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**ROYAL COMMISSION ON THE  
DONALD MARSHALL, JR., PROSECUTION**

**Volume 89**

Held: September 21, 1988, at the St. Thomas Aquinas Church Hall,  
Halifax, Nova Scotia

Before: Chief Justice T.A. Hickman, Chairman  
Assoc. Chief Justice L.A. Poitras and  
The Honourable G. T. Evans, Q.C., Commissioners

Counsel: Messrs. George MacDonald, Q.C., Wylie Spicer, and David  
Orsborn: Commission counsel

Mr. Clayton Ruby, Ms. Marlys Edwardh, and Ms. A. Derrick:  
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Mr. Donald C. Murray: Counsel for Mr. William Urquhart

Messrs. Frank L. Elman, Q.C., and David G. Barrett: Counsel for  
Donald MacNeil estate

Messrs. Jamie W.S. Saunders and Darrel I. Pink: Counsel for the  
Attorney General of Nova Scotia

Mr. James D. Bissell & Mr. A. Pringle: Counsel for the R.C.M.P.  
and Counsel for the Correctional Services of Canada

Mr. William L. Ryan, Q.C.: Counsel for Officers Evers, Green and  
MacAlpine

Mr. Charles Broderick: Counsel for Sgt. J. Carroll

Messrs. S. Bruce Outhouse, Q.C. and Thomas M. Macdonald: Counsel  
for Staff Sgt. Wheaton and Insp. Scott

Messrs. Bruce H. Wildsmith and Graydon Nicholas: Counsel for  
the Union of Nova Scotia Indians

Mr. E. Anthony Ross: Counsel for Oscar N. Seale

Mr. E. Anthony Ross and Jeremy Gay: Counsel for the Black  
United Front

Court Reporting: Margaret E. Graham, OCR, RPR

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DISCUSSIONSeptember 21, 1988 - 9:09 a.m.MR. CHAIRMAN

Mr. Ruby?

MR. RUBY

My Lords, I rise again on a matter that's brief for which I want to draw to your attention, if I may. It's, I'm afraid, a request for an additional witness. It arises in the following way.

One of the unexplained matters in the Thornhill case is why after the very full and careful review by the Committee in Ottawa, Mr. Venner then reverses with the concurrence of the Deputy Commissioner the decision which had been taken so carefully. And Commissioner Simmonds was unable to assist us on the reasoning for that and none of the witnesses we have have been able to assist us on why that occurred. We know it occurred but we don't know why. After Commissioner Simmonds stepped down from the stand, and I believe went en route to the airport last day, I received information which I passed on to counsel for the Commission and counsel for the Government of Canada, and that was this. Former Corporal House, who was the officer in charge of...

MR. BISSELL

Objection. If my friends proposes to read evidence that a witness might or might not put in, I object to that. If he wants to make... I don't think this is proper place to put evidence before an Inquiry.

DISCUSSION

1 MR. RUBY

2 I'm sorry, I don't want to inconvenience my friend, but I  
3 don't see how I can apply for further witnesses to be called  
4 without explaining to you why they're relevant.

5 MR. CHAIRMAN

6 Well, I have to have some indication of what Mr. Ruby is  
7 talking about.

8 MR. BISSELL

9 I have no objection if my friend wants to make his motion,  
10 but I think it's improper to discuss the nature of evidence that  
11 somebody might give, particularly the nature of this type of  
12 evidence.

13 MR. ORSBORN

14 I may be of some assistance. I don't know if my friend  
15 would agree, Mr. Ruby would agree to casting the information  
16 received from Corporal House in general terms, to say that it was  
17 evidence that would, if accepted, would relate to the reasons for  
18 the R.C.M.P. not proceeding and leave it at that, rather than get  
19 into the details. I'm not sure that at this stage the details would  
20 be of assistance to the Commission in his application.

21 MR. BISSELL

22 I have no trouble with that.

23 MR. CHAIRMAN

24 Go ahead, Mr. Ruby.

25 MR. RUBY

DISCUSSION

1 It makes no sense. There is a note...

2 COMMISSIONER EVANS

3 Try it and we'll see.

4 MR. RUBY

5 There is a note in Corporal House's notebook dated the 16th  
6 of December, which is the time when the decision was being taken  
7 on the evidence, of a conversation he had with an officer named  
8 Blue who was in charge of commercial crime in Ottawa.

9 MR. PRINGLE

10 First of all, excuse me, My Lord. That's wrong in itself. Blue  
11 was in Halifax. My friend is...

12 MR. RUBY

13 Roy.

14 MR. PRINGLE

15 Excuse me, giving evidence and he's giving it erroneously  
16 and he's giving evidence on matters that probably are important,  
17 but it's very important, if he does give this evidence, that we  
18 recall the witnesses that gave evidence before, including the  
19 Commissioner, and we'd make that request.

20 MR. RUBY

21 Can I at least say what I want... what I think the evidence is  
22 important for?

23 MR. CHAIRMAN

24 So far, I gather it's not Blue you're speaking of.

25 MR. RUBY

DISCUSSION

1           It's Roy.

2           MR. CHAIRMAN

3           Roy?

4           MR. RUBY

5           Out of Commercial crime in Ottawa.

6           MR. CHAIRMAN

7           All right, go ahead, go ahead. I can't deal with it unless I  
8           have some idea what's coming.

9           MR. RUBY

10           I'm quite surprised by all this. It's a matter that really  
11           should not be arising this kind of strong feeling. They've known  
12           about it since last Friday. They've had lots of time to consider it  
13           and think about it. I just don't see the difficulty.

