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ROYAL COMMISSION ON THE
DONALD MARSHALL, JR., PROSECUTION

VOLUME VIII

Held: September 18, 1987

At: St. Andrew's Church Hall
Bentinck Street
Sydney, Nova Scotia

Before: Chief Justice R. A. Hickman, Chairman
Assoc. Chief Justice L. A. Poitras, Commissioner
Hon. G. T. Evans, Commissioner

Counsel: George MacDonald, Q.C., Wylie Spicer, & David Orsborn:
Commission Counsel

Clayton Ruby, Ms. Maryls Edwardh, & Ms. Anne S. Derrick:
Counsel for Donald Marshall, Jr.

Michael G. Whalley, Q.C.: Counsel for City of Sydney
Ronald N. Pugsley, Q.C.: Counsel for John F. MacIntyre
Donald C. Murray: Counsel for William Urquhart
Frank L. Elman, Q.C., & David G. Barrett:
Counsel for the Donald MacNeil estate
Jamie W. S. Saunders, & Darrel I. Pink:
Counsel for Attorney General
James D. Bissell: Counsel for the R.C.M.P.
Al Pringle: Counsel for Correctional Services Canada
William L. Ryan: Counsel for Evers, Green and McAlpine
Charles Broderick: Counsel for Carroll
S. Bruce Outhouse: Counsel for Wheaton & Scott
Guy LaFosse: Counsel for Davies
Bruce H. Wildsmith: Counsel for Union of N. S. Indians
Assisted by Daniel Christmas
E. Anthony Ross, & Kevin Drolet: Counsel for Oscar N. Seale
E. Anthony Ross, & Jeremy Gay: Counsel for Black United Front

Court Reporters: J. Graham Robson, & Judith M. Robson, OCR, RPR

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COURT REPORTER'S CERTIFICATE HH

INQUIRY RECONVENED AT 8:10 o'clock in the forenoon on Friday, the 18th day of September, A.D., 1987, at Sydney, County of Cape Breton, Province of Nova Scotia.

1

2 MR. CHAIRMAN:

3 Yes, Mr. Spicer

4 MR. SPICER:

5 Thank you, My Lord. Before proceeding with the evidence of the
6 witness this morning, we have a preliminary request to make and
7 it is in respect of the testimony to be given by John Pratico
8 which we would expect at the moment will probably be next Tuesday;
9 and with respect to the evidence to be given by Mr. Pratico, we
10 request that you order that the t.v. cameras and lights be turned
11 off during Mr. Pratico's testimony.

12 The basis of this request is as a result of an opinion which
13 we've been given by Doctor Mian who is a psychiatrist for the
14 Cape Breton Hospital and who has been John Pratico's psychiatrist
15 since 1970.

16 He's advised us by letter to the following effect, and I'll
17 just read the letter into the record:

18 Dear Mr. Spicer:

19 Considering John's past history and his
20 present clinical condition, in my opinion
21 it will be detrimental to his mental health
22 and his testamentary capacity if he is
23 given television exposure. I hope you will
24 consider this and I would appreciate it if
25 this could be avoided if at all possible.

23 Your Lordships are aware that as Commission counsel, we have
24 indicated in the past the extent of the human tragedy that has
25 befallen many of the people involved in this case, and the request

DISCUSSION BETWEEN COMMISSION AND COUNSEL

1 | which we make today is out of concern that this tragedy not be
2 | added to. We do not ask for exclusion of the public or for
3 | exclusion of the Press, and we don't ask you to compromise the public
4 | nature of the Inquiry. We ask merely that the Commission exceed
5 | to the very real concerns expressed in the letter of Doctor Mian.
6 | We are also mindful of the importance of the evidence to be given
7 | by Mr. Pratico and of its relevance to the issues before the
8 | Commission. The public interest is surely served by hearing
9 | that testimony and the public's desire to know is not compromised
10 | in any way by the request which we make.

11 | I understand that Counsel for some of the other parties intend
12 | to speak to this application, and following that Counsel for the
13 | T.V. media, Mr. Murrant, is seated behind me and intends, as I
14 | understand it, to oppose our request.

15 | In the event of that Your Lordships wish I'd be pleased to
16 | respond to whatever Mr. Murrant has to say, if you feel at that
17 | time that such a response would be of assistance to you in your
18 | deliberations.

19 | I'm not at this time going to cite chapter and verse. I think
20 | the law is quite clear, to put it simply, a T.V. does not have a
21 | right to be here. Thank you.

