

IN THE MATTER OF a Public Inquiry relating to the administration of criminal justice in Newfoundland and Labrador ordered by the Minister of Justice and Attorney General Kelvin Parsons on March 21, 2003

AND IN THE MATTER OF the interpretation of the Terms of Reference which are contained in an Order in Council dated March 24, 2003

**WRITTEN SUBMISSIONS OF
THE ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED (AIDWYC)
RE COMMISSION'S TERMS OF REFERENCE**

MELVYN GREEN
Sack Goldblatt Mitchell
20 Dundas Street West
Suite 1130
Toronto, Ontario
M5G 2G8

Tel # (416) 977-6070
Fax # (416) 591-7333

Of Counsel for **AIDWYC**

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Submissions of AIDWYC Re Commission's Terms of Reference

1. The Commission has scheduled a hearing commencing October 28, 2003 into various questions pertaining to the interpretation and scope of its Terms of Reference. AIDWYC has been granted standing to participate in this hearing.

2. AIDWYC intends to address all three "issues" identified by the Commissioner. As Issues No. 2 and 3 raise fundamental questions that are of direct concern to AIDWYC, we intend to address them before Issue No. 1. Further, to avoid redundancy, AIDWYC intends to address Issue No. 2 and Issue No. 3 together.

A. Summary of AIDWYC's Position

3. In brief, AIDWYC's position with respect to Issues No. 2 and 3 is as follows: The Commission can and should determine the factual innocence of Druken and Dalton. This predicate inquiry is implicitly directed by the referenced Terms, necessarily incidental to express duties assigned the Commission, consistent with the remainder of Commission's Terms of Reference and the constitutional division of powers, and responsive to widespread public concern about the integrity of the administration of criminal justice in the province. In the alternative: If the Terms of Reference do not afford a power to determine the factual innocence of Druken and Dalton, then it is AIDWYC's position that the Commissioner should return to the Government of Newfoundland and Labrador to request such amendments to its Terms of Reference as may be necessary to make such determinations. In short, any inquiry into Druken's

criminal proceedings or the entitlement to and quantum of Druken's and Dalton's compensation is a hollow exercise absent a preliminary determination of their factual innocence.

4. As to Issue No. 1, AIDWYC's position is that any and all conduct that may have contributed to the wrongful prosecution, conviction, appeal, re-prosecution and delayed exoneration of Parsons and Druken (if, indeed, wrongly convicted) is fit subject for inquiry under Terms 1(a) and (b). Judicial conduct, if relevant and reviewable without intruding on recognized immunities or privileges, is not excluded from this compass of inquiry. Nor, as a *general rule*, is conduct that has already been – or could have been – the subject of an appeal following conviction.

B. General Introduction

5. This Inquiry is unique. There have been three previous public inquiries into wrongful convictions in Canada: the "Marshall Inquiry" in Nova Scotia in 1988-1989, the "Morin Inquiry" in Ontario in 1997-1998, and the "Sophonow Inquiry" in Manitoba in 2000-2001. However, this is the first public inquiry charged with the duty to investigate not one but three cases of persons whose prosecutions for murder each went terribly wrong. Further, these three miscarriages of justice all occurred within six years in a province of under 600,000 persons with the by far the lowest provincial homicide rate in the entire country. Further still, two of the three cases were investigated by the same police force, and all three were prosecuted or reviewed at some point by the same Crown law office. This inquiry, even more so than its predecessor inquiries, is

compelled to address the hypothesis that systemic or institutional factors contributed to unsafe homicide convictions.

