conviction lies with an application to the federal Minister pursuant to a federal statute, the remedying of a wrongful conviction also concerns the administration of criminal justice. Saskatchewan Justice was an active participant in the Case on Reference, which led to David Milgaard's conviction being set aside and the investigation being re-opened. The s.690 applications and the Case on Reference were important steps in the administration of criminal justice and therefore are relevant matters for which recommendations may be made.

14. Subject to any constitutional limitations (and the Minister's claim of solicitor-client privilege) the Commission's Terms of Reference authorize it to inquire into the following general subject areas:

- a) The steps taken by federal justice lawyers and their agents in reviewing, assessing and investigating the matters raised in the two applications;
- b) The discussions and communications amongst and between federal justice lawyers during the course of the investigation of the two applications;
- c) The communications between federal justice lawyers and the Minister in relation to the two applications including the reporting of the results of the investigation and any advice to the Minister;
- d) The factors considered by the Minister in the disposition of the applications under section 690 of the Criminal Code and the basis for her decisions;
- e) The participation of federal justice lawyers and the Minister in the organization and conduct of the Supreme Court Reference including their knowledge of the permissible scope of the hearing (issues and evidence); and
- f) The steps taken by the Minister and federal justice lawyers (and their agents) in relation to the DNA testing of Gail Miller's clothing.

15. A more detailed outline of the relevant subject areas to be canvassed with federal justice witnesses is attached as Appendix "B".

III. Constitutional Question

16. The Commission must be mindful of the fact that its reach is constitutionally limited to matters within the jurisdiction of the Provincial Legislature, as enumerated in s. 92 of the *Constitution Act, 1867*. The Supreme Court of Canada reinforced this principle in *Starr v. Houlden*, [1990] 1 S.C.R. 1366 in the following terms:

"At the outset, it is worth noting that this court has consistently upheld the constitutionality of provincial commissions of inquiry and has sanctioned the granting of fairly broad powers of investigation which may incidentally have an impact upon the federal criminal law and criminal procedure powers. At the same

time, however, this court has consistently held that the power of the provinces to establish commissions of inquiry is not constitutionally unlimited.”

17. The Supreme Court of Canada has set out several principles relating to provincial commissions of inquiry, which will instruct and guide the Commission in determining the constitutional limits of its mandate. Those principles are as follows:

- a) By virtue of s. 92(14) of the *Constitution Act, 1867*, the provinces have power over the administration of justice within the province. The words “the administration of justice in the province” are to be given a fair, large and liberal construction such that they encompass the administration of criminal justice. Implicit in the grant to the provinces of exclusive legislative authority in respect of administration of justice and in the grant to the federal government of exclusive legislative authority in respect of criminal law and procedure is an acceptance of a certain degree of overlapping. Also noted was the following: “A provincial commission of inquiry, inquiring into *any* subject, might submit a report in which it appeared that changes in federal laws would be desirable. There is nothing novel in this. Changes to the *Criminal Code* might seem warranted in which event one would expect the Attorney General to act in liaison with the federal government, as is done daily.” *Di Iorio and Fontaine v. Warden of Common Jail of Montreal and Brunet*, [1978] 1 S.C.R. 152.
- b) A provincial commission of inquiry cannot inquire into the policies, procedures, rules, administration or management of a federal institution or entity: *Attorney General (Que.) and Keable v. Attorney General (Can.)*, [1979] 1 S.C.R. 218.
- c) A provincially appointed commission can inquire into a reference by the federal Minister of Justice under s. 690 (formerly s. 617) of the *Criminal Code*. The province has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of one of its citizens as these are matters pertaining to the administration of justice within the province (subject to the caveat expressed in *Keable*, supra, that no provincially constituted commission of inquiry can inquire into the actual management or operation of the federal activity or entity in question) and they do not constitute an attempt to interfere with the valid federal interest in the enactment of and provision for a uniform system of procedures and rules governing criminal justice in the country: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796.

IV. Process

18. On or before May 23, 2006, counsel for the Minister shall file a written submission outlining the Minister’s position on any constitutional limitations applicable to the Commission’s scope of inquiry. To the extent possible counsel for the Minister shall

June 27, 2006

identify the subject areas in Appendix "B" (outline for federal justice witnesses) that the Minister asserts are beyond the constitutional reach of the Commission.

19. On May 30, 2006, counsel for the Minister may make oral submissions in support of its position. Counsel for any party with a demonstrated interest in these issues may respond (in writing and/or oral submissions) on May 30, 2006.

20. The Commission has two witnesses scheduled to testify with respect to the federal justice department's response to the s.690 applications - Eugene Williams and Ron Fainstein. Once the constitutional issues are resolved, the Commission will consider whether any further federal justice witnesses are necessary.

CONFIDENTIAL

**OUTLINE OF AREAS TO BE COVERED IN EXAMINATION OF
FEDERAL JUSTICE WITNESSES**

1. Provide an overview of the section 690 process;
2. Identify roles and responsibilities of Justice Canada lawyers involved in responding to the section 690 applications filed by David Milgaard;
3. Review David Milgaard's first application to the Federal Minister of Justice (the "Minister") under section 690 of the *Criminal Code* (December 28, 1988) and identify:
 - a. original application materials;
 - b. supplementary information provided by David Milgaard to Justice Canada;
 - c. Justice Canada's communications with David Milgaard and his counsel prior to the filing of the application;
 - d. Justice Canada's communications with Saskatchewan Justice prior to the filing of the application.
4. Review Justice Canada's investigation of the first application including the following:
 - a. Justice Canada's initial review and analysis of the application and the supporting materials;
 - b. Review communication between the Minister/Justice Canada and David Milgaard, his counsel and Joyce Milgaard during the course of the investigation, including the meeting of October 1, 1990;
 - c. Review communication between Justice Canada and Saskatchewan Justice during the course of the investigation;
 - d. Review the role of and interaction with the RCMP (Rick Pearson);
 - e. Review the investigation conducted by Justice Canada, including the following:

is exhibit "E" referred to in the
avit of Christine Elias
n before me this 14th day
July, A.D. 20 06
[Signature]
on Commissioner for Oaths in and for
Province of Saskatchewan.
Commission Expires July 31/11
ng a Solicitor: [Signature]

- (i) the purpose of investigation;
- (ii) the witness interview/examination process including the determination of who was interviewed and why, who was not interviewed and why not, as well as the manner of interview/examination chosen for each witness;

- (iii) the assessment of witnesses and their credibility;
- (iv) identify factual information gathered;
- (v) discussions between Justice Canada lawyers relating to the investigation of the application.

f. Review the process which led to the Minister's decision on February 28, 1991, including:

- (i) Review the investigation report(s) provided by Justice Canada to the Minister, including discussions and communication between Justice Canada lawyers in the course of preparation and review of the report(s);
- (ii) Review the advice provided to the Minister by Justice Canada lawyers;
- (iii) Review the advice provided to the Minister by third parties (i.e. Mr. Justice McIntyre);
- (iv) Elaborate on the decision made by the Minister to dismiss the application and the supporting reasons.

5. Review David Milgaard's second application to the Federal Minister of Justice (August 14, 1991) and identify:

- a. original application materials;
- b. supplementary information provided by David Milgaard to Justice Canada;
- c. Justice Canada's communications with David Milgaard, his counsel and Joyce Milgaard between February 27, 1991 and August 14, 1991;
- d. Justice Canada's communications with Saskatchewan Justice between February 27, 1991 and August 14, 1991.

6. Review Justice Canada's investigation of the second application including the following:

- a. Justice Canada's initial review and analysis of the application and the supporting materials;

- b. Review communication between the Minister/Justice Canada and David Milgaard, his counsel and Joyce Milgaard during the course of the investigation;
- c. Review communication between Justice Canada and Saskatchewan Justice during the course of the investigation;
- d. Review the role of and interaction with the RCMP (Rick Pearson);
- e. Review the investigation conducted by Justice Canada, including the following:
 - (i) the purpose of investigation;
 - (ii) the witness interview/examination process including the determination of who was interviewed and why, who was not interviewed and why not, as well as the manner of interview/examination chosen for each witness;
 - (iii) the assessment of witnesses and their credibility;
 - (iv) identify factual information gathered;
 - (v) discussions between Justice Canada lawyers relating to the investigation of the application.
- f. Review the process which led to the Minister's decision of November 27, 1991, including:
 - (i) Review the investigation report(s) provided by Justice Canada to the Minister, including discussions and communication amongst and between Justice Canada lawyers in the preparation and review of the report(s);
 - (ii) Review the advice provided to the Minister by Justice Canada lawyers;
 - (iii) Review the advice provided to the Minister by third parties (i.e. Mr. Justice McIntyre);
 - (iv) Elaborate on the decision made by the Minister to refer the matter to the Supreme Court of Canada.

7. Identify all documents, materials and information provided by Justice Canada to counsel for David Milgaard.

8. Review the scope of the Supreme Court Reference and the organization of the hearing of the Reference case, including the following:

- a. Review the terms of the Order-in-Council dated November 27, 1991;

- b. Disclosure of documents and information to the Supreme Court and the parties by Justice Canada, Saskatchewan Justice and David Milgaard;
 - c. Review the preparation of the "Case on Reference" and the process used to determine the documents included in the record before the Supreme Court;
 - d. Review how witnesses were selected to testify before the Supreme Court;
 - e. The role of Justice Canada lawyers during the Reference case;
 - f. Review of Supreme Court decision dated April 14, 1991.
9. Review steps taken by the Minister/Justice Canada following the Reference decision.
- a. The Minister's decision to set aside the conviction of David Milgaard, following the Reference decision;
 - b. Post-Reference communication with counsel for David Milgaard, regarding issues raised by David Milgaard;
 - c. The role of Justice Canada officials in arranging for DNA testing of Gail Miller's clothing.

