Commission of Inquiry into certain aspects of the trial and conviction of James Driskell

Submissions in Reply to the *Responses* of the Attorney General of Manitoba, the Winnipeg Police Service, and the RCMP

Introduction

1. Counsel for Mr. Driskell was given permission by the Commissioner to file a *Reply* to the Responses to our brief on systemic issues. In the event, only three parties with standing responded to Mr. Driskell's and AIDWYC's brief, namely the Attorney General of Manitoba, the Winnipeg Police Service and the RCMP. It is worthy of note that counsel for the Attorney General of Manitoba has not made a single recommendation for the Commissioner to consider. This is unfortunate, and likely unprecedented. As well, his counsel has opposed every recommendation suggested by Mr. Driskell and AIDWYC. The RCMP, too, seem to be of the view that their Laboratory, which plays such a vital role in the administration of justice throughout the Country, does not need any recommendations to uncover past, or prevent future, miscarriages of justice. The message conveyed by the evidence at the Inquiry has fallen on deaf ears. The Winnipeg Police Service, to its credit, has endorsed some of our recommendations, and proposed alternatives to others.

2. This *Reply* addresses some of the issues raised by the three *Responses.*

A. THE TERMS OF REFERENCE

3. The Attorney General of Manitoba and the RCMP have both suggested in their *Responses* that the Commissioner's Terms of Reference are narrow. Manitoba Justice, for example, suggests that for the Commissioner to recommend the creation of a tribunal similar to the *Criminal Cases Review Commission* in the United Kingdom "is not within the narrow and specific provisions of the Terms of Reference." The RCMP submits in a similar vein (but in a different context):

> "The terms of reference given to this Inquiry are, it is submitted, narrow in scope and very much focused on events directly related to the investigation and prosecution of James Driskell. As such, a proper reading of the various elements of the Order-in-Council reveals a focus on the actions and conduct of individuals relative to this specific prosecution."

The Terms of Reference are broad and clear where systemic issues are concerned. Clause 1(e) mandates the Commissioner:

> "To give advice about whether any aspect of this case should be further studied, reviewed or investigated and by whom, and to make systemic recommendations arising out of the facts of the case which the Commissioner considers appropriate."

Attorney General of Manitoba's *Response*, para. 18
RCMP *Response*, under "Recommendation 6.1"

B. THE NEED FOR A REVIEW OF THE RCMP LABORATORY AND JURISDICTIONAL ISSUES

4. The RCMP *Response* suggests that our Recommendation 6.1 that an independent review of the RCMP Forensic Laboratory is necessary is *ultra vires* the Commission because a provincial Commission of Inquiry cannot inquire into the administration and management of a federal body. But such a recommendation would not constitute an

inquiry into the administration and management of the RCMP Laboratory, but would rather be something, which, if the RCMP Laboratory chose to accept the recommendation, could lead to the creation of an independent Review Committee which could conduct such an inquiry. Cory J. put it this way in the *Krever Commission*:

> "A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. *There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.*" (emphasis added)

The independent review, therefore, if it were to take place, would be held with the consent of the Laboratory. A ***recommendation*** for such a review will alert the Laboratory to the Commissioner's concern about its functioning and culture, and enable the Laboratory to consider taking action, whether it is the action recommended by the Commissioner or some other form of action. Hopefully, it would inspire action on the part of the Laboratory's management, and its Advisory Board, just as the *Morin Inquiry* recommendations inspired the Centre of Forensic Sciences to take action.

Canada (Attorney General) v. The Krever Commission, [1997] 3 S.C.R. 440, paras. 29-31, 34
See *Starr v. Houlden*, [1990] 1 S.C.R. 1366

5. Counsel for the RCMP relies heavily in his written submissions on the reports of Mr. Lucas, and did the same in his oral submissions to the Commission. There can be no doubt that Mr. Lucas's report was uncritical of the RCMP Laboratory system. It was not, in our submission, a compelling analysis of the RCMP Laboratory Services – it was confined to a review of their hair microscopy comparison practices, and excused their

failings in this regard on an 'historical' basis. Mr. Lucas's supplementary report did not address the Laboratory's position on the mtDNA results in a satisfactory way. *Even the RCMP Laboratory's Director has finally and belatedly acknowledged that the hair microscopy results were wrong.* Perhaps it was public exposure that brought the Laboratory to this position; it was certainly not Mr. Lucas's reports. We urge the Commissioner to pay heed to what came out during Mr. Christianson's testimony, which was heard after the release of Mr. Lucas's reports, and to the Panel of Experts, in his determination of whether serious systemic issues and cultural problems exist at the RCMP Laboratory. We submit that they do.

