QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2006 SKQB 385**

Date: **2006 08 18**
Docket: Q.B.G. No. 1051 of 2006
Judicial Centre: 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

Counsel:

Graeme G. Mitchell, Q.C. and Lana L. Krogan-Stevely for the applicant Attorney General of Canada
Douglas C. Hodson and T. John Agioritis for the respondent Commission of Inquiry
Mark R. Kindrachuk, Q.C. and Michael Peirce for the Department of Justice
Donald J. Sorochan, Q.C. for David Asper

JUDGMENT
August 18, 2006

LAING C.J.

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[1] By order in council dated February 18, 2004, the Honourable Mr. Justice Edward MacCallum (hereinafter referred to as "the Commissioner"), was appointed commissioner of a commission of inquiry which has come to be referred to as the Milgaard Inquiry. The terms of reference for this Inquiry specified:

> 1. 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.

The applicant was granted standing at the Inquiry which has been hearing evidence over approximately the last one and one-half years.

[2] The applicant became concerned about proposed lines of questioning of two Department of Justice lawyers who had been subpoenaed to testify at the Inquiry. One of these lawyers had been the Department of Justice's lead lawyer in processing and investigating Mr. Milgaard's application pursuant to s. 690 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, for a review of his conviction, which application was dismissed by the Federal Minister of Justice in a letter dated February 27, 1991. The other lawyer was involved in a second application pursuant to s. 690 of the *Criminal Code* brought by Mr. Milgaard dated August 14, 1991, which resulted in the Federal Minister of Justice ordering a reference to the Supreme Court of Canada on November 28, 1991.

[3] In April and May 2006, the applicant made known to counsel for the Commission that it had no objections to the two lawyers being questioned with respect to any factual matters related to the s. 690 *Criminal Code* applications and the Supreme Court of Canada reference, but did object to the Commission questioning the lawyers

with respect to advice, legal or otherwise, they may have shared with lawyers in the Department or with the Minister of Justice prior to the decisions being rendered by the Minister of Justice in each case. The applicant requested the Commissioner to make a ruling on the constitutional limitations for the questioning of these two federal Department of Justice lawyers. In a decision dated June 1, 2006, the Commissioner did so. The applicant seeks judicial review of this decision.

[4] The notice of motion requests the following orders:

> a) For an Order, by way of *certiorari*, quashing the ruling rendered by the Respondent on 1 June 2006.
>
> b) For 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.

The grounds offered in the motion are:

> 1. The Respondent exceeded his jurisdiction by failing to limit the matters with respect to which officials of the Department of Justice of the Government of Canada ("the Department of Justice") may be required to give evidence to matters properly within the jurisdiction conferred upon the Respondent by the terms of Saskatchewan Order in Council 84/2004 dated 18 February 2004;
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> 2. Further or in the alternative, the Respondent exceeded his jurisdiction by failing to limit the matters with respect to which officials of the Department of Justice may be required to give evidence to matters properly within the jurisdiction of a provincially-constituted commission of inquiry, and in particular, erred in law by failing to recognize that questions about the advice given or

> received by counsel in the Department of Justice are in substance questions about the actual management and operation of that Department, and are beyond the jurisdiction of a provincially-constituted commission of inquiry.

[5] The motion was served on all parties with standing at the Inquiry. The Government of Saskatchewan, and Mr. David Asper have made submissions on this application. The Government of Saskatchewan supports the Commissioner's ruling. Mr. David Asper, one of the two counsel acting for Mr. Milgaard on the s. 690 *Criminal Code* applications, supports the position of the applicant. Counsel for the Commission restricted his submission to the jurisdictional issue raised by the applicant with respect to the terms of reference, and to providing materials that were explanatory of the record before the Board in keeping with the Supreme Court of Canada decision in *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684. Each party provided written submissions on the issues, in addition to oral submissions, which were very helpful.

BACKGROUND OF THE APPLICATION

[6] The relevance of the s. 690 proceedings to the terms of reference was considered by the Commission, with input from the parties (including the federal Department of Justice) prior to the commencement of public hearings in January 2005. On December 7, 2004, the Commission issued a position paper on its terms of reference. The portions of this position paper relevant to this application are:

> **Introduction**
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> . . .
>
> The Terms of Reference are important. They set out the Commission's specific duties and responsibilities. They also

proscribe the legal boundaries and scope of the Commission's inquiry. The Commission is only empowered to act within the confines of its Terms of Reference. In addition, the reach of the Commission is constitutionally limited to matters within the jurisdiction of the Provincial Legislature.

