1987

IN THE MATTER OF:		The Royal Commission on the Donald Marshall, Jr. Prosecution
	- and -	
IN THE MATTER OF:		The Canadian Charter of Rights and Freedoms;
	- and -	
IN THE MATTER OF:		John F. MacIntyre and an application for funding of legal counsel

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SUBMISSION ON BEHALF OF THE DEPARTMENT OF THE ATTORNEY-GENERAL

Jamie W.S. Saunders
Darrel I. Pink
Patterson Kitz
Barristers & Solicitors

Counsel for the Department of the Attorney-General of the Province of Nova Scotia and the Attorney General of Nova Scotia

INTRODUCTION

By letter dated April 14, 1987, George W. MacDonald, Q.C., Commission Counsel, invited written submissions from parties with standing before this Royal Commission on the application brought for:

> "funding of counsel for certain parties through the Commission, or alternatively that the Commission direct the Province of Nova Scotia to provide the required funding."

To date only the application of John F. MacIntyre has been seen. It is understood other parties have applied to the Commission for funding. This Brief, while addressing the broad issues, will deal specifically with the John F. MacIntyre application. At the hearing on May 13th, counsel for the Department of the Attorney General may deal with issues raised by other applicants and not anticipated herein.

Counsel for the Department of the Attorney General wish to address the issues raised by the funding application and specifically:

(a) Whether the Commission has any jurisdiction to entertain the application for funding;

(b) What relief the Commission has jurisdiction to provide; e.g., Order or recommendations.

The position to be stated with regard to these two questions eliminates the need to deal with the third issue referred to in Mr. MacDonald's letter ("The necessity for, and the extent of, funding required by your client from the Province of Nova Scotia"). Depending on the result of the Commission's deliberations, counsel for the Department of the Attorney General reserve the right to deal with the specifics of that third issue.

NATURE OF A COMMISSION OF INQUIRY

Whether called Royal Commissions, Public Inquiries or Commissions of Inquiry, they all perform the functions of "inquiry into, reporting on and recommending to" the Government regarding specific governmental concerns. The Ontario Court of Appeal described the practice of establishing Royal Commissions in Re Ontario Crime Commission, ex parte Feeley and McDermott (1962), 34 D.L.R. (2d) 451, 467:

> "It has been the practice in England for centuries to appoint Royal Commissions to make inquiry concerning matters affecting the good government of the country, the conduct of any part of the business thereof or of the administration of justice therein, or other matters relating to the welfare of the nation. The issuance of letters patent appointing such a commission is an exercise of the royal prerogative, and the true object is to authorize an inquiry to be made into questions of public interest and the public good as contrasted with private matters or litigation between private parties in which the public has no recognizable interest."

In its Working Paper 17, the Law Reform Commission of Canada described Commissions of Inquiry at page 13:

> "Broadly speaking, commissions of inquiry are of two types. There are those that advise. They address themselves to a broad issue of policy and gather information relevant to that issue. And there are those that investigate. They address themselves primarily to the facts of a particular alleged problem, generally a problem associated with the functioning of government. Many inquiries both advise and investigate. Consideration of a wrongdoing in government naturally leads to consideration of policies to avoid the repetition of similar wrongdoings. Study of broad issues of policy may lead to study of abuses or mistakes permitted by the old policy, or absence of policy. But almost every inquiry primarily either advises or investigates."

Whether they are advisory or investigatory, it is clear they carry out their assigned duties with a view toward making recommendations to Government on the matters specifically assigned to them in the Order in Council establishing the inquiry. As Sir W.J. Richie, C.J. noted in Godson v. The Corporation of The City of Toronto, [1890] S.C.R. 36, 40:

> "The object of such inquiry was simply to obtain information for the council as to their members, officers and contractors, and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action. The county judge was in no way acting judicially; he was in no sense a court; he had no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual. The proceeding for prohibition in this case was, therefore, wholly unwarranted,..." (emphasis added)

The Commission has no power to pronounce judgment or to impose a legal duty or obligation upon anyone. Its authority is limited to that which is given by the Public Inquiries Act, R.S.N.S. 1967, c. 250 and the Order in Council establishing the inquiry.

THE PUBLIC INQUIRIES ACT, R.S.N.S. 1967, c. 250

Only four of the five sections of the Public Inquiries Act are relevant to the present inquiry. Section 1 authorizes the Governor in Council to "cause inquiry to be made into and concerning any public matter" within the legislative competence of Nova Scotia. Section 2 authorizes appointment of commissioners "to inquire into and concerning" matters not regulated by any specific law of the Province. The only powers granted to commissioners are derived from Sections 3 and 4:

> "3 The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing (or on solemn affirmation if they are entitled to affirm in civil matters), and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire. R.S., c. 250, s. 3.
>
> 4 The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court to a judge [Judge] thereof in civil cases, and the same privileges and immunities as a judge [Judge] of the Supreme Court of Nova Scotia. R.S., c. 250, s. 4."

