

IN THE MATTER OF AN APPLICATION
BY
JOYCE MILGAARD
FOR
TRAVEL AND ACCOMODATION EXPENSES
WHILE ATTENDING THE INQUIRY
RULING

On December 7, 2004, Mr. James Lockyer on behalf of Joyce Milgaard asked for approval for his client's travel expenses, standard hotel accommodation, and a \$50. per day meal allowance to assist her in attending "most, if not all, of the Inquiry". He added that the Commission might consider a daily or weekly stipend in addition to her expenses. His letter of request is marked Schedule A.

Two questions arise:

1. Does the Commission have such spending authority either by Statute or by Order-In-Council?
2. If it has should it exercise that authority in favor of Mrs. Milgaard?

The Public Inquiry process is not an adversarial one, a fact which does not make the resolution of issues like this one any easier. The responsibility of Commission Counsel is not that of an advocate for any particular position. Counsel for Mrs. Milgaard can of course be relied upon to present the case for payment of her expenses as a party but no one has been invited to present an argument *contra*, so it falls to me to examine the matter critically. I do so entirely without bias and solely in the public interest.

The legal position

The spending authority of the Commission is set out in *The Public Inquiries Act* and the Order-In-Council:

The Public Inquiries Act

s.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.

Order-In-Council

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

- a. appointing the Honourable Mr. Justice Edward P. MacCallum, Edmonton, as a Commissioner of the Commission of Inquiry ...
- ...
- 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 advised with;
 - (ii) 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 traveling and expenses incurred by him in the performance of his duties and sustenance;
- f. authorizing payment by the Department of Justice of expenses incurred in the administration of the Commission of Inquiry.

Terms of Reference

- 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, to determine at what rate such Counsel shall be paid for their services.

None of these provisions authorizes the Commission to pay travel or living expenses or a stipend to a party to the Inquiry.

Upon my instructions Mr. Hodson, Commission Counsel, wrote to The Saskatchewan Department of Justice, Civil Law Division seeking clarification of the limits of our spending authority. The Province of Saskatchewan called this Inquiry and is paying for it but it is as well a party with standing in the Inquiry. If that appears to give rise to a conflict of monetary interest, I can only say that it is one which is unavoidable and is more technical than substantial. As a party with standing, the Province is concerned with events which began 36 years ago. The present government, which had nothing to do with those events called a public inquiry as a consequence of a commitment made by a previous government. The present government has a right to consultation with respect to the funding of the public inquiry and I had no hesitation in asking for their position on the legality of the payment of a party's expenses for attending the Inquiry.

Mr. Tegart of the Civil Law Division was kind enough to reply to us by letter dated December 27, 2004, a copy of which is attached as Schedule B. As may be seen, the Province does not see the list of approved expenditures in the Order-In-Council as being an exhaustive one. He says:

In order to ensure that the Commissioner is able to fulfil his mandate, there must be some scope in the words of the closing paragraph of the Order-In-Council to implicitly authorize expenditures of other kinds, where the work of the Commission in carrying out the Terms of Reference reasonably requires a particular expenditure.

The words in the O.C. referred to are those authorizing "payment by the Department of Justice of expenses incurred in the administration of the Commission of Inquiry".

It is apparent that the Province is not taking a hard line with respect to Mrs. Milgaard's request and welcomes my ruling.

However broadly one interprets the spending authority in the legislation and Order-In-Council, however, at the least, reasonable necessity must be shown for incurring an expense "in the administration of the Commission of Inquiry".

Subject to that qualification, I am prepared to concede that Mrs. Milgaard's request is not without legal foundation.

The discretionary position

Has Mrs. Milgaard shown that her attendance at the public hearings is reasonably necessary in the administration of the work of the Commission?

Were Mrs. Milgaard an unrepresented party with standing her entitlement to expenses for attending the hearing would be easier to show. But that is not her situation. She has funded counsel. We will not be hearing from her directly, except as a witness. In that role she will be responding to Commission Counsel's questions and to questions put by other counsel.

In the McLean affidavit in support of the initial application for standing and funding we read:

4. ...She devoted almost 30 years of her life to overturning his wrongful conviction.

Indeed, her remarkable effort deserves to be termed a crusade, but it is over. The public inquiry is not a continuation of her crusade. The Inquiry belongs to the public, not to Mrs. Milgaard, nor has she been entrusted with its conduct.

She will be reimbursed for her expenses as a witness, and of course her legal counsel will be funded.

As a general principle, I should think that a party with standing and funded counsel should not further be funded publicly for attending the hearings.

But even a principled approach admits of exceptions. For example, were David Milgaard to make a similar application, his status as the subject of the wrongful conviction would put him in a different class.

Mrs. Milgaard's herculean effort in freeing her son has attracted considerable public sympathy. There is much anecdotal evidence in the media record to confirm her status as a champion of the wrongfully convicted.

As well, and of no little significance, is the fact that David Milgaard, through his counsel, said that he will not attend the Inquiry, although the Commission intends to call him as a witness.

As I suggested above, his status as the subject of the wrongful conviction would put him in a class by himself, so a strong argument can be made for paying the expenses of a surrogate, his mother. David Milgaard might of course reconsider his decision not to attend and if funding were granted for Mrs. Milgaard's attendance, it would have to be conditional upon her son's absence.

It is in my view not strictly necessary that either David Milgaard or Joyce Milgaard attend the Inquiry, except as witnesses. The Public Inquiry will proceed with or without their presence. But as I said above, only reasonable necessity need be shown and I see it as necessary that counsel for the Milgaard family be properly instructed. Joyce Milgaard had a voice in instructing her son's counsel before and during the trial and her involvement with his cause has never ceased.