14           The information in his note that he says he got, and I've  
15           spoken to him and confirmed this, from Roy explains why the  
16           Commissioner did not want, was not going to make a decision in  
17           favour of proceeding with the case, and it gives a reason. I want  
18           to tell you what the reason was. I want to put it on record so the  
19           public knows exactly what I know.

20           MR. SAUNDERS

21           That's not evidence. No, I will rise. My friend in saying  
22           what the reason is is giving evidence.

23           MR. RUBY

24           I'm not giving evidence. I'm asking that a witness be called  
25           and I want you to know what he says so you'll know why it's

DISCUSSION

1 important that he should be called.

2 MR. CHAIRMAN

3 You said that a Corporal, that a gentleman named House,  
4 who was a corporal in the R.C.M.P. at the time of the original  
5 investigation, allegedly made a note in a notebook which indicates  
6 that there may be some reason why Commissioner... What's the  
7 name? ...Simmonds arrived at a conclusion other than the reason  
8 he testified to.

9 MR. RUBY

10 That's right. It said that... giving him advanced notice that  
11 Simmonds was going to turn it down before the decision was  
12 communicated through the official formal channels and telling him  
13 why that was being done. And I think he ought to be called and  
14 that matter ought to be explored in public evidence. Because we  
15 have no evidence of why that decision was reversed, none. It's  
16 inexplicable on the evidence we have. And I would like to tell  
17 you what that notation says, in summary, so that you'll appreciate  
18 the significance of it.

19 COMMISSIONER EVANS

20 If you're going to tell us what the summary is, then surely  
21 you're giving evidence.

22 MR. RUBY

23 I'm not giving evidence, I'm making an application to call  
24 this evidence and I want you to know what the evidence is that  
25 I'm going to call. If, for example, the reason was because the

DISCUSSION

1 colour of your eyes are blue, he doesn't like you, I wouldn't be  
2 asking for this evidence to be called at all. But it's far more  
3 significant than that.

COMMISSIONER EVANS

4  
5 But you're asking for something that (A) writes in his book  
6 that (B) told him that (C) said.

MR. RUBY

7  
8 I'm not sure how he knows it. The note doesn't include that  
9 information. House may or may not know why he was told, or  
10 who told him that.

MR. ORSBORN

11  
12 My Lord, if I may. As my friend indicates, he did us the  
13 courtesy of providing us with this information very shortly after  
14 he became aware of it and it has been the subject of some  
15 inquiries by Commission counsel, by counsel of the R.C.M.P. over  
16 the last couple of days. I am a little surprised that my friend is  
17 actually making an application to call additional evidence. It had  
18 been my understanding that, after our discussion, my friend was  
19 satisfied that the evidence was not going anywhere and he simply  
20 wanted to place the fact that he had been so advised on the record  
21 so that if it ever came up later, he could say, "Yes, I did bring it to  
22 the attention of the Commission."

23 We did pursue the note that was indicated in Corporal  
24 House's notebook. We interviewed, I interviewed Corporal House  
25 and inquiries were made of Superintendent Roy. And it was my

DISCUSSION

1 view that, at best, the evidence of Corporal House, if given, and  
2 indeed the evidence of Superintendent Roy, if given, would  
3 amount to nothing more than speculation on reasons for the  
4 R.C.M.P. making the decision. These gentlemen were not involved  
5 in the actual decision itself not to proceed with charges, and  
6 Corporal House was unable to suggest anything other than what  
7 was indicated to him by Superintendent Roy, was pure speculation  
8 from two gentlemen that admittedly, were perhaps not happy at  
9 that time with the decision. We have had evidence from the  
10 decision maker, Deputy Commissioner Quintal, who signed his  
11 name to correspondence directing Chief Superintendent Feagan  
12 not to proceed and we also have had evidence from his superior,  
13 Commissioner Simmonds. Whether that evidence is sufficient to  
14 enable Your Lordships to draw a conclusion is for you to  
15 determine. It may be or it may not be. It was our view as  
16 Commission counsel that calling further evidence on that point  
17 would, as I say, be at best speculative and it would not assist you  
18 in reaching any conclusions.

COMMISSIONER EVANS

19  
20 This would not be direct evidence, in any event.

MR. ORSBORN

21  
22 No, the evidence that Corporal House could give to support  
23 the entry in his notebook would be to say that I wrote this down  
24 following a conversation with Superintendent Roy or Inspector  
25 Roy. This is what Roy said to me. This is what Roy, I think,

DISCUSSION

1 thought at the time. He had no indication of where the thought  
2 came from, other than that he was upset at the time. But it is  
3 certainly at least third hand.

COMMISSIONER POITRAS

4  
5 And this would apply to Roy as well?

MR. ORSBORN

6  
7 My understanding is that if Roy were called to testified, he  
8 would not have a recollection of the conversation in question, the  
9 conversation with House.

MR. CHAIRMAN

10  
11 Does the counsel for the R.C.M.P. wish to be heard?

