

BRUCE H. WILDSMITH, B.Sc., L.I.B., L.I.M. (HARV.)
BARRISTER & SOLICITOR

33 WALTON DRIVE
HALIFAX, NOVA SCOTIA
B3N 1X6

May 4, 1987

Chief Justice T. Alexander Hickman
Associate Chief Justice Lawrence A. Poitras
The Honourable

Mr. Justice Gregory Thomas Evans
Royal Commission on the Donald Marshall, Jr., Prosecution
Maritime Centre, Suite 1026
1505 Barrington Street
Halifax, Nova Scotia
B3J 3K5

My Lords:

Re: The Funding of Participation
by Union of Nova Scotia Indians

The Union of Nova Scotia Indians (UNSI) submits that the Commission as a whole, and each Commissioner individually, has an obligation not to proceed unless adequate and equitable funding arrangements are in place. Regardless of legalities over the power and jurisdiction of the Commission, the primary consideration for each Commissioner should be the integrity and credibility of the Inquiry itself. A public inquiry in which allegations of racial discrimination play a central role should not itself contribute to further discrimination by proceeding when racial minorities are denied the means of effective participation. The Commission must not be "colour blind" to the participants but rather ought, in our submission, to act affirmatively to ensure that racial minorities have proper representation. Otherwise any recommendations that the Commission may eventually make on the issue of discrimination will lack credibility in the eyes of those minorities. Thus, the question of funding should not be seen as purely a matter of law alone. Rather, the question is: for what values does this Commission stand.

With reference to the three matters specifically raised in George W. MacDonald's letter of April 14, 1987, the UNSI says:

(a) The Commission has jurisdiction to hear submissions on the question of funding. The Public Inquiries Act, R.S.N.S. 1967, c.250 is not helpful on this, but the Order-in-Council establishing the Commission does authorize an inquiry into "other related matters which the Commissioners consider relevant to the Inquiry". The parties who will participate and the terms and means of such participation seem clearly relevant.

(b) On the subject of relief, the Commission undoubtedly has the power to make recommendations concerning the issue of funding participation: this is a "related matter . . . relevant to the Inquiry". In the Sinclair Steven's Conflict of Interest Inquiry Mr. Justice Parker refused the Liberal Party of Canada's application for funding in these words (at p. 3748-49 of Transcript and p. 4 of "Ruling Regarding Funding of Parties, August 20, 1986"): ". . . the terms of reference themselves make no reference to public funding. It would, therefore, seem to be in my discretion whether or not I recommend to the government that funding be provided to the applicants." [Emphasis added] It is also our understanding that some Commissions of Inquiry have made recommendations that parties/participants/intervenors be funded. In the Inquiry by Mr. Justice Grange into the deaths at the Sick Children's Hospital in Toronto the parents of the babies that died were represented by four lawyers who were funded by the Inquiry (See Parents of Babies Gosselin v. Grange (1984), 8 Admin.L.R. 250). And Mr. Justice Berger in the Northern Pipeline Inquiry strongly endorsed participant funding and developed criteria to be applied to such funding.

We are doubtful that the Commission has the formal power to order the government to provide funding. The capacity to make such an order appears inconsistent with the legal character of the Commission as part of the executive branch of government created by and subject to the direction of the Governor-in-Council. As Russell J. Anthony and Alastair R. Lucas point out in A Handbook on the Conduct of Public Inquiries in Canada (Toronto: Butterworths, 1985), at p. 3: "It is clear that inquiries are not courts; nor are they a branch of the judiciary Rather, they carry out executive or administrative functions" It is the government's money, after all.

However, these considerations ultimately miss the mark. The Commission, and each Commissioner, has the power, indeed the responsibility, in our submission, to comment, to recommend, to refuse to proceed and finally to resign if the inquiry cannot be conducted to appropriate standards of propriety. We believe that Mr. Justice Berger took such a stand on the Northern Pipeline Inquiry and refused to proceed without funding for, inter alia, native intervenors.

(c) The UNSI needs funding to participate because it is a non-profit society incorporated under the Societies Act (N.S.) without a source of funding independent of government. The UNSI provides the corporate structure through which the Chiefs of all the Micmac Bands in Nova Scotia (13), elected under the Indian Act (Can.), collectively act.

The UNSI survives as a result of operating funds provided by the Department of the Secretary of State (Canada) through its Native Representative Organizations Funding Program. Salaries, office expenses, travel, annual and board meetings and general operational expenses are covered by this grant. There is some flexibility to the allocation of these funds to special projects, but nothing approaching the magnitude needed to participate in this Inquiry. Indeed, due to cash problems the UNSI laid off most of its staff for 3 1/2 weeks in March and is still experiencing cash flow problems. All of the other funds received by the UNSI are designated for identified programs and cannot be spent to participate in this Inquiry.

As to the extent of funding required, why should it be any different than that provided to other parties? The UNSI has an interest in any evidence of racial prejudice against Indians that may have been present in the events surrounding Donald Marshall, in any defects in the administration of justice which permitted it and in how the system may be changed to avoid discrimination in the future. Consideration of these matters will require relatively full participation in the Inquiry.

Several particular financial questions need resolution by the Commission:

1. Will transcripts of the evidence be provided by the Commission to each party without cost to the party? If not, this will be expensive and could be a considerable barrier to participation.
2. We feel that the Commission should Inquire into systemic discrimination in the administration of justice. This may require, for example, the examination by experts of the statistics kept by the government on the justice system, expert evidence on other studies done in other jurisdictions on this issue and on what information should be kept on these issues if such are not presently adequate. Will the Commission pay for these studies and these experts? Will the Commission take the responsibility and incur most of the expense of ferreting out such evidence?
3. The extent of travelling and therefore the need for accommodation away from home for counsel is unclear. There was some suggestion that some witnesses may be examined outside of Nova Scotia.

Having said all this, the UNSI is prepared to live within reasonable limits on the extent of government financing, provided others are under the same limitations. However, our impression is that the Province has written a blank cheque to the outside counsel retained to represent the Attorneys-General (past and present) and their people, and has done the same for Donald Marshall's counsel. While we do not expect to expend as much as these parties, on what basis can limitations on the UNSI different than that on others be justified?

The UNSI wishes as well to emphasize that its concern on the issue of funding is on behalf of all Indians in the Province of Nova Scotia. All Indians and not just Donald Marshall, Jr. are affected by the administration of justice. The Board of the UNSI recognized this on April 22 and 23 when the Chiefs resolved that the UNSI continue in its efforts to participate in this Inquiry.

All of which is respectfully submitted,

Yours faithfully,



Bruce H. Wildsmith
Counsel, Union of Nova Scotia

Indians

BHW/hmp