6. This inquiry is also unique (or almost so) among notorious Canadian miscarriages of justice because all three cases were “caught” – the convictions reversed and new trials ordered -- at the appellate level. Donald Marshall’s wrongful conviction was not reversed by the Nova Scotia Court of Appeal, nor 20 years later was that of his fellow wrongly convicted Nova Scotian, Clayton Johnson. Guy Paul Morin’s wrongful conviction was ultimately conceded by the Crown, following DNA-testing on the eve of his appeal against conviction; ironically, the Ontario Court of Appeal had earlier reversed Morin’s factually correct acquittal, compelling his retrial after the Supreme Court affirmed the order of a new trial. David Milgaard’s wrongful conviction survived appeals, and a s.690 referral to the Supreme Court of Canada; a public inquiry into his case has recently been struck in Saskatchewan. Like Milgaard, Stephen Truscott’s and Romeo Phillion’s convictions for murder were not corrected through appeals or their original s.690 referrals; we may soon learn whether these convictions, too, were factually wrong. Among the more notorious and now-acknowledged Canadian cases of wrongful conviction for murder, only those of Benoit Proulx, in Quebec, and Thomas Sophonow, in Manitoba, were corrected on first appellate review. Indeed, both of Sophonow’s wrongful convictions were reversed, the second appeal judgement resulting in an acquittal, but on grounds of fairness rather than the merits of the case. Like Druken’s current fate, Sophonow was left to hang in a legal limbo between guilt and innocence. Although not the intention of the Manitoba Court of Appeal, its order of

what was widely viewed as a “technical” acquittal may well have contributed to a tragic but wide-scale public perception that Sophonow had gotten away with murder.

7. The reversals of the convictions of Parsons, Dalton and Druken speak to the integrity of the appellate process in Newfoundland and Labrador. They do not answer, however, the question of why these men were prosecuted in the first place or, in the cases of Dalton and Druken, why they were convicted -- as the results in both of these appeals turned on the receipt of fresh evidence. As the Supreme Court said in reference to the wrongful conviction of David Milgaard: “a fair trial does not *always* guarantee a safe verdict”: *United States of America v. Burns* (2001), 151 C.C.C. (3d) 97, at 139 (emphasis in original). Absent serious error of law or procedure, one must look elsewhere for an explanation as to why factually innocent persons are prosecuted let alone convicted of murder.

8. This inquiry is also unique because it is the first inquiry detailed to investigate unsafe murder convictions where there is neither acceptance or consensus regarding the factual innocence of each subject of the inquiry. Marshall, Morin and Sophonow were recognized as factually innocent when their inquiries began. Not so here. Parsons has been acquitted, and his factual innocence has been publically acknowledged. Dalton, too, has been acquitted, but he does not enjoy the same endorsement of factual innocence from the Government of Newfoundland and Labrador. And Druken has never been acquitted or declared innocent; he is saddled with a prosecutorial stay of proceedings that denies him both the legal and factual innocence he claims.

9. This is the crux of the conundrum presented by the Commission's Terms of Reference. The Terms invite confusion. The Commission is to inquire into the investigation and prosecution of Parsons and Druken, but not Dalton – even though Dalton was acquitted and Druken was not. The Commission is to inquire into the reasons for the delay in hearing Dalton's appeal, even though the question may be primarily of academic interest unless Dalton is factually innocent. And the Commission is to determine the appropriateness of compensating Druken and Dalton (and, if so, the quantum of each award), even though the critical element in such assessments -- recognition of factual innocence – is conspicuously absent in both cases.

10. Central, then, to the performance of the Commission's mandate is its determination of this question: were Dalton and Druken "wrongly convicted"? This is the central, predicate concern for AIDWYC as well, as Druken and Dalton offer few lessons for preventing future injustice if they were not wrongly convicted.

11. AIDWYC, of course, is the Association in Defence of the Wrongly Convicted. It is not the Association in Defence of those whose convictions are overturned on appeal, or those whose charges are stayed once a new trial is ordered, or those wrongly acquitted. AIDWYC's interests are narrowly focused on the "wrongly convicted" -- a settled term of art in Canadian jurisprudence that refers to persons who are found guilty of crimes they did not commit: factually innocent persons. AIDWYC exists solely for the purpose of correcting wrongful convictions and minimizing the risk of their recurrence. That is why AIDWYC is here. Indeed, it is difficult to comprehend the purpose of a public inquiry into errant homicide prosecutions unless it is driven by the same concerns that bottom

AIDWYC's participation. A public inquiry into why a guilty man was successfully convicted has as much social utility as one into why a plane did not crash or a mine did not have an accident.