22 | MR. CHAIRMAN:

23 | Would you file for the record, Mr. Spicer, the letter of Doctor
24 | Mian?

25 | MR. SPICER:

Yes, My Lord.

DISCUSSION BETWEEN COMMISSION AND COUNSEL

1 MR. CHAIRMAN:

2 Do any Counsel of the parties with standing wish to be heard?

3 MS. EDWARDH:

4 I wonder, My Lord, whether I might reserve any comment I might
5 have until Mr. Murrant proceeds (Inaudible - microphone not
6 transmitting)

7 MR. COUNSEL:

8 Counsel for Donald Marshall, Jr., asks if she can reserve until
9 counsel for the Canadian Broadcasting Corporation has been heard
10 and to respond if she seems it necessary or appropriate and that's
11 satisfactory to us.

12 MR. PUGSLEY:

13 I would make the same request, My Lord.

14 MR. MURRAY:

15 I will not be commenting, My Lord.

16 MR. ELMAN:

17 No comment, My Lord.

18 MR. SAUNDERS:

19 My Lord, I rise to support the application by Commission Counsel.
20 All I can say is to echo the comments that he's made and I draw
21 your Lordships attention to the second statement by the Doctor
22 in his report; that is to say, that with respect to Mr. Pratico's
23 mental health, the comments that it would be adversely affected
24 by the presence of television cameras and the visual media, but
25 he goes on to say "that the testamentary capacity of the witness

DISCUSSION BETWEEN COMMISSION AND COUNSEL

1 | would also be affected" and I say with respect, that the public
2 | interest ought to be best served by having Mr. Pratico here
3 | to give us the best possible recollection he can under the
4 | circumstances and if there's any chance that could be adversely
5 | effected by the visual media present, then I say with the
6 | greatest of deference that they ought to be excluded.

7 | MR. CHAIRMAN:

8 | R.C.M.P. counsel.

9 | MR. BISSELL:

10 | No comment.

11 | MR. CHAIRMAN:

12 | Mr. Ross.

13 | MR. ROSS:

14 | I would like to reserve until after the application has been heard,
15 | after the representations have been made on behalf of the
16 | applicant.

17 | MR. CHAIRMAN:

18 | Mr. Wildsmith.

19 | MR. WILDSMITH:

20 | Our comment at this time would be that it's always a very serious
21 | matter when the press is excluded. If there's anything less than
22 | complete and full coverage, our position would be that if it is
23 | absolutely necessary to exclude to get good evidence, then we
24 | would be agreeable to that. The only caveat, I guess, we would
25 | want to leave on the record is that the Commission ought to be

DISCUSSION BETWEEN COMMISSION AND COUNSEL

1 clear in its mind that it is necessary to exclude to get the
2 best evidence from Mr. Pratico.

3 MR. CHAIRMAN:

4 Fine. Four counsel have reserved and have been granted the right
5 to be heard again if they deem it necessary or appropriate. Now
6 I understand there is counsel present from -- representing a
7 party that has not been granting standing. The rules that
8 were laid down that are followed in all Commissions of Inquiry
9 is that only parties of -- counsel for parties of standing and
10 Commission counsel have the right to be heard but there is a
11 discretionary power or authority vested in the Commission under
12 the appropriate legislation to allow us to hear any other person
13 or persons that we deem appropriate and necessary.

14 Before counsel for the Canadian Broadcasting Corporation is
15 heard, I want to make it abundantly clear that this is not a
16 precedent for anything other than the fact that we are at this
17 time allowing a short, concise, precise and relevant intervention
18 by the Canadian Broadcasting Corporation. If the counsel for
19 C.B.C. is present, would he please identify himself?

20 MR. MURRANT:

21 My Lord, Robert Murrant. I appear for the Canadian Broadcasting
22 Corporation and the Atlantic Television Systems.

23 COMMISSIONER EVANS:

24 I just want to find out if you're representing everybody here
25 who has been running around with television cameras --

DISCUSSION BETWEEN COMMISSION AND COUNSEL - MURRANT

1 MR. MURRANT:

2 Television cameras, yes, as I understand it.

3 MR. CHAIRMAN:

4 The C.B.C. and?

5 MR. MURRANT:

6 The Atlantic Television System.

7 MR. CHAIRMAN:

8 The Atlantic Television System. All right.

9 MR. MURRANT:

10 To make my submission, My Lord, I would try to be as concise as I
11 can, given what's at stake here.

12 First of all, I thank the Commission for allowing me to be
13 heard. The witness we're anticipating, Mr. Pratico, is a key
14 witness in the mind of Commission counsel.

