Q.B. No. 1051 of 2006

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

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT DAVID ASPER

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OVERVIEW

1. The Respondent, David Asper, agrees with the proposition advanced by Justice Canada that to the extent that a provincial commission of inquiry investigates an area of federal jurisdiction, the result is that the executive of the province encroaches on federal jurisdiction.

2. The Respondent, David Asper, also agrees with the proposition advanced by Justice Canada that the Milgaard Inquiry has not been given a mandate to inquire into the conduct of the federal Department of Justice of the two reviews under sections 617 and 690 of the *Criminal Code* ("section 617/690 reviews"), the Department of Justice's role in respect of the Supreme Court Reference or the conduct of other federal government duties connected to Mr. Milgaard's applications seeking relief from the federal Minister of Justice, which applications resulted in the ultimate release of David Milgaard.

3. It is acknowledged by Mr. Asper that there are many legitimate areas of inquiry that the Milgaard Inquiry may pursue that are within the Terms of Reference and within the constitutional jurisdiction of the Province of Saskatchewan.

4. Mr. Asper finds it regrettable that there is no constitutionally valid inquiry into federal aspects (whether by the federal Department of Justice or the RCMP) of Mr. Milgaard's wrongful conviction and twenty-three years of incarceration for a crime he did not

commit. It has long been Mr. Asper's view that there are several "federal aspects" that warrant an independent inquiry and report, including:

- The appropriateness of the sections 617 and 690 review process at the time and now and in the future;
- The appropriateness of the review process at the time and now and in the future for applications under the royal prerogative of mercy;
- Whether the federal government should establish an independent agency that conducts such reviews, as have been established in other jurisdictions;
- The policies and procedures within the federal Department of Justice for conducting such reviews;
- The appropriateness of a policy or procedures within the federal Department of Justice to require applicants to waive solicitor client privilege when conducting such reviews, or in the absence of such policy or procedures whether it was appropriate for Justice officials assigned to conduct the review to require applicants to waive solicitor client privilege;
- The selection of career justice prosecutors within the federal Department of Justice to conduct the review on behalf of the federal minister;
- The training of the federal Department of Justice officials assigned to conduct the review on behalf of the federal minister;
- Whether, in the Milgaard case, there was "tunnel vision" or other factors that inappropriately influenced the federal Department of Justice officials assigned to conduct the review on behalf of the federal minister;
- Whether, in the Milgaard case, there was inappropriate influence put on key witnesses on the part of the federal Department of Justice officials assigned to conduct the review on behalf of the federal minister to have the witnesses evidence conform to the views of the Justice officials;
- The role of the RCMP in assisting the federal Department of Justice in the conduct of the review on behalf of the federal minister,
- How it was that through two reviews under sections 617 and 690 of the *Criminal Code* conducted by federal Department of Justice officials, the officials did not discover that the semen stains (containing DNA) of the true killer of Gail Miller went undetected for over twenty years on the dress and coat of the deceased Gail Miller and the true killer's blood (containing DNA and blood serological identifiers) went undetected for even longer in blood stains on Gail Miller's gloves;

- What role, if any, political considerations played in the responses and decisions of the federal Department of Justice officials and the federal minister in relation to Mr. Milgaard's applications to the federal Minister of Justice..

5. Requests for a federal inquiry into the Milgaard case were rejected and the procedure of having a joint federal-provincial inquiry (an inquiry created together by the federal government and one or more province or territory, for which there was precedent in the 1985 joint inquiry into the sinking of the oil rig *Ocean Ranger*), was not followed in the Milgaard case. Governments have held joint inquiries to avoid duplication or, as is happening here, to avoid division of powers disputes between the federal and provincial levels of governments.

6. However, the fact that there are "federal aspects" that may warrant inquiry does not mean that this provincially constituted Inquiry can perform this functions. It cannot.

7. This Inquiry is to "inquire into and report on" the matters set out in the Terms of Reference. It is the submission of Mr. Asper that the Commissioner cannot, within the constitutional limitations of a provincially constituted inquiry, inquire into and report on the matters that relate to "federal aspects" including the important matters set out in paragraph 4 of this Memorandum of Fact and Law.