12. It is not only AIDWYC and the public who are concerned to know how it is that justice miscarried in the Province of Newfoundland and Labrador. Those with the greatest interest are the victims of these miscarriages: Parsons, Dalton and Druken. If their claims are sound, one cannot help but sympathize with Dalton's and Druken's frustration with the administration of justice in the province and, in particular, the facially confusing language of this Inquiry's Terms of Reference. What AIDWYC knows through its cumulative experience is that the most profound desire of all wrongly convicted persons is for public acknowledgment of their factual innocence. This is what drove David Milgaard and Thomas Sophonow and Stephen Truscott for decades. This is the fair claim – for public exoneration – made by Dalton and Druken at this Inquiry.

13. It is undoubtedly true that Dalton – unlike Druken – has been “acquitted”. The harder truth, however, is that, in the public eye, there's a terrible disconnect, a moral chasm, between “legal” and “factual” innocence, between a finding of “not guilty” and a declaration of “wrongly convicted”. *Grdic* (1985), 19 C.C.C.(3d) 289 (S.C.C.) may be a complete and elegant answer to the problems otherwise posed by procedural fairness doctrines such as *res judicata* and issue estoppel. But *Grdic* is an unsatisfying answer to persons like Dalton, and no answer at all to Druken. These two men are not content to fly off into obscurity on the wings of reasonable doubt or an exercise of Crown fiat. Let the chips fall where they may, they say, but at least give us a chance to

demonstrate our factual innocence. For the wrongly convicted, nothing is as important as public recognition of that fact. There is, then, a symmetry between the fundamental concern of Dalton and Druken and those factual determinations essential to the Commission's task.

C. Issues No. 2 and 3:

(a) Introduction

14. Issues No. 2 and 3 relate to the scope of the Commission's mandate with respect to Druken and Dalton, and the practical value of these inquiries absent predicate findings, if possible, as to the factual innocence of each. The issues beg the question of whether Dalton and Druken were wrongly convicted and, for reason of this commonality, they are addressed together here.

15. There is no proposition so trite in the law of public inquiries as the assertion that commissioners are authorized to make findings of fact. In *Phillips v. Nova Scotia (Westray Inquiry)* (1995), 98 C.C.C.(3d) 20 at 48 (S.C.C.), Cory J. wrote that "One of the primary functions of public inquires is fact-finding". Returning to this theme in *Canada (A.G.) v. Canada (Commission of Inquiry on the Blood System)* [hereafter, *Blood Inquiry*] (1997), 151 D.L.R. (4th) 1 at 16-7, Cory J., on behalf of a unanimous Supreme Court, emphasized the necessity of setting out the facts,

... even if those facts reflect adversely on some parties. If this were not so, the inquiry process would be essentially pointless. Inquiries would produce reports composed solely of recommendations for change, but there could be no factual findings to demonstrate why the changes were necessary. If an inquiry is to be useful in its roles of investigation, education and the making of recommendations, it must make findings of fact. It is these findings which will eventually led to the recommendations which will seek to prevent the recurrence of future tragedies.

16. The Commissioner, in Term 4, is directed to “make such recommendations as he considers advisable relating to the current administration of criminal justice in the Province of Newfoundland and Labrador”. The Commissioner is also directed, in Term 1(b), to “inquire” into the circumstances bearing on the investigation and prosecution of Druken; his assessment of these activities critically depends on his first determining whether Druken is factually innocent. The Commissioner is further directed to “advise” on the entitlement and quantum of compensation for both Druken and Dalton. Formulating this advice depends on first determining whether Druken and Dalton were wrongly convicted. This is the essential, predicate fact to any fair assessment of compensation in the context of a public inquiry focused on multiple miscarriages of justice. Any other reading of Terms 1(c) and 1(e) is an exercise and linguistic or legal contortion, an effort to avoid the obvious.

(b) Division of Powers

17. There is nothing flowing from the division of powers between federal and provincial authorities that precludes these essential factual determinations. Any concern respecting the risk of trespass on the criminal law power has been alleviated by the Supreme Court’s more recent pronouncements on the necessary powers of provincial public inquiries. As summarized this year by A.W. MacKay and M.G. McQueen (“Public Inquiries and the Legality of Blaming: Truth, Justice and the

Canadian Way”, in *Commissions of Inquiry: Praise or Reappraise?*, Eds. A. Manson and D. Mullan, Irwin Law, 2003, at 254):

The case law has made clear ... that these jurisdictional infringements will be interpreted narrowly, in favour of wide latitude for provincial commissions of inquiry. [Citations omitted.] At issue is whether the search for potential criminality on the part of individuals is the principal aim of the commission, or only an incidental effect. Focus on a broad social policy question that is within provincial jurisdiction will take the inquiry out of the narrow parameters of *Starr [v. Houlden]*, [1990] 1 S.C.R. 1366] and render it valid. The division of powers does not prevent a province from establishing a commission to examine the conduct of organizations and individuals. Nor does it deny the possibility that such examination might eventually lead to criminal charges. It only prevents the use of the public inquiry process as a substitute for a police investigation or *Criminal Code* preliminary inquiry.