15 Excuse me.

16 As I pointed out, the witness in question is a key witness
17 for counsel for the Commission. He is also a key witness with
18 respect to the public interest in Canada. In addressing this
19 matter, I want to simply canvass a number of factors which I
20 hope will assist the Commission in determining something that
21 is rather without precedent as I understand the law.

22 The first part of my submission is the legal principle
23 involved and those are well-known but to repeat summarily, I
24 point to the decision of the Supreme Court of Canada in the
25 Attorney General versus MacIntyre in the search warrant case

DISCUSSION BETWEEN COMMISSION AND COUNSEL - MURRANT

1 | which is the leading decision in this Nation on openness of
2 | judicial proceedings. Simply to go to the expression of Mr.
3 | Justice Dixon, as he then was:

4 | In my view, curtailment of public access-
5 | ibility can only be justified when there
6 | is present the need to protect social
7 | values of super-ordinate importance...

8 | with emphasis on those last two words.

9 | ...one of these is the protection of the
10 | innocent...

11 | which becomes an ironic comment in the circumstances of this
12 | Inquiry.

13 | The second authority I would merely refer to summarily,
14 | the decision of the Manitoba Court of Appeal in F. P. Publications
15 | Western Limited v The Queen, decided in 1979. At issue was an
16 | order made by a Provincial Court Judge banning newspaper
17 | publication of the names of patrons of a bawdy -- a bawdy house.
18 | Mr. Justice Hewman said:

19 | The result of such an order is to erode
20 | public confidence in the criminal justice
21 | and ultimately to damage the administration
22 | of justice. There is nothing unusual about
23 | reluctant witnesses and there are numerous
24 | procedures available to ensure witnesses
25 | attend and tell the truth regardless of
 personal discomfort. The Court should not
 envoke the discretionary powers which would
 erode the common law principle.

 And I will return to that when I return to the facts. A helpful
 guide, My Lords, is a decision from the Florida courts. I point
 this out only because in the state of Florida, as in 43 other
 states, cameras are permitted in court rooms. And this decision

DISCUSSION BETWEEN COMMISSION AND COUNSEL - MURRANT

1 | is merely sort of a helpful factual guide on the issue of when
2 | to exclude the camera at a trial. The decision is Florida v
3 | Russell and it's reported in 8 Media Law Report, 2176, decision
4 | of the Florida District Court. It's a one page decision. I
5 | will refer only to a portion of it:

6 | The Supreme Court of Florida has established
7 | a three-part test for reviewing a request to
8 | exclude electronic media and cameras from a
9 | court room. Simply stated, the presumption
10 | of openness in our courts remains un rebutted
11 | unless it is shown that the presence of
12 | electronic media will have an effect on the
13 | individual seeking exclusion, that is...

14 | and the three points are:

- 15 | 1. Substantial
- 16 | 2. Qualitatively different from the effect
17 | other media have on the individual
- 18 | 3. Qualitatively different from the effect
19 | that electronic media have on members
20 | of the public in general.

21 | And a very other brief part of that decision,

22 | The defendant has voiced particular concern
23 | with the possibility of tainting the veneer
24 | through broadcast of suppression hearings but
25 | does not attempt to show how camera access
 presents any special problem in that regard.

26 | Now putting those legal considerations, if I should call them
27 | that in perspective, my second branch of my submission is
28 | simply the circumstances and that is that this is a public
29 | inquiry. I'm mindful of the decision in Scott v Scott which
30 | is familiar to many of us on the open court principle. That
31 | provides that "justice requires openness". It is our
32 | submission that injustice as is the case here requires a

DISCUSSION BETWEEN COMMISSION AND COUNSEL - MURRANT

1 | blazing exposure.

2 | If we look at the third branch of my submission which is the
3 | facts, I would suggest, given the practice and procedure adopted
4 | by the Commission to date in terms of the presence of the
5 | electronic media and the camera, that in the motion to exclude
6 | that Mr. Spicer has advanced, that really the burden should lie
7 | on the applicant.

8 | If we assume that, we then must go to the third and last
9 | part of my submission which is a little less concise than the
10 | previous two but I first turn to Doctor Mian's letter.

11 | This letter, I would suggest, is a polite request but is
12 | not a detailed psychiatric report. There is no diagnosis. There
13 | is no mention of any particular condition. The -- there's no
14 | basis for what is described as my opinion. There's reference to
15 | detrimental. There is no detriment, and I raise that because
16 | could it be that the witness would be uncomfortable for a period
17 | of a week or two when many persons involved in this Inquiry have
18 | been uncomfortable for more substantial periods of time. If it's
19 | -- if it's a discomfort of the witness that Doctor Mian could
20 | treat, then surely when we say what is more important, we say
21 | public access to Nova Scotia exceeds the importance of that.

