COMMISSION OF INQUIRY 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

HONOURABLE MR. JUSTICE EDWARD P. MacCALLUM,
COMMISSIONER

Supplemental Written Submission on Behalf of the Attorney General of Canada for the Minister of Justice (Canada)

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SUPPLEMENTAL SUBMISSIONS

1. The Attorney General of Canada, on behalf of the Minister of Justice, ("Minister") continues to submit that this Commission of Inquiry does not have the constitutional jurisdiction to make recommendations about the s.617/s.690 (mercy provisions) utilized by Mr. Milgaard, given it's terms of reference and status as a Provincial Inquiry.

2. In addition to the constitutional limitations, there are evidentiary limitations that the Inquiry must overcome to permit informed recommendations about the mercy provisions which are now s.696.1 to 696.6 of *The Criminal Code.*

3. However, if this Inquiry decides to make recommendations about the Mercy provisions of *The Criminal Code*, there are certain matters raised by the other parties which require a response.

4. It is necessary to re-iterate that this Inquiry has heard no evidence about how the current Conviction Review Process works in Canada. Mr. Milgaard's case was handled under a completely different system and as such, the facts surrounding the processes that existed in 1988-1992 are of limited assistance.

5. This is especially true given the fact that this Inquiry does not have the practical ability to assess the current operations of the Criminal Convictions Review Group (CCRG) since the legislation has changed and the regulations have been added. While this Inquiry can get some indication of the process by reviewing the application for persons applying to have their cases reviewed (Doc ID 337766) or by reviewing the 2005 annual report (Doc ID 339797), the reality of how the current process works is not something that this Inquiry has heard evidence about.

6. There is no evidence to say that the CCRG does not approach new applications in an inquisitorial manner.

I. The Submissions on behalf of David and Joyce Milgaard

7. At Paragraph 1, page 72 of the submissions made on behalf of David and Joyce Milgaard (the Milgaard's), there is the following statement,

> "The Committee concluded that the minor changes reflected in the draft legislation were better than no changes at all, and that major substantive changes should await the report of the Milgaard Inquiry."

8. The debates of October 2, 3, 4, 2001 of the Standing Committee on Justice and Human rights (Doc IDs 340792, 340801, 340831) have been, by request of both Counsel for the Federal Minister and Counsel for the Milgaard's, added to the Inquiry document collection. They are also available to the general public at the following parliamentary website, http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Session=9&query=2979&List=toc

9. A review of such debates will give this Inquiry a good understanding of all of the issues the Federal Minister of Justice considered prior to introducing amendments to the sections of *The Criminal Code* which dealt with Mercy applications.

10. Federal Justice Minister Anne McLellan, addressed the Committee on October 2nd, 2001. The highlights of her remarks are reproduced below,

> "In October of 1998, I released a public consultation paper seeking submissions on how our conviction review process could be improved. After extensive consultations and review of all the submissions received from interested parties, I concluded that the ultimate decision-making authority in criminal conviction review should remain with the Federal Minister of Justice, who is accountable to Parliament and the people of Canada. This recognizes and maintains the

traditional jurisdiction of the Courts while providing a fair and just remedy in those exceptional cases that have somehow fallen through the cracks of the conventional justice system.

Having concluded that an independent body for conviction review was not needed in Canada, I must also say that the consultation process convinced me that maintaining the current state of conviction review was not a desirable option. Therefore, the amendments to the conviction review process will provide investigative powers to those investigating cases on my behalf. This will for the first time allow investigators to compel witnesses to testify and compel the production of documents." (Doc ID 340792 at 340794)

.....

" I also intend to make administrative changes to improve the conviction review unit, which will make the conviction review process more open, accessible, and more accountable. The conviction review unit will be expanded to include investigators, a website will be created to give applicants information on the process, and a special advisor (sic) will be appointed to oversee the review of applications and to provide advice directly to me in these matters.

In fact, while we have a conviction review unit in the department now that is in fact separate to a large extent, what we want to do is ensure that they operate as an independent unit. I will be appointing from outside my department a so-called special advisor (sic) who in fact will head up this unit and who will report to me-not to others in the department-or to future ministers of justice to help enhance the independence of this position and the unit within the Department of Justice. I believe that these amendments are the most efficient and effective way to improve the post-appellate extrajudicial conviction review process in Canada."

....

" I met with the head of the British independent commission. I met with his commissioners and spent some time talking to them about both the strengths and weaknesses of their system.

I will tell colleagues that they have created an ever-expanding bureaucracy. They have thousands and thousands of applications, most of which they dismiss

as frivolous, but only after they have taken up some amount of time on the part of the commission. They do not have the resources to do their job. They will continue to ask for new resources. And the backlog of cases is not less; in fact, it's growing.

