IN THE MATTER OF THE COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD

REPLY SUBMISSIONS OF

THE ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED (AIDWYC)

Julian K. Roy
Elisabeth Widner
Falconer Charney LLP
8 Prince Arthur Avenue
Toronto, ON, M5R 1A9
Ph: (416) 964-3408
julianr@fcbarristers.com

1. The Association in Defence of the Wrongly Convicted (hereafter "AIDWYC") respectfully adopts the main submissions, and in particular the proposed recommendations, of David and Joyce Milgaard, dated November 13, 2006.

2. The remainder of AIDWYC's reply will respond to the submissions made by the Attorney General of Canada with respect to the jurisdiction of this Commission of Inquiry to make recommendations concerning sections 696.1 through 696.6 of the *Criminal Code of Canada*. AIDWYC submits that this Commission of Inquiry may validly make recommendations with respect to sections 696.1 through 696.6 of the *Code*.

3. AIDWYC respectfully submits that the scope of a provincial commission of inquiry's jurisdiction to make recommendations in respect of federal legislation was defined in *Quebec (Attorney General) v. Canada (Attorney General)*[1]. The court held that a provincial commission may make recommendations touching on federal matters where the desirability of such changes to federal law are revealed through an inquiry into an area validly within provincial competence:

> Great stress was laid by the appellants as well as by intervenants on Dickson's J. statement in Di Iorio, at p. 208, that "A provincial commission of inquiry, inquiring into any subject, might submit a report in which it appeared that changes in federal laws would be desirable". This was said obiter in a case concerning an inquiry into organized crime. As previously noted, the basis of the decision was that such an inquiry into criminal activities is within the proper scope of "The Administration of Justice in the Province". The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The commission might therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable. This does not mean that

[1] [1979] 1 S.C.R. 218 ("Keable No.1")

> the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission. [emphasis added][2]

While the gathering of evidence for the specific purpose of making recommendations respecting federal legislation is prohibited, a provincial commission is entitled to make recommendations when deficiencies in federal legislation become apparent through a validly constituted inquiry within provincial areas of jurisdiction.

4. The question is not, as is submitted by the Attorney General of Canada (at paragraph 244 of its main submission): "...whether the 696.1 process is a matter within provincial competence". Rather, the question is whether the need for changes to the s.696 process has become apparent through an inquiry into matters that fall within the "administration of justice in the Province of Saskatchewan" as prescribed by the Terms of Reference.

5. The term "administration of justice" under s.92(14) of the *Constitution Act* was defined in the context of a provincial commission of inquiry in *MacKeigan v. Hickman*:

> The first question is whether a provincially appointed commission can inquire into a reference by the federal Minister of Justice under s. 617(*b*) of the *Criminal Code*. It is contended that such an inquiry is invalid because it trenches on the exclusive federal power with respect to the criminal law.
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> The answer to this contention lies in the mandate of the Commission. Section 1 of the *Public Inquiries Act* authorizes such an inquiry provided that the inquiry concerns a "public matter in relation to which the Legislature of Nova Scotia may make laws." The question is whether the inquiry is "into the administration of justice", in which case it falls within the Province's powers under s. 92(14), or into the "criminal law" or "criminal procedure", in which case it infringes the federal criminal law power.
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> The answer to this question depends on how the phrase "administration of justice" is construed in relation to the federal power over criminal law and procedure. In *Di Iorio v.*

[2] *Hickman, supra* at pp.241-242

Warden of Montreal Jail, [1978] 1 S.C.R. 152, this Court held that "administration of justice" should be interpreted broadly as including criminal justice. At pages 199-200, the Court stated:

> The question in the present case is whether the words "The Administration of Justice in the Province" are to be given a fair, large and liberal construction or, whether by reason of the abstraction of criminal law and criminal procedure, they must receive such attenuated interpretation as would confine "administration of justice" to nothing more than "administration of civil justice". In my opinion, Canadian legislative history, as well as the development of legal institutions within the Provinces since Confederation, favour the broader construction as do, by and large, the authorities, admittedly few in number, which touch upon the subject under consideration.[3]

6. In *Hickman*, the Supreme Court concluded that the reference by the federal Minister of Justice under section 617(b)[4] of *Criminal Code* was a matter that pertained to the "administration of justice", and was not *ultra vires* the Province[5]. *Hickman* is directly applicable to these facts. It supports AIDWYC's contention that this Commission of Inquiry is entitled to make recommendations concerning the federal conviction review process[6].