MR. BISSELL

12  
13 I have listened to the comments of my friend, Mr. Orsborn,  
14 and that is the view that we hold in the matter as well. That, at  
15 best, this is entirely speculation by people who are not involved in  
16 the making of the decision and would have no means of  
17 knowledge on what the decision was based at the time it was  
18 made. And I think it's speculation that is irresponsible and is  
19 brought at a time when the person about whom the speculation is  
20 made is no longer in a situation to respond to it. I think it most  
21 unfair.

MR. RUBY

22  
23 Let me deal first with that last suggestion. Commissioner  
24 Simmonds was questioned on what went into the reason...  
25 Commissioner Quintal, and Commissioner Simmonds were

DISCUSSION

1 questioned on what went into the reasoning with regard to the  
2 reversal of the decision. And they were all quite clear that only  
3 proper and legitimate factors and nothing related to the force's  
4 own interest were part of that decision. And if I remember, I  
5 asked the question would it be wrong to take into account  
6 anything having to do with the force's own personal interest and  
7 they agreed that it would. So my friend's suggestion that they  
8 won't have a chance to respond is just not there. If you knew  
9 what was in this particular note, you would know that that  
10 submission is nonsense. They have dealt with this issue. It's been  
11 dealt with squarely.

12 Now I'm most concerned about the way in which this matter  
13 is being dealt with. You'll recall we had a man on the witness  
14 stand, Mr. Gale, who was concerned because the way the matter  
15 was left, left the impression that something was being covered up.  
16 And all of a sudden, these two gentlemen agreed that whatever  
17 this information is, I shan't be allowed to tell you about it. And  
18 it's just wrong. This is a perfectly routine matter.

19 This is my submission, My Lord, and I intend to make it.  
20 This is a perfectly routine matter. We have heard evidence which  
21 leaves a question wide open as to why a decision was reversed.  
22 It's an important piece of evidence. We don't know why that  
23 occurred. A man named Venner was involved in the decision.  
24 He's not been called. He was clearly the man who drafted that  
25 decision. I'm not saying we have to call him, but I do say that this

DISCUSSION

1 evidence would suggest that there was something else going on in  
2 Ottawa, besides what we've heard about under oath, ought to at  
3 least consider the matter of a decision by Your Lordships and you  
4 cannot decide until you know what the allegation is.

5 Now I'm not in a position as counsel for Donald Marshall to  
6 go to the senior officers and say, "I want to know what happened.  
7 I want further documentation. I want to see more notes. Was  
8 something going on which you want to tell me about?" But those  
9 questions and the question of whether or not that should be done  
10 is what's before you now and you can't decide that until you know  
11 what we're talking about. You just can't decide.

MR. CHAIRMAN

12  
13 Well, Mr. Orsborn says that as a result of his, which is the  
14 responsibility of Commission counsel, as a result of his interview  
15 of Mr. House, and as a result of his interview on some occasion, I  
16 understand, with Superintendent Roy, that his conclusion is that  
17 the evidence is speculative. That it's not direct evidence. And  
18 speculative evidence is not going to help us. I have no difficulty  
19 in accepting the fact that we have before us, last week, sufficient  
20 evidence to allow this Commission to conclude, The one purpose  
21 for the calling of this evidence, whether or not there was different  
22 standards of dealing with or practices and procedures with some  
23 cases in Nova Scotia and others. And that's the only purpose why  
24 we call them. And, you know, we had a lot of evidence, we had a  
25 week of evidence on that and I have no difficulty, having heard

DISCUSSION

1 all of the witnesses, in reaching conclusions that I think are  
2 sustainable by the evidence. So how is this speculative evidence  
3 going to help us?

4 MR. RUBY

5 If, in fact, person or persons at headquarters who were  
6 involved in this matter (I'm not talking about junior officers) I'm  
7 talking about someone at headquarters, head of commercial crime,  
8 had at that time a view that there was, in fact, a motive, a  
9 particular motive for killing this investigation of Thornhill, you  
10 won't know about it and your conclusion as to why the R.C.M.P.  
11 acted may be quite erroneous.

12 COMMISSIONER EVANS

13 Mr. Ruby, you put that suggestion to a couple of witnesses  
14 and there was a denial.

15 MR. RUBY

16 That's right.

17 COMMISSIONER EVANS

18 So what more are you going to get?

19 MR. RUBY

20 Denial may not be credible, but it appear credible in the  
21 absence of any other evidence.

22 COMMISSIONER EVANS

23 Well, if what we know now from Commission counsel is that  
24 the man who is reported to have told this or stated this to House,  
25 says I don't recall this at all, Where is the connection? How do

DISCUSSION

1 you get from (C) to (B) to (A)?

2 MR. RUBY

3 Okay.

4 COMMISSIONER EVANS

5 You don't have (D).

6 MR. CHAIRMAN

7 (A) is the Commissioner.

8 COMMISSIONER EVANS

9 Well, either way.

10 MR. RUBY

11 (B) is Venner. One of the questions I would expect  
12 Commission counsel to ask, and I have no idea if he has asked it, is  
13 whether Venner was dealing with a particular issue. You don't  
14 know and I'm going to tell you what the issue was. May I tell you  
15 what the issue was? Because Venner redrafted his opinion for  
16 Quintal. I wonder what was on their minds?

