

1987

IN THE MATTER OF:

The Royal Commission on  
the Donald Marshall, Jr.  
Prosecution

- and -

IN THE MATTER OF:

An Application for Funding  
of Legal Counsel by:

ADOLPHUS JAMES EVERS, Civilian  
Member of the R.C.M.P.;

- and -

GARY GREEN, Constable with  
the R.C.M.P.;

- and -

R.A. MACALPINE, Civilian  
Member of the R.C.M.P.

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SUBMISSION TO THE COMMISSION WITH  
RESPECT TO APPLICATIONS FOR  
FUNDING OF LEGAL COUNSEL

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1.

PART I

NATURE OF APPLICATIONS

1. The Governor in Council has caused an inquiry to be made into and concerning the investigation of the death of Sandford 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 Sandford 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; all pursuant to the Public Inquiries Act, R.S.N.S. 1967, c. 250, s. 1. The Applicants have been connected with the Royal Canadian Mounted Police over the course of years since the initial date of reference of the Inquiry (May 28, 1971), and indeed were employed with the Royal Canadian Mounted Police at that time. Each of the individual Applicants has had involvement with the matters under inquiry since May 28, 1971, which will be sketched briefly below.

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2. It is respectfully submitted that because each of the Applicants is connected with the Royal Canadian Mounted Police, the following pronouncement by the Supreme Court of Canada is relevant to the scope of this Honourable Royal Commission in relation to these Applicants:

I thus must hold that an inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this police force. It is operating under the authority of a federal statute, the Royal Canadian Mounted Police Act, (R.S.C. 1970, c. R-9). It is a branch of the Department of the Solicitor General, (Department of the Solicitor General Act, R.S.C. 1970, c. S-12, s. 4). Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authority to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force.

Attorney General of Quebec and Keable v. Attorney General of Canada et al., [1979] 1 S.C.R. 218, at p. 242. The

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ultimate holding of that case was that a provincial Royal Commission could properly inquire into the involvement of the R.C.M.P. in specific events, and the R.C.M.P.'s co-operation with other police forces with respect to those events: see the Terms of Reference of the Keable Royal Commission set out at pp. 226-227 of the decision, as amended at p. 253 by the Supreme Court of Canada in that case.

3. It is respectfully submitted that the main, if not the only, purpose of this Honourable Royal Commission is to seek out reasons why the administration of justice in Nova Scotia permitted Donald Marshall, Jr. to be convicted of a murder for which he was eventually acquitted. The possibility therefore exists that this Honourable Royal Commission will find or conclude that there was some wrongdoing within the bodies which supported the originally successful prosecution of Donald Marshall, Jr. There is authority that if this Honourable Royal Commission does find wrongdoing of some sort it may recommend appropriate proceedings to put an end to and punish such wrongdoing: Re The Children's Aid Society of the County of York, [1934] O.W.N. 418, at p. 421 (Ont. C.A.):

4.

The public, for whose service this Society was formed, is entitled to full knowledge of what has been done by it and by those who are its agents and officers and manage its affairs. What has been done in the exercise of its power and in discharge of its duties is that which the Commissioner is to find out; so that any abuse, if abuse exists, may be remedied and misconduct, if misconduct exists, may be put an end to and be punished not by the Commissioner, but by appropriate proceedings against any offending individual.

Unlike the case in Ontario, there is no statutory provision in the Nova Scotia Public Inquiries Act, supra, which requires the Commission to give an individual reasonable notice of the substance of any misconduct alleged against him and to allow him full opportunity during the inquiry to be heard in person or by counsel before making such a finding of misconduct: compare Public Inquiries Act, 1971, R.S.O. 1980, c. 411, s. 5 (2). Nor have the Terms of Reference of this Honourable Royal Commission been expressly limited, as was the Grange Commission in Ontario, from "expressing any conclusion of law regarding civil or criminal responsibility": see Grange Commission Terms of Reference, attached as Appendix "C". The potential for this Honourable Royal Commission, in the full exercise of its mandate, to come to conclusions adverse to the Applicants which might bear on their civil responsibility or otherwise really exists. Even if, in particular cases, the potential

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for criminal or civil proceedings arising out of this Honourable Royal Commission's inquiry is slight, the individual Applicants must also have concern for findings which may expose them to opprobrium in the eyes of the public and have an impact on the standing of these individuals within the Royal Canadian Mounted Police Force.