It is the responsibility of the Commission to interpret the scope and meaning of the Terms of Reference. The Commission must ensure that it fulfills its mandate, as expressed in the Terms of Reference, to the fullest extent possible. The Commission must also ensure that it does not go beyond the boundaries of its mandate or delve into matters that are constitutionally or otherwise outside of its scope or purpose.

. . .

3. Re-Opening the Investigation

The Commission has the responsibility to "seek to determine" whether the investigation into the death of Gail Miller should have been re-opened based on information subsequently received by the police and the Department of Justice.

The relevant time period for this determination runs from the date of David Milgaard's conviction (January 31, 1970) to the date that the investigation was re-opened. Based upon information provided by the Department of Justice and the RCMP, the investigation into the death of Gail Miller was re-opened when the Department of Justice was advised of new DNA evidence linking Larry Fisher to the murder of Gail Miller.

The term "police" would include both municipal or local police forces and the RCMP. The term "Department of Justice" is interpreted to mean the Saskatchewan Department of Justice (hereinafter "Saskatchewan Justice"), being the department responsible for the administration of criminal justice in Saskatchewan.

In this part of the inquiry, the Commission's mandate goes beyond fact finding, as it must go further and determine whether the investigation should have been re-opened. Of necessity, the Commission must identify and review any information that was received by Saskatchewan Justice or the police, and determine

what was done and what should have been done with such information.

In addition, the Commission must identify and review any information which existed and which would have been relevant to the decision to re-open the investigation into the death of Gail Miller. In order for the Commission to determine whether the investigation should have been re-opened based upon information received by the police or Saskatchewan Justice, the Commission should have full knowledge of all relevant information that existed.

. . .

The Commission is of the view that it is not precluded from inquiring into certain aspects of the section 690 proceedings, although there are some constitutional limitations which apply, and which will be discussed below. As part of the section 690 proceedings, it is apparent that information was received by Saskatchewan Justice and the police. In order for the Commission to determine whether the investigation should have been re-opened, the Commission must determine what information arose or was gathered as a result of these proceedings, what information was made available to Saskatchewan Justice or to the police, and what action, if any, was or should have been taken. These matters fall squarely within the Commission's mandate.

. . .

Constitutional Limitations

. . .

In determining the permitted scope of its inquiry into the s. 690 applications, the Commission will be guided by the decisions of the Supreme Court of Canada, and by the limitation set out in *Keable*, supra. The Commission recognizes that it is difficult at this early stage to define precise constitutional limitations on the scope of the inquiry, and that inevitably the parties before the Commission will have certain views on this issue. Therefore, this issue will be further addressed at a future date and parties will have an opportunity to make submissions to the Commission.

Conclusion

> This position paper on the Terms of Reference has been provided to counsel for all parties with standing. The position paper is not intended as a ruling, but rather as a means of describing the scope of the Inquiry.

[7] On May 23, 2006, the applicant submitted its position on the constitutional limitations of the Inquiry. This submission stated in part:

> As this Commission of Inquiry stated at the outset of these proceedings, there are constitutional limits which must be observed by a Provincial Commission of Inquiry when it comes to matters which touch upon the Federal Government.
>
> The Federal Minister of Justice has approached this Provincial Inquiry with a spirit of cooperation: the Minister has sought standing and participates full time at this Inquiry, broad access has been provided to documents, counsel have refrained from objecting from time to time and the Minister has voluntarily proposed that two "federal witnesses" participate.
>
> The material put forward by Commission counsel on May 18th, 2006, contained a proposed outline of areas to be covered with Federal witnesses. This outline suggests areas which may go beyond any reasonable construction of the Commission's mandate and thus it will be imperative to have the constitutional matters clarified before any federal witnesses testify.
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> . . .
>
> III. THE PERMISSIBLE AREAS OF INQUIRY
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> The Minister concedes that a Provincial Inquiry can inquire into those aspects of the handling of the s. 690 applications filed by Mr. Milgaard, subject to the constitutional limitations, based on the Supreme Court's decision in MacKeigan v. Hickman, [1989] 2 S.C.R. 796.
>
> . . .