The power of the Commission as found in the Public Inquiries Act is thus limited to compelling the attendance of witnesses, the administration of oaths and the production of documents for "the full investigation of the matter into which he or they are appointed to inquire".

Any power to pay expenses of witnesses

THE ORDER IN COUNCIL

Order in Council 86-1265 dated October 28, 1986 appoints this Commission under the Public Inquiries Act. The specific authority or power given to the commissioners is:

> "To inquire into, report their findings and make recommendations to the Governor in Council respecting the investigation of the death of Sanford William Seale on the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall, Jr. with that death; the subsequent conviction and sentencing of Donald Marshall, Jr., for the non-capital murder of Sanford William Seale for which he was subsequently found to be not guilty; and such other related matters which the Commissioners consider relevant to the Inquiry."

As is standard in similar Orders in Council, the document authorizes payment of the Commissioner's expenses; directs the retention of legal counsel and further staff for the Commission and authorizes remuneration at rates approved by Management Board; directs arrangements for facilities for hearings; orders payment of expenses out of the Consolidated Fund of the Province; authorizes the Commission to set its own rules of procedures; and directs the Commission to report their findings and recommendations to the Governor in Council.

The Order in Council does not authorize the Commission to deal with funding of participants before the inquiry. An example of clear language where the Order in Council dealt with funding is found in Re Bortolotti, et al and Minister of Housing, et al (1977), 15 O.R. (2d) 617 (Ont. C.A.). There the Donnelly Commission was established "to consider, recommend and report in relation to" the North Pickering Project near the proposed new Toronto airport. Order in Council 2959/76 provided specifically for funding in the following language:

> "All matters referred to this Commission shall be heard and determined in proceedings of an adversarial nature. The Ministry of Housing, former land owners, present and former agents and officials of what now forms part of the Ministry of Housing will be entitled to be represented by counsel who shall be paid by the Ministry of Housing. The reasonable costs of counsel and of any appraisals required for the former land owners, shall be borne by the Ministry of Housing. Counsel for the former land owners will be appointed by the Ombudsman."

No similar language is found in Order in Council 86-1265 nor can an intention to authorize funding be inferred from the language of that document.

A Commission of Inquiry exceeds its jurisdiction if it deals with subject matters not within the Order in Council establishing it. In Re Bortolotti the supervising role of the Ontario Divisional Court under Section 6(1) of the Public Inquiries Act, 1971 are discussed at 15 O.R. (2d) 623:

> "...the statutory powers of the Court are now 'supervisory only, i.e., confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion lying within the confines of its jurisdiction.'
>
> An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in order in Council 2959/76."

Thus if a Commission of Inquiry goes beyond the subject matter of its Order in Council establishing, it is subject to judicial supervision.

That the language of Order in Council 82-1265 authorizes an inquiry only is confirmed by reference to Re Copeland and McDonald (1978), 88 D.L.R. (3d) 724 (F.C.T.D.) where there was a challenge to the McDonald Royal Commission investigating the Royal Canadian Mounted

Police. After quoting the language of the Order in Council setting up the Royal Commission, Cattanach, J. said at p. 731:

> "Thus at its very highest the Commission is but a fact-finding, reporting and advisory body.
>
> Paraphrasing and applying the words of Lord Denning, M.R., to the Commissioners herein, they are not even quasi-judicial, for they decide nothing, they determine nothing.
>
> The Commission reports to the Governor in Council and it is for him to decide what shall be done. He may implement the advice given in the report in whole or in part or he may consign the report to oblivion. The action to be taken thereon is exclusively his decision."

Therefore when language of an Order in Council authorizes the Commission "to investigate" or "to inquire into" or to "make such report" that is all they are empowered to do. They can do no more.

See also Royal American Shows Inc. v. Laycraft, J., [1978] 2 W.W.R. 168 (Alta. S.C.).

FUNDING

Because funding is not dealt with in the Order in Council, the applicants seek to have the Commission find authority to recommend or order funding for them. The power of a Commission is dealt with in the next section of this Brief; however, the role of a Commission of Inquiry regarding funding merits brief comment.

The Order in Council for the Donnelly Commission is quoted above. It was a clear statement and authorization for funding of legal costs for participants. No such authority exists in Order in Council 86-1265.

In a Handbook for the Conduct of Public Inquiries in Canada (1985) the authors acknowledge that the funding of participants is in a government decision rather than that of the Commission itself. At page 54 they state:

> "The question of public participation and the funding of public intervenors is a crucial element in the inquiry process, and it is usually not completely under the control of the commissioner. The practice in Canada has been for government to fund intervenors directly but to use the inquiry as the vehicle for delivery of the funds. Funding for intervenors is a separate allocation from the government according to criteria agreed upon, and these allocations cannot be used for other purposes within the inquiry. While the inquiry plays an important role in advising government on the amount of funding, the ultimate decision is made by government."