**ADOLPHUS JAMES EVERS**

4. Adolphus James Evers is a civilian member of the R.C.M.P. stationed at Sackville, New Brunswick, and has been in charge of the Hair and Fibre section of the R.C.M.P. Crime Detection Laboratory there since 1970. He has given evidence as an expert in the science of hair and fibre examination and comparison before various Courts in British Columbia, the Yukon, and all of the Atlantic Provinces. In particular, he testified at the original trial of Donald Marshall, Jr. For the purposes of that trial Mr. Evers examined a jacket and a coat for the presence of fresh cuts or tears. He gave the opinion that there were both fresh cuts and fresh separations of material on these two garments. Upon the 1982 re-investigation of the Marshall conviction it was discovered that Mr. Evers still had slides of the material from the brown coat as well as a piece of the material from the yellow jacket. He was asked to examine ten knives for the presence

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of any fibres consistent with the fibres of the coat or jacket. After review of his evidence by other R.C.M.P. officers and a Crown Prosecutor, it was decided that Mr. Evers' evidence linked the knives with the cuts and separations in the garments introduced in evidence at the 1971 trial of Donald Marshall, Jr. Indeed, before the Appeal Division re-hearing, the Crown Prosecutor submitted that "perhaps more than any other single factor, [his]...evidence will prove to be the key to the ultimate resolution of this case.". However, the Appeal Division in its decision on the re-hearing commented on Mr. Evers' evidence and described it as "highly speculative and by itself would not be of much force in determining the guilt or innocence of the appellant.". Mr. Evers' evidence only had "independent validity" to the extent that it corroborated the evidence of James W. MacNeil.

**R.A. MACALPINE**

5. Mr. Richard A. MacAlpine is also a civilian member of the Royal Canadian Mounted Police, employed with the Serology Section of the Halifax Detachment of the Royal Canadian Mounted Police. He had involvement with the same exhibits and materials as Mr. Evers, but his first involvement with the case was during the re-investigation of 1982. At the original trial expert blood



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identification and analysis evidence was given by Sandra Catherine Mrazek.

#### CONSTABLE GARY GREEN

6. Gary Green is a Constable with the Royal Canadian Mounted Police. He was contacted in approximately 1974 by Donna Elaine Ebsary with information alleging that her father had committed the Seale killing, and that she had tried to get action taken on this by the Sydney City Police. Upon receiving this information Constable Green also contacted the City Police.. He had no further involvement in the matter.

#### APPLICATION FOR FUNDING

7. It is respectfully submitted that each of the above-described individuals has had an involvement with the prosecution, continued detention, and ultimate release of Donald Marshall, Jr. It is apparent, we submit, that because of the number and nature of the interventions filed before this Honourable Royal Commission that each of the individual Applicants here may be cross-examined up to eight times during the course of the proceedings. It is difficult, if not impossible, for anyone to speculate as to the directions or scope of these cross-examinations, no matter how limited the involvement of these individuals might appear from a review of documents or even from the

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direct examination contemplated by Commission Counsel themselves. Also, because of the breadth of the Commission's mandate, it is difficult to speculate in advance, and particularly without a list of witnesses, as to evidence that might affect any of these individuals in some way. It is acknowledged that as members of the Royal Canadian Mounted Police these individuals will be provided with funding for counsel during the time of any interviews with Commission Counsel when their own counsel is present, as well as during the time of any actual testimony by these individuals.

8. The application made on behalf of the Applicants is limited to necessary costs which will be incurred other than those which will be paid by the federal government through the Treasury Board. These necessary costs may well be substantial. In addition to instructing their own counsel, and permitting their own counsel to prepare him or herself including the extensive time which would be required to familiarize oneself with the lengthy documentation which exists in this case, the necessary attendances with the Commission on procedural matters prior to the commencement of hearings and the hearing of pre-hearing motions, there may also be time required

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to attend before the Commission when witnesses whose evidence might affect the Applicants is being given. It is respectfully submitted on behalf of the Applicants that they cannot be fairly represented without counsel being involved throughout to advise them and to protect the positions that they have taken in the past and will take before this Honourable Royal Commission. Although there is difficulty in assessing what the ultimate costs involved would be, the Applicants are not in a position to personally afford even the large expense which would be incurred in preparing the Applicants to give their own evidence. Therefore, this application is made on behalf of the Applicants for an Order or recommendation of this Honourable Royal Commission that the Province of Nova Scotia pay the difference between what will be paid by the Treasury Board and the ultimate accounts rendered to these Applicants up to the limits of remunerations as are approved by Management Board.