Submissions on Behalf of the Federal Minister of Justice regarding the constitutional limitations on the Saskatchewan Inquiry into the wrongful conviction of David Milgaard.

As this Commission of Inquiry stated at the outset of these proceedings, there are constitutional limits which must be observed by a Provincial Commission of Inquiry when it comes to matters which touch upon the Federal Government.

The Federal Minister of Justice has approached this Provincial Inquiry with a spirit of cooperation: the Minister has sought standing and participates full time at this Inquiry, broad access has been provided to documents, counsel have refrained from objecting from time to time and the Minister has voluntarily proposed that two "federal witnesses" participate.

The material put forward by Commission counsel on May 18th, 2006, contained a proposed outline of areas to be covered with Federal witnesses. This outline suggests areas which may go beyond any reasonable construction of the Commission's mandate and thus it will be imperative to have the constitutional matters clarified before any federal witnesses testify.

At the present time, the two proposed Federal witnesses include Mr. Eugene Williams, Q.C. and Mr. Ronald Fainstein, Q. C. Mr. Williams performed the investigative work in response to Mr. Milgaard's applications for mercy which resulted in many witness statements being taken. Mr. Fainstein was counsel for the Minister of Justice at the Supreme Court reference and was also primarily responsible for pursuing the DNA testing after the s.690 process was over which ultimately led to the exoneration of Mr. Milgaard. To the extent that the facts gathered by these individuals and their testimony will assist the Commission with its work, the Attorney General does not object to their being called, subject to a ruling on the constitutional boundaries.

In addition, the Minister has already asserted a claim of privilege on some of the areas outlined by Commission counsel. As Commission counsel has already indicated, any outstanding issues with privilege will be dealt with after the constitutional matters have been decided.

This is exhibit "F" referred to in the affidavit of Christine Elias sworn before me this 4th day of July, A.D. 2006

[Signature]
A Commissioner for Oaths in and for the Province of Saskatchewan.

My Commission Expires July 31/11

Being a Solicitor [Signature]

I. The constitutional limits of a Provincial Commission of Inquiry.

The legal authority to limit the scope of Inquiry into a Federal entity, such as the Department of Justice, is the Supreme Court of Canada's decision in Quebec (Attorney General) and Keable v. Canada (Attorney General), [1979] 1 S.C.R. 218.

As Commission counsel has already pointed out, the limits of a Provincial Commission of inquiry as stated in Keable are;

"A Provincial commission of Inquiry can not inquire into the policies, procedures, rules, administration or management of a Federal institution or entity"

As the Federal Department of Justice is a Federal institution to which the rules of Keable will apply, there will be constitutional limits upon the areas into which this Provincial Commission of Inquiry can venture.

Commission counsel has used the terms "gather", "assess" and "analyze" a number of times to describe the Federal Government's role in dealing with Mr. Milgaard's s.690 applications. The Minister respectfully submits that the appropriate distinction to be made is between which activities were investigative or fact finding in nature and those which constituted advice, legal or otherwise.

The Minister respectfully submits that those communications which are more appropriately characterized as advice, either written or oral, are at the very core of that which is proscribed by the Supreme Court of Canada's decision in Keable.

II. THE OUTLINE OF AREAS TO BE COVERED IN EXAMINATION OF FEDERAL JUSTICE WITNESSES

Referring to the Commission's outline of areas to be covered in examination of Federal Justice witnesses, the Minister submits that some of the questions or documents are, in whole or in part, beyond the scope of this Inquiry. The areas which concern the Minister are outlined below and where there is only a partial concern with the line of questioning, the specific concern is detailed in brackets.

4(a) Justice Canada's initial review and analysis of the application and the supporting materials. (The review and analysis of the facts by the investigator would be permissible lines of questioning to the extent that it involves fact gathering. If any of the review or analysis is characterized as legal advice or advice to others within the Department from the investigator, it would be beyond the scope of this Inquiry)

4(b) Review communication between the Minister/Justice Canada and David Milgaard, his counsel and Joyce Milgaard during the course of the investigation, including the meeting of October 1, 1990. (If anything in this area would include internal discussions about any of these matters, the line of questioning would take the matter outside the bounds of the Inquiry)

4. (e)(ii) the witness interview/examination process including the determination of who was interviewed and why, who was not interviewed and why not, as well as the manner of interview/examination chosen for each witness. (The investigator can speak to why he interviewed those people he did and the type of examination he chose for each person but he can not be asked about what the practices or policies within the Department are with respect to these questions)

4. (e)(v) discussions between Justice Canada lawyers relating to the investigation of the application.

4. (f) Review the investigation reports Review the process which led to the Minister's decision on February 28, 1991, including:

- (i) Review the investigation report(s) provided by Justice Canada to the Minister, including discussions and communication between Justice Canada lawyers in the course of preparation and review of the report(s);**
- (ii) Review the advice provided to the Minister by Justice Canada lawyers;**
- (iii) Review the advice provided to the Minister by third parties (i.e. Mr. Justice McIntyre);**
- (iv) Elaborate on the decision made by the Minister to dismiss the application and the supporting reasons. (ok)**

6. (e) Review the investigation conducted by Justice Canada, including the following:

(v) discussions between Justice Canada lawyers relating to the investigation of the application.

6. (f) Review the process which led to the Minister's decision of November 27, 1991, including:

- (i) Review the investigation report(s) provided by Justice Canada to the Minister, including discussions and communication amongst and between Justice Canada lawyers in the preparation and review of the report(s);**
- (ii) Review the advice provided to the Minister by Justice Canada lawyers;**
- (iii) Review the advice provided to the Minister by third parties (i.e. Mr. Justice McIntyre);**

- (iv) Elaborate on the decision made by the Minister to refer the matter to the Supreme Court of Canada.
- (v) Review steps taken by the Minister/Justice Canada following the Reference decision.

9. (a) The Minister's decision to set aside the conviction of David Milgaard, following the Reference decision;

(c) The role of Justice Canada officials in arranging for DNA testing of Gail Miller's clothing (This is a very general statement and without further details, it is difficult to determine what the Constitutional limitations are).

III. THE PERMISSIBLE AREAS OF INQUIRY

The Minister concedes that a Provincial Inquiry can inquire into those aspects of the handling of the s.690 applications filed by Mr. Milgaard, subject to the constitutional limitations, based on the Supreme Court's decision in McKeigan v. Hickman [1989] 2 S.C.R. 796.

However, the mandate of this Commission is only concerned with the s. 690 process as it existed at the time of Mr. Milgaard's applications. The Commission should be conscious of not only the constitutional limitations on its mandate in this regard, but the practical reality that the mercy process is much different now than it was at the time of Mr. Milgaard's applications. The relevant Criminal Code provisions have been significantly amended and the administration of mercy applications has been altered.

IV CONCLUSION

The Minister has agreed to fully participate in this Inquiry as demonstrated by seeking standing, the disclosure of numerous documents and the voluntary participation of witnesses.

As this is a Provincial Commission of Inquiry, the parameters of such must respect constitutional limitations.

The Minister respectfully requests a ruling on the general scope of the constitutional boundaries of this commission of Inquiry along with a ruling on the specific areas as identified in part II of this submission to facilitate the Minister's cooperation with the Inquiry. These matters should be dealt with prior to any Federal witnesses giving evidence so that there is a common understanding of the appropriate focus of questioning.

**COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION
OF DAVID MILGAARD**

Honourable Mr. Justice Edward P. MacCallum, Commissioner

**REPLY OF THE GOVERNMENT OF SASKATCHEWAN
TO SUBMISSIONS ON BEHALF OF THE FEDERAL MINISTER
OF JUSTICE REGARDING THE CONSTITUTIONAL
LIMITATIONS ON THE SASKATCHEWAN INQUIRY
INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD**

Douglas E. Moen, Q.C.
Deputy Minister of Justice and
Deputy Attorney General for Saskatchewan
10th Floor, 1874 Scarth Street
REGINA SK S4P 3V7

This is exhibit "G" referred to in the
affidavit of Christine Elias
sworn before me this 14th day
of July, A.D. 2006

D. Moen
A Commissioner for Oaths In and for
the Province of Saskatchewan.
My Commission Expires July 31/11
Being a Solicitor

INTRODUCTION

1. The Government of Saskatchewan ("Saskatchewan") submits this Reply in response to the document dated May 23, 2006 submitted by the Government of Canada ("Canada") and entitled "Submissions on behalf of the Federal Minister of Justice regarding the Constitutional Limitations on the Saskatchewan Inquiry into the Wrongful Conviction of David Milgaard".

2. Saskatchewan does not intend to make a formal oral presentation at the hearing before the Commissioner, the Honourable Mr. Justice Edward P. MacCallum, scheduled for May 30, 2006 at which time Canada will ask for a formal ruling on its objections to certain areas of inquiry about which Commission counsel gave notice he intended to pursue with witnesses from the Department of Justice (Canada). However, counsel for Saskatchewan will be present to answer any questions the Commissioner may have regarding the submissions contained in this Reply.

GENERAL POSITION

3. Saskatchewan established this Commission of Inquiry into the Wrongful Conviction of David Milgaard by Order-in-Council 84/2004 dated February 18, 2004. The scope of inquiry for this Commission is broad as set out in paragraph 1 of its Terms of Reference as follows:
 1. The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller. The Commission of Inquiry will also have the responsibility to seek to determine whether the investigation should have been re-opened based on information subsequently received by the police

and the Department of Justice. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province of Saskatchewan. (Emphasis added).

4. Saskatchewan accepts that a provincial commission of inquiry such as this one, has certain limitations placed upon it by the Constitution of Canada. Generally, Saskatchewan agrees with the summary of the constitutional limits found at pages 5 and 6 of the Commission's Position Paper on the Terms of Reference and dated December 7, 2004. That summary is replicated in part at page 4 of Commission counsel's memorandum dated May 18, 2006.