17 COMMISSIONER EVANS

18 Well, I don't have any trouble figuring out what you think  
19 was on their mind.

20 MR. RUBY

21 Well, why can't I talk about it?

22 COMMISSIONER EVANS

23 And I think that question was put to the witnesses and they  
24 said, no, there was no extraneous influence whatsoever. That was  
25 clear from the evidence of Quintal and Simmonds. Now whether

DISCUSSION

1 we accept that is something else. That was their evidence. Now I  
2 take it you're trying to establish through this speculative  
3 evidence, and it can be no more than that, that what they said is  
4 incorrect.

MR. RUBY

6 I don't know whether it was more than that, but I would  
7 assume, if this application is successful that somebody would start  
8 asking questions of Venner concerning this subject matter. I don't  
9 know if anyone has ever done that. I have no idea. And Your  
10 Lordships can't know. So you can't know whether this evidence  
11 goes anywhere because you don't know what it's about, first of all.  
12 And, secondly, you don't know what's been done in terms of  
13 inquiries of Venner.

COMMISSIONER EVANS

15 I don't have any trouble figuring it out what you're getting  
16 at.

MR. RUBY

18 I'm not surprised. Thank you, My Lords.

COMMISSIONER EVANS

20 It's spelled out.

21 9:25 a.m.

MR. ORSBORN

23 My Lord, if I may, one comment of my friend that I would  
24 not like to go unnoticed. I take strong exception, strong and  
25 vigorous exception to his suggestion that the Commission counsel

DISCUSSION

1 is involved in any sense of a cover up of this matter. I believe  
2 that suggestion was made earlier in his comments. This was a  
3 decision made by us following a review of the possible evidence.  
4 It was made in good faith on the basis of our view of the  
5 relevance and the usefulness of the evidence to yourselves. I  
6 would hope that it would not be the situation, and any situation  
7 which Commission counsel disagreed with Mr. Ruby that we'd be  
8 accused of a cover up, and I take strong exception to that and  
9 would ask him to withdraw it.

MR. CHAIRMAN

11 Let me deal with the application. The purpose of our  
12 hearing evidence last week and again this week was simply to see  
13 if there is enough evidence, if there is evidence available to allow  
14 us to reach conclusions with respect to our recommendations to  
15 the Government of Nova Scotia concerning future practises in the  
16 justice system as to how investigations are handled and how  
17 charges by the police are laid and the role of the prosecutor, vis-  
18 a-vis senior officials in the Department of the Attorney General,  
19 and nothing more.

20 We've had four days of evidence where the issues raised  
21 were clearly put to the witnesses to our satisfaction and to the  
22 extent that I, and I think my fellow commissioners agree, that we  
23 are in a position to reach credible and factual conclusions and  
24 more importantly to make recommendations.

25 I do quarrel with Mr. Ruby's use of the phrase "cover up"

RULING

1 when dealing with the activities of Commission counsel. My  
2 experience has been, and I'm sure all counsel here, I would hope,  
3 verify it, Commission counsel has discharged their responsibility  
4 with a high degree of quiet professionalism. Their duty is to  
5 examine all of the evidence that they can lay their hands on and  
6 to bring before this Commission evidence that's relevant to us in  
7 the discharge of our mandate. I seen in the more than a year  
8 that this Commission has been in existence, I have seen nothing  
9 but nothing to indicate that they have failed one iota in the  
10 discharge of their duty. And I have no difficulty, and I accept  
11 without reservation the position put by Mr. Orsborn in this matter  
12 this morning.

13 Consequently the application to call the Mr...the corporal, or  
14 Mr. House or anyone else in this matter is denied.

MR. RUBY

15  
16 If I could just indicate for the record, I don't want that  
17 remark to pass without saying that I intended and, I think, made  
18 no aspersions against counsel. I share your view of their task in  
19 the way they worked. I was intending to point out the peculiarity  
20 of the position they urged upon you in the course of argument  
21 that this application should be made and disposed of without the  
22 Commissioners ever knowing the subject matter of the comment.  
23 I meant no more than that.

MR. CHAIRMAN

24  
25 Now let me deal with another application that was heard

RULING

1 yesterday. We've been asked by counsel for the Black United  
2 Front to provide them with an opportunity to present to the  
3 Commission through the sworn testimony of two witnesses the  
4 results of research they have conducted into five cases involving  
5 the death of black persons. This research, funded by the  
6 Department of the Secretary State, will describe the perceptions  
7 by the black community of their treatment by the criminal justice  
8 system in relation to these five cases. They propose to call Mr.  
9 Bernie Jones, the coordinator of the project, and Mr. Ken Crawford.  
10 The Black United Front wishes to make the case that racism in the  
11 criminal justice system is a very real variable in the treatment of  
12 black people in the justice system of Nova Scotia.

13 The Black United Front was granted full standing at this  
14 Inquiry and their counsel has had the same opportunity as all  
15 other parties with standing before this inquiry to present the  
16 position of their client. They have been active participants, not  
17 only in the public hearings of the Inquiry, but also in providing  
18 important assistance to the Commission in its research efforts.  
19 Counsel for the Black United Front has been fully funded by the  
20 Province of Nova Scotia. There has been no attempt to limit the  
21 scope of their participation before us except, as with all counsel,  
22 where the question of relevance to our mandate is raised.  
23 We are satisfied, however, that the Black United Front has had full  
24 access to these hearings.

