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July 6, 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 Memorandum of Fact and Law of the Applicant.

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

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

Yours truly,

Mark Kindrachuk, Q.C.
General Counsel

/cee
Encl.

Q.B No. 1051 of 2006

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPLICANT

- 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 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 APPLICANT

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RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

OVERVIEW

1. A commission of inquiry is an extension of the executive branch of the government which established the inquiry. To the extent that a provincial commission of inquiry investigates an area of federal jurisdiction, it is, in effect, the executive of the province that trenches on federal jurisdiction.

Dixon v. Canada (Governor in Council), [1997] 3 F.C. 169 (C.A.) at p. 180, paragraph 13.

A.G. of Que. and Keable v. A.G. of Can. et al, [1979] 1 S.C.R. 218 at p. 243.

2. It is perhaps for this reason that the Terms of Reference of the Milgaard Inquiry have been carefully drafted to avoid the prospect that the Inquiry might stray into areas of federal jurisdiction; that is, that the provincial executive might stray into areas of federal jurisdiction.

3. By its very terms, the Milgaard Inquiry is limited to inquiring into the investigation into the death of Gail Miller; the subsequent criminal proceedings resulting in the wrongful conviction of David Milgaard on the charge that he murdered Gail Miller; and whether the investigation should have been re-opened based on information subsequently received by the police and the Saskatchewan Department of Justice.

> *See exhibit "A" to the Affidavit of Christine Elias. The Commission's Terms of Reference, Schedule A to Order in Council 84/2004.*

4. As is evident, the Milgaard Inquiry has not been given a mandate to inquire into the work of the federal Department of Justice be it the two reviews under sections 617 and 690 of the *Criminal Code* ("section 617/690 reviews")[1] or the Department of Justice's role in respect of the Supreme Court Reference or other matters connected to the subsequent review and the ultimate release of David Milgaard.

5. As a result, in keeping with its Terms of Reference, the Milgaard Inquiry is limited to seeking factual information from federal Department of Justice officials and may only seek information that is relevant to the three areas of inquiry set out in the Terms of Reference of the Inquiry.

6. It must be emphasized that the Milgaard Inquiry has no mandate to inquire into the advice given or received by federal Department of Justice lawyers. Indeed, it would be rather startling if the executive branch of the Saskatchewan government had given itself jurisdiction to inquire into the legal advice provided within or by

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[1] Mr. Milgaard's first application was made pursuant to s. 617 of the *Criminal Code*, R.S.C. 1970, c. C-34 and the second was made pursuant to s. 690 of the *Criminal Code*, R.S.C. 1985, c. C-46. Both provisions are similar and have now been replaced with ss. 696.1 to 696.4 of the *Criminal Code*, enacted by S.C. 2002, c. 13, s. 71.

the federal Department of Justice.

7. Regardless, if the scope of the Inquiry's Terms of Reference were somehow interpreted by the Inquiry to permit investigation into the legal advice provided or received by Department of Justice officials, the Inquiry would then exceed the constitutional limits on its jurisdiction.

8. The constitutional boundaries around the inquiry include the following:

   (a) A provincial commission of inquiry cannot inquire directly into the federal Department of Justice *per se*;

   (b) A provincial inquiry may only incidentally have an impact on an area of federal jurisdiction; and,

   (c) A provincial inquiry cannot inquire into the management or operation of a federal entity. The provision of legal advice is at the core of the operation of the federal Department of Justice; it is therefore beyond the constitutional jurisdiction of a provincial inquiry to review and investigate the legal advice provided or received by Department of Justice officials. Again, it would be startling if an extension of the provincial executive had the jurisdiction to review the legal advice of the federal government.

9. To the extent that the Inquiry has determined that it has authority to inquire into the legal advice provided or received by federal Department of Justice officials, the Inquiry has exceeded its statutory and its constitutional jurisdiction.

10. The federal Department of Justice has cooperated fully with the Commission of Inquiry into the Wrongful Conviction of David Milgaard. The Department of Justice has provided thousands of documents and has proposed two federal witnesses to testify at the inquiry.