22 | Then he goes on to say "detrimental to his mental health."
23 | We don't know the extent or consequence of that. And he says
24 | "and his testamentary capacity if he is given television
25 | exposure." That I take to mean if what he says is broadcast.

DISCUSSION BETWEEN COMMISSION AND COUNSEL - MURRANT

1 The report does not, My Lords, address in any way, shape or form
2 the presence of cameras in this room. It refers to if this man
3 is given television exposure. And simply on the facts, I'd like
4 to be frank. If we look at realities, there's no complaint
5 about the camera in the room. There's no complaint about the
6 lighting in the room. I came early this morning and as we all
7 appreciate, the lighting wouldn't be adequate were it not for
8 the television lighting. There will be audio recording. There
9 could be still photographs of Mr. Pratico as I understand it,
10 and the television cameras could scum him as he enters or leaves
11 the Hearing.

12 Doctor Mian's concern is with television exposure and if we
13 take the very helpful guide from Florida v Russell, this report
14 does not address those considerations, that it's "substantial"
15 and "qualitatively different" than other media.

16 To continue on the facts, the Commission has before it, I
17 believe from examining the records, an affidavit from Mr. Pratico.
18 You have his trial evidence. I believe the Commission has or
19 will have a deposition he gave on a civil matter. There is
20 considerable evidence already from Mr. Pratico. This would not
21 be his only evidence on the matter. Doctor Mian's report does
22 not address what I think should be primary and that is the
23 rigors of cross-examination by the counsel present, and in
24 weighing the balance, I would think that would be much more
25 significant.

DISCUSSION BETWEEN COMMISSION AND COUNSEL - MURRANT

1 Looking at those factors which are not addressed, what we have
2 is a psychiatric opinion that does not say that this is an
3 incompetent witness. It does not say that this witness must
4 testify "in camera", so it follows that he's competent and
5 can testify at this public hearing subject to the public being
6 here and subject to cross-examination by a number of counsel.

7 MR. CHAIRMAN:

8 And subject to the media being here.

9 MR. MURRANT:

10 And I would submit -- Yes. Yes, My Lord, because what that all
11 boils down to is discrimination against one form of communication
12 and that is to say my clients' cameras as opposed to any other
13 form without showing a "substantial, qualitative difference" with
14 respect to the witness.

15 I think in concluding this, to assist the Commission in making
16 a determination, we are on the fact -- the fact, somewhere in
17 making a speculative decision as to the nature and extent of
18 consequences to a witness.

19 If we bear in mind F. P. Publications on personal inconvenience,
20 we all know that that is virtually meaningless in the balance in
21 open justice. If we bear in mind what Chief Justice Dixon said in
22 the MacIntyre case, the concerns of John Pratico are not of "super-
23 ordinate importance" vis-a-vis the function of this public inquiry.

24 The last point I would mention is a practical matter, My Lords,
25 and that is I came to the room early this morning not having been

DISCUSSION BETWEEN COMMISSION AND COUNSEL - MURRANT

1 here to try and put the request in perspective. My clients are
2 prepared to remove two out of three cameras in this room and
3 leave the front camera which will be a pool camera and give a
4 feed of the testimony for the benefit of the Commission and
5 counsel and quite importantly the public.

6 The second thing that I did do bearing that in mind was to
7 assume the witness chair myself. Any witness testifying at this
8 inquiry, My Lords, in that chair subject to questions from the
9 Commission would not have that single camera within his vision,
10 barely within his peripheral vision. That should be an adequate
11 compromise. As I pointed out the lighting level in this room
12 would not be adequate without the television lights and that's
13 not addressed by Doctor Mian.

14 What it comes to in the result and the conclusion of my
15 submission is that it's difficult given the public importance
16 and the function of the press in this to conclude on Doctor
17 Mian's report that one camera within the possible peripheral
18 vision of one witness in this very important matter would have
19 any mark or substantial effect that would put the balance in
20 favour of the application.