> **IV. CONCLUSION**
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> . . .
>
> The Minister respectfully requests a ruling on the general scope of the constitutional boundaries of this commission of Inquiry along with a ruling on the specific areas as identified in part II of this submission to facilitate the Minister's cooperation with the Inquiry. These matters should be dealt with prior to any Federal witnesses giving evidence so that there is a common understanding of the appropriate focus of questioning.

THE COMMISSIONER'S DECISION

[8] The Commissioner issued a decision dated June 1, 2006 with respect to the constitutional issue raised by the applicant. This decision stated in part as follows:

> Justice Canada has no objection to witnesses Williams and Fainstein being called "within the appropriate constitutional boundaries". Those boundaries, as everyone recognizes, were set in *Quebec (Attorney General) and Keable v. Canada (Attorney General)*, [1979] 1 S.C.R. 218 and followed in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 where McLachlin J. stated:
>
> > 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

> This means, says Justice Canada, that questions may be asked which engage investigative or fact finding activities but not those which touch upon advice, legal or otherwise giving rise to or following those activities. Therefore, those areas proposed to be covered by Commission Counsel which concern advice, either written or oral "are at the very core of that which is proscribed by the Supreme Court of Canada's decision in *Keable*".

The Commissioner repeated the positions of the parties, including that of the Government of Saskatchewan, and referred to relevant case law. The Commissioner went on to state:

> The immediate problem to be addressed arises from Commission Counsel's proposal to question Federal witnesses about the reasons for their actions, including advice they provided or received, in connection with David Milgaard's two s. 690 applications and the Case on Reference. I will not attempt to set guidelines which will answer all possible objections I might hear in the future, and will confine my remarks for the moment to the question of whether advice, legal or otherwise, is a constituent of "administration or management" of a federal institution or entity (*Keable*, supra).
>
> The Concise Oxford Dictionary defines advice as "guidance, or recommendations offered with regard to future actions".
>
> The definitions of administration and management, found in the same source, give no hint of advice, in the above sense, being a constituent. Read as a whole, the phrase quoted above from *Keable* speaks to me of governance, and advice is clearly a distinguishable term. Therefore, questions which seek to probe the reasons behind actions, including questions about advice given or received, do not trench upon exclusive Federal jurisdiction.
>
> Support for this conclusion may be found in the fact that the court in *Keable* spoke of "administration and management" in the context of "the force", i.e. the R.C.M.P.
>
> Thus it held that while provincial authority can be exercised over

> the acts of individual officers, it cannot amount to an inquiry into the administration and management of the force. That would be colourable.
>
> I conclude 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.
>
> . . .
>
> Counsel will frame their questions so as to avoid the areas proscribed by *Keable*, namely the administration or management of a federal institution or entity. Objections to questions will be resolved by reference to the plain meaning of those terms, wherever possible.

THE TERMS OF REFERENCE ISSUE

[9] It is the position of counsel for the applicant that the only term of reference with respect to which the s. 690 *Criminal Code* proceedings could be relevant is the third one which authorizes the 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.

Counsel raises the question of how advice exchanged by federal Department of Justice lawyers between themselves or with their Minister, which advice has never been made public, and therefore never received by Saskatchewan Justice or the police, would assist the Commission in determining whether the investigation should have been re-opened prior to when in fact it was in the year 1997.

[10] Commission counsel did not specifically address the foregoing position, but put forward the position this Court should not address the applicant's request to set aside the Commissioner's ruling on the basis the proposed inquiries of federal Department of Justice lawyers are outside of the Commission's terms of reference because this position was not advanced before the Commissioner, and he has not ruled on the same. His position is that as there has been no ruling by the Commissioner on this point, there is nothing to judicially review. There is merit to this submission.

[11] Counsel for the applicant states it is implicit the Commissioner ruled the proposed inquiries to be within the terms of reference, because this was a prerequisite to deciding whether it was necessary to consider the constitutional argument.