5. In response to the Commission's Position Paper, Saskatchewan filed a short document setting out its position respecting the constitutional limitations upon the parameters of the Commission's jurisdiction. Two limitations were highlighted in that document. The second limitation identified there is especially relevant now. It reads:

The second limitation is that a province cannot inquire into the policies, procedure, rules or administration or management of a federal institution or entity ... [Saskatchewan] acknowledges that this limitation may potentially come into play in relation to aspects of the federal review under section 690 of the *Criminal Code*, but agrees with the position paper that it is not possible, at this early stage of the proceedings, to determine if this constitutional limitation may need to be considered.

6. When establishing this Commission and formulating its terms of reference, Saskatchewan sought to imbue it with a scope of inquiry as generous as possible within accepted constitutional constraints. Saskatchewan wants the Commissioner to inquire into, and make recommendations about, all aspects of the administration of criminal justice in Saskatchewan which may have

contributed to the wrongful conviction of David Milgaard. This would include actions taken by the Department of Justice (Canada) that might have affected decisions made by police, prosecutors and other justice officials in Saskatchewan about this matter. It is precisely for this reason that subject to the comments below, Saskatchewan submits the Commission has the constitutional authority to inquire into the operation of section 690 of the *Criminal Code* in the context of Mr. Milgaard's two applications.

SOLICITOR/CLIENT PRIVILEGE

7. Saskatchewan submits that it is important to segregate questions of solicitor/client privilege from issues of constitutionality. Claims of privilege have no bearing on whether a provincial commission of inquiry has the constitutional authority to inquire into a particular subject-matter. Such a commission may be prevented from pursuing even legitimate areas of inquiry by valid claims of solicitor/client privilege.

8. Saskatchewan submits that Canada blurs these two issues. At page 2, it states that "the appropriate distinction to be made is between which activities were investigative or fact finding in nature and those which constituted advice, legal or otherwise". This distinction may be useful for addressing any claims of privilege which Canada might advance; however, it offers little assistance in resolving the objections based upon the Constitution that Canada now raises.

CONSTITUTIONAL OBJECTIONS

9. Saskatchewan agrees with Canada that the governing authority is *Quebec (Attorney General) and Keable v. Canada (Attorney General)*, [1979] 1 S.C.R. 218. It was in *Keable* that Pigeon J. for the majority announced at page 242 that a provincial commission of inquiry lacked the constitutional authority to inquire into or make recommendations respecting “the administration and management of the [Royal Canadian Mounted Police]”. At issue in *Keable* was the constitutionality of a provincial commission of inquiry established by the Government of Quebec to investigate alleged criminal activities undertaken by the RCMP in that province. The terms of reference gave the Keable Commission wide ranging powers. The Supreme Court upheld virtually all of these terms; however, it did remove certain portions which appeared to authorize the provincial commission of inquiry to make recommendations respecting systemic policies and regulations of the RCMP. In particular, paragraph d) authorized the Keable Commission “to make recommendations on the measures to be taken to ensure that any illegal or reprehensible acts the Commission uncovers will not be repeated in the future”. Pigeon J. concluded that this particular paragraph could not stand. He stated at page 243 that:

This paragraph pertaining to recommendations following as it does provisions contemplating an inquiry into the regulations and practices of the R.C.M.P., is clearly intended to invite, as a purpose of the inquiry, recommendations for changes in such regulations and practices. Inasmuch as these are the regulations and practices of an agency of the federal government, it is clearly not within the proper scope of the authority of a provincial legislature to authorize such an intrusion by an agent of a provincial government. (Emphasis in original).

10. The principles which emerge from *Keable* and subsequent authorities which applied it, demonstrate that this Commission does not lack authority to penetrate the walls of the Department of Justice (Canada), as it were. Saskatchewan submits that this Commission can investigate the various actions undertaken, and decisions taken by officials in the Department of Justice (Canada) subject to valid claims of solicitor/client or Crown privilege, in respect of the two applications under section 690 of the *Criminal Code* brought on behalf of Mr. Milgaard.

11. Saskatchewan does concede that following *Keable*, this Commission lacks the constitutional authority to embark upon a general systemic inquiry into the Department of Justice (Canada)'s policies, procedures and protocols respecting the operation of section 690 applications either at the time of Mr. Milgaard's two applications or at present.

12. Saskatchewan leaves it to the Commissioner to decide which areas of inquiry fall outside these general parameters.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 30th day of May, 2006.

Graeme G. Mitchell, Q.C.

Counsel for the Government of Saskatchewan

RESPONSE ON BEHALF OF THE FEDERAL MINISTER OF JUSTICE TO THE CONSTITUTIONAL SUBMISSIONS OF THE GOVERNMENT OF SASKATCHEWAN

The Attorney General of Canada has reviewed the written submissions of the Government of Saskatchewan dated the 30th day of May, 2006 and submits the following responses.

I. In response to paragraph 8

The Attorney General of Saskatchewan is submitting that the Attorney of General of Canada is blurring the issue of privilege with the constitutional limitations of a Provincial Inquiry.

The Attorney General of Canada submits that privilege and constitutional limitations are separate and distinct issues. The issue before this Commission of Inquiry today is what constitutes the **administration and management** of the Federal Department of Justice. Whether or not a matter is privileged is not relevant to a determination of the constitutional limitations upon this inquiry, even though the two may overlap.

II. In response to paragraph 10

The Government of Saskatchewan is suggesting that the only limits upon this Inquiry are the claims of solicitor client privilege.

The Attorney General of Canada submits that this proposition ignores the limitations as set out in Keable.

III. In response to paragraph 11

The Government of Saskatchewan submits that the Commission of Inquiry only "lacks the constitutional authority to embark upon a general systemic inquiry into the Department of Justice (Canada)'s policies, procedures and protocols respecting the operation of section 690 applications either at the time of Mr. Milgaard's two applications or at the present."

This is exhibit "H" referred to in the affidavit of Christine Elias sworn before me this 4th day of July, A.D. 2006

[Signature]
A Commissioner for Oaths in and for the Province of Saskatchewan.

My Commission Expires July 31/11

Being a Solicitor [Signature]

The Attorney General of Canada takes the position that the terms from Keable such as the **administration** and **management** of a Federal institution encompass more than general policies or procedures. Further, constitutional limitations are not qualified or confined in Keable to the type of Inquiry (a general systemic Inquiry) but rather whether the issue or facts sought to be inquired into are within the administration and management of the Federal Department of Justice. The Attorney General of Canada restates its position by saying that activities which go beyond an investigative or fact finding level within the Department of Justice, are activities which are within the administration and management of the Federal Department of Justice.

Surely if the Supreme Court intended the constitutional limits to extend only to the general policies and procedures of a Federal entity such as Justice, it would not have included the terms administration and management in the prohibited areas along with policies, procedures and rules.

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MR. HODSON: Good afternoon, Mr. Commissioner. I thought I would just introduce this issue and give a bit of background. We will now deal with the determination of constitutional limitations and I will not be making formal submissions on the issue, but rather will set out a bit of background and history on this, identify what the issues are and introduce the parties who will be making submissions.

This Commission of Inquiry is a provincial Commission of Inquiry created by the Government of Saskatchewan and therefore its constitutional reach is limited in some respects because it's a provincial inquiry. As you know, we have heard evidence that David Milgaard's application went, or two applications went to the Federal Justice Minister and that the Justice Department and justice ministers were involved to a significant degree in dealing with his applications and so the question, or the constitutional question is the extent, is to determine the extent to which this Commission of Inquiry can inquire into matters involving the

is exhibit I referred to in the
oath of Christine Elias
before me this 4th day
July 25, A.D. 2006
Commissioner for Oaths in and for
Province of Saskatchewan.
Commission Expires July 31/11
ing a Solicitor



1 was raised back in December of 2004 before --
2 actually, in June of 2004 before we started
3 hearings. The Commission published a position
4 paper to the parties indicating here's how we
01:37 5 initially interrupt our Terms of Reference,
6 here's where we think we are entitled to and must
7 go.

8 We received submissions of the
9 parties, including from the federal government
01:37 10 and provincial government. In that paper we
11 identified this constitutional, potential
12 constitutional limitation saying that there may
13 be a line out there that we cannot cross, there
14 may be some matters involving the Federal Justice
01:37 15 Department, the Federal Justice Minister that are
16 outside the constitutional bounds of this
17 Inquiry.

18 We received feedback from both
19 the provincial and federal government who in
01:37 20 essence agreed that yes, we're entitled to get
21 into some aspects of it, there is a line and it's
22 best to address where the line is drawn at a
23 later date. That later date is now.

24 The second issue that I should
01:37 25 point out is the interpretation of the Terms of



1 Reference and we have put out on May 18th, 2006,
2 I sent out a document to all parties with some
3 background information, and if we could actually
4 maybe call that up, I think it is the -- yes,
01:38 5 here's the document, and there are a bit of
6 background information here, but on the Terms of
7 Reference, I just will point out a couple of
8 things.

9 Basically I think what we as a
01:38 10 Commission have concluded, or how we have
11 interpreted our Terms of Reference is that but
12 for any constitutional limitations and but for
13 solicitor/client privilege, which I'll deal with
14 in a moment, that most if not all of the
01:38 15 activities of Federal Justice officials and the
16 minister fall within the Terms of Reference which
17 are our guide to what we do, and again this was
18 sent out to the parties, and then on the next
19 page there's just a couple of paragraphs that I
01:38 20 should point out and I will read them because I
21 think they spell out the most significant part of
22 where the Section 690 proceedings are relevant.