In Re Royal Commission on the Northern Environment (1983), 33 C.P.C. 82 (Ont. Div. Ct.), Linden, J. dealt with an application by an Indian Grand Council to participate fully in the Royal Commission on the Northern Environment, with a right to examine and cross-examine witnesses. In ruling that the Commission is in charge of the inquiry

and controls it process he placed several caveats on that power including the following regarding funding at page 88:

> "...there is nothing in this decision which is meant to influence the commissioners or others in relation to the question of funding of the participants with regard to this cross-examination feature. Merely because funding is provided for the presentation of briefs does not necessarily mean that funding would be provided in full participation. That is a distinct question that will be determined by those responsible for those matters."

The Law Reform Commission also deals with the question of funding of participants before Commissions of Inquiry and recommends in Working Paper 17 that there be a statutory amendment to the federal Inquiries Act to authorize participant funding. The present federal Inquiries Act is silent on the issue as is the Public Inquiries Act of Nova Scotia.

POWERS OF COMMISSIONS OF INQUIRY

A Commission of Inquiry has no inherent power. In Keable, et al v. Attorney General of Canada, et al (1978), 24 N.R. 1 (S.C.C.) the Court stated at pages 36-37:

> "...The Commissioner does not enjoy the status of a superior court, he has only a limited jurisdiction. His orders are not like those of a superior court which must be obeyed without question; his orders may be questioned on jurisdictional grounds because his authority is limited. Therefore his decisions as to the proper scope of his inquiry, the extent of the questioning permissible, and the documents that may be required to be produced, are all open to attack, as was done before the Ontario Divisional Court in Re Royal Commission and Ashton (1975), 64 D.L.R. (3d) 477....
>
> Because a commissioner has only limited authority he enjoys no inherent jurisdiction, unlike superior courts which have such jurisdiction in all matters of federal or provincial law unless specifically excluded."

In Royal American Shows Inc. supra the Alberta Supreme Court was considering its role in reviewing the conduct of a Commission of Inquiry. The Court finds it can intervene in the conduct of a Commission if:

(1) the report of the Commission is susceptible to effecting rights of a person;

(2) if it wrongfully impairs the liberty of goods of a person (and that person has not been afforded natural justice and fairness in the course of the inquiry),

(3) if the inquiry is beyond the jurisdiction of the provincial legislature, and

(4) "if the commissioner, in the course of conducting his inquiry, sought to inquire into matters outside his terms of reference" (page 180-182).

Again it is clear there is no power of a Commission of Inquiry to go "outside the terms of reference". Because there is no inherent power or authority in a Commission of Inquiry, it must refer to its empowering Order in Council to determine if a matter before it is properly there. The present application for funding falls outside that authority. For that reason the Commission cannot make a recommendation to the Governor in Council on that matter.

Because it is only authorized to inquire, report and recommend this Commission has no authority to "order" funding for any participant. As a Supreme Court of Canada said in Godson v. Corporation of the City of Toronto supra at page 40:

> "...He (the Commissioner) has no powers conferred on him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual."

The Supreme Court of Newfoundland said in Re City of St. John's (1928), 22 Nfld. & P.E.I. R 46,50 that a Commission of Inquiry "has no authority to effect the rights of others, either directly or indirectly".

The Federal Court said in Landreville v. The Queen (1973), 41 D.L.R. (3d) 574, 578, "The report of a Royal Commission does not have any legal effect."

All these authorities confirm the limited scope of the Commission's authority. Thus the Commission cannot order that funding be provided to any of the applicants.

CHARTER OF RIGHTS AND FREEDOMS

The Applicant, John F. McIntyre styles his application in part:

IN THE MATTER OF: The Canadian Charter of Rights and Freedoms

Through the specific section of the Charter under which the application is made is not identified, it is submitted the applicant must be looking for relief under Section 24(1).

> "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

In R. v. Mills (1986), 67 N.R. 241, the Supreme Court of Canada dealt at length with what a court of competent jurisdiction is under this section. Separate concurring decisions were rendered by MacIntyre, J. and LaForest, J. with Lamer, J. (Dickson, C.J.C. concurring) and Wilson, J. writing a dissenting judgment. The decision of Justice MacIntyre is the main decision of the court. In concluding that a Provincial Court Judge conducting a Preliminary Inquiry under Part XV of The Criminal Code is not a court of competent jurisdiction for purpose of granting relief under Section 24(1) of the Charter, MacIntyre, J. says at page 251-252:

> "The preliminary hearing magistrate, now ordinarily a provincial court judge, finds his jurisdiction in Part XV of the Criminal Code of Canada. He is given jurisdiction to conduct the inquiry and in the process he must hear the evidence called for both parties and all cross-examination. He is given procedural powers under ss. 465 and 468 of the Code., including a power to direct the trial of an issue as to fitness to stand trial. His principal powers are conferred in s. 475. After

> all the evidence has been taken, he may commit the accused for trial if, in his opinion, the evidence is sufficient, or discharge the accused if, in his opinion, upon the whole of the evidence no sufficient case is made out to put the accused on trial. He has no jurisdiction to acquit or convict, nor to impose a penalty, nor to give a remedy. He is given no jurisdiction which would permit him to hear and determine the question of whether or not a Charter right has been infringed or denied. He is, therefore, not a court of competent jurisdiction under s. 24(1) of the Charter. It is said that he should be a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). In my view, no jurisdiction is given to enable him to perform this function. He can give, as I have said, no remedy. Exclusion of evidence under s. 24(2) is a remedy, its application being limited to proceedings under s. 24(1). In my view, the preliminary hearing magistrate is not therefore a court of competent jurisdiction under s. 24(1) of the Charter, and it is not for courts to assign jurisdiction to him. I might add at this stage that it would be a strange result indeed if the preliminary hearing magistrate could be said to have the jurisdiction to give a remedy, such as a stay under s. 24(1), and thus bring the proceedings to a halt before they have started and this in a process from which there is no appeal."

Other courts have dealt with Section 24(1) as it relates to the competence of statutory courts and tribunals. Only a court or tribunal which is authorized to grant remedies is able to deal with Charter matters within the ambit of its authority. The Ontario Court of Appeal described the power of the Divisional Court in Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home, et al (1984), 13 D.L.R. (4th) 220, 226:

> "To grant declaratory relief to the applicant, the Divisional Court must be a court of competent jurisdiction: s. 24(1) of the Charter. It is common ground that to meet this requirement, the court must have jurisdiction, independently of the Charter, to grant the remedy sought."

The Federal Court has dealt with the power of the Immigration Appeal Board to grant Charter remedies in Law v. Solicitor General of Canada, et al (1983), 144 D.L.R. (3d) 549 where Mahoney, J. said at page 553:

> "The Immigration Appeal Board is, within the limits of its jurisdiction as defined by statute, a court of competent jurisdiction within the contemplation of s-s. 24(1) of the Charter. The Board has, by ss. 59(1) of the Immigration Act, 1976 sole and exclusive jurisdiction to herein determine, inter alia all questions of law that may arise in relation to the removal order against which the plaintiff has appealed, under ss. 72(21) to the Board. The issues raised in this action, namely whether the law as stated in Prata v. Minister of Manpower & Immigration remains the law in light of subsequent juris prudence and the Charter, are such questions of law. The Board has sole and exclusive jurisdiction to determine them; this court is without such jurisdiction."

Finally, reference is made to the Ontario High Court's decision in Re Regina and Brooks (1982), 1 C.C.C. (3d) 506 where the headnote states as follows:

> "The court of competent jurisdiction within the meaning of s. 24 is a court given jurisdiction by the laws of the country and it was not Parliament's intention to give all jurisdiction in all matters to all courts. In giving a person a right to apply to a court of competent jurisdiction as s. 24 does, the section refers to and points to the court or courts of competent jurisdiction with respect to the matter that is sought to be enforced under s. 24."

It is submitted this reasoning applies to a Commission of Inquiry and limits its ability to deal with this application.

It is submitted this Commission is not an appropriate forum for an application under the Charter of Rights and Freedoms for this

Commission is not competent to grant relief for the enforcement of rights protected by the Charter.

CONCLUSION

The third issue identified in Commission Counsel's letter dated April 14, 1987 is:

> "(c) The necessity for, and the extent of, funding required by your client from the Province of Nova Scotia."

For the reasons previously stated, it is our submission that this Commission has no jurisdiction to entertain the application brought by John F. MacIntyre or any other party for funding. Consequently this Commission need not concern itself with the distinction between an order and a recommendation since - in the circumstances of the present application - it has no authority to deliberate upon the relief sought.

In the result we decline to make any representations on "the necessity for" or the "the extent of" funding required by any participant, as such comments would be moot and neither helpful for relevant.

However, should it ever be presumed that the Province of Nova Scotia would be approached to address the extent of funding requirement of any participant, then the Province would reserve to itself whatever considerations such an inquiry importuned but they would undoubtedly include full and complete disclosure of each and every aspect of the Applicant's financial circumstances.

Counsel for the Department of the Attorney General and the Attorney General of Nova Scotia request that the application herein be dismissed.

ALL OF WHICH is respectfully submitted this 30th day of April, 1987.

JAMIE W. S. SAUNDERS

DARREL I. PINK

Counsel for the Department of
the Attorney General and the
Attorney General of Nova Scotia