This Inquiry will follow a much traveled road through the investigation and prosecution stages, but the reopening stage will take us into areas not covered by the courts or by the

RCMP Inquiry – areas concerning which nobody would have greater knowledge than Joyce Milgaard. In my view, for the purpose of instructing counsel the presence of one Milgaard family representative is reasonably necessary.

Accordingly I approve funding to meet the expenses of either Joyce or David Milgaard, but not both, throughout the hearing.

Mr. Lockyer has suggested a rental apartment to serve the needs of both himself, Mrs. Milgaard and alternate counsel. I have no objection provided it is cost effective. The rent, in the case of counsel, would be recoverable only to the extent that it was actually occupied by funded counsel and only in an amount equivalent to that which counsel would have paid had he or she stayed in a Saskatoon hotel (see Schedule C of the Guidelines). In the case of Mrs. Milgaard, the rent would be a recoverable expense only to the extent that it was actually occupied by her in a given month and only in an amount equivalent to that which she would have been entitled as a witness.

The Commission plans to sit, generally speaking, three weeks per month. It would be reasonable for Mrs. Milgaard to return to her Manitoba residence in the fourth week, but her funded expenses for travel would include only one round trip between her residence and Saskatoon per month and for those months only in which the Commission holds hearings.

There is no reasonable necessity for the payment of a stipend to her.

In the interests of procedural fairness, I will allow Mr. Lockyer the option of making further argument in a public hearing without prejudice to anything I have said. Alternatively he should, prior to January 13, 2005, indicate his acceptance of this Ruling.

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

COMMISSIONER

Schedule A

Lockyer Campbell

BARRISTERS AND SOLICITORS

CRIMINAL TRIALS AND APPEALS

Counsel

James Lockyer
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December 7, 2004

Fax: 306-933-8305

Candace Congram
Executive Director
Commission of Inquiry Into the Wrongful
Conviction of David Milgaard
1020-605 Spadina Cres. E.
Saskatoon, SK
S7K 3H1

Dear Ms. Congram:

RE: *Milgaard Inquiry*

Ms. Milgaard would like to attend most, if not all, of the Inquiry. She lives in Winnipeg. Her expenses would be limited to her travel expenses (flights and taxi), standard hotel accommodation and a \$50.00 per day meal allowance. In my opinion, she should be treated at least as well as counsel are. It would be thoughtful if the Commission considered a daily or weekly stipend in addition to her expenses.

Depending on how many Milgaard and AIDWYC counsel are to be present for substantial portions of the Inquiry, it may be more economical for the Commission if we (myself, Joanne McLean, Mrs. Milgaard and any other counsel who want to join us) were to rent an apartment on a monthly lease rather than use nightly hotel accommodation. Should we look into this?

Yours faithfully,

LOCKYER CAMPBELL


James Lockyer
/kmd

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Schedule B



Saskatchewan
Department of Justice
Civil Law Division

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December 27, 2004

Douglas C. Hodson
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BY FAX: (306) 933-8305

Re: Payment of Witness and Other Expenses

Your December 16 letter asked for our input regarding the payment of witness expenses and expenses for Mrs. Milgaard.

As your letter mentions, the closing paragraph of the order in council establishing the inquiry authorizes "payment by the Department of Justice of expenses incurred in the administration of the Commission of Inquiry". We regard that provision as general authority for the payment of the regular expenses incurred by the commission in carrying out its work as set out in the rest of the order in council and in the terms of reference. Without intending to provide an exhaustive list, we believe this would extend to fees and salaries for professional and administrative services, ordinary office expenses, equipment rentals and purchases and travel and accommodation expenses for the commissioner, his staff and others engaged by the commission.

The order in council and the terms of reference make specific reference, directly or indirectly, to certain types of expenses, including those related to counsel for the commission and other advisors and experts and those related to counsel for the parties before the commission. Again, we do not see these references as an exhaustive list. In order to ensure that the commissioner is able to fulfill his mandate, there must be some scope in the words of the closing paragraph of the order in council to implicitly authorize expenditures of other kinds, where the work of the commission in carrying out the terms of reference reasonably requires a particular expenditure.

As you know, the independent nature of the commission is not always capable of clear definition. We do appreciate the efforts made to avoid unnecessary or inappropriate expenditures, and we appreciate being offered an opportunity to comment here. However, we welcome the commissioner's ruling on these matters.

With respect to witness expenses, we believe those should be paid for in the manner usual in civil proceedings. This would, of course, apply to Mrs. Milgaard to the extent she will be a witness.

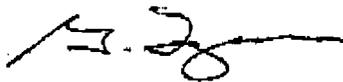
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Douglas C. Hodson, Milgaard Inquiry
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Expenses for a person who is attending in his or her capacity as a party is clearly a different matter. However, it would not be appropriate for us to object to the payment of such fees in any particular instance. If the commissioner determines that they are reasonable expenses for the purpose of furthering the work of the commission, we accept that they may be paid to the extent and in the manner determined by the commissioner. We are not aware that such expenses have usually been paid in inquiries held in this province, with one exception. The commissioner in the Stonechild Inquiry ordered the payment of expenses for Mr. Stonechild's mother, Stella Bignell, for the days she chose to come from Manitoba to attend the inquiry. We are not aware of any instance in which a party was paid a stipend to attend.

Thank you again for allowing us to comment. If you would like anything further from us, please let me know.

Yours truly,



Gerald Tegart
Executive Director