C. OUR SUBMISSIONS FOR REFORM OF THE PRESENT MINISTERIAL REVIEW PROCESS

6. Counsel for the RCMP refers to the decision of Laing C.J. of the Saskatchewan Court of Queen's Bench which arose out of the continuing *Milgaard Inquiry.* The Commissioner had authorized questioning of the Justice Department's lawyers through which it was intended to elicit the advice given to lawyers in the Department and to the Minister himself regarding Mr. Milgaard's first section 690 application. In particular, the Justice Department sought to prevent production of advice given by retired Justice McIntyre (formerly of the Supreme Court of Canada) to the Minister after Mr. Milgaard had brought his first section 690 application. Laing C.J. said:

> "I conclude the applicant's position is correct that a province cannot authorize an inquiry into the substantive operations of a federal institution, or into its administration or management of the same, beyond what is authorized in its terms of reference which are either accepted, or found by a court to be constitutional because the pith and substance of the terms of reference are a valid exercise of a provincial constitutional power. Neither the federal Department of Justice, nor any of its individual employees, is a subject of investigation under the terms of reference in this matter.

> I also conclude that, subject to the terms of reference authorizing the same as a valid exercise of a provincial power, a provincial commission of inquiry cannot inquire into the conduct, or the job performance of a federal employee with respect to the employee's activities on behalf of his or her employer."

But this does not prevent a Provincial Commission of Inquiry directing recommendations to a federal body.[1]

7. The same holds true for recommendations regarding federal enactments such as Mr. Driskell's particular request for recommendations *qua* section 696.1 of the *Criminal Code*. It is the Province which administers justice under the *Criminal Code* and, therefore, prosecutes individuals for crimes committed under it including murder. If problems arising from the conviction and post-conviction events can be attributed to provisions in the *Criminal Code* (or a federal body like the RCMP Laboratory), it is within the powers of the Commission to explore them. If the present process for Ministerial Review is unsatisfactory and in need of reform, the Commissioner can make recommendations accordingly.

8. These submissions are consonant with the decision of the Supreme Court of Canada in *MacKeigan v. Hickman* (1989), 50 C.C.C. (3d) 449 (S.C.C.) which arose out of the *Donald Marshall Inquiry*. One of the questions asked of the Court was:

> "...whether the direction to the Commission to inquire into a reference by the Minister of Justice is ultra vires the province because it is a matter of criminal law and procedure reserved exclusively to the federal Parliament under s. 91(27) of the Constitution Act, 1867. " (per McLachlin J. at p. 476)

McLachlin J. concluded as follows:

> "I am satisfied that the province has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of Donald Marshall. These are matters pertaining to the administration of justice within the province, and, subject to the caveat expressed by Pigeon J. in A.-G. Que. and Keable

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[1] None of the three parties who have responded have directly suggested otherwise, but it may be seen as implicit in the submissions of the Attorney General of Manitoba and the RCMP.

> v. A.-G. Can. (1978), 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161, [1979] 1 S.C.R. 218 (S.C.C.), that no provincially constituted commission of inquiry can inquire into the actual management or operation of the federal activity or entity in question (there the R.C.M.P.), they do not constitute an attempt to interfere with the valid federal interest in the enactment of and provision for a uniform system of procedures and rules governing criminal justice in the country: Di Iorio, supra; O'Hara v. British Columbia (1987), 38 C.C.C. (3d) 235 at p. 247, 45 D.L.R. (4th) 527 at p.541, [1987] 2 S.C.R. 591." (at p 485)

Two months later, the *Marshall* Commissioners wrote in their Report:

> "The Marshall case is not unique, and it would be unrealistic to assume otherwise. "Justice", the British Section of the International Commission of Jurists, for example estimates there are at least 15 cases a year in the United Kingdom in which people are imprisoned for crimes they did not commit. One such incident, of course, is clearly too many, so the question for us is how do we bring these situations to light and provide wrongly convicted people with fair opportunity to establish their innocence.
>
> We believe someone – or some body – has to be appointed to serve as a kind of "court" of last resort, not only for individuals who claim they have been wrongfully convicted but also for others who may have information that someone else has been wrongly convicted."

The Commission then made the two Recommendations in this regard listed in our earlier written submissions.