[12] The evidence submitted by Commission counsel on this application, including the written submission of the applicant to the Commissioner, and the applicant's reply to the position of the Government of Saskatchewan does not make reference to the proposed inquiries being objectionable on the basis such inquiries are beyond the Commission's terms of reference. The applicant's submissions to the Commissioner commenced by making reference to the Supreme Court of Canada decision in *Quebec (Attorney General) and Keable v. Canada (Attorney General)*, [1979] 1 S.C.R. 218, and the applicant's response to the Government of Saskatchewan discusses only whether the *Keable* decision is applicable. The Commission's position paper on its terms of reference referred to above, make it clear that from the outset, the Commissioner intended to inquire into "certain aspects of the section 690 proceedings," subject to constitutional limitations. The position paper made it clear that the only constitutional limitation the Commission considered applicable was the limitation set out in *Keable*. The federal Department of Justice has known of this position throughout, and did not raise the terms of reference as an issue until its submissions made on this application.

[13] It is not the role of a court sitting on judicial review of a public inquiry commissioner's explicit ruling, to address rulings that may be implicit, but have not been formally presented to the Commissioner for a decision. It is the Commissioner's role in the first instance to interpret the terms of reference and to determine the relevancy of any line of inquiry. For this reason, this Court declines to address this ground for setting aside the Commission's ruling.

CONSTITUTIONAL ISSUE

[14] The parties agree the standard of review with respect to the constitutional issue is one of correctness.

[15] It is worth noting that the federal Department of Justice has not taken issue with the Commission pursuing the factual and investigative aspects of the s. 690 applications of Mr. Milgaard. In fact, the Province of Saskatchewan received all of the material from these applications when the federal Minister of Justice turned these materials over to the Supreme Court of Canada to conduct the reference, which materials it received by reason of it having Standing at the reference. The federal Department of Justice has not objected to its lawyers testifying at the Inquiry, and one of them has in fact testified for eight days on factual and investigative matters related to the s. 690 *Criminal Code* applications.

[16] The position of the federal Department of Justice is that while the Commission's pursuit of factual and investigative material from the federal s. 690 *Criminal Code* applications is reasonably incidental to the mandate set out in the terms of reference for the Commission, any attempt to go beyond this and inquire into advice given or received by Department of Justice lawyers offends the constitutional limitation

imposed on provincial commissions of inquiry set out in *Keable, supra*, and *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796.

[17] The Commissioner has ruled that advice federal Department of Justice lawyers may have exchanged with each other or with their Minister within the s. 690 *Criminal Code* proceedings does not fall within a proscribed area identified in *Keable, supra*. The Commissioner's words are:

> I conclude 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.

The reasoning of the Commissioner is based on the definition of advice contained in a *Concise Oxford Dictionary*. In his decision, he noted:

> The Concise Oxford Dictionary defines advice as "guidance, or recommendations offered with regard to future actions".
>
> The definitions of administration and management, found in the same source, give no hint of advice, in the above sense, being a constituent. Read as a whole, the phrase quoted above from *Keable* speaks to me of governance, and advice is clearly a distinguishable term. Therefore, questions which seek to probe the reasons behind actions, including questions about advice given or received, do not trench upon exclusive Federal jurisdiction.

[18] Counsel for the applicant and counsel for Mr. Asper take the position the Commissioner's interpretive approach was too narrow for a constitutional determination. In its brief, counsel for the applicant states:

> 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 [sic] 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.

[19] To the extent the Commissioner focused on the words administration and management which appear in the *Keable* decision, it is perhaps worth reviewing how those words came to appear in the decision of Justice Pigeon. At pages 242-43 of the decision, Justice Pigeon stated:

> . . . Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. 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. As Viscount Simon said in *Attorney General for Saskatchewan v. Attorney General for Canada*, (at p. 124) "you cannot do that indirectly which you are prohibited from

doing directly".

[20] What prompted the foregoing remarks were the constitutional questions which the Supreme Court of Canada had ordered should be determined on the appeal. Constitutional question No. 3 is set out at pages 238-39 of the decision and reads as follows:

> 3. If members of a federal institution, namely the Royal Canadian Mounted Police, be involved in allegedly criminal or reprehensible acts, does a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province have the right, while conducting an inquiry into the circumstances surrounding the commission of said acts, to inquire into:
>
> > (a) the federal institution, namely, the Royal Canadian Mounted Police;
> > (b) the rules, policies and procedures governing the members of the institution who are involved;
> > (c) the operations, policies and management of the institution;
> > (d) the management, operations, policies and procedures of the security service of the Royal Canadian Mounted Police;
>
> and to make recommendations for the prevention of the commission of said acts in the future?

