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 LAW SUBMITTED ON BEHALF OF THE ATTORNEY GENERAL FOR SASKATCHEWAN

Douglas E. Moen, Q.C.
Deputy Minister of Justice and
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8th Floor, 1874 Scarth Street
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PART I

STATEMENT OF FACTS

1. The Attorney General of Canada ("Canada") seeks judicial review in the nature of *certiorari* of a decision rendered on June 1, 2006 by the Honourable Mr. Justice Edward P. MacCallum, Commissioner (the "Commissioner"), of the Commission of Inquiry into the Wrongful Conviction of David Milgaard (the "Milgaard Inquiry"). Canada also seeks an order from this Honourable Court prohibiting the Commissioner from "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."

Canada's Notice of Motion dated July 4, 2006.

2. The Attorney General for Saskatchewan ("Saskatchewan") participated through counsel at the hearing before the Commissioner on May 30, 2006 which preceded the issuance of his Decision on June 1, 2006. He participates in this judicial review application not only because the Government of Saskatchewan has standing at the Milgaard Inquiry, but also by virtue of the provisions of *The Constitutional Questions Act.*

The Constitutional Questions Act, R.S.S. 1978, c. C-29, s. 8(7).

3. For purposes of this hearing, Saskatchewan accepts the recitation of relevant facts set out in paragraphs 12 to 26 of Canada's Memorandum of Fact and Law dated July 6, 2006. Saskatchewan accepts as well the summary of relevant facts found in the Commissioner's Memorandum of Law.

PART II

STATEMENT OF THE ISSUES

4. Canada's Notice of Motion raises two issues, one challenging the Commissioner's ruling on the basis that it exceeds the scope of the Milgaard Inquiry's terms of reference as set out in Order-in-Council 84/2004 dated February 18, 2004. For purposes of this application, this issue will be referred to as the "Terms of Reference Issue". The second issue alleges that the Commissioner's ruling exceeds his jurisdiction under the Constitution of Canada. As enlarged upon in its Memorandum of Fact and Law, Canada asserts that the Commissioner exceeded the constitutional jurisdiction of 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". For purposes of this application, this issue will be referred to as the "Constitutional Issue".

Canada's Memorandum of Fact and Law, at p.6, para. 28.

5. In this Memorandum of Law, Saskatchewan will address only the Constitutional Issue. Mr. Douglas C. Hodson, counsel to the Milgaard Inquiry, has filed extensive written submissions with this Honourable Court respecting the Terms of Reference Issue. Saskatchewan agrees with and adopts those submissions.

Milgaard Inquiry's Memorandum of Submissions.

6. This aspect of Canada's application for judicial review raises two issues as follows:

1. What is the applicable standard of review?

2. Is the Commissioner's decision set out in his ruling of June 1, 2006 to permit questioning of federal government witnesses about "advice given or received" a colourable attempt to inquire into the administration or management of the Department of Justice (Canada) contrary to *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218?

POSITION OF SASKATCHEWAN

7. Saskatchewan submits that on this aspect of Canada's application for judicial review, the appropriate standard of review is correctness. Saskatchewan submits further that the Commissioner's ruling is consistent with the principles set down in *Attorney General of Quebec and Keable v. Attorney General of Canada* and is not a colourable attempt by a provincial commission of inquiry to inquire into the administration or management of a federal entity, namely the Department of Justice (Canada). The correctness standard is satisfied and, accordingly, Canada's application should be dismissed.

PART III

ARGUMENT

A. Introduction

8. Saskatchewan submits that for purposes of this application it is important to have regard for the context in which it arises. The Milgaard Inquiry was established by the Government of Saskatchewan through Order-in-Council 84/2004 to ascertain what went wrong in the investigation and subsequent prosecution of David Milgaard that resulted in his wrongful conviction for the murder of Gail Miller, and subsequent incarceration for approximately 23 years. This case cast a shadow over the administration of criminal justice in this province. As Wilson J. stated in *MacKeigan v. Hickman*, when the justice system "in some way went awry" by convicting an innocent person of a heinous crime, "it is obviously a matter of great public concern". The Government of Saskatchewan determined that a public commission of inquiry should be established to inquiry into any and all matters relevant to the wrongful conviction of Mr. Milgaard and his subsequent incarceration.