11. Nevertheless, the Department of Justice cannot, as a matter of principle or law, agree to permit this provincial commission of inquiry to exceed its jurisdiction and

investigate advice or recommendations provided or received by Department of Justice officials.

PART I – STATEMENT OF FACTS

12. On 31 January 1969, Gail Miller was found murdered in Saskatoon, Saskatchewan. On 30 May 1969, David Edgar Milgaard was arrested in Prince George, British Columbia and on 2 June 1969 he was formally charged with the non-capital murder of Gail Miller. A preliminary Inquiry was held in Saskatoon and David Milgaard was committed to stand trial on 11 September 1969. David Milgaard was tried by judge and jury and convicted of the non-capital murder of Gail Miller on 31 January 1970.

13. David Milgaard appealed his conviction to the Saskatchewan Court of Appeal. The appeal was dismissed on 5 January 1971. David Milgaard then sought leave to appeal his conviction to the Supreme Court of Canada. His application for leave to appeal was dismissed on 15 November 1971.

14. David Milgaard's first application was made to the Minister of Justice on 28 December 1988 under s. 617 of the *Criminal Code,* R.S.C. 1970, c. C-34. The grounds put forward in the first application were considered by the Minister, as was information which Mr. Milgaard began to put forward on 28 February 1990 about the activities of Larry Fisher, and information about recantations by the witnesses Ronald Wilson and Dennis Cadrain. On 27 February 1991 the Minister of Justice, the Honourable Kim Campbell, dismissed Mr. Milgaard's application.

15. On 14 August 1991, Mr. Milgaard made a second application, under s. 690 of the *Criminal Code*, R.S.C. 1985, c. C-34. which put forward more information about Larry Fisher's assaults. The Honourable Kim Campbell referred Mr. Milgaard's case to the Supreme Court of Canada on 28 November 1991.

16. The Supreme Court began hearing the matter on 16 January 1992 and concluded its hearing on 6 April 1992. On 14 April 1992, the Supreme Court of Canada rendered a decision, asking the Minister of Justice to quash Mr. Milgaard's conviction and

send the matter back to Saskatchewan for a new trial.

17. On 16 April 1992, a stay of proceedings was entered against David Edgar Milgaard and the Attorney General of Saskatchewan announced that he would not proceed with a new trial. Mr. Milgaard was then released from imprisonment.

18. On 9 October 1992, the Attorney General of Saskatchewan announced that there would be an RCMP investigation into Mrs. Milgaard's allegations of wrongdoing. That investigation (referred to as the "Flicker investigation") was completed on 13 January 1994.

19. Mr. Milgaard initiated a civil action against various parties on 29 March 1993. On 19 August 1997, the Government of Saskatchewan promised to negotiate a settlement with Mr. Milgaard and to hold a public inquiry.

20. On 18 July 1997, the results of the DNA testing done on Ms. Miller's clothing were released. The test results exonerated David Milgaard. The DNA testing also indicated that semen found on Ms. Miller's clothing was likely to have originated from Larry Fisher.

21. Mr. Fisher was arrested and charged with the murder of Gail Miller on 25 July 1997 and was convicted on 22 November 1999.

22. By Order in Council 84/2004 dated 18 February 2004, the Government of Saskatchewan established a Commission of Inquiry into the wrongful conviction of David Milgaard.

23. The Inquiry began hearings in January 2005. The Attorney General of Canada, on behalf of the Minister of Justice, sought and was granted standing at the Inquiry in March, 2005.

24. In January 2006, the Minister of Justice disclosed documents to the Commission of Inquiry.

25. On 14 April 2006, the Minister asserted a claim of solicitor-client privilege with

respect to some Department of Justice documents and requested a ruling on the constitutional scope of the inquiry.

26. On 30 May 2006, the Commissioner heard submissions on the issue. The Commissioner rendered a written decision on 1 June 2006.