9. Mr. Driskell had to use the section 696.1 ministerial review process to re-open his case, and it consequently played a huge role in it. All post-conviction developments occurred in anticipation of, or within, the ministerial review process – the post-conviction non-disclosure took place within and without it; Mr. Driskell's need for legal assistance arose out it, and the stay of proceedings resulted from its eventual resolution. Chief Ewatski was exactly right in his testimonial observations that the post-conviction review process let Mr. Driskell down badly, and that it sorely needs reform. Our systemic submission, that the process of ministerial review needs to be radically altered ,directly "arises out of the facts of the case" in accordance with clause 1(e) of the Terms of Reference.

10. The submissions of the Winnipeg Police Service include the following:

> "The Winnipeg Police Service, through the evidence of Chief Ewatski, recognized that the current system for Criminal Conviction Review created some difficulties for those seeking a review of their conviction. The Winnipeg Police Service also believes that it is necessary to work towards solutions that will improve the Criminal Justice System. The Winnipeg Police Service would welcome changes to improve the process of Criminal Conviction Review and will continue to participate in the process that is available."

Coming from a Police Service that has encountered more than one wrongful conviction in recent history, this is a most welcome submission. In our earlier submissions, it was noted that there was no present consideration within the Department of Justice being given to an overhaul of the present ministerial review process. We can, however, advise that in 2005, a *Special Advisor on Wrongful Convictions* was appointed within the Department of Justice. Mr. Stephen Bindman presently holds the post. His job description involves coordinating all policy development activity related to wrongful convictions within the Department of Justice, and raising public awareness of wrongful convictions. His tasks include reviewing recommendations which arise out of Public Inquiries, and he is now considering the recommendations of the *Lamer Inquiry.* The Commissioner can, therefore, feel confident that any recommendations directed at federal institutions, procedures or laws will be listened to and given careful consideration.

C. COMPENSATION ISSUES

11. Paragraph 5 of the Attorney General of Manitoba's submission reads:

> "At paragraph 5 (of the Driskell/AIDWYC Submissions),you are urged to make a recommendation similar to Commissioner O'Connor in the Maher Arar Inquiry relating to an assessment of the claim for compensation. As you are aware, there are separate

> and outstanding civil proceedings commenced by Mr. Driskell in this Province. There is no mandate for you, Mr. Commissioner, to affect in any way those proceedings, nor to settle or comment on any entitlement to damages or compensation. Indeed, you are directed under paragraph 2 of the Order in Council to perform your duties "without expressing any conclusion or recommendation about the civil .. liability of any person or organization...".

The Winnipeg Police Service has made a similar submission. With respect, these submissions misconceive our position and suggest a failure to understand the Commissioner's recommendation in the *Arar Inquiry*. As in the case of Mr. Driskell's Inquiry, Commissioner O'Connor was statutorily prohibited from making findings of civil liability. As in the case of Mr. Driskell's Inquiry, the Terms of Reference of the *Arar Inquiry* included a specific reminder of this in clause (o) which follows:

> "(o) The Commissioner be directed to perform his duties without expressing any conclusion or recommendation *regarding the civil* or criminal *liability of any person or organization* and to ensure that the conduct of the inquiry does not jeopardize any ongoing criminal investigation or criminal proceedings." (emphasis added)

As in the case of Mr. Driskell, Mr. Arar had outstanding civil proceedings at the time of his Inquiry. Commissioner O'Connor, in recommending that the Government of Canada

> "should assess Mr. Arar's claim for compensation in light of the findings in this report and respond accordingly"

did not violate the federal *Inquiries Act* and express a conclusion or recommendation regarding the civil liability of the Government of Canada, or any government organization or individual. He simply suggested *how* the Government should assess Mr. Arar's claim for compensation.

Attorney General of Manitoba's *Response*, para. 5
Winnipeg Police Service's *Response*, paras. 48-51

12. Mr. Driskell makes a similar request. Until now, the Government of Manitoba has let him down at every turn. Its initial reaction to Mr. Driskell's civil claim has been predictably adversarial, consistent with its position on all aspects of his case for 16 years. A timely reminder from the Commissioner that the Government of Manitoba (*not* the Winnipeg Police Service) "should assess Mr. Driskell's claim for compensation in the light of the findings in this report and respond accordingly" may help finally bring this instinctive and endless adversarial posture to an end and enable Mr Driskell to put the case behind him once and for all.