> *MacKeigan v. Hickman,* [1989] 2 S.C.R. 796, at p. 808, *h*, per Wilson J. (dissenting, but not on this point).

9. Provincial commissions of inquiry make significant contributions to Canadian polity. In *Phillips v. Nova Scotia (Westray Mine Inquiry)*, Cory J. spoke eloquently about these unique bodies. So comprehensive is Cory J.'s discussion that it is worth reproducing in full here:

> Commissions of inquiry have a long history in Canada. This Court has already noted ([*Starr v. Houlden*, [1990] 1 S.C.R. 1366], at pp. 1410-11) the significant role that they have played in our country, and the diverse functions which they serve. As *ad hoc*

bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed, although it is an unfortunate reality that their establishment is often prompted by tragedies such as industrial disasters, plane crashes, unexplained infant deaths, allegations of widespread child sexual abuse, or grave miscarriages of justice.

At least three major studies on the topic have stressed the utility of public inquiries and recommended their retention: Law Reform Commission of Canada, Working Paper 17, *Administrative Law: Commissions of Inquiry* (1977); Ontario Law Reform Commission; *Report on Public Inquiries* (1992); and Alberta Law Reform Institute, Report No. 62, *Proposals for the Reform of the Public Inquiries Act* (1992). They have identified many benefits flowing from commissions of inquiry. Although the particular advantages for any given inquiry will depend upon the circumstances in which it is created and the powers it is given, it may be helpful to review some of the most common functions of commissions of inquiry.

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free form partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.

This important characteristic was commented upon by Ontario Supreme Court Justice S. Grange following his inquiry into infant deaths at Toronto Hospital for Sick Children:

> I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered by my error. They are not just inquiries; the are *public* inquiries. . . .I realized that there was another purpose to the inquiry just as important as one man' solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to from its opinion as it goes along. [Emphasis in original.]

(S.G.M. Grange, "How Should Lawyers and the Legal Profession Adapt?", in A. Paul Pross, Innis Christie and John A. Yogis, eds., *Commissions of Inquiry* (1990), 12 *Dalhousie L. J.* 151, at pp. 154-55.)

The public inquiry has been even more broadly characterized as serving a particular "social function" within our democratic culture:

> . . . a commission. . . has certain things to say to government but it also has an effect on perceptions, attitudes and behaviours. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach to a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and response of individuals at the various places at which they effect the problem are of profound importance.
>
> What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction. . . Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.

(Gerald E. Le Dain, "The Role of the Public Inquiry in our Constitutional System", in Jacob S. Ziegel, ed., *Law and Social Change* (1973), 79, at p. 85.)

The investigative, educational and informative aspects of inquiries, clearly benefit society as a whole. As well, many commissions of inquiry have, through their recommendations, achieved improvements in the particular situations being reviewed. Nonetheless, it cannot be forgotten that harsh and persuasive criticisms have been levelled against them. Every inquiry created must proceed carefully in order to avoid complaints pertaining to excessive, cost, lengthy delay, unduly rigid procedures or lack of focus. More importantly for the purposes of this appeal is the risk that commissions of inquiry, released from many of the institutional constraints placed upon the various branches of government, are also able to operate free from the safeguards which ordinarily protect individual rights in the face of government action.

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 98, at pp. 137-140, paras. 60-65, per Cory J. (dissenting in part, but not on this point).

10. Given the salutary societal and legal goals commissions of inquiry seek to accomplish, it should not occasion surprise that the trend in the Supreme Court of Canada jurisprudence reveals, as Binnie

J. asserted in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, a strong tendency of "giving broad scope to provincial inquiries".

> *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 1, at p. 41, para. 52 (citations omitted).

11. With the context of this judicial review application firmly established, it is necessary first to consider the standard of review to be applied by this Honourable Court when adjudicating Canada's challenge to the Commissioner's ruling respecting the Constitutional Issue.