27. On 23 June 2006, the Minister requested that Commission counsel advise whether he and other parties agree with the Minister's assertion of privilege. Commission counsel provided a response on 29 June 2006.

PART II – POINTS IN ISSUE

28. The applicant submits that:

(a) In the decision of 1 June 2006, the Commissioner has exceeded his jurisdiction by failing to limit the matters with respect to which Department of Justice officials may be required to give evidence to matters properly within the jurisdiction conferred by the Order in Council which establishes the Inquiry;

(b) Further or in the alternative, in the same decision, the Commissioner has exceeded the jurisdiction which can be exercised by a provincially-constituted commission of inquiry, by allowing questions with respect to issues which are in substance questions about the management and operation of the federal Department of Justice.

PART III – SUBMISSIONS

A. Introduction

29. Commission counsel has set out his intention to question federal witnesses about the reasons for their actions, including advice they provided or received, in connection with David Milgaard's s. 617/690 applications and the reference to the Supreme Court of Canada.

See exhibit "E" to the Affidavit of Christine Elias. The Outline of Areas to be covered in examination of Federal Justice Witnesses.

30. The Commissioner has ruled that "questions which seek to probe the reasons behind actions, including questions about advice given or received, do not trench upon exclusive Federal jurisdiction."

See exhibit "J" to the Affidavit of Christine Elias. In the Matter of an Application by Federal Minister of Justice to set Constitutional Limitations on the Questioning of Federal Witnesses, June 1, 2006 at page 4.

31. The Commissioner has also ruled 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."

See exhibit "J" to the Affidavit of Christine Elias. In the Matter of an Application by Federal Minister of Justice to set Constitutional Limitations on the Questioning of Federal Witnesses, June 1, 2006 at page 5 .

32. The combined effect of these rulings is that the Commissioner has determined that he has jurisdiction to inquire into Mr. Milgaard's s. 617/690 applications and the reference to the Supreme Court of Canada, including probing the reasons behind the actions taken and inquiring into the advice given or received by federal Department of Justice officials.

33. In so ruling, the Commissioner has exceeded his jurisdiction as provided for by the Order in Council setting out the Terms of Reference of the Commission of Inquiry pursuant to *The Public Inquiries Act.*

34. In so ruling, the Commissioner also has exceeded the constitutional jurisdiction of a provincial Commission of Inquiry.

B. Excess of Statutory Jurisdiction

Introduction

35. A Commission of Inquiry appointed pursuant to *The Public Inquiries Act* cannot

exceed the authority delegated to it under that statute. In particular, a Commission of Inquiry cannot exceed the Terms of Reference established for it by Order in Council pursuant to the *Public Inquiries Act*.

> *The Public Inquiries Act*, P-38, Revised Statutes of Saskatchewan, as mended by Statutes of Saskatchewan, 2004, c. 47.

36. 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. In particular, the Terms of Reference do not authorize the Commission to inquire into advice given by or to officials of the federal Department of Justice in relation to the s. 617/690 applications or the reference to the Supreme Court of Canada.

> *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866.

37. The Commission of Inquiry into the Wrongful Conviction of David Milgaard therefore exceeds its jurisdiction in so far as it seeks to inquire into or permits inquiry to be made into the s. 617/690 applications to the Minister of Justice or the reference to the Supreme Court of a Canada and, in particular, advice given by or to officials of the federal Department of Justice.

The Terms of Reference

38. The Terms of Reference of the Commission are not open-ended but rather are limited in both time and scope. (They are also subject to constitutional limitations as addressed below.)

39. The mandate of the Commission is prescribed by its Terms of Reference which state:

> 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.
>
> *See exhibit "A" to the Affidavit of Christine Elias. The Commission's Terms of Reference, Schedule A to Order in Council 84/2004.*

40. 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.

41. The Commission may inquire into "all aspects of the conduct of the investigation into the death of Gail Miller." This refers to the investigation into the death of Gail Miller and to no other investigation. In particular, it does not refer to the investigation of whether David Milgaard was wrongfully convicted or the investigation of whether there should be a re-hearing.