25 Early in its deliberations the Commission reached the

RULING

1 conclusion that racism is an issue that is more effectively dealt  
2 with by means other than through sworn testimony at the public  
3 hearings. With the assistance of the Black United Front, the terms  
4 of reference of a significant research project were drawn up and a  
5 well-known researcher was hired to study the perceptions of  
6 racism in the criminal justice system by black people in Nova  
7 Scotia. The first draft of this paper was peer reviewed and the  
8 subject of an all-day workshop attended by academic, government  
9 and community experts including a sizeable representation from  
10 the Black United Front. A similar process has been followed in  
11 dealing with our research projects. It is clear to us that the  
12 participation of the Black United Front in the research process has  
13 been extremely important and relevant, in some cases resulting in  
14 raising issues that were not dealt with adequately in the research.  
15 We are most appreciative of their input and expertise. We  
16 anticipate that this input will be reflected in the final research  
17 reports and more importantly in the final report of the  
18 Commission. It should be noted that we have not called any of  
19 our researchers to testify before the Inquiry to defend their work  
20 or to air it in a public forum. But their work will nonetheless be  
21 considered most seriously by the Commission and will be  
22 published as an appendix to our final report.

23 The perception of the black and native community that  
24 racism may be a factor in the criminal justice system of Nova  
25 Scotia is a very important one, one that cannot be ignored. We

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1 have been made aware of these issues through the active  
2 participation in these hearings of counsel for the Black United  
3 Front and the Union of Nova Scotia Indians and through the  
4 research process. We know that racism is extremely difficult to  
5 prove in a legal sense. To open up these issues to cross-  
6 examination by counsel may unnecessarily limit the extent of the  
7 comments that might be permitted only to those who can stand to  
8 courtroom scrutiny. There are many ways to arrive at conclusions  
9 and *viva voce* evidence is only one of the ways. We have not  
10 changed our view that the public hearing forum is not the most  
11 appropriate or effective one to deal with this type of information.

12 With very few exceptions, we have not called witnesses to  
13 speak only to the issue of racism, either as it affects natives or  
14 blacks. This issue has, in general, arisen when a witness was  
15 called to speak to involvement in the Marshall case and questions  
16 dealings with racism flowed from there. We did, however, hear  
17 evidence from Bernie Francis and Herb Desmond.

18 To deny the application of the Black United Front to call  
19 research evidence before this Inquiry is not to infer we are not  
20 interested in receiving this information. There are several  
21 opportunities remaining which might provide a forum for the  
22 Black United Front to bring such material before the Commission.  
23 The results of their research project might be submitted to Mr.  
24 Briggs, the Commission's director of research, to be circulated to  
25 the authors of the research projects and incorporated into the

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1 final version of their studies for consideration of the  
2 Commissioners.

3 In the alternative counsel for the Black United Front will  
4 have the opportunity to make final written and oral argument and  
5 might incorporate the research of the Black United Front into  
6 those submissions. There may be another opportunity for the  
7 black community to give the Commissioners the benefit of their  
8 advice on the recommendations that might be contained in the  
9 final report of the Commission. This forum will provide an  
10 important opportunity for representatives of the black community  
11 to direct the Commissioner's minds toward recommendations  
12 which flow from the community itself.

13 In denying this application we wish to assure the Black  
14 United Front that we look forward to receiving the results of their  
15 research but direct that this information must be received by  
16 means of a forum other than the public hearings. We will strive  
17 mightily to ensure that their concerns are considered most  
18 seriously.

19 The application is, therefore, dismissed.

20 Now before we start the next witness I heard that there's  
21 another application somewhere.

MR. WILDSMITH

23 Yes, My Lord, I have another application. On behalf of the  
24 Union of Nova Scotia Indians an application that involves a real  
25 life living case example and not a research project.

MR. WILDSMITH - APPLICATION

1 I'm instructed to bring this motion to the Commission with  
2 respect to an administration of justice issue that is a vital concern  
3 to the Micmac people of Nova Scotia. This issue concerns the  
4 response of the law enforcement authorities, in particular the  
5 Department of the Attorney General and Ministers of the  
6 provincial Crown to the Micmac Treaty Moose Hunt.

7 At the outset I apologize to the Commission for the lateness  
8 of this application, to Commission counsel for not having full  
9 discussions with them on the matter to this point in time, and to  
10 my learned colleagues, particularly representing the Department  
11 of the Attorney General, for not being able to give them much in  
12 the way of advance notice, just a brief discussion this morning.

13 My instructions on this point came yesterday and they came  
14 as a result of a meeting of the Union of Nova Scotia Indians and  
15 other Micmac leaders in the Province. This meeting yesterday  
16 was held in response to events over the past weekend whereby  
17 the Province of Nova Scotia made clear its position and attitude to  
18 Micmac rights.

19 As you may be aware from media reports in the last couple  
20 of days nine Micmac hunters now stand charged, including one  
21 Chief, one former President of the Union of Nova Scotia Indians,  
22 and Commissioner of the Nova Scotia Human Rights Commission.  
23 They stand charged with offences under the Wildlife Act and it  
24 may well be that others will stand charged as well.

25 What we can see quite clearly is what the future holds on

MR. WILDSMITH - APPLICATION

1 this issue and we've come to ask ourselves a very fundamental  
2 administration of justice question which we think ought to be of  
3 interest to this Commission.

