

**COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION
OF DAVID MILGAARD**

Honourable Mr. Justice Edward P. MacCallum, Commissioner

**REPLY OF THE GOVERNMENT OF SASKATCHEWAN
TO SUBMISSIONS ON BEHALF OF THE FEDERAL MINISTER
OF JUSTICE REGARDING THE CONSTITUTIONAL
LIMITATIONS ON THE SASKATCHEWAN INQUIRY
INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD**

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INTRODUCTION

1. The Government of Saskatchewan ("Saskatchewan") submits this Reply in response to the document dated May 23, 2006 submitted by the Government of Canada ("Canada") and entitled "Submissions on behalf of the Federal Minister of Justice regarding the Constitutional Limitations on the Saskatchewan Inquiry into the Wrongful Conviction of David Milgaard".
2. Saskatchewan does not intend to make a formal oral presentation at the hearing before the Commissioner, the Honourable Mr. Justice Edward P. MacCallum, scheduled for May 30, 2006 at which time Canada will ask for a formal ruling on its objections to certain areas of inquiry about which Commission counsel gave notice he intended to pursue with witnesses from the Department of Justice (Canada). However, counsel for Saskatchewan will be present to answer any questions the Commissioner may have regarding the submissions contained in this Reply.

GENERAL POSITION

3. Saskatchewan established this Commission of Inquiry into the Wrongful Conviction of David Milgaard by Order-in-Council 84/2004 dated February 18, 2004. The scope of inquiry for this Commission is broad as set out in paragraph 1 of its Terms of Reference as follows:
 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. (Emphasis added).

4. Saskatchewan accepts that a provincial commission of inquiry such as this one, has certain limitations placed upon it by the Constitution of Canada. Generally, Saskatchewan agrees with the summary of the constitutional limits found at pages 5 and 6 of the Commission's Position Paper on the Terms of Reference and dated December 7, 2004. That summary is replicated in part at page 4 of Commission counsel's memorandum dated May 18, 2006.

5. In response to the Commission's Position Paper, Saskatchewan filed a short document setting out its position respecting the constitutional limitations upon the parameters of the Commission's jurisdiction. Two limitations were highlighted in that document. The second limitation identified there is especially relevant now. It reads:

The second limitation is that a province cannot inquire into the policies, procedure, rules or administration or management of a federal institution or entity ... [Saskatchewan] acknowledges that this limitation may potentially come into play in relation to aspects of the federal review under section 690 of the *Criminal Code*, but agrees with the position paper that it is not possible, at this early stage of the proceedings, to determine if this constitutional limitation may need to be considered.

6. When establishing this Commission and formulating its terms of reference, Saskatchewan sought to imbue it with a scope of inquiry as generous as possible within accepted constitutional constraints. Saskatchewan wants the Commissioner to inquire into, and make recommendations about, all aspects of the administration of criminal justice in Saskatchewan which may have

contributed to the wrongful conviction of David Milgaard. This would include actions taken by the Department of Justice (Canada) that might have affected decisions made by police, prosecutors and other justice officials in Saskatchewan about this matter. It is precisely for this reason that subject to the comments below, Saskatchewan submits the Commission has the constitutional authority to inquire into the operation of section 690 of the *Criminal Code* in the context of Mr. Milgaard's two applications.

SOLICITOR/CLIENT PRIVILEGE

7. Saskatchewan submits that it is important to segregate questions of solicitor/client privilege from issues of constitutionality. Claims of privilege have no bearing on whether a provincial commission of inquiry has the constitutional authority to inquire into a particular subject-matter. Such a commission may be prevented from pursuing even legitimate areas of inquiry by valid claims of solicitor/client privilege.

8. Saskatchewan submits that Canada blurs these two issues. At page 2, it states that "the appropriate distinction to be made is between which activities were investigative or fact finding in nature and those which constituted advice, legal or otherwise". This distinction may be useful for addressing any claims of privilege which Canada might advance; however, it offers little assistance in resolving the objections based upon the Constitution that Canada now raises.

CONSTITUTIONAL OBJECTIONS

9. Saskatchewan agrees with Canada that the governing authority is *Quebec (Attorney General) and Keable v. Canada (Attorney General)*, [1979] 1 S.C.R. 218. It was in *Keable* that Pigeon J. for the majority announced at page 242 that a provincial commission of inquiry lacked the constitutional authority to inquire into or make recommendations respecting “the administration and management of the [Royal Canadian Mounted Police]”. At issue in *Keable* was the constitutionality of a provincial commission of inquiry established by the Government of Quebec to investigate alleged criminal activities undertaken by the RCMP in that province. The terms of reference gave the Keable Commission wide ranging powers. The Supreme Court upheld virtually all of these terms; however, it did remove certain portions which appeared to authorize the provincial commission of inquiry to make recommendations respecting systemic policies and regulations of the RCMP. In particular, paragraph d) authorized the Keable Commission “to make recommendations on the measures to be taken to ensure that any illegal or reprehensible acts the Commission uncovers will not be repeated in the future”. Pigeon J. concluded that this particular paragraph could not stand. He stated at page 243 that:

This paragraph pertaining to recommendations following as it does provisions contemplating an inquiry into the regulations and practices of the R.C.M.P., is clearly intended to invite, as a purpose of the inquiry, recommendations for changes in such regulations and practices. Inasmuch as these are the regulations and practices of an agency of the federal government, it is clearly not within the proper scope of the authority of a provincial legislature to authorize such an intrusion by an agent of a provincial government. (Emphasis in original).

10. The principles which emerge from *Keable* and subsequent authorities which applied it, demonstrate that this Commission does not lack authority to penetrate the walls of the Department of Justice (Canada), as it were. Saskatchewan submits that this Commission can investigate the various actions undertaken, and decisions taken by officials in the Department of Justice (Canada) subject to valid claims of solicitor/client or Crown privilege, in respect of the two applications under section 690 of the *Criminal Code* brought on behalf of Mr. Milgaard.

11. Saskatchewan does concede that following *Keable*, this Commission lacks the constitutional authority to embark upon a general systemic inquiry into the Department of Justice (Canada)'s policies, procedures and protocols respecting the operation of section 690 applications either at the time of Mr. Milgaard's two applications or at present.

12. Saskatchewan leaves it to the Commissioner to decide which areas of inquiry fall outside these general parameters.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 30th day of May, 2006.

Graeme G. Mitchell, Q.C.

Counsel for the Government of Saskatchewan