23 And at paragraph 10:

24 "One of the functions the Federal
01:39 25 Justice Officials and the Minister in



1 responding to the s.690 applications was
2 to gather and assess information
3 relevant to the applications. To the
4 extent that the information gathered and
01:39 5 assessed by Federal Justice Officials
6 was information relevant to the
7 re-opening of the investigation and was
8 received by police and Saskatchewan
9 Justice, the information (source and
01:39 10 reliability) is relevant to the
11 Commission's Terms of Reference."

12 Paragraph 11:

13 "The investigation of and responses to
14 the s.690 applications by the Minister
01:39 15 and the decision of the Supreme Court of
16 Canada in the Reference case were, to
17 some extent, relied upon by the police
18 and Saskatchewan justice in their
19 decision not to re-open the
01:39 20 investigation. The Minister's
21 investigation of and response to the two
22 applications and the Supreme Court
23 Reference case are therefore relevant to
24 this aspect of the Terms of Reference."

01:39 25 And so that is where I think the most significant



1 relevance is with respect to what Federal Justice
2 did, and lastly, there's mention made as well
3 that this Commission is to make recommendations
4 regarding the administration of criminal justice
01:40 5 in the Province of Saskatchewan and certainly
6 there are matters relating to the setting aside
7 of a wrongful conviction in this province that
8 may be touched on by some of the evidence of
9 these justice officials.

01:40 10 So the constitutional question
11 is essentially this, to what extent should our
12 Terms of Reference be interpreted to have limits
13 to the constitutional scope of where we can go.

14 The reason we're raising it
01:40 15 today is that we're scheduled to have Eugene
16 Williams testify later this week or next week and
17 so I think the parties are looking for some
18 guidelines or information about where this line
19 ought to be drawn.

01:40 20 There's one other document that
21 I should bring up, that is an outline, 337974,
22 and I won't go through this, but essentially this
23 is a document that I prepared that set out all
24 the various subject areas that could be canvassed
01:41 25 with Federal Justice officials and it was



1 provided to assist the parties in making their
2 submissions and in particular for the Federal
3 Justice lawyers to say what areas here do you say
4 are outside the constitutional bounds.

01:41 5 The last point I wish to bring
6 up is the issue of solicitor/client privilege.
7 The Federal Justice Minister has asserted
8 solicitor/client privilege with respect to
9 various documents and communications between
01:41 10 justice lawyers and the Federal Minister.

11 They've provided that position to the Commission
12 in a letter dated April 14th of this year. That
13 issue at their request will be put aside until
14 after the constitutional issue is decided and so
01:41 15 once you rule on the constitutional limits, we
16 will then go to the next step and say to what
17 extent does privilege preclude us from getting
18 into certain areas of advice.

19 I think the parties that I
01:42 20 canvassed, I advised all parties that they were
21 entitled to make oral and written submissions.
22 I'm advised that Mr. Frayer, who is here on
23 behalf of Federal Justice, has filed a written
24 application last week, he's filed a rebuttal as
01:42 25 well to the provincial position this afternoon.



1 He will speak first. Next, Graeme Mitchell, who
2 I can introduce now, from the Department of
3 Justice Saskatchewan, will be here to address the
4 submissions on behalf of the Government of
01:42 5 Saskatchewan, and then I believe Mr. Wolch may
6 have some submissions on behalf of David Milgaard
7 with respect to these issues. No other party has
8 expressed a desire to be heard on that matter.

9 So with that, I will call upon
01:42 10 Mr. Frayer.

11 MR. FRAYER: Thank you, Mr. Commissioner.
12 Yes, Mr. Hodson has outlined in fairly succinct
13 form the issue before you this afternoon. I
14 might say at the outset that I would observe that
01:43 15 the motion is not intended in any way to impede
16 the work of this Inquiry.

17 It says, Mr. Hodson has
18 outlined a request to have the constitutional
19 limitations of this provincial inquiry looking
01:43 20 into the actions of federal government officials
21 defined before any Federal Justice witnesses are
22 called, and as you heard from Mr. Hodson, Mr.
23 Williams is likely to start his evidence either
24 later this week or early next week and to that
01:43 25 end, to show sort of the continuing spirit of



1 co-operation with respect to the Inquiry, Mr.
2 Hodson and I have spent some considerable time in
3 interviewing and preparing Mr. Williams, there's
4 still a fair amount of work to be done as you can
01:43 5 appreciate, but we have gone through some
6 interviews of him and we expect that he will be
7 ready to proceed, as Mr. Hodson has indicated,
8 either later this week or at the commencement of
9 next week's activities.

01:44 10 As you are well aware too,
11 constitutional limitations are not subject to
12 waiver or negotiation. Now, as I've said to
13 date, the Minister of Justice of Canada has
14 co-operated fully with the Inquiry since standing
01:44 15 was granted back in early March, 2005. We've
16 provided a substantial number of documents, we've
17 fully participated in the Inquiry since standing
18 was granted and as has been noted, we've provided
19 actually two witnesses who we expect will be
01:44 20 called during the course of the Inquiry, the
21 first of those is Mr. Williams, the second of
22 those is Mr. Fainstein, who will likely be called
23 at some later stage.

24 By way of background, it's
01:44 25 clear that you, Mr. Commissioner, are very much



1 aware of the constitutional limitations that
2 obtain in situations like this and I hearken back
3 to some comments you made very early on in these
4 proceedings, back on April the 20th of 2004, and
01:45 5 I quote from what you said:

6 "The reach of our Commission is
7 constitutionally limited to matters
8 within the jurisdiction of the
9 legislature. We cannot infringe on
01:45 10 federal power or the criminal law or
11 procedure, we cannot investigate the
12 internal workings of a federal
13 institution."

14 I think that's a recognition of what the Supreme
01:45 15 Court of Canada said in the *Keable* decision which
16 is the decision upon which the Minister of
17 Justice Canada primarily relies to say where the
18 line should be drawn with respect to a provincial
19 inquiry looking into the work of a federal
01:45 20 department or institution.

21 And once again, you recognized
22 this particular limitation in an observation you
23 made back on November 29th of 2005 where we were
24 dealing then with a solicitor/client privilege
01:46 25 issue and you said:



1 "The federal government of course is in
2 a special position here constitutional."

3 So I think with respect, that there is a
4 recognition that there are certain constitutional
01:46 5 limitations that have to be abided by when it
6 comes to looking at the operation of a federal
7 institution.

8 Now, insofar as the position of
9 the Minister of Justice is concerned, on May the
01:46 10 23rd we filed with the Commission through Mr.
11 Hodson a four page document which is essentially
12 the brief upon which I'm relying this afternoon
13 and would ask you, Mr. Commissioner, to consider
14 that as essentially setting out the position of
01:46 15 the Minister of Justice Canada.

16 If I might just make brief
17 reference to that particular document and sort of
18 highlight a couple of areas of it, and reading
19 from the first page, although I note the pages
01:47 20 aren't numbered:

21 "At present, the two proposed Federal
22 witnesses ..."

23 Are those that I've mentioned. It goes on near
24 the end:

01:47 25 "To the extent that the facts gathered



1 by these individuals and their testimony
2 will assist the Commission with it's
3 work, the Attorney General does not
4 object to their being called, within the
01:47 5 appropriate constitutional boundaries."

6 It goes on:

7 "As Commission counsel has already
8 indicated, any outstanding issues with
9 privilege will be dealt with after
01:47 10 constitutional matters have been
11 decided."

12 And I think that's, at least insofar as the
13 Minister of Justice is concerned and Commission
14 Counsel, and he's already given you that position
01:47 15 this afternoon, that the understanding here today
16 is that the constitutional limitation is the only
17 part of this motion that's before the Inquiry.

18 Now, with respect to the
19 constitutional limits of a provincial Commission
01:48 20 of Inquiry, on page 2 there's a quote from *Keable*
21 which is the case that essentially is relied upon
22 by the Minister of Justice, and it says:

23 "A Provincial commission of inquiry can
24 not inquire into the policies,
01:48 25 procedures, rules, administration or



1 management of a Federal institution or
2 entity."

3 Which is a fairly comprehensive prohibition
4 against a provincial Commission of Inquiry
01:48 5 inquiring into those areas. What I might say the
6 judgment lacks is any reference to any definition
7 of any of the meanings of those words, but I
8 suppose at some stage or other should the issue
9 arise, I'll be asking, Mr. Commissioner, for your
01:48 10 ruling as to whether it comes under one of those
11 particular headings as set out in *Keable*.

12 COMMISSIONER MacCALLUM: Yes. I think, Mr.
13 Frayer, that you can't expect too much from me in
14 terms of guidelines which are very specific,
01:48 15 because in large measure they will be fact driven
16 by what we hear from a witness and then it will
17 be up to me to decide whether what he's saying is
18 a proscribed area as being under -- as being
19 administration or rule or procedure or whatever,
01:49 20 so I'll do my best to give some guidelines, but I
21 can't promise that they will answer all the
22 questions at the time.

23 MR. FRAYER: I'm sure you will. It doesn't
24 assist in terms of, as I say, defining any of
01:49 25 those areas. I suppose you can look at the plain



1 meaning of some of those words and say that the
2 particular evidence attempted to be adduced is
3 evidence that may fall under one of those
4 headings, so --

01:49 5 COMMISSIONER MacCALLUM: Yes.

6 MR. FRAYER: And we have set out in fair
7 detail in response to the document that was
8 prepared by Commission Counsel and provided to
9 all the parties the outline of areas to be
01:49 10 covered in examination of Federal Justice
11 witnesses, and I'm not going to go through all of
12 those with you this afternoon, you have our
13 position as set out there with respect to those
14 witnesses, and of course we have the conclusion
01:50 15 which is essentially here, that the minister
16 respectfully requests a ruling on the general
17 scope of the constitutional boundaries of this
18 Commission of Inquiry along with a ruling on the
19 specific areas as identified in part 2 of the
01:50 20 submission to facilitate the minister's
21 co-operation at the Inquiry. These matters
22 should be dealt with prior to any federal
23 witnesses giving evidence, and so on, so that's
24 why this particular motion is being made this
01:50 25 afternoon shortly in advance of Mr. Williams'



1 appearance here later this week or early next
2 week.