4 And that very fundamental administration of justice issue is  
5 this. By what means can the Province of Nova Scotia, acting  
6 through the Attorney General's Department and through the  
7 Provincial Cabinet, ignore the substance of a legal declaration of  
8 Micmac rights by the highest court in the land? How can it  
9 happen that an issue is submitted to the courts for resolution that  
10 the dispute works its way up the system to the Supreme Court of  
11 Canada that the Micmac people win that case, and yet, as far as  
12 the Province is concerned, nothing has changed? Business as  
13 usual. How can the Micmac people respect the system of justice  
14 whose decisions can be explained away and ignored by  
15 governments that apparently don't like the outcome? One does  
16 not have to be very cynical to wonder how this government would  
17 have responded, would have treated Micmacs if the Province had  
18 been the victor in court and not the Micmacs.

19 Now, of course, the decision I speak about is the Supreme  
20 Court of Canada's decision in a case called James Matthew Simon  
21 v. The Queen. For the record, it's citation (1985), 62 National  
22 Reporter, page 366, a unanimous decision written by the Chief  
23 Justice of Canada.

24 Now six of the Micmacs charged are facing the present day  
25 version of the same offence that Mr. Simon faced, which involved

SUBMISSION - MR. WILDSMITH

1 the possession of a firearm, a rifle, in a wildlife area during a  
2 closed season.

3 9:40 a.m.

4 So that Your Lordships might appreciate the significance of  
5 our submission and the strength of the decision of the Supreme  
6 Court of Canada, I would like to draw your attention to two  
7 paragraphs that appear towards the end of this decision and I'd  
8 be happy to provide you with a copy for your later reference.

9 This is the Chief Justice of Canada, Brian Dickson, speaking  
10 now in paragraph 60 of his decision.

11  
12 In my opinion, Section 150 of the Lands and  
13 Forest Act of Nova Scotia [which is, as I say, the  
14 former counterpart to the provisions of the  
15 Wildlife Act that six Indians are now charged  
16 with] restricts the appellant's right to hunt under  
17 the Treaty. The Section clearly places seasonal  
18 limitations and licensing requirements for the  
19 purposes of wildlife conservation on the right to  
20 possess a rifle and ammunition for the purposes  
21 of hunting.

18 The restrictions imposed in this case  
19 conflict, therefore, with the appellant's to right to  
20 possess a firearm and ammunition in order to  
21 exercise his free liberty to hunt over the lands  
22 covered by the Treaty. As noted, it is clear that  
23 under Section 88 of the Indian Act, provincial  
24 legislation cannot restrict native treaty rights. If  
25 conflict arises, the terms of the treaty prevail,  
therefore, by virtue of Section 88 of the Indian  
Act, the clear terms of Article 4 of the Treaty  
must prevail over Section 150 of the Lands and  
Forest Act.

1 And a second paragraph, paragraph 62:

2  
3 I conclude that the appellant has a valid treaty  
4 right to hunt under the Treaty of 1752 which, by  
5 virtue of Section 88 of the Indian Act cannot be  
6 restricted by provincial legislation. It follows,  
7 therefore, that the appellant's possession of a  
8 rifle and ammunition in a safe manner referable  
9 to his treaty right to hunt cannot be restricted  
10 by this provision of the Lands and Forest Act.

11 So, of course, with these pretty definitive statements I  
12 would daresay absolutely clear statements, the Micmac  
13 community now asks itself "Why are Micmacs still being harassed  
14 and prosecuted for doing what the Supreme Court of Canada has  
15 said they could? Why is the province issuing press releases that  
16 call the Micmac activities illegal? Why is the Deputy Minister of  
17 Lands and Forests writing to all the Chiefs and leaders of the  
18 Micmac community telling them that the Micmac hunt is not  
19 authorized and that any Micmac hunting will be prosecuted? Why  
20 is the province seizing rifles, knives and moose meat? Why is the  
21 full force of the justice system (that is being examined by this  
22 Commission), wildlife officers, RCMP officers, prosecutors in courts,  
23 being unleashed on the Micmac harvest which is purely for  
24 subsistence and ceremony purposes?"

25 In our respectful submission there can be only one  
26 explanation, the same one that is evident in the Marshall case, the  
27 Thornhill case and the MacLean case, and this is an attitude  
28 problem. Somewhere the rule of law has broken down and the

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1 rule of men with capacities for prejudice and bias is at work.  
2 Personal views and other extra legal factors are undermining the  
3 independence, objectivity and impartiality that are supposed to be  
4 the hallmark of our justice system.

5 You may say well why bring this issue to you. Well, first of  
6 all, we cannot, in our view, expect a political resolution. Three  
7 years have almost gone by from the Supreme Court of Canada's  
8 decision and despite some negotiations and some discussions, the  
9 province has not publicly acknowledged the Micmac hunting of  
10 any sort and negotiations with Micmacs over hunting rights is an  
11 issue that's been played out very much as the Commission saw  
12 with respect to compensation issues for Donald Marshall.