8. Mr. Asper submits, however, that the position of the federal Department of Justice (as stated in some of its submissions in support of their application herein) where those submissions focus on "matters with respect to which Department of Justice officials may be required to give evidence" is too narrow a jurisdictional objection. Mr. Asper submits that the Commissioner may not, with respect to <u>any witness</u> – not just Justice witnesses - inquire into and report on matters outside the jurisdiction in the Terms of Reference and outside the constitutional parameters of a provincially constituted inquiry.

9. In terms of the questions relating to "federal conduct" to witnesses (Justice witnesses or any witness) or other indeed other evidence, including documents, such evidence is not properly admissible before this Commission for the purpose of inquiring into such conduct since it is not relevant to the Terms of Reference and since irrelevant material is inherently incapable in informing the mind of the Commission.

10. Moreover, the admissibility of evidence must be assessed in the context of the evidence being relevant to a matter upon which the Commissioner may report within the jurisdiction of the Inquiry. It is, therefore, submitted that in assessing the jurisdictional appropriateness of the Inquiry the focus should be on the context of the appropriateness of the Commissioner's findings in the Inquiry's report which flows from the evidence.

11. The evidence adduced or sought to be adduced in this Inquiry, including from Mr. Asper, clearly establishes that the Commission's inquiry goes beyond an investigation within provincial jurisdiction which may incidentally have an impact upon federal aspects. Rather, the impugned aspects of the Commission's inquiry are into federal aspects, including into the policies, procedures, rules, administration or management of one or more federal institutions.

12. It is submitted that it is not appropriate that the federal Department of Justice seek immunity from questioning for federal employees while not objecting to the Inquiry conducting an inquiry into "federal aspects" from Mr. Asper and other witnesses. If there is no jurisdiction for the Inquiry to inquire into and report on a matter, that jurisdictional limitation should be imposed on the Commission with respect to evidence from any source, not just the federal government.

13. There has already been a great deal of testimony adduced from Mr. Asper and other witnesses that relate to federal aspects outside the jurisdiction of the Inquiry. As part of the questioning in this area Mr. Asper was questioned on solicitor-client privileged communications between Mr. Asper and his clients David and Joyce Milgaard. Federal Department of Justice officials required David and Joyce Milgaard to waive solicitor-client privilege and Commission Counsel has questioned Mr. Asper about such communications. Mr. Asper, however, cannot properly respond to issues raised by such questioning about "federal aspects" because the federal government refuses to waive solicitor-client privilege with respect to documents or communications between federal officials that relate to Mr. Asper's dealings with Justice Canada.

14. Mr. Asper submits that it was readily anticipated from the outset of the Inquiry that this conflict was likely to arise and that the Commission erred in embarking upon inquiries into federal aspects that it knew, or ought to have known, that it cannot report upon.

15. While disagreeing with some aspects of the position of the federal Department of Justice, Mr. Asper agrees with the following submissions of the federal Department of Justice:

- A Commission of Inquiry appointed pursuant to *The Public Inquiries Act* cannot exceed the authority delegated to it under that statute or exceed the Terms of Reference established for it by Order in Council (paragraph 35 – Justice Argument);

- The Terms of Reference of the Commission of Inquiry into the wrongful conviction of David Milgaard do not authorize inquiry to be made into the two applications to the Minister of Justice for review or the reference to the Supreme Court of Canada (paragraph 36 – Justice Argument);

- The Terms of Reference focus on the period from the death of Gail Miller to the conclusion of the subsequent criminal proceedings resulting in the wrongful conviction of David Milgaard. The Terms of Reference do not refer to the s. 617/690 applications, the reference to the Supreme Court of Canada. the release of David Milgaard or the compensation paid to David Milgaard (paragraph 40 – Justice Argument);

- The Commission may also inquire into "the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar N4ilgaard on the charge that he murdered Gail Miller." The natural and ordinary meaning of these words encompasses the criminal proceedings *resulting* in the wrongful conviction of

