

**IN THE MATTER OF AN APPLICATION**

**BY**

**DAVID ASPER**

**FOR**

**STANDING AND FUNDING**

**RULING**

David Asper has applied for standing and funding retroactive to November 22, 2005.

As may be seen in Part I of the Rules, persons may be granted standing by the Commissioner if they:

- a) Are directly and substantially affected by the inquiry;
- b) Represent clearly ascertainable interests and perspectives that are essential to the Commission's mandate;
- c) The applicant has special experience or expertise with respect to matters within the Commission's terms of reference.

Mr. Asper had much involvement in the re-opening effort, but none in the investigation or prosecution. That is why he is being called as a witness at this stage of the inquiry. The documents show that he helped in the gathering and publication of information which came, or perhaps should have come, to the attention of the authorities.

The question before us is whether such information should have caused the authorities to re-open the case sooner. Answering that question will involve an evaluation of the information produced through Mr. Asper's efforts.

I will deal first with the material filed in support of the motion for standing, then with counsel's oral submissions and finally with the evidence which I have listened to which bears on the question of standing.

The applicant submits that he qualifies under all three of the grounds stated.

I will consider these in reverse order:

c) Special experience or expertise;

The applicant states his experience in acting as an advocate for a wrongfully convicted man. In terms of expertise, AIDWYC has already been granted standing. As to experience, we would hear from Mr. Asper about his experiences when he testifies whether as a witness or as a party.

The applicant anticipates issues about the appropriateness of the use of the media and says that his special experience and expertise as a senior media executive is essential to the conduct of the inquiry.

Without meaning to denigrate Mr. Asper's standing in the media world, were I to feel the need from an expert from that milieu, I would not choose one so closely involved in the re-opening effort.

b) Represents interests and perspectives essential to the successful conduct of the inquiry.

The interests and perspectives cited are those of counsel, specifically a defence lawyer. While Mr. Asper acted for the Milgaards in the re-opening effort, he was not defence counsel. His experience in the re-opening could be fully related by him as a witness.

a) He is directly and substantially affected by the inquiry.

The applicant refers to having performed duties on the Milgaard file under Mr. Wolch over a period of six years. His chief argument, as I read it, is that his professional reputation might suffer at the hands of parties to the inquiry who seek to justify their own roles in the conviction by casting aspersions upon others who worked to overturn it. Thus, he argues, he will be directly affected.

The Commission is cognizant of its duty to provide notices under Part IV of the Rules after information about alleged misconduct has come to its attention which may give rise to findings of misconduct. Where such notice has been given, the affected party may apply for leave to call evidence or may request that Commission Counsel call evidence to respond to allegations. Thus, an affected party is not without remedy even though he lacks standing. And, of course, notices would be given only on the basis of factual information, not mere aspersions. I cannot make findings of criminal or civil liability.

But, arguably, Part IV does not adequately allow a witness as such whose reputation is in peril to adequately meet the case against him because the

privilege of cross examination is reserved for parties with standing. I must, then, turn to the factors which might support the application under the first ground.

The Applicant, in his written materials, complains of aspersions being cast against him, the ordinary meaning of which is that his character or reputation is being attacked. That is a legitimate ground to advance in support of an application for standing, because, if true, it would mean that he is directly and substantially affected by the inquiry.

I was not persuaded by the material as submitted that this had been shown. Certainly, some counsel by their examination of witnesses have signaled their belief that Mr. Asper's words or activities in support of the re-opening were hurtful to their clients. But I thought that what I had heard, or might expect to hear, could not be described as an attack on character or reputation.

But having listened for only a short time to Mr. Asper's evidence as a witness, I hear that not long after he began acting in the re-opening, he formed the view that 5 of the witnesses who testified for the Crown in the Milgaard trial were liars and that 5 others, 3 members of the Bar and 2 former police officers, were "bad guys". He then drew analogies to warfare without rules, and the gloves being off to describe his reaction. The 2 former officers have already testified and although one did not ask for standing, his former employer, the Saskatoon Police Service is a party in this inquiry, so that officer's interests are adequately covered in terms of cross examination. The other officer has standing, as does one member of the Bar. The other 2 members of the Bar were Federal Justice employees and their employer has standing as well. I am concerned by the reaction which might be provoked by such testimony – a reaction which might be interpreted by Mr. Asper, at least, and perhaps by the public, as an attack upon character or reputation. Let me emphasize that I do not invite such reaction, nor do I mean to set limits upon either the content or the style of testimony, provided it meets the test of relevance.

But in view of all that has passed in the course of the re-opening, and in view of the sometimes open hostility which certain counsel and witnesses have displayed in this inquiry, I must acknowledge the unlikelihood that the "enemy", in Mr. Asper's metaphor, will turn the other cheek.

It is not without concern that I permit the membership of standing to grow. I am concerned about cost and about time. But Mr. Asper, as witness, has made the case for Mr. Asper as party with standing. I am satisfied that his reputation is directly and substantially affected and that he should have standing from this date but not for any discrete phase of the inquiry dealing with systemic issues, should one be held.

The applicant has not filed material in support of funding for counsel beyond asking for it, so I will not make an order at this time. If the applicant wishes to file an affidavit in support of such a request, he may do so, and I will deal with the request in writing.

Given at Saskatoon in the Province of Saskatchewan this 22<sup>nd</sup> day of February, 2006.

---

**COMMISSIONER**