B. Standard of Review

12. To date, the Supreme Court of Canada has identified three standards of review available to a court on judicial review of administrative tribunals. These three standards reflect differing degrees of relative deference to the tribunal in question. They are: (1) correctness or an "exacting review"; (2) reasonableness described as a "significant searching or testing", and (3) patent unreasonableness, where the issue is "left to the near exclusive determination of the decision maker".

> See especially: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at para. 22.

13. This jurisprudence instructs that courts should undertake a "pragmatic and functional approach" when ascertaining the degree of deference to be accorded to the administrative decision maker in question. This analysis involves a consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to a court on

the issue in question; (3) the purposes of the legislation and the provision in question; and (4) the nature of the question as one of fact, of law, or of mixed fact and law.

> See especially: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 29-38.
>
> *Dr. Q., supra*, at paras. 26-35.

14. A provincial commission of inquiry like the Milgaard Inquiry is not a typical administrative tribunal. The Commissioner is a highly esteemed judge of the Alberta Court of Queen's Bench who possesses considerable expertise in the various legal and criminal justice issues which confront him. Nevertheless, respecting the Constitutional Issue raised by Canada in its Notice of Motion, it is well-settled that when a court is asked to review the determination of a decision-maker on a question of constitutional law— be it a division of powers issue or the application of the *Canadian Charter of Rights and Freedoms*— the pragmatic and functional approach dictates that correctness is the operative standard.

> See especially: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, at p. 530, para. 31.
>
> *Barrie Public Utilities v. Canadian Cable Television Association*, [2003] 1 S.C.R. 476, at pp. 506-7, para. 66 per Bastarache J. (dissenting, but not on this point).

15. Although the relevant standard of review on this aspect of the case at bar is correctness, Saskatchewan urges this Honourable Court to give considerable weight to the Commissioner's reasoning. The Commissioner is an experienced superior court judge, and his considered views on the

constitutional issues raised by Canada as set out in his Decision of June 1, 2006, it is submitted, are at the very least worthy of careful study and consideration.

C. <u>Constitutional Issue</u>

16. Canada challenges the Commissioner's Decision of June 1, 2006 on the ground that to permit questioning of officials from Department of Justice (Canada) about advice and recommendations given to the federal Minister of Justice respecting Mr. Milgaard's applications under sections 617/690 of the *Criminal Code of Canada*, as well as the Case on Reference exceeds his constitutional jurisdiction. Saskatchewan submits that while Canada's challenge does engage the division of federal and provincial legislative powers located in sections 91 and 92 of the *Constitution Act, 1867*, in essence it is an argument about colourability, rather than constitutional *vires*. Indeed, the Commissioner suggested as much. Saskatchewan proposes to address its reply to Canada's challenge in two parts. First, the general principles will be addressed. Second, the Commissioner's Decision will be measured against those principles on a correctness standard. Saskatchewan submits that the Commissioner did not err as a matter of constitutional law in his ruling.

> Commissioner's *Decision in the Matter of An Application by Federal Minister of Justice To Set Constitutional Limitations On the Questioning of Federal Witnesses,* dated June 1, 2006, at p. 4.

1. The General Principle and its Exceptions

17. Generally speaking, by virtue of section 92(14) of the *Constitution Act, 1867*, a provincial commission of inquiry into a wrongful conviction has the constitutional authority to inquire into all aspects of the investigation, charging, prosecution, conviction and post-conviction matters, including an application under section 690 of the *Criminal Code*, relating to a particular accused. Provincial legislatures have been given the exclusive jurisdiction to legislate in relation to the administration of justice in the province, which includes authority over the administration of criminal justice.

> *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at p. 835 per McLachlin J. (as she then was).

18. There are two limitations placed upon this admittedly broad jurisdiction. The first is dictated by the express language of the constitutional text. Section 91(27) of the *Constitution Act, 1867* stipulates that the enactment of criminal laws or rules of criminal procedure fall solely within the legislative purview of the Parliament of Canada. Any attempt by a provincial legislature or a provincial commission of inquiry to trench upon those areas is *ultra vires*.

> *Constitution Act, 1867*, section 91(27).

