

IN THE COURT OF QUEEN'S BENCH
FOR THE PROVINCE OF SASKATCHEWAN
JUDICIAL CENTRE OF 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

**MEMORANDUM OF FACT AND LAW
OF THE RESPONDENT DAVID ASPER
IN RESPONSE TO THE SUBMISSIONS OF THE COMMISSION
RELATING TO MR. ASPER'S PARTICIPATION
IN THIS PROCEEDING**

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THE SUBMISSIONS OF THE COMMISSION ARE NOT APPROPRIATE

1. In the Commission's Memorandum of Fact and Law in this proceeding much emphasis is made on the Supreme Court of Canada decision in *Northwestern Utilities Limited et al v. City of Edmonton*, (1979) 7 Alta. L.R. (2d) 370, which held that the role of an administrative tribunal whose decision is at issue before the Court should be limited to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. In all propriety under the principles of *Northwestern Utilities*, the Commission ought not to have made the submissions it has in an attempt to stifle or restrict the voice of Mr. Asper before this Court.

**MR. ASPER HAS PROCEEDED APPROPRIATELY - AS A PARTY WITH STANDING
BEFORE THE COMMISSION HE HAS A RIGHT TO BE HEARD IN THIS COURT**

2. Mr. Asper is a Party with Standing before the Commission of Inquiry into the Wrongful Conviction of David Milgaard. As such, he was served by counsel representing the Attorney General of Canada with the application for judicial review herein and supporting materials. Also on July 6, 2006, as a Party with Standing before the

Commission of Inquiry, he was sent an electronic copy of the federal justice application by Commission Counsel, Mr. Douglas Hodson.

3. These materials were served as required by Queens Bench Rule 667(1), which provides:

Persons to be served

667(1) Each person interested or likely to be affected by the application shall be served with the notice of motion and all material in support of the application.

4. On June 29, 2006, Mr Hodson, at the request of Mr. Mark Kindrachuck, counsel for the Attorney General of Canada, sent all counsel for Parties with Standing an e-mail message stating "If wish to make submissions at the hearing of the application, we would appreciate it if you could tell us what dates in July and August would be most convenient for you in order to assist in scheduling the application". Our client, Mr. David Asper, instructed us to make submissions and we have filed an Affidavit and a Memorandum of Fact and Law with the Court.
5. Mr. Asper has been proceeding on the basis that as a Party to the Inquiry, he is entitled to make submissions in the judicial review proceedings as a matter of right by virtue of his status as a Party with Standing in the Commission proceedings.
6. It is submitted that Mr. Asper is correct in that position. In *Re Canadian Human Rights Commission and Eldorado Nuclear Ltd.* (1981), 114 D.L.R. (3d) 154 (F.C.C.A.), a complaint was filed against the respondent by an employee. Alleging that the Commission was biased, the respondent filed an originating notice seeking a writ of prohibition and served only the Human Rights Commission. This resulted in an order. The order was appealed and the complainant employee permitted to participate as a party and be heard on the appeal. The Appeal Court held at p. 155, that "... the Trial Division erred in proceeding to make the ... order without notice to the complainant or permitting her to adduce evidence in support of her position and to be heard on the application". They went on to say at p. 156:

In our view the complainant is an essential party to these proceedings and ought to have been joined as such, served with the originating notice and, thus, have been given the right to appear, if she wished, to file her own affidavit material, to cross-examine on the affidavits filed by the other parties, and to have been heard. That she is an essential party is demonstrated by the fact that she, as the complainant, is deprived at the moment, if the Trial Division's order stands, of any possibility of having her claim adjudicated favourably to her. She is the only person who has a personal and vital interest in the outcome of the claim. [Emphasis mine]

7. The *Canadian Human Rights Commission and Eldorado Nuclear* case was followed in *Simmonds v. Law Society of Prince Edward Island*, [1994] P.E.I.J. No. 1, affirmed on appeal [1995] P.E.I.J. No. 17, where two parties subject to Law Society complaints were held to be necessary parties to a judicial review proceeding and added as parties by the general Rules of Court relating to parties.

8. The analogous Saskatchewan Queen's Bench Rule to the rule utilized in the *Simmonds* case is Rule 38:

Court may add necessary parties

38(1) The court may, at any stage of the action, order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in an action be added as a party.

Misjoinder, non-joinder

(2) An action shall not be defeated by reason of the misjoinder or non-joinder of a person, and

(a) the court may decide issues or questions in dispute so far as they affect the rights and interests of the persons who are parties and pronounce judgment without prejudice to the rights of persons who are not parties, and

(b) at any stage the court may grant leave to add, delete or substitute a party, or to correct the name of a party and such leave shall be given, on such terms as may be just, unless prejudice will result which cannot be compensated for by costs or an adjournment.

MR. ASPER'S LEGAL RIGHTS ARE AFFECTED BY THIS PROCEEDING

9. The *Simmonds* case makes reference to Lord Denning in *Gurtner v. Circuit et al.*, [1968] 2 Q.B. 587, and the interest test that he had set down to sufficient interest to be a party to a proceeding namely that the "determination of that dispute will directly affect a third person in his legal rights or in his pocket". Also referred to in the *Simmonds* case is that this interest test was affirmed by the Ontario Court of Appeal in *Porretta v. Stock* (1989), 67 O.R.(2D) 736 (Ont. C.A.).
10. It is submitted that Mr. Asper's liberty rights are affected by being compelled to appear as a witness while the Commission embarks upon inquiries outside its constitutional jurisdiction and outside the Terms of Reference. The affidavit filed by Mr. Asper also illustrates how the Commission's conduct is affecting Mr. Asper's ability to carry on his business activities, or his "pocket" as Lord Denning puts it. Finally, the Commission has put Mr. Asper's reputation in issue in areas beyond its proper mandate.

THE JUDICIAL REVIEW PROCEEDING RELATES TO PUBLIC CONSTITUTIONAL ISSUES NOT A PRIVATE DISPUTE

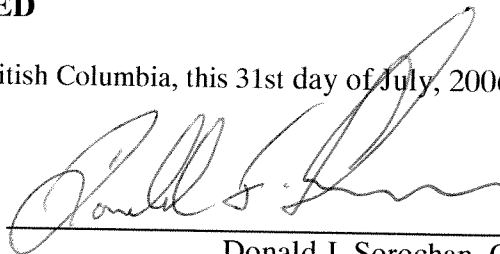
11. In its Memorandum of Argument, the Commission relies upon the case of *Iron v. Saskatchewan (Minister of the Environment and Public Safety)*, [1992] S.J. No. 620 (SK Q.B.). This case is, it is submitted, inappropriate to the issue at bar. It relates to the involvement of an intervener who was not a party to the original proceeding, a proceeding involving private issues only and in which no constitutional issues were raised.
12. In *Iron v. Saskatchewan* the Court makes reference to Halsbury's Laws of England (Fourth Edition, Vol. 37) which says that intervention relates to persons who are not parties. Here Mr. Asper is a Party with Standing in the Commission proceedings.

IT IS IN THE PUBLIC INTEREST THAT ALL RELATED DISPUTES BE RESOLVED

13. It is submitted that the submissions of Mr. Asper on the Judicial Review Proceeding have as their aim the resolution of serious constitutional and jurisdictional disputes relating to the conduct of the Commission. These disputes will not go away if Mr. Aspers ability to make his submissions is thwarted on procedural grounds.
14. It is submitted that it is in the public interest that all related disputes be resolved and that the Rules allow the Court sufficient flexibility to ensure that this happens.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver, in the Province of British Columbia, this 31st day of July, 2006.



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This Memorandum of Fact and law is filed by:
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