42. The Commission may also inquire into "the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard 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. The s. 617/690 application process was a post-conviction review which followed the final determination of the criminal proceedings, not a "criminal proceeding" resulting in the conviction of David Milgaard.

43. Lastly, 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 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.

44. The specified Terms of Reference of the Milgaard Inquiry quite properly focus on the administration of justice in the Province of Saskatchewan.

45. The Terms of Reference do not in any way refer to an investigation of the s. 617/690 applications considered by the Minister of Justice, the reference to the Supreme Court of Canada or the subsequent release of David Milgaard. Even to the limited degree that might be constitutionally permissible, the Terms of Reference do not provide authority for the Commission to inquire directly into any of those events.

46. In that respect, it may be observed that the Terms of Reference of the Milgaard Commission of Inquiry are narrower than the Terms of Reference of the Marshall Commission of Inquiry. The Marshall Terms of Reference, cited by the Supreme Court of Canada in *MacKeigan v. Hickman,* [1989] 2 S.C.R. 796 at page 818, were,

> *"On October 28, 1988, 1986, the Governor-in-Council instituted the present Royal Commission with a mandate to "inquire into, report their findings, and make recommendations to the Governor in Council respecting the investigation of the death of Sandford William Seale on the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall, Jr. with that death; the subsequent conviction and sentencing of Donald Marshall, Jr. for the non-capital murder of Sandford William Seale for which he was subsequently found to be not guilty; and such other related matters which the Commissioners consider relevant to the Inquiry".*

47. The Terms of Reference of the Milgaard Inquiry do not expressly provide authority for the Commission to inquire into the s. 617/690 application process, the Supreme Court Reference or the release of David Milgaard. There is also no general catch-all provision within the Milgaard Terms of Reference, as there was in the Terms of Reference of the Marshall inquiry, which might provide a source of jurisdiction for inquiring into the s. 617/690 application process.

48. Nevertheless, the Department of Justice has agreed to provide factual information which is directly relevant to the investigations which ultimately led to Mr.

Milgaard's exoneration.

49. The advice given by federal Department of Justice officials, however, is not relevant to the Inquiry's pursuit of its mandate. The views of officials within the federal Department of Justice do not bear on the issues to be inquired into and reported on by the Inquiry.

50. The federal Department of Justice has a statutory role in supporting the Minister of Justice and Attorney General of Canada by providing legal advice to the Government of Canada and to no one else, including this provincial Commission of Inquiry.

Department of Justice Act, R.S.C.1985, c. J-2, ss. 2, 4 and 5.

51. As a result, while the factual information known to the Department of Justice, subject to claims of privilege, may be inquired into by the Commission in so far as the information is relevant to whether the investigation should have been re-opened, the advice received or given is out of bounds as it goes to the conclusions reached by officials and the Minister, which is not relevant to the prescribed mandate of the Commission.

C. Constitutional Limits

52. The Commissioner erred in holding that "questions which seek to probe the reasons behind actions, including questions about advice given or received, do not trench upon exclusive Federal jurisdiction."

See exhibit "J" to the Affidavit of Christine Elias. In the Matter of an Application by the Federal Minister of Justice to set Constitutional Limitations on the Questioning of Federal Witnesses, June 1, 2006 at page 4.

53. The reach of the Milgaard Commission of Inquiry is limited by its Terms of Reference and is constitutionally limited to matters within the jurisdiction of the Saskatchewan Legislature as enumerated in section 92 of the *Constitution Act, 1867*.

54. The Milgaard Commission of Inquiry has been established pursuant to paragraph 92(14) of the *Constitution Act, 1867*, which gives the Saskatchewan Legislature jurisdiction over the administration of justice in Saskatchewan.

Incidental Impact on Federal Powers

55. A provincial commission of inquiry must operate within its sphere of jurisdiction and may only have an incidental impact on a federal sphere of authority.