3 Now, with respect to the
4 position taken by the Government of Saskatchewan,
01:50 5 I was kindly provided with a copy of their
6 submission this morning and there was an
7 opportunity to review it and to get some
8 assistance with respect to its contents and we
9 have prepared a response on behalf of the Federal
01:50 10 Minister of Justice to the constitutional
11 submissions of the Government of Saskatchewan
12 which is a document that, in fairness, I just
13 gave Mr. Mitchell just before proceeding this
14 afternoon for his review and I'm not certain
01:51 15 whether he's had a chance to digest it, but it
16 has some comment with respect to some of the
17 issues raised in that brief that he's going to
18 make submissions on shortly.

19 So the position is as set out
01:51 20 in that four page document, Mr. Commissioner, and
21 unless you have any further questions, that's my
22 submission and brief.

23 COMMISSIONER MacCALLUM: Thank you very
24 much. I just have one, is there any agreement on
01:51 25 the proper pronunciation of K-E-A-B-L-E?



1 MR. FRAYER: Well, assuming it comes out of
2 Quebec, I call it Keable.

3 COMMISSIONER MacCALLUM: That's what I've
4 always heard, but I've heard people say Keable
01:51 5 and I thought maybe it would be uniquely
6 Saskatchewan.

7 MR. FRAYER: It may be, and it even found
8 its way into a document this morning.

9 COMMISSIONER MacCALLUM: Okay. Keable is
01:51 10 your version?

11 MR. FRAYER: That's my version.

12 COMMISSIONER MacCALLUM: Okay.

13 MR. FRAYER: Thank you.

14 MR. MITCHELL: Thank you, Mr. Commissioner.
01:52 15 On behalf of the Government of Saskatchewan, my
16 colleague filed a written submission, a draft
17 written submission with, I understand, with you
18 and with Mr. Hodson and other parties and I
19 understand that an executed copy of that document
01:52 20 has been filed and we are relying simply on that.
21 I do not propose, Mr. Commissioner, to go through
22 it with you today. I believe the document itself
23 speaks for itself and sets out the position of
24 the government with respect to the Federal
01:52 25 Department of Justice's objections as clearly as



1 we can. I would be happy, of course, to answer
2 any questions that you may have,
3 Mr. Commissioner, arising from that.

4 I just wanted to make a couple
01:53 5 of comments with respect to the reply that has
6 been, or the response to our document that has
7 been filed on behalf of the Federal Department of
8 Justice, Mr. Frayer was kind enough to give me a
9 copy just before we resumed this afternoon, and I
01:53 10 note really we're not all that far apart on
11 certain aspects of this claim. Certainly he does
12 agree with me that solicitor/client privilege
13 issues and the framing of those issues as
14 privilege issues are really of no particular help
01:53 15 to you as a Commissioner for assessing the
16 constitutional parameters of a provincial
17 Commission of Inquiry.

18 In respect to their response to
19 paragraph 10 of the government brief, I'm quoting
01:53 20 here, the federal department suggests in response
21 to paragraph 10, and I quote:

22 "The Government of Saskatchewan is
23 suggesting that the only limits upon
24 this Inquiry are the claims of solicitor
01:54 25 client privilege."



1 With respect, we're not being that expansive. We
2 do accept that there are limits upon a provincial
3 Commission of Inquiry, what they can do in
4 respect of the internal operations, management,
01:54 5 administration of a federal entity such as the
6 Federal Department of Justice. In our respectful
7 submission, in this particular case, in this
8 particular inquiry that is before you, that you
9 do have a broad scope to inquire into what
01:54 10 happened specifically with respect to the
11 applications brought by Mr. Milgaard under
12 Section 690 and it gives you a fair range of
13 opportunity in our submission to inquire into
14 what transpired.

01:55 15 Where the Government of
16 Saskatchewan would draw the line and agree with
17 the Government of Canada is that you cannot, as a
18 provincial Commission of Inquiry, then embark
19 upon what we have described in the brief as a
01:55 20 general systemic review of that process either at
21 the time Mr. Milgaard filed his applications with
22 the Minister of Justice or at the present time
23 how those applications are dealt with by the
24 Federal Department of Justice, but with respect
01:55 25 to how the application process worked out in this



1 particular matter, in our respectful submission
2 you do have a broad scope and you do have the
3 opportunity, subject of course to valid claims of
4 solicitor/client privilege, and I suspect there
01:55 5 will be quite a few of those, you will have an
6 opportunity to investigate, as a matter of
7 context, background and fuller appreciation of
8 what transpired.

9 As we've said in our
01:56 10 submission, it is the hope of the government that
11 in setting up this Inquiry and receiving the
12 recommendations of you as Commissioner that we
13 will have a much better understanding of what
14 went wrong with the administration of justice in
01:56 15 this particular matter and we believe it is
16 important for you to have the opportunity to
17 investigate how the Section 690 applications
18 proceeded and the fall-out from those occurred.

19 Subject to any questions,
01:56 20 Mr. Commissioner, that you may have, those are
21 the submissions on behalf of the government.

22 COMMISSIONER MacCALLUM: Mr. Mitchell, on
23 page 2, starting on page 2 of your written
24 submission, you say:

01:56 25 "Saskatchewan wants the Commissioner to



1 inquire into, and make recommendations
2 about, all aspects of the administration
3 of criminal justice in Saskatchewan
4 which may have contributed to the
01:57 5 wrongful conviction of David Milgaard.
6 This would include actions taken by the
7 Department of Justice (Canada) that
8 might have affected decisions made by
9 police, prosecutors and other justice
01:57 10 officials in Saskatchewan about this
11 matter."

12 Now, I find that, with respect, not only helpful,
13 but straightforward, except that, you know, to
14 boil it down a little further, what sort of
01:57 15 actions, would actions include policy decisions,
16 for example? For example, witness X did such and
17 such, that would be relevant, I would determine
18 it would be relevant, and that it might have
19 affected decisions taken by Saskatchewan police
01:57 20 or justice officials, but would the action, would
21 the reason for the action taken be an admissible
22 line of inquiry which is getting into a bit of a
23 policy issue?

24 MR. MITCHELL: And this is where the line
01:57 25 gets a bit blurred and I readily concede that,



1 Mr. Commissioner. It is our position that you do
2 have the authority to inquire about, for example,
3 and as a hypothetical, if witness X was saying we
4 followed this process because it was in keeping
01:58 5 with our policy with respect to this particular
6 aspect of a Section 690 application, it would be
7 our position that that's a legitimate area of
8 inquiry. I think where the line, when you bump
9 up against what we would say is the
01:58 10 constitutional line between a valid area of
11 inquiry for you and an ultra vires area of
12 inquiry, would be then if you were then to try
13 and inquire but why is this policy in place, is
14 this the best policy, how might this policy be
01:58 15 better.

16 COMMISSIONER MacCALLUM: Yes.

17 MR. MITCHELL: I think that, in our
18 respectful submission, that is where you hit the
19 line.

01:58 20 COMMISSIONER MacCALLUM: Yes. You would
21 also get into a doubtful area when it comes to
22 advice given to witness X for doing such and such
23 a thing and if he said, "well, I did it because I
24 was advised," "well, what were you advised," he
01:59 25 would say "sorry, I can't tell you that because



1 that's a matter that the administration is
2 proscribed by Keable," but really that's not an
3 answer, I mean, it almost begs the question "my
4 action is justified because I am advised that it
01:59 5 was justified," and it's very unhelpful at the
6 very least. Whether or not it's constitutional
7 or not I don't know.

8 MR. MITCHELL: It would be our position
9 that as Commissioner you should try and view this
01:59 10 as broadly as you can.

11 COMMISSIONER MacCALLUM: Yes.

12 MR. MITCHELL: Understanding, of course,
13 that there is a certain area that you can't
14 trespass into. In our respectful submission that
01:59 15 is a systemic review.

16 COMMISSIONER MacCALLUM: Yes, and secondary
17 where it's likely to come into play I think is in
18 the area of recommendations.

19 MR. MITCHELL: Yeah.

01:59 20 COMMISSIONER MacCALLUM: And at that point
21 if I try to make recommendations which invade
22 federal jurisdiction which trench upon federal
23 jurisdiction, I'm sure to receive complaints
24 about it, and I would like to know in advance
02:00 25 what the limitations are, so those things are not



1 very easy to verbalize at this moment I must say.

2 MR. MITCHELL: Yeah, I agree with you, it's
3 difficult to deal with this as hypotheticals.

4 COMMISSIONER MacCALLUM: Yes.

02:00 5 MR. MITCHELL: And I certainly appreciate,
6 and the government certainly does appreciate the
7 difficulties you would have as a Commissioner
8 trying to craft your report and particularly your
9 recommendations --

02:00 10 COMMISSIONER MacCALLUM: Uh-huh.

11 MR. MITCHELL: -- on these particular
12 aspects of this matter, but we would urge you to
13 use as broad a scope as you can, as you feel you
14 are entitled to constitutionally, and our view is
02:00 15 that you do have a fair latitude, but not an
16 all-embracing latitude to deal with that.

17 COMMISSIONER MacCALLUM: Well, I was
18 thinking, as a matter of fact, that if I am to
19 err at this stage of the proceedings, I should do
02:01 20 so on the side of inclusion which is in the
21 spirit of a public inquiry, but leave it open to
22 counsel at the end of the inquiry when it comes
23 to the recommendation stage to argue that while
24 you heard that and that was the evidence, but
02:01 25 nevertheless it shouldn't -- it now appears that



1 it's unconstitutional, it shouldn't be a part of
2 your recommendations.