It will be observed that question No. 3(a) was whether the provincial commission could inquire into a federal institution, in that case the Royal Canadian Mounted Police. It will be observed that in Clause 3(c) and (d), the question posed was whether the commission had the right to inquire into the operations, policies and management of the institution. At page 253 of the decision, Pigeon J. answered the constitutional questions posed, and with respect to constitutional question No. 3, the answer was an unqualified "no".

[21] The unqualified answer of "no" to constitutional question No. 3 adds perspective to Pigeon J.'s use of the words "administration" and "management". The word "administration" does not appear in constitutional question No. 3. Pigeon J. uses the words management and administration interchangeably. It seems clear that Pigeon J. was simply using these words to summarize the overall content of constitutional question No. 3.

[22] In reviewing constitutional question No. 3, it would appear that subparas. (b), (c) and (d), were included in the event the answer to clause (a), which asked if the Commission could inquire into the federal institution, was a partial yes, as it was with constitutional question No. 1. Question No. 3(b) relates to rules, policies and procedures governing personnel. Question No. 3(c) and (d) address the R.C.M.P. as an organization or an entity, including its operations, policies and management. A fair reading of question No. 3 in its context suggests the question relates to all aspects of the R.C.M.P. organization.

[23] In *MacKeigan v. Hickman, supra*, McLachlin J. (as she then was) at pages 835-36 was quoted in the Commissioner's decision, wherein she stated in part:

> . . . 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.

It is suggested McLachlin J.'s use of the word operation as opposed to administration, was not simply a misquote of Pigeon J.'s remarks in *Keable*, but simply McLachlin J.'s own interpretation of what the *Keable* case stands for with respect to constitutional limitations. It will be observed McLachlin J. considered the constitutional limitation to apply to federal activities as well as entities.

[24] I conclude the applicant's position is correct that a province cannot authorize an inquiry into the substantive operations of a federal institution, or into its administration or management of the same, beyond what is authorized in its terms of reference which are either accepted, or found by a court to be constitutional because the pith and substance of the terms of reference are a valid exercise of a provincial constitutional power. Neither the federal Department of Justice, nor any of its individual employees, is a subject of investigation under the terms of reference in this matter.

[25] I also conclude, that subject to the terms of reference authorizing the same as a valid exercise of a provincial power, a provincial commission of inquiry cannot inquire into the conduct, or the job performance of a federal employee with respect to the employee's activities on behalf of his or her employer. The Supreme Court of Canada decision in *Alberta (Attorney General) v. Putnam*, [1981] 2 S.C.R. 267 is instructive in this respect. The issue in the case was whether provisions of *The Police Act* in the Province of Alberta related to investigation of police conduct could apply to R.C.M.P. officers. In deciding the Alberta *Police Act* had no application to R.C.M.P. officers, Laskin J. on behalf of the majority, at page 278, found the R.C.M.P. code of discipline precluded the application of the provincial *Police Act*, but also noted "[t]his is so apart altogether from any constitutional impediment so clearly raised here as it was in *Keable*, *supra*."

[26] The Minister of Justice and Attorney General of Canada is the chief legal advisor to the federal Crown, including the various departments and agencies of government. Department of Justice lawyers are charged with carrying out the Minister's duties, one of which was processing s. 690 *Criminal Code* applications up until that section was repealed in 2002. Section 690 stated in part:

> 690. The Minister of Justice may, on an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment. . . .

The advice lawyers working on Mr. Milgaard's applications offered to each other within the Department of Justice or to their Minister, or why they did certain things and did not do other things while engaged in this activity, as counsel for the applicant puts it, is within the core area of operations of the Department of Justice. (*Vide*: *Department of Justice Act*, R.S.C. 1985, c. J-2, ss. 2, 4 and 5). In addition such inquiries would be inquiring into the federal employee's performance of his duties, or conduct. For both of the foregoing reasons, the proposed inquiries would offend the constitutional limitation on provincial powers established in the *Keable* decision.

[27] I conclude the Commissioner erred in law in concluding the constitutional limitation on his Commission with respect to the questioning of federal Department of Justice lawyers was with respect to governance issues only. The constitutional limitation set out in the *Keable* decision precludes the Commission from asking federal Department of Justice lawyers "questions which seek to probe the reasons behind actions, including questions about advice given or received." The Commissioner's ruling is set aside.

[28] Order accordingly.

R. O. Laing C.J.
R.D. LAING