David Milgaard, but does not extend to post-conviction proceedings following that conviction (paragraph 42 – Justice Argument);

- The Commission may inquire into "whether the investigation should have been re-opened based on information subsequently received by the police and the (Saskatchewan) Department of Justice." This refers to whether the investigation of the murder of Gail Miller should have been reopened rather than whether David Milgaard's case should be reopened. It also refers exclusively to the decision based on information received by the police and the Saskatchewan Department of Justice. It does not refer to information received by the federal Department of Justice (paragraph 43 – Justice Argument);

PART I - STATEMENT OF FACTS

16. Mr. Asper accepts the Statement of Facts in the Memorandum of fact and Law of the federal Department of Justice

17. In addition, Mr. Asper relies upon the facts set forth in his affidavit filed in this proceeding.

PART II - POINTS IN ISSUE

18. Mr. Asper submits that:

(a) In the decision of 1 June 2006 and in erroneously assuming jurisdiction over federal matters throughout the Inquiry proceedings, the Commissioner has exceeded his jurisdiction by failing to limit the inquiry proceedings to matters properly within the jurisdiction conferred by the Order in Council which establishes the Inquiry.

(b) the Commissioner has exceeded the jurisdiction which can be exercised by a provincially-constituted commission of inquiry, by failing to limit the inquiry proceedings to matters properly within the jurisdiction of the Province of Saskatchewan by inquiring into issues which are in substance issues about the conduct, management and operation of the federal Department of Justice.

PART III - SUBMISSIONS

19. A provincially appointed commission cannot inquire into the actions of the federal Department of Justice in reviewing and considering an application by the federal Minister of Justice under s. 690 (formerly s. 617) of the *Criminal Code* or for relief under the Royal Prerogative of Mercy. It has long been recognized that the Royal Prerogative of Mercy is a Queen's prerogative exercised in Canada by the Governor General or the Governor in Council.

20. The Royal Prerogative of Mercy is not confined to the remedies referred to in s. 690 of the *Criminal Code* but includes pardons or remission of sentences, as well as new trials or referrals to courts of appeal. The Royal Prerogative of Mercy originates in the ancient power vested in the British monarch who had the absolute right to exercise

mercy on any subject. In Canada the power to exercise the Royal Prerogative of Mercy is vested in the Governor General of Canada by virtue of the Letters Patent, constituting that office (most recently, in the *Letters Patent of 1947*, by which the then monarch, King George VI, delegated to the Governor General the entire prerogative powers of the Crown at the federal level).

> *Letters Patent Constituting the Office of the Governor General of Canada, 1947*, R.S.C. 1985, Appendix II, No. 31, Art. II
> *Governor General's Act*, R.S.C. 1985, c. G-9

21. Article XII of the Letters Patent constituting the office of the Governor General (R.S.C. 1985, App. No. 31) states that the Governor General has the power to order a conditional or free pardon and, in addition, may "grant to any offender convicted of any such crime or offence ... any respite of the execution of the sentence of any such offender ...". In addition the residual powers of the Governor General as expressed in Article II of the Letters Patent, which states:

> And we do hereby authorize and empower Our Governor General, with the advice of our Privy Council for Canada or any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada

22. The residual power is the basis for the exercise of the Royal Prerogative power of commutation of sentence. Commutation consists of an actual reduction of the sentence being served by the applicant, as compared to a remission of sentence which amounts to a forgiveness of all or part of a sentence. Commutation is not referred to in any statutory expression of the royal prerogative, nor is it referred to expressly in the Letters Patent constituting the office of the Governor General. Commutation is, however, a well-recognized Royal Prerogative that was used in Canada to commute death sentences to lesser punishment.

23. The following is a complete list of remedies available under the royal prerogative of mercy, whether at common law or codified in statute:

- free pardon; *Criminal Code*, s. 748(2).

- conditional pardon; *Criminal Code*, s. 748(2).

- pardon under the *Criminal Records Act*; R.S.C. 1985, c. C-47.