18. The instant Inquiry is not directed to furthering a criminal investigation. Accordingly, and to adopt the language of Cory J. in *Blood Inquiry*, at 22, a more “flexible approach” is sanctioned where, as here, the inquiry is “general in nature” and “established for a valid public purpose” and, of course, within a proper head of power (as undoubtedly is the case here: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796). As set out in the *Proclamation* announcing the creation of this Inquiry, it is grounded on the need to address matters of public importance “connected with the administration of justice” and other “matters ... for the public good”, and, more specifically, on “a number of questions relating to the administration of criminal justice in Newfoundland and Labrador” that arise from the cases of Parsons, Druken and Dalton. In short, there are some things so deeply troubling about the administration of criminal justice in the province that, as said, they “are of sufficient public importance to justify an inquiry”.

19. Viewed functionally – in light of the social purpose of valid public inquiries generally *and* those particularized for *this* Inquiry – the Commissioner’s task is to

determine what went wrong with the criminal justice system in Newfoundland and Labrador that led to repeated unsafe convictions for murder within a very brief time span. The answer to that question, the recommendations that flow from those answers, and, ultimately, the restoration of public confidence in the administration of justice depend on whether these convictions were merely of dubious integrity or (as is settled in the case of Parsons) truly wrongful convictions. The preliminary factual issue, then, is not, as put at p.20 in *Blood Inquiry*, “to discover who had committed the specific crime” but, rather, to determine whether there is a probable basis to conclude that Druken had not and, in the case of Dalton, that no crime had been committed.

(c) The Effect of the Terms of Reference

20. There is nothing in the Terms of Reference that preclude such factual findings. Term 5, of course, prohibits the Commissioner from “expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization”. To be clear, it is *conclusions of law* that are prohibited. And, as recited in *Blood Inquiry*, at 27, “Unless there is something to show that the standard applied is a legal one, no conclusion of law can be said to have been reached”. So long as this critical distinction is observed, there is nothing in Term 5 that prevents the Commissioner from making those findings of fact necessary to the exercise of his duties. Nor, so long as they do not clearly amount to conclusions of legal liability or guilt, does it prevent the Commissioner from exercising his power to draw “the appropriate evaluations or conclusions which flow from those facts”: *Blood Inquiry*, at

19. The *ratio*, as Cory J. explained, at 15, derives from the legally unique nature of public inquiries:

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. 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. ... 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.

21. Commissioner Kaufman was bound by words identical to those set out in Term 5 when he embarked on the Morin Inquiry. This did not prevent him from making adverse findings of fact against individuals and organizations, although, of course, he was careful_not to couch these findings in the language of civil or criminal liability. Most significantly, it did not prevent Commissioner Kaufman from repeatedly pronouncing that Guy Paul Morin was factually innocent -- despite the fact that the Commission creating the Morin Inquiry (unlike, for example, that establishing the Sophonow Inquiry) did *not* assert the factual innocence of the subject of that inquiry. Morin's wrongful conviction was a factual conclusion. It framed the inquiry and informed the Commissioner's recommendations. It was not shared, at least not initially, by all the participants in the inquiry, but it was a determination that -- one way or the other -- had to be made. The Term 5 restraint is clearly intended to protect persons from purported findings of civil or criminal fault. There is no reason to turn this shield into a sword that equally prevents a finding of factual_innocence where such finding is both warranted by the evidence and essential to the exercise of a commission's mandate.