3 MR. MITCHELL: And with respect,
4 Mr. Commissioner, that seems like a very prudent
02:01 5 way to approach because at least at that point
6 there will be a factual basis upon which you can
7 then apply these standards. Even now at this
8 stage of the inquiry we're still a little bit in
9 a hypothetical area, not so much of course as we
02:01 10 were at the outset, but certainly right now we
11 are still dealing somewhat with hypotheticals.

12 COMMISSIONER MacCALLUM: Thank you,
13 Mr. Mitchell.

14 MR. MITCHELL: Thank you, Mr. Commissioner.

02:01 15 COMMISSIONER MacCALLUM: And Mr. Wolch?

16 MR. WOLCH: Mr. Commissioner, having heard
17 My Friend from the Province of Saskatchewan, I
18 can indicate that we agree with his position and
19 don't feel necessary to repeat it. What he said
02:02 20 and the comments that the Commissioner said in
21 reply are such that I don't feel I have to go
22 through a submission.

23 I might, though, just make one
24 observation and that is that Commission Counsel,
02:02 25 who is exceptionally familiar with where we're



1 heading and what's required, has prepared an
2 outline and obviously a lot of care and time went
3 into that and Commission Counsel obviously is of
4 the view that it's relevant to this Inquiry, that
02:02 5 it's important to this Inquiry, and we accept
6 that, so any limitation on relevant evidence we
7 discourage and we're encouraged by your words
8 about inclusion, so accordingly, we stress that
9 it is relevant and we also stress that we are
02:03 10 interested in one case, the *Milgaard* case and
11 what happened there, our interest does not go
12 into the department's handling of other cases and
13 we don't really care, we care what happened here,
14 and that's what we want to find out, and so we
02:03 15 simply urge the Commission to accept the
16 Saskatchewan position which we adopt.

17 Thank you.

18 COMMISSIONER MacCALLUM: Thanks, Mr. Wolch.

19 MR. HODSON: I think those are all the
02:03 20 submissions, Mr. Commissioner, and might I
21 suggest we just take a short adjournment to allow
22 Mrs. Milgaard to return to the stand.

23 A I'm here.

24 MR. HODSON: Oh, sorry, okay, no short
02:04 25 adjournment required.



This is exhibit "J" referred to in the affidavit of Christine Elias sworn before me this 4th day of July, A.D. 2006

**IN THE MATTER OF AN APPLICATION
BY
FEDERAL MINISTER OF JUSTICE
TO SET CONSTITUTIONAL LIMITATIONS
ON THE QUESTIONING OF FEDERAL WITNESSES**

[Signature]
A Commissioner for Oaths in and for the Province of Saskatchewan.

My Commission Expires July 31/11
Being a Solicitor [Signature]

DECISION

The Federal Minister of Justice (Justice Canada) asks that I set limits upon the questioning of its witnesses which recognize its constitutional jurisdiction over criminal law and procedure.

Saskatchewan's view of those limits is somewhat more expansive as may be seen by comparing the written submissions of these two parties with standing.

Mr. Wolch, for David Milgaard, the only other party with standing to make submissions, agreed in essence with Saskatchewan's stance.

Justice Canada has no objection to witnesses Williams and Fainstein being called "within the appropriate constitutional boundaries". Those boundaries, as everyone recognizes, were set in *Quebec (Attorney General) and Keable v. Canada (Attorney General)* [1979], 1 S.C.R. 218 and followed in *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796 where McLachlin J. stated:

I am satisfied that the Province has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of Donald Marshall, Jr. These are matters pertaining to the administration of justice within the Province, and, subject to the caveat expressed by Pigeon J. in *Attorney General (Que.) and Keable v. Attorney General (Can.)*, [1979], 1 S.C.R. 218, that **no provincially constituted commission of inquiry can inquire into the actual management or operation of the federal activity or entity in question** (there the R.C.M.P.), they do not constitute an attempt to interfere with the valid federal interest in the enactment of and provision for a uniform system of procedures and rules governing criminal justice in the country: *Di Iorio v. Warden of Montreal Jail*, supra; *O'Hara v. British Columbia*, [1987], 2 S.C.R. 591. at p. 610

This means, says Justice Canada, that questions may be asked which engage investigative or fact finding activities but not those which touch upon advice, legal or otherwise giving rise to or following those activities. Therefore, those areas proposed to be covered by Commission Counsel which concern advice, either

written or oral "are at the very core of that which is proscribed by the Supreme Court of Canada's decision in *Keable*".

Commission Counsel has circulated a memo setting out his proposed field of questioning. It is unnecessary to repeat it here. Suffice to say, Justice Canada finds objectionable any question which seeks to look behind witnesses' actions or those of other justice officials, particularly where they involve advice received or given.

Saskatchewan, while accepting that the limitations are as expressed in *Keable*, urges that this Commission is entitled to consider:

...actions taken by the Department of Justice (Canada) that might have affected decisions made by police, prosecutors and other justice officials in Saskatchewan ...

including:

...the operation of s.690 of the Criminal Code in the context of Mr. Milgaard's two applications.

Justice Canada, as I understand their position, does not dispute this, as far as it goes. But I think that they perceive a desire to go behind what was done into the reasons for which it was done, thus invading what they see as the proscribed subject of advice.

Saskatchewan suggests that Justice Canada confounds the questions of privilege and constitutional prerogative, something which Justice Canada denies. The latter responds that the real issue is whether the terms from *Keable* such as "the administration and management" of a federal institution (which are protected areas) encompass more than general policies or procedures, which Saskatchewan admits are beyond our reach.

The authorities on the matter were discussed in the Commission's revised Position Paper, pages 5 and 6:

The Commission must be mindful of the fact that its reach is constitutionally limited to matters within the jurisdiction of the Provincial Legislature, as enumerated in s.92 of the *Constitution Act, 1867*. The Supreme Court of Canada reinforced this principle in *Starr v. Houlden*, [1990] 1 S.C.R. 1366 in the following terms:

"At the outset, it is worth noting that this court has consistently upheld the constitutionality of provincial commissions of inquiry and has sanctioned the granting of fairly broad powers of investigation which may incidentally have an impact upon the federal

criminal law and criminal procedure powers. At the same time, however, this court has consistently held that the power of provinces to establish commissions of inquiry is not constitutionally unlimited."

The Supreme Court of Canada has set out several principles relating to provincial commissions of inquiry, which will instruct and guide the Commission in determining the constitutional limits of its mandate. Those principles are as follows:

1. By virtue of s.92(14) of the *Constitution Act, 1867*, the provinces have power over the administration of justice within the province. The words "the administration of justice in the province" are to be given a fair, large and liberal construction such that they encompass the administration of criminal justice. Implicit in the grant to the provinces of exclusive legislative authority in respect of administration of justice and in the grant to the federal government of exclusive legislative authority in respect of criminal law and procedure is an acceptance of a certain degree of overlapping: *Di Iorio and Fontaine v. Warden of Common Jail of Montreal and Brunet*, [1978] 1 S.C.R. 152.
2. A provincial commission of inquiry cannot inquire into the policies, procedures, rules, administration or management of a federal institution or entity: *Attorney General (Que.) and Keable v. Attorney General (Can.)*, [1979] 1 S.C.R. 218.
3. A provincially appointed commission can inquire into a reference by the Federal Minister of Justice under s.690 (formerly s.617) of the *Criminal Code*. The province has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of one of its citizens as these are matters pertaining to the administration of justice within the province (subject to the caveat expressed in *Keable*, supra, that no provincially constituted commission of inquiry can inquire into the actual management or operation of the federal activity or entity in question) and they do not constitute an attempt to interfere with the valid federal interest in the enactment of and provision for a uniform system of procedures and rules governing criminal justice in the country: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796.

4. A province is responsible for, and has control and supervision of, law enforcement in the province with respect to provincial legislation and criminal law as defined by the Federal Parliament. The pith and substance of a provincial commission of inquiry must be firmly anchored to a provincial head of power, so that it cannot be used either purposely or through its effect, as a means to investigate and determine the criminal responsibility of specific individuals for specific offences: *Starr v. Houlden*, [1990] 1 S.C.R. 1366 and *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591.

The question before me does not arise from evidence heard, but rather has been asked for the purpose of giving counsel some guidance in the questioning of Federal witnesses.

Mr. Frayer rightly submits that while Justice Canada intends full cooperation in the work of the Inquiry, constitutional limits are something not subject to waiver.

The immediate problem to be addressed arises from Commission Counsel's proposal to question Federal witnesses about the reasons for their actions, including advice they provided or received, in connection with David Milgaard's two s.690 applications and the Case on Reference. I will not attempt to set guidelines which will answer all possible objections I might hear in the future, and will confine my remarks for the moment to the question of whether advice, legal or otherwise, is a constituent of "administration or management" of a federal institution or entity (*Keable*, supra).

The Concise Oxford Dictionary defines advice as "guidance, or recommendations offered with regard to future actions".

The definitions of administration and management, found in the same source, give no hint of advice, in the above sense, being a constituent. Read as a whole, the phrase quoted above from *Keable* speaks to me of governance, and advice is clearly a distinguishable term. Therefore, questions which seek to probe the reasons behind actions, including questions about advice given or received, do not trench upon exclusive Federal jurisdiction.

Support for this conclusion may be found in the fact that the court in *Keable* spoke of "administration and management" in the context of "the force", i.e. the R.C.M.P.

Thus it held that while provincial authority can be exercised over the acts of individual officers, it cannot amount to an inquiry into the administration and management of the force. That would be colourable.