7. The Attorney General of Canada (at paragraphs 236-242) seeks to distinguish *Hickman* based on differences in the precise wording of the terms of reference in the Marshall Inquiry relative to the herein Terms of Reference. In particular, the Attorney General of Canada submits that "...such other related matters which the Commissioners consider relevant to the Inquiry" grants a broader jurisdiction to consider section 696.1 than "...such

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[3] [1989] 2 S.C.R. 796 at paras.73-75 per McLachlin J. (as she then was)
[4] Section 617 was the predecessor legislation to section 690, under which Mr. Milgaard's applications for review were considered.
[5] *Hickman, supra* at para. 77
[6] That the provincial commissions of inquiries into the wrongful convictions of Guy Paul Morin, Thomas Sophonow and Donald Marshall, Jr. all made recommendations with respect to the Federal conviction review process lends further support to AIDWYC's position.

recommendations as it considers advisable relating to the administration of justice in the Province of Saskatchewan". This submission is incorrect for at least two reasons.

8. First, as is submitted above, the Supreme Court in *Hickman* specifically considered the term "administration of justice" in determining that the Marshall Inquiry could inquire into the section 617 process. The phrase "administration of justice" considered in *Hickman* corresponds precisely to the language in the herein Terms of Reference. This is not a co-incidence. The "administration of justice" is the language in s.92(14) of the Constitution Act which defines the extent of Provincial jurisdiction over the justice system. By mirroring the phrase "administration of justice" in the Terms of Reference, the legislature has evinced an intention to grant this Commission of Inquiry the power to inquire and make recommendations to the full extent of the Province's constitutional jurisdiction, as pertains to Mr. Milgaard's wrongful conviction.

9. Second, regardless of the precise wording of the Terms of Reference, the scope of provincial jurisdiction is defined by the *Constitution Act*; in other words, the Terms of Reference cannot grant a commission of inquiry more jurisdiction than the Province enjoys. If the Province of Nova Scotia enjoys the jurisdiction to empower a commission to inquire into Mr. Marshall's s.617 application (as was found by the Supreme Court of Canada), the Province of Saskatchewan has no less jurisdiction in this setting.

10. The Attorney General of Canada also makes reference to its failure to cross-examine Mr. Kyle or to seek to call evidence regarding the current conviction review process as further

support for its position. AIDWYC submits that tactical decisions made by the Attorney General of Canada should have no bearing on whether recommendations are appropriate. This Commission of Inquiry is well-positioned to assess the legislative scheme now in place, as well as the annual reports submitted by the Minister to Parliament, and to compare the functioning of Canada's conviction review process to the English model.

11. AIDWYC makes one final observation concerning the jurisdiction of this Commission of Inquiry as it pertains to federal matters. In their submissions, both the Attorney General of Canada and Mr. Williams have invited this Inquiry to find that their respective conduct in addressing Mr. Milgaard's section 690 applications was diligent and appropriate[7]. In making this submission, it appears that the Attorney General has resiled from the position it took before Mr. Justice Laing in judicial review proceedings i.e. that this Commission of Inquiry is not entitled to make findings regarding the conduct of federal officials. AIDWYC agrees with the new position of the Attorney General of Canada in this regard.

ALL OF WHICH IS REPSECTFULLY SUBMITTED, THIS 30TH DAY OF NOVEMBER 2006.

Julian K. Roy

Elisabeth Widner

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[7] Attorney General of Canada's Main Submission, paras.254, 258; Main Submissions of Eugene Williams, paras. 20, 62, 72, 73