56. The Supreme Court of Canada has stated:

> 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. (Underlining added.)
>
> *Starr v. Houlden,* [1990] 1 S.C.R. 1366 at page 1390(i).

57. According to the majority of the Supreme Court of Canada, therefore, the Commission of Inquiry into the wrongful conviction of David Milgaard may only *incidentally* have an impact on federal criminal law and criminal procedure powers. To that can be added that the Commission of Inquiry may only *incidentally* have an impact on the federal Minister of Justice's jurisdiction over the royal prerogative of mercy as it applies to *Criminal Code* offences such as murder.

Starr v. Houlden, supra.

A Provincial Inquiry Cannot Investigate Federal Undertakings with the Intention of So Doing

58. Not only can a provincial inquiry only incidentally have an impact on the federal sphere of power, such an inquiry cannot inquire into a federal undertaking or entity for the purpose of inquiring into that undertaking or entity *per se*.

59. The Supreme Court of Canada in *Keable* permitted an inquiry into the conduct of

RCMP members. However, the Court permitted such inquiry not because they were members of the RCMP *per se* but rather to determine whether they had committed acts which were illegal or reprehensible.

Keable, supra.

Starr, supra.

60. It is not open to a provincial inquiry to investigate the work of a federal department for the specific purpose of making findings about the conduct of the department.

61. Similarly, a provincial inquiry cannot inquire into the work of officials of the Department of Justice because they are Department of Justice officials *per se*. Any examination of the actions of Department of Justice officials must be undertaken for some other valid reason beyond the fact that they are members of the Department.

62. The Milgaard Inquiry cannot, therefore, inquire into the workings of the federal Department of Justice except in so far as it is incidental to an inquiry that is within provincial jurisdiction.

63. Here, the purpose of any proper inquiry into the conduct of federal Department of Justice officials cannot be for the purpose of reviewing or making findings about the s. 617/690 application process in general or as it operated in the Milgaard matter or in respect of the Supreme Court reference. There must be another valid purpose and, if there is, the pursuit of that valid purpose may only have the incidental effect of inquiring into the activities of federal government employees such as members of the Department of Justice.

Administration and Management

64. A provincial inquiry also cannot inquire into the administration and management of a federal undertaking or entity.

Keable, supra.

65. This limitation operates in addition to the limitation that a provincial inquiry can only have an incidental impact, as the Supreme Court of Canada in *Keable* stated:

> While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation. (underlining added)

Keable, supra, at page 242.

66. Even with a valid purpose for inquiring into the conduct of RCMP members, the Supreme Court of Canada imposed additional limitations on the Commission's jurisdiction. The Supreme Court of Canada further restricted the scope of the provincial inquiry by foreclosing any inquiry into the "administration and management of the force."

67. Thus, regardless of whether the Milgaard Inquiry can inquire into matters related to the s. 617/690 applications as a matter incidental to a valid provincial area of inquiry, the Milgaard Inquiry cannot "interfere with the valid federal interest" and cannot inquire into the "administration and management" of the federal Department of Justice.

Keable, supra, at page 242.

68. The meaning of the phrase "administration and management" of a federal undertaking or entity has not been explained in the jurisprudence.

69. That phrase is not amenable to being construed simply by reference to a dictionary definition. It is not a statutory phrase which can be read according to the basic canons of statutory interpretation. Rather, it is a term that is used in the written reasons of the majority of the Supreme Court. It is the product of prose rather than drafting. It must be read in a way which gives effect to the principles which underlie the court's decision.

70. There are a number of points of reference to guide an understanding of what is meant to be protected by prohibiting inquiry into the administration and management of a federal undertaking. The phrase must be understood in the context in which it was originally used, why it was used and by reference to the manner in which it has since been used in the jurisprudence.

71. In *MacKeigan*, the majority, *per* McLachlin J. (as she then was), used the phrase "the management or operations of the federal activity or entity" in the place of the phrase "administration and management." The reference to "operations" rather than "administration" suggests that the Supreme Court of Canada was concerned to insulate the substantive operations of the federal undertaking to protect it from provincial encroachment.