I conclude that the proscribed areas of administration and management listed in *Keable* have nothing to do with advice, in the present case, concerning the s.690 applications or the Case on Reference.

Furthermore, there is precedent from the Marshall Commission. There, Douglas Rutherford of Justice Canada testified at length about his department's decision to refer the Marshall matter to the Court of Appeal under s.617(b) of the Criminal Code. His testimony recounted discussion with and advice given to the Minister of Justice. It should be added, however, that he testified on the understanding that the department was not thereby waiving its right to question the jurisdiction of the Commission in other areas or in future cases.

Counsel will frame their questions so as to avoid the areas proscribed by *Keable*, namely the administration or management of a federal institution or entity. Objections to questions will be resolved by reference to the plain meaning of those terms, wherever possible.

Dated at Saskatoon in the Province of Saskatchewan this 1st day of June, 2006.

COMMISSIONER

Prairie Region, Saskatoon Office
10th Floor
123 - 2nd Avenue South
Saskatoon, SK S7K 7E6

Région des Prairies, Bureau de Saskatoon
10^e étage
123 - 2^e Avenue sud
Saskatoon, SK S7K 7E6

Telephone: (204) 983-2252
Facsimile: (204) 983-3636
Internet:

Our File: 2-32417
Notre dossier:

June 23rd, 2006

VIA FACSIMILE

Commission of Inquiry into the Wrongful Conviction of David Milgaard
1020 - 606 Spadina Crescent East
Saskatoon, SK S7K 3H1

Attention: Douglas C. Hodson
Commission Counsel

Dear Sir:

FAXED

Re: Solicitor-Client Privilege

By way of letter on April 14th, 2006 the Federal Minister of Justice asserted claims of solicitor-client privilege. This claim of solicitor client-privilege encompasses documents and matters which relate to communications and advice among Federal Justice lawyers, communications and advice between Federal Justice lawyers and the Minister of Justice, communications and advice between Federal Justice lawyers and Mr. William McIntyre, Q.C. and communications and advice between the Minister of Justice and William McIntyre, Q.C.


On June 19th, 2006 a draft list of the 271 documents for which the Minister claims privilege was provided to you.

The Minister would now like to know whether you accept the position asserted in the April 14th, 2006 letter, and whether you accept that the documents set out in the list dated June 19th, are privileged. In addition, my client would request that you canvass the parties with standing at the Inquiry to determine whether they accept the assertions of privilege made by the Minister in the April 14th, 2006 letter and accept the documents set out in the draft list dated June 19th, are privileged.

Given the time constraints that we are all under to have the Inquiry completed as soon as possible, I would appreciate if you could formally respond to this letter by June 29th, 2006.



If you have any further questions, please do not hesitate to contact me.

Yours truly,


for David G. Frayer, Q.C.
General Counsel

JLC

This is exhibit "K" referred to in the affidavit of Christine Elias sworn before me this 4th day of July, A.D. 2006


A Commissioner for Oaths in and for the Province of Saskatchewan.
My Commission Expires July 31/11
Being a Solicitor 

Cox, Jennifer

From: Douglas Hodson [REDACTED]
Sent: June 29, 2006 4:12 PM
To: Pat Loran; Frayer, David; Aaron Fox [REDACTED]; Alec Pringle [REDACTED]; Gibson, Bruce; Catherine Knox [REDACTED]; Christopher Boychuk [REDACTED]; Don Sorochan; Eamon O'Keeffe; Garret Wilson [REDACTED]; Hersh Wolch [REDACTED]; James Lockyer [REDACTED]; Jay Watson [REDACTED]; Cox, Jennifer; Lana Krogan [REDACTED]; Marshall Hopkins [REDACTED]; Wempe, Rochelle; Brian Beresh; Joanne McLean; Rick Elson

Attachments: ltr to D. Frayer reSolicitor-client priv June 29, 2006.pdf



ltr to D. Frayer reSolicitor-c...

Counsel:

Attached is a copy of my letter dated June 29, 2006 to Mr. Frayer dealing with solicitor-client privilege issues.

Douglas C. Hodson
Commission Counsel

Commission of Inquiry into the Wrongful
Conviction of David Milgaard
1020-606 Spadina Crescent East
Saskatoon, Saskatchewan
S7K 3H1

telephone: (306) 933-8303
fax: (306) 933-8305

web: www.milgaardinquiry.ca

<<ltr to D. Frayer reSolicitor-client priv June 29, 2006.pdf>>

This is exhibit "L" referred to in the
affidavit of Christine Elias
sworn before me this 4th day
of July, A.D. 2006

[Signature]
A Commissioner for Oaths in and for
the Province of Saskatchewan.
My Commission Expires July 31/11
Being a Solicitor [Signature]



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

June 29, 2006

David G. Frayer, Q.C.
General Counsel
Department of Justice (Canada)
Prairie Region, Saskatoon Office
10th Floor
123 2nd Avenue South
Saskatoon, SK S7K 7E6

Dear Sir:

Re: Solicitor-Client Privilege

Thank you for your letter dated June 23, 2006. You have asked that I formally respond to your letter by June 29, 2006.

Following receipt of your April 14, 2006 letter, we had some discussions in anticipation of the likelihood that a challenge would be made to the Minister's claim of solicitor-client privilege. I was asked to outline some potential issues which might arise. For the assistance of your client, by email correspondence dated June 4, 2006, I provided you with an outline and my comments on possible issues regarding the scope and extent of the privilege claimed by the Minister. I also advised you at that time that I was not intending to provide you with my final position on any of the matters raised.

In response to the first matter raised in your June 23, 2006 letter, I can advise that as Commission Counsel, I will not be taking any position on the claim of solicitor-client privilege asserted by the Minister. The issue of privilege will be evaluated and decided upon by the Commissioner. My role as Commission Counsel is simply to ensure that the issue of privilege is properly raised before the Commissioner, that the evidentiary basis required to evaluate the claim is in place, and that the parties have an opportunity to address the Commissioner on these issues.

With respect to the second matter raised in your letter of June 23, 2006, you have now received a copy of my June 26, 2006 email to counsel for parties with standing asking that they advise whether they accept the solicitor-client privilege claim asserted by the Minister. Once I have obtained those replies, I will communicate them to you. I can advise that some counsel for parties with standing have already responded informally,

indicating that they expect to receive instructions to challenge the claim of privilege asserted by the Minister.

The Commission's Rules of Procedure and Practice acknowledge solicitor-client privilege. Rule 30 specifically provides that a party is not required to disclose or produce any document for which privilege is properly claimed. The question for the Commissioner then is whether the privilege is properly claimed by the Minister (ie. are the documents privileged, and if so, has there been any waiver of the privilege). The Supreme Court of Canada has stated that the fundamental right to communicate with one's legal advisor in confidence has given rise to a rule of evidence and a substantive rule (see *Descoteaux v. Mierzewski*, [1982] 1 S.C.R. 860). Solicitor-client privilege is an issue that is often raised in legal proceedings and the role of Commission Counsel is simply to ensure that any issues with respect to the privilege claimed are fully addressed.

In my view there are at least two issues that may potentially arise with respect to the Minister's claim of solicitor-client privilege. The first issue is whether all of the documents listed by the Minister are in fact solicitor-client communications. If the documents are protected from production on the basis of solicitor-client privilege, the second issue is whether there has been (by conduct, disclosures or statements on the part of the Minister) a waiver of the privilege. A determination of these issues should assist in answering any questions surrounding the privileged status of verbal communications as well. Based on discussions with counsel for parties with standing to date, I expect that challenges will be raised both to the proper scope of the privilege asserted and to the question of waiver of such privilege.


I am of the view that further information is required before the Minister's claim of privilege can be fully evaluated by the Commissioner. We may need to have a more complete evidentiary basis before the Commission in order for the matter to be determined. In particular, some evidence concerning matters such as the nature and purpose of the documents, the circumstances of their creation, the roles of the various persons involved, to whom the documents were circulated, any efforts taken to ensure their confidentiality, and the subject matter addressed, will likely need to be received from a federal justice witness. In addition, with respect to the list of documents over which the Minister has claimed solicitor-client privilege, some further description might be necessary in order for an evaluation of the nature of those documents to be made. I would simply note that some documents do not, on their face, fall within the categories set out in your June 23, 2006 correspondence. On this latter point I am speaking of documents described by the Minister as briefing notes, question period notes, and communications material.

Finally, assuming that the claim of the Minister is challenged, some consideration must also be given to the process by which the issue will ultimately be determined. I note that in *Carey v. The Queen in Right of Ontario*, [1986] 2 S.C.R. 637 the Supreme Court of Canada decided that documents in question should be produced and inspected by the trial judge to determine whether, on balancing the competing interests involved, the documents should be produced. This appears to be an appropriate and practical procedure

to employ when a claim of privilege is made in respect of documents which are *prima facie* relevant to the issues before the court or tribunal involved.

Once I receive replies from all counsel I will forward them to you. I would then like your comments on these matters and your input regarding the process to have the privilege issues determined by the Commissioner.

Yours truly,


Douglas C. Hodson
Commission Counsel

Cc: counsel for parties

Cox, Jennifer

From: Douglas Hodson [REDACTED]
Sent: June 29, 2006 4:09 PM
To: Cox, Jennifer; Frayer, David
Subject: FW: Privilege

Douglas C. Hodson
Commission Counsel

Commission of Inquiry into the Wrongful
Conviction of David Milgaard
1020-606 Spadina Crescent East
Saskatoon, Saskatchewan
S7K 3H1

telephone: (306) 933-8303
fax: (306) 933-8305

[REDACTED]
web: www.milgaardinquiry.ca

-----Original Message-----

From: Garrett Wilson [REDACTED]
Sent: Wednesday, June 28, 2006 5:16 PM
To: Douglas Hodson
Subject: Privilege

Doug - I take no position on the Fed's claim of privilege.