- remission of sentence; Article XII of the Letters Patent constituting the office of the Governor General; R.S.C. 1985, App. No. 31

- respite of sentence; Article XII of the Letters Patent.

- commutation of sentence; Article II of the Letters Patent.

- new trial; *Criminal Code*, s. 690(*a*).

- referral of a case to a court of appeal; *Criminal Code*, s. 690(*b*).

- reference to court of appeal on a legal issue; *Criminal Code*, s. 690(*c*).

- reference by the federal Governor in Council to the Supreme Court of Canada. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53.

24. For the purposes of this application, the point is that issues relating to the Royal Prerogative of Mercy in any of its forms relate exclusively to federal jurisdiction and cannot be the subject of inquiry by a provincially constituted commission of inquiry.

25. This issue of the jurisdiction of commissions of inquiry has arisen in a great many cases in the past two decades, many of which are decisions of the Supreme Court of Canada. The most significant of those cases, are the following:

(a) *Batary v. A.G. Sask.*, [1965] S.C.R. 465. In Batary, it was held that a person charged with murder was not compellable to give evidence at an inquest.

(b) *Faber v. The Queen*, 1975 CanLII 12 (S.C.C.), [1976] 2 S.C.R. 9. In Faber, the majority held that a coroner's inquest is not a criminal matter because its purpose is not the prosecution or punishment of an accused but is, rather, to determine whether there has been a crime associated with the death of an individual. Inquests are, therefore, properly a matter authorized by provincial legislation.

(c) *Di Iorio & Fontaine v. Warden of the Common Jail of Montreal,* 1976 CanLII 1 (S.C.C.), [1978] 1 S.C.R. 152. Di Iorio held a broad inquiry into the existence and nature of organized crime to be a matter properly within provincial jurisdiction, even though it would involve the identification of persons alleged to be criminals. The investigation of crime and identification of criminals was said to be a proper function of government in the administration of justice.

(d) *A.G. Que. & Keable v. A.G. Can., 1978 CanLII 23 (S.C.C.)*, [1979] 1 S.C.R. 218. Keable upheld the constitutional validity of a provincial inquiry in which the commissioner was called upon to investigate and report on various allegedly illegal or reprehensible incidents or acts in which various police forces, including the R.C.M.P., were involved. The application by the Commissioner of the R.C.M.P. to stay the commission was refused.

(e) *Re Nelles et al. v. Grange et al.* (1984), 46 O.R. (2d) 210 (Ont.C.A.). The Ontario Court of Appeal decided in Nelles that the commissioner appointed to investigate the mysterious deaths of several infants at the Hospital for Sick Children could not express any opinion as to whether any of the deaths was a result of the action of any "named person or persons". In other words, the inquiry was permitted to proceed only on the basis that the commissioner could "name no names". While the decision rests upon the court's interpretation of the words of the order-in-council which expressly forbade the commissioner to express any conclusion of law "regarding civil or criminal responsibility", that

interpretation rests largely upon the court's view that a contrary interpretation would render the order-in-council unconstitutional.

(f) *A.G. Alta. v. Putnam,* [1981] 2 S.C.R. 267. In Putnam, it was held that the province has no authority to inquire into the conduct of R.C.M.P. officers who were performing provincial police duties under contract with the province of Alberta.

(g) *O'Hara v. B.C.,* 1987 CanLII 45 (S.C.C.), [1987] 2 S.C.R. 591. In O'Hara it was held that, although there was no restriction in naming names, the province does not infringe federal jurisdiction by creating a commission of inquiry to investigate and report on alleged wrongdoings committed by members of a municipal police force created under provincial legislation where the inquiry was aimed at investigating an incident of alleged police misconduct which had undermined the proper administration of justice and where the purpose was not to determine criminal responsibility.