72. In *Keable*, the Supreme Court concluded that the investigative "methods" used by the RCMP are essential aspects of the administration and management of that police force and cannot properly be the subject of provincial inquiry.

Keable, supra, at page 243.

73. The idea that the substantive workings of the federal undertaking, rather than just its administrative governance, should be protected from provincial inquiry is consistent with the basic notion that there are constitutional limits on provincial jurisdiction.

74. It would be odd, to say the least, if a provincial commission of inquiry were precluded from inquiring into how a particular employee was appointed but could investigate and make recommendations about the merits of the substance of that employee's work.

75. Indeed, the concept of the management or operations of a federal undertaking or entity must be understood in the context of a determination of the division of powers between the federal Parliament and provincial legislatures. It is used to delineate the core activities of the federal undertaking in order to protect the core of Parliament's jurisdiction over the federal undertaking from provincial intrusion.

76. This analytical approach leaves room for legitimate provincial inquiry into areas of provincial jurisdiction even though such inquiry might have an incidental impact on federal jurisdiction. However, it makes it clear that an inquiry touching the core of the federal jurisdiction, the management and operations of the federal undertaking, is not permitted.

77. The core operation of the federal Department of Justice, the Minister of Justice and Attorney General of Canada are set out in the *Department of Justice Act*. The Minister of Justice and Attorney General of Canada is the chief legal adviser to the Crown including the various departments and agencies of government. The Department of Justice is presided over by the Minister of Justice and Attorney General. The Department is charged with carrying out his duties.

Department of Justice Act, supra, at ss. 2, 4 and 5.

78. The core area of operation of the Department of Justice is the provision of legal advice. An inquiry into the advice given or received by federal Department of Justice lawyers is an inquiry into the core operations or administration of the Department and is foreclosed on that basis.

79. Further, such an inquiry does not have merely an incidental impact on an area of federal jurisdiction but rather effectively forces the Department of Justice to provide advice to a provincial inquiry.

80. The decision of whether and to whom to provide legal advice is a central to the administration and management of the Department of Justice. It is an area on which a provincial inquiry cannot trench.

81. In *Keable*, the Supreme Court found that the inquiry could look at the individual acts of RCMP officers but not the investigative methods used. This is because the inquiry could look at the actions of individuals who are members of the RCMP and who may have committed criminal acts not for the purpose of inquiring into the operations of the RCMP but rather incidental to an inquiry into whether criminal

acts were committed. However, an examination of the investigative methods used by the RCMP would amount to an express inquiry into the operations of the force.

82. Similarly, an examination of facts and information known to federal Department of Justice officials may be incidental to an inquiry into the valid purposes of the Milgaard Commission while an investigation into the legal advice received or given by Justice officials goes to the actual operations of the Department.

Significance of the Supreme Court of Canada Decision in MacKeigan v. Hickman, [1989] 2 S.C.R. 796.

83. Some of the matters raised in this application were averted to by the Supreme Court of Canada in the MacKeigan case.

MacKeigan v. Hickman, supra.

84. There, the Supreme Court was not called upon to decide whether a provincial commission of inquiry could inquire into the advice given or received by federal Department of Justice officials in respect of a s. 617/690 application or a court reference.

> *Mr. Rutherford testified on behalf of the Attorney General of Canada at the Marshall Inquiry and answered questions about some of the advice given to the Minister regarding the appropriate section under which the Reference should be held.. Mr. Rutherford's evidence was provided with the stipulation that he was not prejudicing Canada's constitutional position. See the evidence of Douglas Rutherford at the Royal Commission on the Donald Marshall, Jr., Prosecution, March 8th, 1988.*

85. Rather, McLachlin J., writing for the majority, avoided any direct reference to the provisions of the *Criminal Code* and instead focused on the jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of Donald Marshall Jr. As McLachlin J. put it:

> 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.
>
> *MacKeigan, supra., at page 835*

86. Accordingly, the majority decision in *MacKeigan* is fully consistent with the conclusion that a provincial commission of inquiry can hear evidence about a process such as the s. 617/690 application process as an incident of a valid inquiry (e.g., an inquiry into the wrongful conviction and subsequent release of an individual), but only if it does not engage in such an inquiry for the purpose of investigating the federal department; only if the inquiry has a merely incidental affect on the federal jurisdiction and only if it does not inquire into the actual management or operation of the federal activity of entity in question.