Garrett Wilson, Q.C.,
2933 McDonald St.
Regina, SK S4N 3A3

This is exhibit "M" referred to in the
affidavit of Christine Elias
sworn before me this 28th day
of July, A.D. 2006
[Signature]
A Commissioner for Oaths in and for
the Province of Saskatchewan.
My Commission Expires July 31/11
Being a Solicitor [Signature]

Cox, Jennifer

From: Douglas Hodson [REDACTED]
Sent: June 29, 2006 4:09 PM
To: Cox, Jennifer; Frayer, David
Subject: FW: Milgaard Inquiry - judicial review application

This is exhibit "N" referred to in the affidavit of Christine Elias sworn before me this 4th day of July, A.D. 2006
Christine Elias

Douglas C. Hodson
Commission Counsel

A Commissioner for Oaths in and for the Province of Saskatchewan.
My Commission Expires July 31/11
Being a Solicitor [Signature]

Commission of Inquiry into the Wrongful Conviction of David Milgaard
1020-606 Spadina Crescent East
Saskatoon, Saskatchewan
S7K 3H1

telephone: (306) 933-8303
fax: (306) 933-8305

web: www.milgaardinquiry.ca

-----Original Message-----

From: Don Sorochan [REDACTED]
Sent: Thursday, June 29, 2006 1:51 PM
To: Douglas C. Hodson
Subject: Re: Milgaard Inquiry - judicial review application

Thank you for this message. Just to confirm my verbal advice to you that our position on privilege asserted by the federal Department of Justice is that the justice lawyers involved were not acting in a solicitor-client relationship but we're rather acting as functionaries performing delegated responsibilities of the Minister pursuant to statutory and Crown prerogative powers.

With respect to the Justice McIntyre report, our position is that there has been a waiver of any privilege that may have attached to the report because at the time the Minister publicly relied upon his independent legal advice to justify her actions.

Donald J. Sorochan, QC
Managing Partner, B.C. and Yukon offices

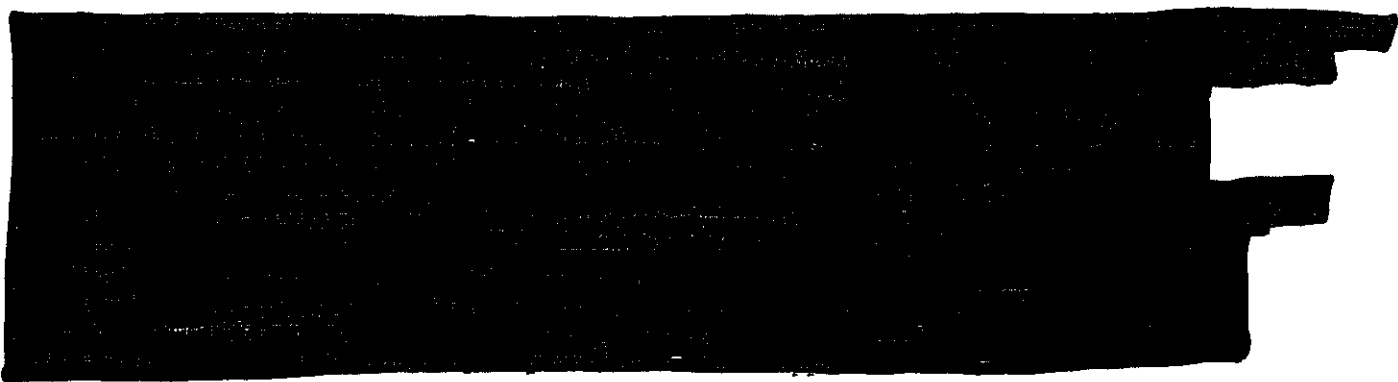
MILLER THOMSON LLP
Barristers & Solicitors, Patent & Trademark Agents

Direct line: 604.643.1214
Fax: 604.643.1200
Website: www.millerthomson.com
Vancouver office: 1000-840 Howe Street, Vancouver, B.C. V6Z 2M1

----- Original Message -----

From: Douglas Hodson [REDACTED]
Sent: 06/29/2006 06:21 AM

[REDACTED]



Counsel:

Attached is an email from Mark Kindrachuk, counsel for the federal Minister, advising of their intent to bring an application for judicial review. Mr. Kindrachuk asked me to circulate his email to all parties with standing. I will keep you apprised of all matters related to the application and will forward the application materials to you once I receive them.

Douglas C. Hodson
Commission Counsel

Commission of Inquiry into the Wrongful
Conviction of David Milgaard
1020-606 Spadina Crescent East
Saskatoon, Saskatchewan
S7K 3H1

telephone: (306) 933-8303
fax: (306) 933-8305

web: www.milgaardinquiry.ca

-----Original Message-----

From: Kindrachuk, Mark
Sent: Wednesday, June 28, 2006 11:32 AM
To:
Subject: Milgaard Inquiry - judicial review application

I would appreciate it if you could arrange for the following message to be forwarded to all parties with standing before the inquiry. Thank you for your assistance in this regard.

We have been instructed to make an application to the Court of Queen's Bench for judicial review of the Commissioner's decision of 1 June 2006 with respect to the constitutional limitations on the scope of the inquiry. We expect to serve and file the material early next week. If wish to make submissions at the hearing of the application, we would appreciate it if you could tell us what dates in July and August would be most convenient for you in order to assist in scheduling the application. We would like to arrange a hearing date in late July or early August, subject to what the court can provide and what fits the schedules of counsel.

Mark Kindrachuk, Q.C. || c.r.
General Counsel || Avocat général
Department of Justice (Canada) || Ministère de la Justice (Canada)
Prairie Region || Région des Prairies
10th Floor, 123 - 2nd Avenue South || 123 - 2e avenue sud, 10e étage

Saskatoon, Saskatchewan
S7K 7E6

tel. || tél. 306-975-4765
fax || téléc. 306-975-5013

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Cox, Jennifer

From: Douglas Hodson [REDACTED]
Sent: June 29, 2006 4:10 PM
To: Cox, Jennifer; Frayer, David
Subject: FW: federal justice privilege claim

This is exhibit "O" referred to in the affidavit of Christine Elias sworn before me this 4th day of July, A.D. 2006

Attached is email from Mr. Beresh on privilege claim.

Douglas C. Hodson
Commission Counsel

A Commissioner for Oaths in and for the Province of Saskatchewan.

Commission of Inquiry into the Wrongful Conviction of David Milgaard
1020-606 Spadina Crescent East
Saskatoon, Saskatchewan
S7K 3H1

My Commission Expires July 31/11
✓ Being a Solicitor [Signature]

telephone: (306) 933-8303
fax: (306) 933-8305

web: www.milgaardinquiry.ca

-----Original Message-----

From: Brian Beresh [REDACTED]
Sent: Tuesday, June 27, 2006 11:18 AM
To: Douglas Hodson
Subject: RE: federal justice privilege claim

Doug,

Thank you for your note of June 26, 2006, and subsequent follow-up including the letter from Mr. Frayer.

Our position is that very few of the documents referred to by Mr. Frayer ought to survive a claim of privilege. The very purpose of the inquiry is to make a determination as to whether or not the government responded properly and/or in a timely fashion to Mr. Milgaard's claim for relief.

While considering this claim for privilege, I have divided the documents into a number of major categories dependant upon the strength of the claim for privilege. These categories are as follows:

1. All correspondence to third-parties arising after the first section 690 application (least likely to succeed a claim of privilege)
2. Reports generated related directly or indirectly to the Milgaard Claim
3. Internal memoranda
4. General BN and QP Notes
5. Communications material (Items 237-257)
6. Bills or Statement of Accounts (most likely to survive the claim of privilege)

The federal government refused the proposal by a number of groups to adopt the English process for the equivalent section 690 applications. That process would have offered a clear transparency which the government has refused. That being the case, it is not now open for the government to argue that it should be allowed to assert privilege as to the steps it took in relation to the liberty of a citizen.

In our view, the public interest is very high and supports the Commission's position that the documents ought to be made public or at the very least be made available to the Commissioner to review before a decision regarding privilege is determined.

Our bottom line is that but for the actual bills or statement of accounts referred to in items 258 -271 the balance of the material ought to be revealed to the Commission. Whether or not the Commission imposes and undertaking on counsel, or bans in part the publication of some of the material, is a secondary issue.

Please advise as to when you expect this issue to be litigated or whether you expect it to be settled by written argument only.

Best personal regards,

Brian Beresh, Q.C.

-----Original Message-----

From: Douglas Hodson [redacted]
Sent: Monday, June 26, 2006 7:17 PM
To: Pat Loran; [redacted]; Aaron Fox [redacted]; Alec Pringle [redacted]; Bruce Gibson [redacted]; Catherine Knox [redacted]; Christopher Boychuk [redacted]; Don Sorochan; Eamon O'Keeffe; Garret Wilson [redacted]; Hersh Wolch [redacted]; James Lockyer [redacted]; Jay Watson [redacted]; Jennifer Cox [redacted]; Lana Krogan [redacted]; Marshall Hopkins [redacted]; Rochelle Wempe; Brian Beresh; Joanne McLean; Rick Elson
Subject: federal justice privilege claim

Counsel:

I made two mistakes in my last email on this subject. I failed to attach the June 23 letter. It is attached to this email. I also provided the wrong deadline. Counsel for Justice would like your position by June 29. Sorry for the mixup.

Douglas C. Hodson
Commission Counsel

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Conviction of David Milgaard
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Saskatoon, Saskatchewan
S7K 3H1

telephone: (306) 933-8303
fax: (306) 933-8305

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<<fax from D. Frayer on June 23, 2006.pdf>>