21 Thank you very much for hearing me this morning.

22 MR. CHAIRMAN:

23 Ms. Edwardh, do you wish to respond?

24 MS. EDWARDH:

25 I have only two brief comments. I would adopt the words that

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1 Mr. Wildsmith said and that is that the principle of openness
2 is indeed of fundamental importance, especially in an inquiry
3 that deals with a miscarriage of justice but on behalf of Mr.
4 Marshall, my primary position is it is essential that the
5 adjudicative function that has been given to your Lordships not
6 be impaired and that if you are satisfied that there is in fact
7 a basis to conclude that this witness will not be able to give
8 his evidence effectively or that his testamentary capacity will,
9 as the Doctor described it, be affected to the extent that it
10 renders difficulty or renders your task more difficult, then it
11 would be my submission that I would adopt the position of
12 Commission counsel.

13 MR. CHAIRMAN:

14 Mr. Pugsley.

15 MR. PUGSLEY:

16 The effect of the television cameras upon the ability of the
17 witness to freely give his evidence is I think the critical aspect
18 of the matter. Your Lordships have before you an affidavit that
19 is explicit and on behalf of my client, I support the position
20 taken by Commission counsel.

21 MR. CHAIRMAN:

22 Mr. Ross.

23 MR. ROSS:

24 My Lord, if we get by the procedural problem as to whether or not
25 the intervener gets automatic standing, if we get by that and

DISCUSSION BETWEEN COMMISSION AND COUNSEL - ROSS

1 | address the matter of substance, it is my view that it was the
2 | duty of the intervener at this point to produce contrary evidence
3 | from that which is already before the Commission before his
4 | application could be properly heard.

5 | Thank you, My Lord.

6 | MR. CHAIRMAN:

7 | Mr. Wildsmith, do you have anything -- I wasn't clear whether you --

8 | MR. WILDSMITH:

9 | No, I don't have anything further to add, My Lords. I've made my
10 | point previously. Thank you.

11 | MR. CHAIRMAN:

12 | On that assumption, does Commission counsel wish to respond?

13 | MR. SPICER:

14 | I just have one comment, My Lord. I just want to make it clear to
15 | your Lordships that as you can appreciate before we came forward
16 | with this request, I can assure you that we or I explored all
17 | possible avenues to see whether or not there was a way in fact
18 | that Mr. Pratico could give his testimony with the presence of
19 | the t.v. cameras and after having spent a considerable amount of
20 | time exploring those avenues, it was clear to me that it was going
21 | to be problematic. We agreed initially to have t.v. here through
22 | these Hearings so long as they did not become disruptive to the
23 | process of the inquiry and up until this time of course that has
24 | been the case. This is an exception to that. Thank you.

25 | MR. CHAIRMAN:

All right. Maybe we will just take a couple of minutes to review

DISCUSSION BETWEEN COMMISSION AND COUNSEL - RULING

1 the submissions of counsel and then deal with it.

2 INQUIRY ADJOURNED: 8:35 a.m.

3 INQUIRY RECONVENED: 8:50 a.m.

4 MR. CHAIRMAN:

5 This is an application made by Commission counsel on behalf of
6 John Pratico who will be a witness before this Commission that
7 television cameras be excluded while John Pratico is testifying
8 and that he not be subjected to television lights during that
9 period.

10 According to the evidence available to this Commission, John
11 Pratico is admittedly a fragile individual who has a long history
12 of mental instability. His psychiatrist, Doctor M. A. Mian,
13 Medical Director, Cape Breton Hospital, in his written opinion
14 based on John Pratico's past history and his present clinical
15 condition, states that in his professional opinion

16 ...it will be detrimental to his mental
17 health and his testamentary capacity if
he is given television exposure.

18 The chief concern of this Commission is to obtain the facts.
19 Freedom of the press is a report -- is a right to report fully.
20 In that regard, this Commission has had, in my view, the
21 maximum public exposure, the maximum coverage by the media with
22 unrestricted right of access that has been enjoyed before any
23 Canadian Commission.

24 The right of the press to report fully is secondary only to
25 the Commission's duty to ensure that all relevant evidence is

DISCUSSION BETWEEN COMMISSION AND COUNSEL - RULING

1 given freely and uninhibited.

2 Commission counsel's motion would in no way prevent the media
3 from reporting fully upon the proceedings. It would merely
4 ensure that a witness be allowed to testify without such testimony
5 being impeded by floodlights.

6 In our view, the public can best be served and protected and
7 the adjudicative role of this Commission discharged fairly and
8 properly by granting the application of John Pratico. It is
9 ordered, therefore, that the order requested by Commission counsel
10 on behalf of John Pratico is granted. There is no order as to
11 costs at this time.

12 Mr. Spicer, are you ready to proceed?

13 MR. SPICER:

14 Yes, My Lord. I recall Chief Walsh.

15
16
17
18
19
20 *JMC.*
21
22
23
24
25