13 Second, we could always go back to the courts and  
14 ultimately if these charges stand, we will have to do that, because  
15 the charges must be answered. But to take the Simon case as an  
16 example, it took more than five years for that case to proceed  
17 from the activities leading to the charge to the Supreme Court of  
18 Canada's decision. And, of course, the expense of doing so is  
19 enormous with very little financial support for an important case  
20 like that I might mention from the Federal Government.

21 And of course, which is really the issue that we're bringing  
22 to you, we've already gone through the back route with the Simon  
23 case. We've already been there and if that didn't do any good the  
24 first time why should we expect that it will the second. Being  
25 forced back to court can be a form of harassment and persecution.

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1           And then, of course, the final reason for bringing it to Your  
2 Lordships, is that you are charged with the duty to make  
3 recommendations on the administration of justice in this province  
4 and have the independence and objectivity to look at this issue.  
5 Within your mandate, as you've already indicated this morning,  
6 you are looking at the treatment of Indians in the criminal justice  
7 system and as is evident from the Thornhill and MacLean cases,  
8 you are looking at the operation of extra legal factors such as  
9 political favoritism.

10           The Micmac hunting issue reflects on the operation of these  
11 extra legal factors and reflects on the possible existence of actual  
12 bias and on the undoubted operation of systemic bias. It also has  
13 the advantage of not just being a purely historical inquiry but  
14 looking at activities and personalities that are presently involved  
15 in the system.

16           So what is it, in particular, that we are suggesting to the  
17 Commission that you do? It's this. It's to examine the events  
18 from the Simon decision in 1985 to the present in the same way  
19 that you examined the Thornhill and MacLean matters and this, of  
20 course, would include not just the public response but the internal  
21 memoranda and documents generated within the Attorney  
22 General's Department and working their way up through the  
23 system to see if proper legal advice was formulated the same way  
24 we examined Mr. Coles' opinion to see whether proper legal advice  
25 was formulated and passed up the line on our instructions

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1 eventually to Cabinet. And in this process to see if there were  
2 other factors at work, other extra legal factors that should not  
3 have been taken into account. And of course as has happened in  
4 all of these other cases, we have absolute trust and faith in the  
5 integrity of Commission counsel to examine this issue to see  
6 whether there is anything worth putting forward to the  
7 Commission in a public way such as this.

8 Finally, there is the question of Cabinet. My information and  
9 what we seem to have confirmed through Commission counsel is  
10 whether the decision to prosecute Micmacs for this offence was a  
11 decision not made by law officers and the Crown but made by  
12 Cabinet or through the direction of Cabinet. If the issue of the  
13 subpoenas which Your Lordships already issued with respect to  
14 Cabinet ministers and breach of Cabinet privilege are upheld by  
15 the courts and there is a further session of this Commission to deal  
16 with discussions in Cabinet, then of course it's our respectful  
17 submission that this issue of how the MicMac hunting rights have  
18 been treated since Simon in 1985 should be part of that exercise  
19 as well.

20 If Your Lordships are in agreement that that would be an  
21 appropriate course of conduct, of course in preparation for that we  
22 would need to have gone through the exercise of seeing what  
23 information was generated internally within the Attorney  
24 General's Department and eventually found it's way into Cabinet's  
25 hands.

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1           Those are my submissions.

2           MR. ORSBORN

3           My Lord, I'd initially thank my friend for his apology in not  
4 being able to brief us earlier on this matter. I appreciate the  
5 difficulty that stemmed from his receiving late instructions in the  
6 matter.

7           From his comments I think he has raised an issue that is a  
8 real current grievance of the Micmac people and it is obviously a  
9 matter of some complexity— legally, culturally and otherwise.

10          However, he has indicated that one of the reasons for  
11 bringing the application this morning is because he cannot expect  
12 a political resolution of the matter, and I would suggest that this  
13 Commission cannot and should not be an alternative route to go  
14 when one cannot expect a political resolution. The Commission is  
15 not a standing remedial body through which particular grievances  
16 may be addressed. And for that reason alone it would be my  
17 respectful submission that the matter, although of current concern  
18 to his clients, is not one that is within the reasonable mandate of  
19 the Commission.

20          It is true that incorporated within the mandate of the  
21 Commission we have considered it necessary to examine other  
22 cases other than Mr. Marshall to see if a double standard does  
23 operate in the administration of justice in the province. And it  
24 will be for Your Lordships to consider whether or not that does  
25 exist based on the evidence before you.

DISCUSSION

1           However, boundaries must be drawn in determining the  
2 number of examples that will be brought before you. And it is not  
3 unreasonable to draw a boundary where it has been drawn in the  
4 two cases presently before you.

5           Of perhaps more fundamental importance is the fact, as my  
6 friend indicates, that nine of his clients presently stand charged of  
7 an offence arising out of the moose hunt. As such, I would suggest  
8 it would be most inappropriate for this Commission and, indeed,  
9 anybody to embark on an inquiry as to the facts and  
10 circumstances surrounding this matter. Whether the province is  
11 correct it's interpretation of the Simon decision is an issue that  
12 will be presumably argued and decided by the courts who will be  
13 dealing with the prosecutions.

14           And for that reasons and for the others I have mentioned, it  
15 would be our submission, as Commission counsel, that it would be  
16 not appropriate nor within the reasonable boundaries of our  
17 mandate to proceed with consideration of that issue.