22. Of course, Term 5 also precludes the Commissioner from concluding that Druken and Dalton are “guilty”. If the record does not permit a determination of their factual innocence (the appropriate standard being that of balance of probabilities), the Commissioner ought simply to say so, making abundantly clear that his inability to form a conclusive opinion is a product of the unsettled, incomplete or contradictory nature of the available evidence and does not reflect on the civil or criminal responsibility of either man. (d) Reading the Specific Terms of Reference

23. Construed fairly, the language of the relevant terms – Terms 1(b) and (c) and 1(e) – directs the same predicate inquiries into Druken and Dalton’s factual innocence as those driven by the policy considerations that have been earlier canvassed. Those Terms, as they apply, respectively, to Druken and Dalton, are here addressed.

(i) Druken

24. The Attorney General’s formulation of the Commissioner’s task in Term 1(b) argues for a construction that favours an inquiry into Druken’s factual innocence. The phrase “resulting criminal proceedings” necessarily extends to the Crown’s entry of a stay of proceedings against Druken. At that stage of his inquiry, the Commissioner will inevitably have to determine the basis of the Crown decision to enter a stay rather than effect an acquittal. There may well be, in some cases, legitimate reasons for choosing the former option, but AIDWYC’s position is that none of them warrant condonation here if the Crown was satisfied (or ought to have been satisfied) that Druken was wrongly convicted. In these latter circumstances, the issue of Druken’s factual innocence is not

only germane to that inquiry mandated by Term 1(b) but, as well, to systemic concerns bearing on the appropriate response of the Crown Law Office to legitimate claims for public exoneration. Neither level of inquiry can be effectively pursued without first determining Druken's factual innocence.

25. A determination of whether Druken was wrongly convicted also closely bears on the Commissioner's very broad obligation to report "*any findings respecting practices or systemic issues that may have contributed or influenced the course*" of Druken's investigation or resulting prosecution, so as to enable him to make appropriate recommendations. This duty cannot be discharged in a factual vacuum. The issue, at least for AIDWYC, is not whether individual police officers or Crown counsel properly conducted themselves. The issue, rather is whether police and Crown practices, protocols, standards and training intended to ensure the conviction of only the guilty fulfilled their manifest function and, if not, what defects they suffered and how best they can be improved. There is no meaningful, grounded way to conduct this assessment absent a pre-determination as to Druken's factual innocence. If this fundamental issue cannot be determined, there is little basis to question protocol or policy. If Druken was wrongly convicted, aspects, at least, of the same protocol or policy may well attract censure and corrective advice.

26. As to the matter of compensation (Term 1(c)), the Commissioner is to “advise on whether, in the circumstances of his case, Randy Druken should receive financial compensation...”. The word “should” imports an obligation to determine and then advise whether, in law or equity, Druken is entitled to compensation. It also begs the question: compensation for what? Common sense dictates that not every person whose charges are stayed or who is not re-prosecuted following a successful appeal from conviction is entitled to compensation. The Government of Newfoundland and Labrador does not need such trite advice from the Commissioner. The key to compensation for persons such as Druken – and the answer to the “should” question – turns on whether Druken is factually innocent. While compelling evidence of bad faith or gross negligence on the part of the police or the Crown *may* provide a discrete basis for compensation, the monetary value of such misconduct (“the appropriate amount of compensation”) vitally depends on whether Druken was wrongly convicted. Further, findings of, in effect, tortious conduct are foreclosed the Commissioner by virtue of Term 5's prohibition on his rendering “any conclusions ... regarding the civil ... responsibility of any person or organization”. Read in context, there is no other basis for compensation and no other meaningful interpretation of Term 1(c) other than one that includes a determination, if possible, of Druken's factual innocence.

27. The phrase “in the circumstances of *this case*” reinforce this construction, particularly in contrast to the use of “circumstances” in Terms 1(a) and (b) where, in each instance, it qualifies not the “case” but only the “resulting criminal proceedings”. Put simply, if the “circumstances of [Druken's] case” include his wrongful conviction,

there will be an almost irrebuttable argument that he “should” receive compensation and, likely, a substantial amount. This is what the Commissioner is mandated to determine, one way or the other, by Term 1(c).