19. The second limitation flows principally from the seminal judgment of the Supreme Court of Canada in *Attorney General of Quebec and Keable v. Attorney General for Quebec*. In his reasons for judgment for a majority of the Court, Pigeon J. stated that a provincially organized commission of inquiry cannot investigate or make recommendations respecting the administration or management of a federally regulated entity.

Attorney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218.

20. These limitation are not absolute, however. A provincial inquiry may touch upon these areas provided it does so only incidentally. Lamer J. (as he then was) made this point in *Starr*. There he acknowledged that provincial commissions of inquiry legitimately enjoy "fairly broad powers of investigation which may incidentally have an impact upon the federal criminal law and criminal procedure powers". To similar effect, Binnie J. in *Consortium Developments (Clearwater) Inc.*, spoke of "the general constitutional rule that permits provincial inquiries that are in 'pith and substance' directed to provincial matters (in this case local government) to proceed despite possible 'incidental' effect on the federal criminal law power".

Starr v. Houlden, [1990] 1 S.C.R. 1366, at pp. 1390-1391.

Consortium Developments (Clearwater) Inc., *supra*, at p. 40, para. 51.

21. Canada does not challenge the Milgaard Inquiry on the basis that it trenches upon Parliament's exclusive legislative jurisdiction in relation to criminal law or criminal procedure. Rather, its objection is one of colourability. Canada asserts that while the Commissioner has the authority to inquire into various aspects of the section 617/690 applications, he cannot inquire into matters pertaining to the administration and management of the Department of Justice (Canada). Canada's Memorandum of Fact and Law accepts that subject to claims of privilege, the Commissioner is entitled to inquiry into factual information known to Justice Canada which came to light as a result of those applications, but not the

advice given flowing from this information. This argument directly engages the exception identified in *Keable* and its progeny, which case law is discussed in the next part of this Memorandum.

Canada's Memorandum of Fact and Law, at p. 11, para. 51.

2. *Attorney General of Quebec and Keable v. Attorney General of Canada*

22. *Keable* has its genesis in a provincial commission of inquiry established by the Government of Quebec under the *Public Inquiry Commission Act*, R.S.Q. 1964, c. 11 to inquire into alleged criminality committed by members of Quebec's provincial police force, the Montreal Urban Community Police Department and the Royal Canadian Mounted Police in Quebec in the early 1970s. The Terms of Reference clothed the inquiry headed by Jean Keable with wide powers. In an attempt to fulfill his mandate, Commissioner Keable issued comprehensive subpoenas directed to the Solicitor General of Canada demanding that he produce a substantial number of documents pertaining to the internal administration of the RCMP. Associate Chief Justice Hugessen of the Quebec Superior Court dismissed an application brought by the Solicitor General seeking to have these subpoenas quashed on the ground that disclosing such documentation could threaten national security.

23. The Quebec Court of Appeal (Kaufman J.A., dissenting in part) allowed an appeal from this ruling brought by the Government of Canada. The Court directed that in view of the important national security issues at play, the Keable Inquiry should be permanently enjoined from continuing its work.

Re Attorney General of Canada and Keable (1978), 87 D.L.R. (3d) 659 (Que. C.A.).

24. Saskatchewan cites this decision because it illuminates the subsequent ruling of the Supreme Court of Canada in this matter. One of the arguments advanced before the Quebec Court of Appeal was that the Keable Inquiry was *ultra vires* the Quebec Legislature. Only one of the three judges inclined to this view. Monet J. A. stated that because the "Provinces of Canada have no legislative jurisdiction concerning federal institutions", their powers to create commissions of inquiry "should be fashioned along the lines of the distribution of federal legislative powers between the levels of Government." This view reminiscent of the written argument submitted in this proceeding by the Respondent, David Asper, that a provincial commission of inquiry has no jurisdiction to inquire into a federal entity was rejected by Monet J.A's colleagues, as well as subsequent case law.

> *Re Attorney General of Canada and Keable*, *supra*, (Que. C.A.), at p. 703.
>
> Memorandum of Fact and Law of the Respondent, David Asper, dated July 31, 2006.