D. SOME ADDITIONAL ISSUES ARISING OUT OF THE *RESPONSE* OF THE ATTORNEY GENERAL OF MANITOBA

13. In addressing the issues surrounding Mr. Dangerfield's presentations, the Attorney General of Manitoba states:

> "Given the number of major prosecutions conducted by Mr. Dangerfield historically, and the length of time since he retired from service, it is questionable what value any such review would have at this stage in any event. Any major prosecutions involving allegations of wrongful conviction either have already been reviewed and the subject of inquiries/reports, or are in the process of being reviewed. The fact that Mr. Dangerfield handled most of the major prosecutions for many years in Manitoba prior to his retirement ought to be factored into any suggestion that, as some of these cases involved Mr. Dangerfield as Prosecuting Attorney, there is anything indicative of concerns with Mr. Dangerfield's work overall in that regard."

This submission gives rise to several comments:

(i) The "length of time" since Mr. Dangerfield retired from service provides cold comfort to anyone wrongly convicted serving a life sentence as a result of another 'successful' prosecution by Mr. Dangerfield. Frank Ostrowski, for example, was convicted more than a decade before Mr. Dangerfield's retirement but is still in prison serving his life sentence. For him, there is nothing "questionable" about the value of a review of his case. The same goes for Kyle Unger convicted in 1992 of the murder of Brigitte Grenier.

(ii) Other major prosecutions of Mr. Dangerfield which involve allegations of wrongful conviction are not, to our knowledge, being reviewed *by Manitoba Justice*. There are at least five more cases of Mr. Dangerfield's being currently reviewed by AIDWYC. In one of them, Manitoba Justice has conceded the need for a remedy.[2] In the remainder of the cases, those of Frank Ostrowski, Robert Sanderson, Jon Waluk and Mohamed Khan, Manitoba Justice is making no concessions. Two of them, the cases of Robert Sanderson and Mohamed Khan, have already been 'dismissed' by Manitoba Justice as being without merit.

(iii) Mr. Dangerfield handled as many as a third of the homicide prosecutions in Winnipeg in the 1980s and 1990s. This fact reinforces our submission for a review of his cases because of their sheer number. No other prosecutor in *Canada* has been shown to have prosecuted two wrongful convictions, and likely a third in the pending case of Kyle Unger. AIDWYC is now working on *four more* of his cases. [3] This adds up to a total of seven of Mr. Dangerfield's prosecutions in which AIDWYC has been involved. To date, the only cases for which AIDWYC has undertaken reviews in Manitoba have been ones prosecuted by Mr. Dangerfield. These numbers are of acute concern, and the justice system should not depend on a non-governmental organization like AIDWYC to 'solve' the cases. It is a major undertaking that can only be satisfactorily undertaken through an audit of Mr. Dangerfield's cases by a properly funded independent body. At the very least, such a body should be set up to review the outstanding Dangerfield prosecutions which AIDWYC is presently working on.

Para. 26, Attorney General of Manitoba's *Response*

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2 Kyle Unger was released on bail on November 4, 2005 pending his section 696.1 ministerial review application, only the fourth person to have ever been granted this form of release (the others being Romeo Phillion (Ontario), James Driskell (Manitoba) and William Mullins-Johnson (Ontario)). The Attorney General then advised the federal Minister of Justice that it was his opinion that Mr. Unger's case should be referred to the Manitoba Court of Appeal. Mr. Unger, on the other hand, is seeking an order for a new trial from the Minister.

3 In the last month, AIDWYC has received an application from another person, convicted of non-capital murder in 1974, who was prosecuted by Mr. Dangerfield.

14. The Attorney General of Manitoba opposes any post-conviction disclosure recommendations, an extraordinary position in light of what happened to Mr. Driskell. Besides the need for such recommendations, the complacency behind this submission is a powerful demonstration of just how bad things are in Manitoba Justice. The need for a systemic review of Manitoba Justice can never have been so apparent.

Attorney General of Manitoba's *Response*, paras. 27-28

E. SOME ADDITIONAL ISSUES ARISING OUT OF THE *RESPONSE* OF THE WINNIPEG POLICE SERVICE

15. We note with gratitude that the Winnipeg Police Service endorses the creation of a Criminal Justice Committee.

Winnipeg Police Service's *Response*, para. 28

16. The Winnipeg Police Service urges that it should be invited to participate in the development of an Innocence Hearing Model should such a pilot project be recommended by the Commissioner. We agree, and ask that our recommendation be amended to specifically include the Winnipeg Police Service as a necessary participant in the development of such a project.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 6th day of December, 2006.

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