(ii) Dalton

28. The question of compensation for Dalton is much more narrowly focused on the eight year delay that attended his appeal. Protracted appellate delay may well warrant compensation. The merits of the delayed appeal would undoubtedly factor into the calculus. But any real-world assessment of the “appropriate amount of such compensation” must, ultimately, turn on a determination of the factual innocence of the appellant. No matter how egregious the process errors attending his underlying conviction, an appellant_who, *in fact*, is serving a well-deserved sentence for murder does not have the same moral or equitable claim to compensation for a delayed appeal as an appellant whose murder conviction is factually baseless. The Commissioner must determine this factual question respecting Dalton if he is to meaningfully execute his Term 1(e) duty “to advise on ... the appropriate amount of such compensation”.

29. “If”, as posed by the Commissioner in his Memorandum, Dalton’s “compensation can or should be determined without determining factual innocence”, the matter is not one of direct or substantial interest to AIDWYC and, accordingly, we respectfully decline to address the question of “how should compensation”, in these circumstances, “be calculated and on what basis”.

D. Issue No. 1: Inquiry into the “Circumstances Surrounding the Resulting Criminal Proceedings” against Parsons and Druken

30. AIDWYC's primary interest in the work of the Inquiry is its potential for identifying systemic or institutional causes of wrongful convictions and, through the Commissioner's recommendations, contributing to their remedy. For this reason, and because we have no intimate familiarity with "the facts" underlying these two criminal proceedings, AIDWYC is not advancing any "specific conduct" for examination at the Inquiry. Nor is AIDWYC here advancing an inventory of systemic concerns as Commission Counsel (Hearings) has advised that such proposals are premature. However, some points that bear on the scope and focus of these phases of the Inquiry need be made.

31. An initial, if trite, observation is that individual decisions or conduct, even if assessed as faultless by prevailing standards, may with hindsight disclose institutional or generic defects that warrant corrective action. If the Commission is to effectively fulfil its Term 4 mandate respecting systemic findings and recommendations, it must permit the creation of a sufficient evidentiary record to rigorously and fairly examine these broader issues.

32. Second, no reason is apparent to AIDWYC to insulate the conduct of Crown (or defence) counsel "in the face of the court" from Inquiry scrutiny. Conduct that may not have attracted complaint at trial or appeal (or, if impugned, was judicially condoned or excused) may take on a different cast in light of previously undisclosed documents, fresh testimony or the contrast or similarities now afforded by the record bearing on the prosecution of other unsafe convictions. The *Marshall*, *Morin* and *Sophonow* Inquiries examined the conduct of counsel at trial, and their legacy owes much to the vigour of

these pursuits. The key, as ever, is relevance, and its parameters are better served through reference to the Commission's Terms of Reference and the dynamic of the hearings than any arbitrary or presumptive rules of exclusion.

33. Subject to respect for rules of privilege, no reason is apparent to AIDWYC to insulate judicial conduct from Inquiry scrutiny. The *Marshall* Inquiry, for example, very thoroughly examined judicial conduct *at each level* of this notorious case, making numerous adverse findings in the process of explaining the judicial contributions to Donald Marshall Jr.'s long ordeal. (A list of the Commission's major findings about and criticisms of the Nova Scotia Court of Appeal appears at p. 294 of A. Derrick's "Commentary" in Manson and D. Mullan, *supra*.) It may be, of course, that nothing more need to be said of a trial judge's conduct than that already expressed on appeal. On the other hand, the reality of a wrongful conviction may so more strongly illuminate the risk of prejudice associated with certain judicial practices, rulings or instructions as to merit fresh comment by the Commissioner. A number of the recommendations made in the *Morin* and *Sophonow* Reports reflect this level of generic concern and caution.

34. As earlier noted, the mandated inquiry into the "circumstances surrounding" Druken's "criminal proceedings" extends to the Crown entry of a stay of proceedings. With respect to Parsons, these "proceedings" conclude with his acquittal. In AIDWYC's view, it is of paramount importance that all matters bearing on Crown policy and conduct referable to the mode and manner by which these prosecutions were terminated need be examined. These concerns touch directly on the critical issue of the

proper role of the province in re-asserting the factual innocence of those its criminal justice machinery has wrongly convicted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF OCTOBER, 2003



MELVYN GREEN

Sack Goldblatt Mitchell
20 Dundas St. West, Suite 1130
Toronto, Ontario M5G 2G8

Tel. No. 416-979-6445

Fax No. 416-591-7333

green@sgmlaw.com

OF COUNSEL FOR AIDWYC

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