25. Paré J.A. with whom Kaufman J.A. concurred on this point, saw ampler room for provincial inquiries, generally, and the Keable Inquiry, particularly. He stated:

> I do not see in the very terms of the mandate of the Commission under study, the authorization of making <u>a systematic investigation into the internal working of the security services of the R.C.M.P.</u> Indeed, the mandate of inquiring into certain events which occurred within the territory of the province, and into the "behaviour of all persons involved" did not constitute in any way <u>a systematic inquiry into the internal working of security services of the R.C.M.P</u>. That certain person involved are members of the R.C.M.P. in no way makes the mandate unconstitutional, as these person are not sheltered as individuals from the criminal law because of their belonging to the R.C.M.P.

In spite of this, however, Paré J.A. concluded that because Commissioner Keable purported to direct the Solicitor General of Canada to produce sensitive documents relating to national security, a writ of evocation suspending all further proceedings should issue.

> *Re Attorney General of Canada and Keable*, *supra*, (Que. C.A.), at p. 693, and 701 (emphasis added).

26. The Quebec Court of Appeal opined that a provincial commission of inquiry may look into the operations of a federal entity, provided such an investigation was not intended to be, and did not become, a "systematic inquiry into the internal working" of this entity. This important theme was picked up, and figured prominently, in the judgment of the Supreme Court of Canada in this matter.

27. The Supreme Court of Canada unanimously set aside the writ of evocation permanently suspending all proceedings of the Keable Inquiry, imposed by the Quebec Court of Appeal. Pigeon J. wrote the majority opinion. He scrutinized the Keable Inquiry's terms of reference, and determined that "an inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly ordered." He indicated, however, that in view of the fact that the federal police force was implicated, it was necessary to ascertain "the extent to which such inquiry may be carried into the administration of this police force". In a passage the meaning of which is central to the resolution of Canada's constitutional objection raised in the case at bar, Pigeon J. stated:

> Parliament's authority for the establishment of this force and its management as part of the Government of Canada in 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 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 <u>the administration and management of the force</u>. The doctrine

> of colourability is just as applicable in adjudicating on the validity of a commission's terms of reference or decisions as in deciding on the constitutional validity of legislation.
>
> *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218, at p. 242 (emphasis added).

28. Unfortunately, Pigeon J. did not elaborate upon what was connoted by the phrase 'the administration and management of the force'? Saskatchewan, however, submits that illumination may be obtained from scrutinizing how he dealt with the Keable Inquiry's terms of reference. The Supreme Court upheld virtually all of these terms, deeming inapplicable to the R.C.M.P. only those portions which appeared to authorize the provincial commission of inquiry to investigate and make systemic recommendations respecting its policies and regulations. Justice Pigeon explained his reasoning for this in the following paragraph:

> The words [TRANSLATION] "and the frequency of their use" at the end of paragraph a) as well as the words "and the frequency of their use" at the end of paragraph c), of the Commissioner's mandate, do not contemplate an inquiry into criminal acts but into the methods used by the police forces. Those are essential aspects fo their administration and therefore, to the extent that those words relate to the R.C.M.P., what they purport to authorize is beyond provincial jurisdiction to inquire into. That this is the intended scope of the inquiry is apparent from the subpoenas which call for the production of all operating rules and manuals. For similar reasons, I would hold that paragraph d) is invalid in so far as it relates to the R.C.M.P. 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, <u>as a purpose of the inquiry</u>, 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 o authorize such an intrusion by an agent of the a provincial government.
>
> *Attorney General of Quebec and Keable*, *supra*, at p. 243 (emphasis in original).

29. Saskatchewan submits that in *Keable*, the words "administration and management" are not terms of art, rather they are to be given their ordinary meaning as becomes apparent when those portions of the terms of reference which the Supreme Court rendered inoperative as against the R.C.M.P. are scrutinized. The thrust of the holding is that a provincial commission of inquiry can inquire into what a federal entity did in particular circumstances, but it cannot embark upon a direct and concerted investigation into how that entity conducts it business generally. This would be tantamount to a "systematic investigation into the internal working" of a federal entity which the Quebec Court of Appeal determined was not constitutionally permissible.