Application to this Matter

87. The Commissioner ruled that "questions which seek to probe the reasons behind actions, including questions about advice given or received, do not trench upon exclusive Federal jurisdiction."

88. This is plainly mistaken. The advice given by the Department of Justice is given pursuant to the statutory authority creating the Department of Justice. It is literally what the Department of Justice does; it is central to the operation of the Department.

89. Inquiring into the advice given or received by Justice counsel does not simply have an incidental impact on federal jurisdiction. It goes to the very heart of what the Department of Justice does. Indeed, the possibility of disclosure of advice given by Department of Justice officials risks frustrating the capability of the Department of Justice to carry out its core responsibilities under the Department of Justice Act because it puts at risk confidence in the solicitor-client relationship.

90. In addition, the finding that "advice" is a "clearly distinguishable term" from "administration and management" so that advice is not protected from review by the Commission is flawed and oversimplifies the issue.

91. To begin with, resort to dictionary definitions of advice, administration and management is inapt. It loses sight entirely of the purpose for which the phrase "administration and management" or "operations or administration" were used by the Supreme Court of Canada (i.e., to preclude encroachment by into the core operation of a federal undertaking or entity by a provincial inquiry); it misses the context in which the terms were used (i.e., to delineate the proper division of powers); it ignores the guidance that can be gleaned from jurisprudence of the Supreme Court of Canada in its application of the test (e.g., the inclusion of the substantive work of the RCMP as a constituent element of the operations or administration of the force in *Keable*); and it leads to a paradoxical result whereby the administrative details of the management of a federal undertaking are protected but the substantive work that is core to the federal Department of Justice is not.

D. Conclusion

92. The Commissioner has ruled that the Milgaard Inquiry can inquire into the recommendations or advice given or received by federal Department of Justice officials.

93. That ruling takes the Inquiry beyond its statutory and constitutional jurisdiction.

94. The Commissioner's ruling, therefore, cannot be left to stand.

PART IV – ORDER SOUGHT

95. The Applicant's respectfully seek 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) An Order, by way of *certiorari*, quashing the ruling rendered by the Respondent on 1 June 2006.

b) 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.

c) Such other relief as this honourable court may order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 6th day of July, 2006.

Mark Kindrachuk, Q.C.

Michael Peirce

Michael Peirce

Of Counsel for the Applicant,
Attorney General of Canada

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PART V - LIST OF AUTHORITIES

LEGISLATION

Department of Justice Act, R.S.C.1985, c. J-2, s.1.

Criminal Code, R.S.C. 1970, c. C-34, s. 614.

Criminal Code, R.S.C. 1985, c. C-46, s. 690.

Criminal Code, R.S.C. 1985, c. C-46, ss. 696.1 – 696.4 (enacted by S.C. 2002, c. 13, s. 71).

CASES

A.G. of Quebec and Keable v. A.G. of Canada et al., [1979] 1 S.C.R. 218

MacKeigan v. Hickman, [1989] 2 S.C.R. 796

Starr v. Houlden, [1990] 1 S.C.R. 1366

Reference Re Milgaard (Canada), [1992] 1 S.C.R. 866

Dixon v. Canada (Governor in Council), [1997] 3 F.C. 169 (C.A.)

OTHER AUTHORITIES

Evidence of Mr. Douglas Rutherford, *Royal Commission on the Donald Marshall, Jr., Prosecution*, Volume 53, March 8th, 1988.