

COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION
OF DAVID MILGAARD

APPLICATION AND SUBMISSIONS
BY DAVID ASPER
FOR STANDING AND FUNDING OF COUNSEL

APPLICATIONS

DAVID ASPER, a person who has been notified by Commission Counsel that his testimony is required before the Commission of Inquiry, hereby applies for:

- (a) standing as a party before the Commission;
- (b) funding for counsel to represent him and his interests; and
- (c) an order that funding for services of counsel be allowed for services within the Guidelines of the Commission rendered since November 22, 2005 when it became necessary for Mr. Asper to retain counsel with respect to the activities of the Commission.

SUBMISSIONS

The Applicant submits that this Commission should grant the orders for standing and funding because:

- (a) the Applicant is directly and substantially affected by the Inquiry;
- (b) the Applicant represents interests and perspectives essential to the successful conduct of the Inquiry; and
- (c) the Applicant has special experience or expertise with respect to matters within the Commission's Terms of Reference;

and that the order that funding for services of counsel be approved retroactively because:

- (d) the nature and extent of the applicant's involvement in this inquiry (whether as witness or a party) was not immediately apparent but required additional information from Commission staff; and
- (e) it was necessary for the applicant to retain the services of legal counsel to liaise with Commission Counsel, review documents and evidence and otherwise perform legal services which come within the scope of services for which the Commission funds Counsel.

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THE APPLICANT IS DIRECTLY AND SUBSTANTIALLY AFFECTED BY THE INQUIRY

The Applicant's evidence before the Commission, because of his role as counsel to David Milgaard and the arguments he raised in that role, relates to each of the investigation, the prosecution and the re-opening aspects of the terms of reference. Mr. Asper has been advised by Commission Counsel that there are many documents that have already been and will continue to be reviewed with Mr. Asper (both to assist Commission staff and in Mr. Asper's testimony before the Inquiry). Mr. Asper has been advised by Commission Counsel that he is a significant witness with insights, as counsel who represented Mr. Milgaard, which other witnesses cannot give.

Mr. Asper's involvement with Mr. Milgaard's case began in 1986 when he was initially an articled student and subsequently a lawyer with the firm Wolch Pinx Tapper Scurfield. Mr. Asper was assigned duties relating to the case by senior counsel with the firm, Mr. Hersh Wolch, QC. Mr. Wolch had been retained by the Milgaard family to review the case and determine whether there were grounds upon which Mr. Milgaard's conviction could be reviewed.

Except for a period of time when he took a leave of absence from the firm, Mr. Asper remained involved as counsel in the Milgaard case until June of 1992 upon which date he ceased to practice law with Wolch Pinx Tapper Scurfield and commenced employment with CanWest Global Communications Corp.

As Mr. Wolch's associate, Mr. Asper had considerable involvement as Mr. Milgaard's counsel in the day to day investigative and legal work which culminated in December 28th, 1988 in Mr. Milgaard's first application to the Federal Justice Minister pursuant to Section 690 of the *Criminal Code* to review his conviction.

Mr. Asper, as Mr. Milgaard's counsel, participated in the investigation of an anonymous tip received by Hersh Wolch, QC, around February 26th, 1990, that Larry Fisher committed the murder of Gail Miller. Mr. Asper also investigated statements of a witness recanting some of his trial testimony and "new evidence" submitted in support of the first section 690 application.

With respect to the responsibility in the Terms of Reference for this Commission "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", Mr. Asper was often the person responsible for disclosure of the information to the authorities.

During his involvement as counsel for Mr. Milgaard, Mr. Asper's involvement went beyond strictly legal forums and included advocacy on Mr. Milgaard's behalf to raise public awareness of Mr. Milgaard's plight. For example, on August 6, 1991, Gail Miller's family provided a statement to David Asper that he released to the public through the media. The statement indicated that the family was of the opinion that there was a reasonable doubt as to the guilt of David Milgaard.

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Mr. Asper was directly involved in the considerable investigative and legal work which culminated, on August 14th, 1991 in David Milgaard filing a second application to the Minister of Justice to review his conviction pursuant to Section 690 of the *Criminal Code*. This resulted, in the Federal Minister of Justice referring David Milgaard's case to the Supreme Court of Canada on November 28, 1991 for a hearing, which began on March 11th, 1992 and continued until April 6, 1992. Mr. Wolch was senior counsel on the reference hearing, with Mr. Asper appearing as co-counsel. The decision of the Supreme Court of Canada, with which the Commission is familiar, was released on April 14, 1992.