30. This is borne out when consideration is given especially to paragraph (d) of the Keable Inquiry's Terms of Reference. This paragraph authorized the Commissioner "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 future". The Court concluded this paragraph did not apply to the R.C.M.P. because it invited the Keable Commission "as a purpose of the inquiry" to recommend systemic changes to the R.C.M.P.'s operating procedures and policies, a matter relating to the internal working, or the administration or management of Canada's national police force. Saskatchewan submits that by emphasizing the words 'purpose of the inquiry', Pigeon J. signals that it is constitutionally permissible for a provincial inquiry to inquire into the internal working of a federal entity, provided it is not for the purpose of making recommendations respecting the propriety or otherwise about how the entity in question conducts its business.

> *Attorney General of Quebec and Keable*, *supra*, at p. 227, and p. 243 (emphasis in original).

31. Saskatchewan submits further that this interpretation of *Keable* gains support from Lamer J's exegesis of the case in *Starr*. He noted the Supreme Court in *Keable* had ruled that a provincial commission of inquiry could not "investigate the administration of the R.C.M.P." He then pointed to the particular paragraph in the Keable Commission's terms of reference which authorized it to investigate certain "illegal and reprehensible acts" and, without noting that Pigeon J. had ruled this did not pertain to the R.C.M.P. , held:

> I also note that in *Keable* the terms of reference of the Commission empowered it to investigate certain specific "illegal and reprehensible acts" so that it could make recommendations to ensure that those acts would not be repeated by the R.C.M.P. in the future. In that light, while the Commission no doubt was empowered to inquire into certain potentially illegal activity, the inquiry's focus was on the more general issue of R.C.M.P. methods of investigation and wrongdoing in that context, a matter within provincial jurisdiction.
>
> *Starr v. Houlden, supra*, at p. 1395, *e-g* (emphasis added).

3. Canada's Reading of *MacKeigan v. Hickman*

32. In its Memorandum of Fact and Law, Canada appears to suggest that certain language used by McLachlin J. (as she the was) in *MacKeigan v. Hickman* has expanded the aspects of a federal entity which are constitutionally off-limits to provincial commissions of inquiry. In *MacKeigan* when describing *Keable*'s holding, McLachlin J. employed the words "actual management or operation of the federal activity or entity in question", rather than "administration and management", the phraseology used by Pigeon J. in the earlier case. Canada asserts that this choice of language was deliberate, and 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."

MacKeigan v. Hickman, supra, at p. 835.

Canada's Memorandum of Fact and Law, at p.15, para. 71.

33. Saskatchewan submits that this interpretation is misplaced for two reasons. First, it is simply a re-statement in *obiter dicta* of the *ratio* in *Keable*. *Obiter dicta* should not be interpreted in a manner which alters in any way the central holding of another case. The phrase "actual management or operation" used by McLachlin J. must be read to mean the same thing as "administration or management". It should not be interpreted in a way which adds a gloss to the standard set in *Keable*.

34. Second, the actual circumstances in *MacKeigan* belie the interpretation of McLachlin J.'s judgment which Canada urges upon this Honourable Court. At the Royal Commission of the Donald Marshall Jr. Prosecution, a senior official from the Department of Justice (Canada) testified extensively about what transpired inside that department prior to, and at the time of, the then federal Minister of Justice's decision to refer the matter to the Nova Scotia Court of Appeal. On Canada's own submission such testimony was colourable, and ought not to have been received by the Marshall Inquiry. Saskatchewan submits that this precedent bolsters its interpretation of what was meant by Pigeon J. in *Keable*, namely that a provincial commission of inquiry can in the furtherance of a valid provincial purpose inquire into what a federal entity or undertaking did in a particular case or circumstances. That is what the Commissioner seeks to do in the Milgaard Inquiry—no more, no less.

4. Application of Principles to the Commissioner's Decision

35. For the following reasons, Saskatchewan submits that the Commissioner's Decision is not a colourable attempt to inquire into the administration or management of a federal entity as that phrase was meant by the Supreme Court of Canada in *Keable*.

36. Canada in its Memorandum of Fact and Law appears troubled by the Commissioner's reliance upon certain definitions contained in the Concise Oxford Dictionary. Canada states that the "phrase [administration and management] is not amenable to being construed simply by reference to a dictionary definition...It must be read in a way which gives effect to the principles which underlie the court's decision."