Therefore it is not apparent that the independent process is more efficient or more effective or necessarily delivers fairer justice than our process. Yes, it is technically within the Department of Justice with these amendments, but by in large it will be fenced; it will have walls around it. It will be very independent, free-standing unit, with new powers and a new independent advisor who will report to me and not up the line to officials within the department. I'm hoping we will be able to deal with wrongful conviction allegations in a timely fashion and in a fairer fashion." (DOC ID 340792 @ 340799 paragraphs 3-5)

11. In summary the transcript of the Committee hearing reveals that over the course of three days, the Standing Committee heard from the Justice Minister as well as Joyce Milgaard and Mr. Lockyer. The Committee heard that:

- The Minister travelled to the United Kingdom to learn about the CCRC
- The Minister consulted widely with the Provinces and the general public regarding the mercy provisions with the assistance of a discussion paper prepared in 1998.
- The Minister was concerned about the backlog of applications in the United Kingdom and the long periods of time it was taking to review the applications being submitted.
- The Minister took into consideration the major differences in the Canadian Justice System and the justice system in the United Kingdom.

12. Mr. Lockyer and Mrs. Milgaard made a presentation to the Committee members in which Mr. Lockyer suggested that perhaps the Committee should await the outcome of the Milgaard Inquiry. The Committee listened to Mr. Lockyer and

Mrs. Milgaard and asked a member of the Department of Justice to address them regarding the possibility that the Committee should wait for the Milgaard Inquiry. The Committee considered the issue and the majority decided not to wait for the results of the Milgaard Inquiry.

II. Similar Fact Evidence and its use at the trial of David Milgaard.

13. In their submission on behalf of the Milgaards, counsel have submitted that the way the similar fact evidence was received by the authorities over the years, was illustrative of a serious tunnel vision problem and that the similar fact observation was "substantial, persuasive and obvious".

14. However on December 12th, 1991, Mr. Milgaard's lawyers appeared to recognize that the use of similar fact evidence was a complex issue.

15. In his memo to David Milgaard on that issue, Mr. Asper stated as follows:

> "The Minister is quite correct when she says that there are very many complex issues raised by our second application. As an example, the question arises whether all of the Fisher material would be admissible in a trial or proceeding against David Milgaard. Assume for a moment that you are on trial as part of your defence, you want to call evidence that there was another person who might have been the true perpetrator. The question is, what are the ground rules that either allow, limit or prevent you from calling that kind of evidence? There isn't very much case law on this point because it doesn't happen very often, and I think that the Minister wants to know from the highest Court in the land what its view of the law should be." (Doc. ID. 213342 @ 343)

III. DNA

16. At page 80, line 32, the Milgaard's recommend that "blind" testing be done whenever possible, based on the Morin case.

17. As Mr. Fainstein's evidence indicated, the today's method of choice for DNA analysis is what is referred to as Short Tandem Repeats (STR's). The type of testing done in the Morin matter was *DQ Alpha*. As Mr. Fainstein also testified, *DQ Alpha* testing and STR testing are very different. The profiles for STR are far more complex and as Mr. Fainstein testified, the suggestion that such manipulation could take place with STR testing was, "not much of an argument". (transcript page 39892 at line 9)

18. Further, as the scientific evidence at the Inquiry indicated (see Dr. Fourney's letter Doc ID 230508), the decision as to whether to have a blind sample depends somewhat on the size and quality of the sample you have to work with. If you have a very minute or degraded sample, it may not be wise to do a blind sample because you may forsake the ability to do any DNA testing. In other words, there is not necessarily a "one size fits all" approach to the various steps to be taken when doing DNA testing. Therefore, it would appear that a uniform protocol for DNA testing may not work. In any event, this is a matter that would be better left to scientific experts who are in the best position to assess the forensic evidence and the technology available.

IV. The Submissions on Behalf of The Association in Defence of the Wrongfully Convicted

19. While The Association in Defence of the Wrongfully Convicted (AIDWYC) have attempted to speculate on the meaning of the statistics in the 2005 annual report, it is clearly a far reaching attempt that can not be supported by any evidence.

20. While it appears from the submissions before this Inquiry that AIDWYC is not at all satisfied with the current conviction review process, as recently as October of 2006, AIDWYC made written submissions at the Commission of Inquiry Into Certain Aspects of the Trial and Conviction of James Driskell. In their submissions, they

spoke of Mr. Driskell's experience with the current process and this is what his counsel had to say about the process at page 54, paragraph 68,

> "This is not to be critical of the Criminal Conviction Review Group's (CCRG) work on this case. David McNairn, and the CCRG as a whole, did first rate work on his application, discovered many facets of the case that had not been made available to AIDWYC, and worked with commendable speed."

21. The complaint of AIDWYC, based on their submissions in Driskell, appears to have been the fact that they believe that an application had to be made on behalf of Mr. Driskell by someone like AIDWYC or an advocate with some skill. It does not appear that the way the application was managed, once in the hands of the Minister's staff, was the subject of any complaints. In fact, it appears as though AIDWYC thought the Minister's staff approached Mr. Driskell's case in an inquisitorial manner, just as they believe the United Kingdom's Criminal Convictions Review Committee (CCRC) approaches matters.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Saskatoon, Saskatchewan, this 28TH day of November, 2006.

THE ATTORNEY GENERAL OF CANADA

Per: _____
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