Mr. Asper left the practice of law with Wolch Pinx Tapper Scurfield shortly thereafter to commence his employment with CanWest.

In the performance of his role as counsel for David Milgaard, it was the duty of Mr. Asper to raise issues which touched upon and possibly directly and substantially affected others who have appeared as parties to, or witnesses before, this Inquiry. In this Inquiry, some individuals who believe that they have been so affected have taken issue, or it is anticipated will take issue, with actions taken or statements made by Mr. Asper while representing Mr. Milgaard. These responses and anticipated responses directly and substantially affect Mr. Asper.

Mr. Asper submits that because he is directly and substantially affected, he requires standing as a party to this Inquiry

THE APPLICANT REPRESENTS INTERESTS AND PERSPECTIVES ESSENTIAL TO THE SUCCESSFUL CONDUCT OF THE INQUIRY

Mr. Asper represents the interests and perspectives of counsel who over many years utilized the mechanisms available to him at law and in the court of public opinion to right a now acknowledged injustice. He brings to the Inquiry the unique perspective of a defence lawyer in the trenches who in the performance of his duty had to overcome frustrations, challenges and obstacles before justice prevailed for his client, whose wrongful conviction and innocence is now acknowledged and is the reason for the existence of this Inquiry.

It is submitted that these perspectives are essential to the successful conduct of the Inquiry.

THE APPLICANT HAS SPECIAL EXPERIENCE OR EXPERTISE WITH RESPECT TO MATTERS WITHIN THE COMMISSION'S TERMS OF REFERENCE

As summarized above, Mr. Asper possesses the special experience and expertise of an advocate for Mr. Milgaard, a wrongly convicted man.

Issues have been raised about the appropriateness of the use of the media by those advocating on behalf of Mr. Milgaard. Mr. Asper possesses the special experience and expertise of a senior executive of one of Canada's most influential media organizations. In addition to his experience as an advocate in a high profile case, he has experience in both broadcasting and the print media. The media was a source of information received by the police and the Department of Justice subsequent to Mr. Milgaard's conviction.

It is submitted Mr. Asper's special experience and expertise in these areas is essential to the successful conduct of the Inquiry

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FUNDING FOR SERVICES OF MR. ASPER'S COUNSEL SHOULD BE APPROVED AS COUNSEL TO A PARTY RETROACTIVE TO NOVEMBER 22, 2005

The nature and extent of the applicant's involvement in the Inquiry processes was not immediately apparent to the Applicant

The Applicant learned from Commission Counsel in early November 2005 that Commission Counsel would require his assistance in reviewing many documents and providing information about a wide variety of issues that had arisen during the course of the Inquiry as a result of the contents of documents or the testimony of witnesses before the Inquiry.

With respect to testimony, it was initially suggested that the Commission may want to look at two consecutive weeks being set aside for Mr. Asper's evidence. This was problematic to Mr. Asper since he does not have a lot of time to commit solely to this matter given an extremely busy schedule that he maintains to address the essential duties of his business requirements and commitments.

After reviewing some of the transcripts of the Inquiry it appeared to Mr. Asper that some parties to the Inquiry were seeking to justify their conduct or roles in the wrongful conviction of Mr. Milgaard and in so doing, to cast aspersions upon those involved on Mr. Milgaard's behalf in overturning the conviction. Mr. Asper did not consider the Terms of Reference of the Inquiry to mandate an inquiry into the performance of duties of counsel who, like himself, acted to liberate, rather than incarcerate, Mr. Milgaard. Mr. Asper hoped, therefore, to persuade Commission Counsel that much of the testimony was irrelevant, and that his involvement could be greatly reduced.

Mr. Asper has not succeeded in doing so but the full extent of the expected involvement of Mr. Asper in the Inquiry and the extent to which the Inquiry's processes may touch upon him and his professional reputation has only recently become fully apparent.