MR. SAUNDERS

18  
19           My Lords, on behalf of the Attorney General of Nova Scotia I  
20 accept my friend's apology on the late notice. It was only five to  
21 nine this morning that Mr. Wildsmith alerted me to the  
22 application that he intended to place before Your Lordships and  
23 clearly I have not had time to consider Mr. Wildsmith's motion in  
24 any detail nor have I had any opportunity to seek the advice and  
25 instruction of my client to respond in any more detail that

DISCUSSION

1 Commission counsel has.

2 But I will remark that yesterday Your Lordships commented  
3 on the efficacy of proceeding with dispatch and drawing these  
4 hearings to a close and not continuing them in perpetuity, I think  
5 was the word Your Lordship used. To accede to my friend's  
6 request would seem to me to be calling upon endless days and  
7 weekend of further deliberations to explore the questions that he  
8 seeks to place before this Commission. And I say with deference  
9 to my friend that the matter which he asks the Commission to  
10 consider is beyond anyone's wildest interpretation of the ambit of  
11 this Commission of inquiry.

12 And I've just been advised by my friend, Mr. Ross, that the  
13 motion put by my friend, Mr. Wildsmith, is not a motion on behalf  
14 of all native peoples in Nova Scotia. I understand from Mr. Ross  
15 that the Confederation of Mainland Micmacs which Mr. Ross  
16 represents, does not accede to the application made by the Union  
17 of Nova Scotia Indians. So as my friend for the Commission says,  
18 the issues are complex and not all of the complexity lies in the  
19 interpretation of whatever the Simon case says. There are  
20 considerations as to the representations made and by whom they  
21 are made. And I just make that point before this Commission,  
22 That apparently the motion, as put, is not representative of all  
23 native groups as affected.

24 And, finally, My Lords, I have no doubt that the  
25 interpretation of Chief Justice Dickson's decision in Simon would

DISCUSSION

1 be placed before the provincial court judge who was seized with  
2 jurisdiction in handling these nine offences and I would expect  
3 that defence counsel would argue the interpretation as placed on  
4 that decision by Mr. Wildsmith. But that's a matter for the court.  
5 I can't imagine that this Commission would want to get into things  
6 that, as of this weekend, are presently before the provincial court.  
7 9:55 a.m.

8 MR. CHAIRMAN

9 What was the organization again that you took the position  
10 for?

11 MR. SAUNDERS

12 I understand that it's Confederacy of Mainland Micmacs,  
13 consisting of six bands on the mainland. The bands being, if Your  
14 Lordship cares to have them identified: Millbrook, Shubenacadie,  
15 Horton, Pictou Landing, Bear River, and Afton.

16 MR. CHAIRMAN

17 I take it that they have not been granted standing, Mr. Ross.

18 MR. ROSS

19 Mr. Ross is sitting.

20 MR. CHAIRMAN

21 You've imposed the Golden Rule of silence upon yourself.

22 MR. SAUNDERS

23 Thank you, My Lord.

24 MR. CHAIRMAN

25 Mr. Ruby?

DISCUSSION

1 MR. RUBY

2 If they have not been granted standing, I would be very  
3 surprised to hear them making an application, My Lord.

4 MR. SAUNDERS

5 Sorry, I didn't hear all of what my friend said.

6 MR. RUBY

7 As Your Lordship pointed out, since they have not been  
8 granted standing, I'll be very surprised to hear them make an  
9 application here.

10 MR. SAUNDERS

11 And I heard none.

12 MR. RUBY

13 And you shouldn't be surprised about that, because they  
14 have no standing and they never asked for any. I rise simply to  
15 say that I join Mr. Wildsmith's application and I urge Your  
16 Lordships to accept it.

17 MR. CHAIRMAN

18 Well, if you're on Mr. Ross' side, then I'm in some trouble.  
19 You met Mr. Ross, did you not, Mr. Wildsmith?

20 MR. RUBY

21 No, Mr. Ross has no client who is making any application, no  
22 client with standing. I am on Mr. Wildsmith's side. Mr. Wildsmith  
23 is correct in this issue.

24 MR. CHAIRMAN

25 I suspect that's what you meant to say.

DISCUSSIONMR. RUBY

1  
2 In fact, if Mr. Ross has a position, he's not said it. It's rather  
3 counsel for the Government of Nova Scotia conveniently embroiled  
4 in the middle of a dispute who tries to bring in this red herring.  
5 I'm surprised that Your Lordship pays any attention to it at all.

MR. CHAIRMAN

6  
7 I didn't interpret what Mr. Saunders said as being an  
8 application. I interpreted what he said was that he had been  
9 asked by Mr. Ross, as counsel for the Confederacy of Mainland  
10 Micmacs, to point out to the Commission that Mr. Wildsmith does  
11 not represent all of the Micmacs in Nova Scotia. And that,  
12 therefore, this application is not on behalf of all of them. That's  
13 all.

MR. RUBY

14  
15 I would be very surprised, because Mr. Wildsmith never  
16 suggested that he did. I thought his client was the Union of Nova  
17 Scotia Indians.

MR. CHAIRMAN

18  
19 I know. I realize that.

MR. RUBY

20  
21 That's been clear from the very beginning. But perhaps  
22 counsel for the Attorney General of Nova Scotia doesn't  
23 understand that. Perhaps he's trying to make a political point.

MR. BISSELL

24  
25 I rise to say we have nothing to say.