(h) *MacKeigan v. Hickman,* (1989] 2 S.C.R. 796. The appeal raised two issues: whether the *Public Inquiries Act* could be used to compel superior court judges to testify before a Commission inquiring into a wrongful conviction and whether the direction to the Commission to inquire into a reference by the Minister of Justice was *ultra vires* the Province because it is a matter of criminal law and procedure reserved exclusively to the federal Parliament under s. 91(27) of the *Constitution Act, 1867.* The Supreme Court of Canada held that the language of the *Public Inquiries Act* did not override the fundamental principle of judicial immunity from being compelled to testify about the decision-making process or the reasons for the composition of the court in a particular case. It was also held that the phrase "administration of justice" in s. 92 of the *Constitution Act, 1867* could not authorize a provincially constituted commission of inquiry to inquire into the actual management or operation of a federal activity or entity in question.

(i) *Starr v. Houlden,* 1990 CanLII 112 (S.C.C.), [1990] 1 S.C.R. 1366. In Starr a province was found to have exceeded its jurisdiction by appointing a commission to investigate and report on matters related to crime. The majority found that the commission was not firmly anchored to any provincial head of power and that its effect, if not its purpose, was to investigate and determine the criminal responsibility of specific individuals for specific offences. The terms of reference named individuals, using the language of the parallel Criminal Code provision so that the commissioner's findings could be seen as establishing a prima facie case against those individuals. There was no broad policy objective which might distinguish the inquiry from a police investigation. The named persons were not public officials. The commissioner, while specifically prevented from making a determination of criminal responsibility, could do so by implication.

(j) *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 S.C.R. 97. The Nova Scotia government appointed a Commissioner to

> conduct an inquiry into the fatal underground explosion at the Westray Coal Mine. Criminal charges of manslaughter and criminal negligence causing death were laid against the mine management officials who sought a declaration that the Order in Council establishing the Commission was *ultra vires* the province, and that it violated their rights under the *Charter*. The majority of the Supreme Court of Canada held that such prejudice was not established since the accused had elected trial by judge alone and the trial has started and nothing in the record supports the view that the anticipated publicity would have any effect on a trial judge so as to support a stay of the Inquiry.

26. Mr. Asper adopts the submissions of the applicant with respect to the *MacKeigan v. Hickman* decision as set out in paragraphs 46, 47 and 71 of the Applicant's Memorandum of Fact and Law. It is further submitted that *MacKeigan* is specific authority that it is not open to a provincial inquiry to investigate the work of a federal department for the specific purpose, as here, of making findings on the conduct of the department.

27. It is submitted that the *Putnam* decision is also directly supportive of that position. In *Putnam* the following constitutional question was posed to the Supreme Court of Canada:

> Is it constitutionally open to the Province of Alberta to apply its Police Act, 1973 (Alta), c. 44 to members of the R.C.M.P. in respect of inquiries hereunder into the conduct and performance of duty of those who perform policing and law enforcement functions in the Province?

28. The majority (Laskin C.J. delivered the judgment of himself and Martland, Ritchie, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.) held that the constitutional question must be answered in the negative. Dickson J. alone dissented. The position of the Commissioner with respect to the same issue being discussed here, is substantially to advance the dissenting position of Dickson J. twenty-five years later. That position, however, was rejected by the majority decision, a decision that has not been over-ruled by the Supreme Court of Canada in the intervening years. It is still not constitutionally open to a province to inquire into the conduct and performance of duty of those who perform federal functions.

29. As set out in his Affidavit, the Respondent Asper has been, and continues to be adversely affected by the Commission of Inquiry failing to confine itself to its appropriate jurisdiction constitutionally and in accordance with the Terms of Reference.

PART IV - ORDER SOUGHT

30. That the Commissioner limit the inquiry proceedings to matters properly within the jurisdiction conferred by the Order in Council which establishes the Inquiry.

31. That the Commissioner limit the inquiry proceedings to matters properly within the jurisdiction of the Province of Saskatchewan and that the Commissioner not inquire from any witness, including the Respondent Asper, into issues which are in substance issues about the conduct, management and operation of the federal Department of Justice.

32. Such other relief as this Honourable Court may order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver, in the Province of British Columbia, this 31st day of July, 2006.

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