It was necessary for the applicant to retain the services of legal counsel

On November 22, 2005, the Applicant retained Donald J. Sorochnan, QC to represent him and his interests with respect to the Commission of Inquiry. On the next day, Mr. Sorochnan wrote to Mr. Douglas Hodson, Commission Counsel, stating:

I would like to speak to you about the processes of the Commission relating to the participation of counsel for witnesses, short of applying for status as a party to the Commission. The transcripts of the Commission's hearings note frequent references to Mr. Asper, some with a critical connotation, by counsel for other parties to the Commission's hearings. These references cause me concern that Mr. Asper's rights may require more protection from counsel than would be the case of counsel representing a "mere witness".

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With respect to access to materials required to assess Mr. Asper's position, Mr. Sorochan, in his letter to Mr. Hodson, stated:

While I have access to the transcripts of the Commission's hearings through the publicly available website of the Commission, I do not have access to the documents that counsel is referring to in the transcripts. I really require such access to properly represent and advise Mr. Asper and to prepare him for his testimony before the Commission. I understand that this may be accomplished by providing password access to the "Case Vault" containing the documents and exhibits. Mr. Asper raised this issue with you in an e-mail dated November 16, 2005 but I do not believe that you have responded to his request (which I completely understand given the other events that have been occurring with the Commission).

Mr. Hodson responded to the "Case Vault" request by advising that this database of over 22,000 relevant documents (150,000 pages) for use during the Commission hearings is not available to the public nor to any witnesses. Mr. Hodson also provided Mr. Sorochan with information relating to the funding assistance available from the Commission for counsel of witnesses. Mr. Hodson also established a cordial and cooperative relationship with Mr. Asper and Mr. Sorochan. Mr. Hodson and Commission staff have provided electronic versions of documents and commission transcripts to Mr. Sorochan and fully cooperated in assisting Mr. Sorochan within the constraints of the Rules of the Inquiry.

Mr. Sorochan has met with Mr. Hodson for one day of preliminary discussions in Vancouver. Mr. Hodson has also met for two days of interviews with Mr. Asper, with Mr. Sorochan in attendance, in Toronto in January, 2006 and an additional full day in February, 2006. Over twelve hundred documents related to Mr. Asper have been recently produced to Mr. Sorochan by Mr. Hodson. These recently produced documents are in addition to the approximately five hundred documents that were produced to Mr. Sorochan prior to the interviews of Mr. Asper in Toronto. All of these documents are stated by Mr. Hodson to be relevant to Mr. Asper's testimony.

Because of the requirements of his business activities, Mr. Asper has limited time to independently review these documents or all of the relevant testimony in the Inquiry transcripts. He requires the assistance of counsel to do so. Further, the effective management of both the documents and the transcripts requires the use of sophisticated litigation management software, Summation, which Mr. Asper does not personally use or have available to him. Summation is used by both the Commission and Mr. Sorochan.

Between November 22, 2005 and January 30, 2006 the following legal services were performed by Mr. Sorochan and his firm's legal assistants in relation to the Inquiry and Mr. Asper:

Mr. Donald Sorochan	70.1 hours
Ms. Cindy Brandes (certified legal assistant and Summation trainer)	27.0 hours
Ms. Alicia Lawson (junior legal assistant)	16.0 hours

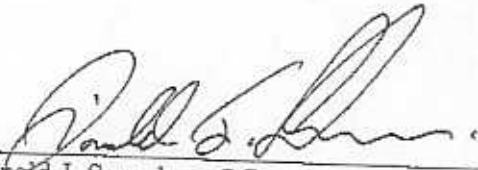
Of these services, the Commission's funding guidelines for counsel of witnesses only provides funding for 16.3 hours of Mr. Sorochan's time (time spent during actual meetings involving Mr. Hodson).

It is submitted that it is not fair or appropriate nor is it in the public interest that Mr. Asper should personally be required to bear the expense of the legal services which are required to prepare to participate in the conduct of this inquiry.

As matters have transpired, it is submitted that it is now apparent that Mr. Asper should be given standing as a party to the Inquiry and that the necessary legal expenses incurred by Mr. Asper should be funded on the same basis that they would be approved for other parties from the date that they were incurred, commencing November 22, 2005.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

This 17th day of February, 2006



Donald J. Sorochan, QC
Counsel to David Asper