Canada's Memorandum of Fact and Law, at p.14, para. 69.

37. Saskatchewan submits, however, that the Commissioner consulted the dictionary definitions only as a starting point in order to try to understand what the phrase implied. As indicated above, there is no magic in the phrase "administration or management", the ordinary meaning of those words as set out in an authoritative dictionary of the English language is a reasonable place to begin the analysis. Moreover, the Commissioner did not consider the illumination he obtained from this source as dispositive. Rather, in his Decision, he clearly signals that he moves from standard definitions found in the dictionary to a contextual application of those words within the particular factual circumstances presented in *Keable*. He did the very thing Canada states should be done, namely he tried to interpret the phrase "in a way which [gave] effect to the principles which underlie the court's decision".

Commissioner's *Decision*, at p. 4.

38. Saskatchewan submits further that the Commissioner correctly ascertained what was connoted by the phrase "administration or management" in *Keable*. Canada suggests he erred only by finding that questions could be asked which would "seek to probe the reasons behind actions, including questions about advice given or received". Canada appears to acknowledge that the Commissioner can be apprised of "factual information" known to the federal Department of Justice "which is directly relevant to the investigations which ultimately led to Mr. Milgaard's exoneration".

Canada's Memorandum of Fact and Law, at p.18, para. 87, and at p. 10, para. 48.

39. Saskatchewan submits that this information/advice distinction "confounds the questions of privilege and constitutional prerogative" to quote the Commissioner's felicitous language in his Decision. The distinction which Canada draws may be useful when addressing claims of solicitor/client privilege, for example; however, it has no bearing on whether a provincial commission of inquiry is interpreting its terms of reference in a colourable way. For the reasons set out above, particularly in Part C.2, the Commissioner is acting in a manner consistent with the principle laid down in *Keable* by permitting questioning of federal officials on matters which might shed light on the wrongful conviction of Mr. Milgaard.

40. Saskatchewan submits as well that the federal Department of Justice is not unique in its advisory role. Senior officials in all government departments across Canada provide advice on a daily basis to their political masters, often on highly sensitive social policy issues. The only difference is that advice

given by officials in Justice Canada may often be protected by solicitor/client privilege. To accept Canada's blanket proposition that advice giving function of a federal government department falls outside the purview of a provincial commission of inquiry effectively precludes such a commission from learning of it, no matter how relevant and important this advice may be to the valid provincial interest being investigated.

41. In conclusion, Saskatchewan repeats certain of its submissions presented to the Commissioner on May 30, 2006:

> 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 the police, prosecutors and other justice officials in Saskatchewan about this matter....
>
> ......
>
> 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 or 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.

Reply of Government of Saskatchewan dated May 30, 2006,
Affidavit of Christine Elias dated July 4, 2006, Exhibit G.

42. Accordingly, Saskatchewan submits that the correctness standard is satisfied in this application for judicial review of the Commissioner's Decision dated June 1, 2006.

PART IV

NATURE OF ORDER SOUGHT

43. It is respectfully submitted that the Constitutional Issue presented to this Honourable Court should be answered "no", and this aspect of the instant application for judicial review be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan, this 3rd day of August, 2006.

Graeme G. Mitchell, Q.C.

Counsel for the Respondent, the Attorney General for Saskatchewan

This document was delivered by:

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PART V

LIST OF AUTHORITIES

Cases

Attorney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218.

Barrie Public Utilities v. Canadian Cable Television Association, [2003] 1 S.C.R. 476.

Consortium Developments (Clearwater) Ltd. v. Sarnia (City), [1998] 3 S.C.R. 1.

Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226.

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

Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504.

Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 98.

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982.

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

Re Attorney General of Canada and Keable (1978), 87 D.L.R. (3d) 659 (Que. C.A.).

Other

Commissioner's *Decision in the Matter of An Application by Federal Minister of Justice To Set Constitutional Limitations On the Questioning of Federal Witnesses*, dated June 1, 2006.

Constitution Act, 1867, section 91(27).

The Constitutional Questions Act , R.S.S. 1978, c. C-29, s. 8(7).