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PART II  
ROYAL COMMISSION POWERS WITH RESPECT  
TO FUNDING

9. It is respectfully submitted that this Honourable Royal Commission has, by its Terms of Reference, authority "to retain the services of legal counsel and such other...personnel who, in the opinion of the Commissioners are required for the purposes of the Inquiry, at remunerations as shall be approved by Management Board", and that such costs be payable out of the Consolidated Fund of the Province: Terms of Reference, attached as Appendix "D". It is respectfully submitted that what is required for the purposes of the Inquiry is what is necessary in the interest of justice being done, and appearing to be done. This is made more acute than might otherwise be the case where the mandate of the Royal Commission is to inquire into the functioning and processes of the administration of justice in a province.

10. In Re Nelles et al. and Grange et al. (1984), 9 D.L.R. (4th) 79 (Ont. C.A.) the following passage was quoted from the words of Commissioner Mr. Justice Grange at p. 86:

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I cannot imagine that there could ever have been the slightest doubt as to why each of the members of the Trayner team is here represented by counsel funded for [by] the Province. If such a doubt has ever existed, let me make it quite clear that each of them may be found to have been implicated, either by accident or with deliberation in the death of the children.

It is respectfully submitted that this passage is extremely instructive in that it was not only Nurses Nelles and Trayner who were independently funded by the Province of Ontario, but rather:

...each of the members of the Trayner team....

They were funded because:

...each of them may be found to have been implicated, either by accident or with deliberation....

Thus, it appears that where a team or group of individuals may be implicated in the subject-matter of the inquiry, they ought to each have funded counsel, whether or not their involvement appears to be accidental or the result of deliberation. The Grange Commission's Terms of Reference with respect to engaging counsel are in substance no different than those contained in this Honourable Royal Commission's Terms of Reference.

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11. The actual report of the Grange Royal Commission also suggested at pp. 220-222 that where an individual is ensnared in a notorious case and an unusual case, and where the matter is complicated, extremely difficult, and above all lengthy, such an individual should be compensated for reasonable solicitor and client costs. See Appendix "E". It is respectfully submitted that these principles would apply with greater force where the individual caught up in the proceedings of a Royal Commission is there without any legitimate or reasonable belief that sufficient evidence exists at this point to show wrongdoing on the part of that individual. Other recent Royal Commissions in this country have decided that the provision of funding for legal counsel for parties appearing before them was implicit in their mandate to ensure that justice was done and appeared to be done: e.g., Royal Commission on the Northern Environment (Ontario), The Report of the MacKenzie Valley Pipeline Inquiry (Berger-Canada), and Alaska Highway Pipeline Inquiry (Lysyk-Canada). In the Terms of Reference of all of these Royal Commissions there was no explicit authority to provide funding of legal counsel for parties appearing, but each did as a result of the general authority to order that what was required to be paid for the purposes of the Royal Commission was indeed paid. It is respectfully submitted

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that this will follow whenever there is a security interest of an individual or group which may be affected by the findings of the Royal Commission.

12. It is respectfully submitted that as Commissioners invested with all the same privileges and immunities as a Judge of the Supreme Court of Nova Scotia, the Honourable Commissioners of this Honourable Royal Commission have the authority to ensure that counsel is provided to the extent necessary to any person appearing before them. As Mr. Justice McDonald stated in Re White and The Queen (1976), 73 D.L.R. (3d) 275, at pp. 287-288:

At one time in Alberta it was common practice in the Supreme Court, at least, that in appropriate cases a Judge would appoint counsel to represent the interests of an accused person, who would then act for the accused without any expectation of payment, whether by the accused or the Attorney-General of the Province, and without any payments in fact being made by the Attorney-General. Later, in the years preceding the introduction of the present legal aid plan, a Judge of the Supreme Court could appoint a counsel and, at least in many if not all cases when this was done, the Attorney-General paid counsel's fee. No doubt such payment was made ex gratia. In the Supreme Court I do not believe that this power to appoint counsel has been eliminated by the creation of the present legal aid plan. Rather, a consequence

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of the legal aid plan is that there will be few instances now where the Supreme Court will be called upon to exercise this power.

It is respectfully submitted that the application before this Honourable Commission constitutes one of these extraordinary cases where the privilege of Judges of the Supreme Court to appoint counsel and ensure that funding exists for representation by that counsel, should be exercised. It is respectfully submitted also that this is clearly the kind of case where there would be an expectation that the Attorney-General would pay for such counsel because the length and complexity of proceedings are too great a burden for counsel to shoulder, and there is no legal aid program in place which would satisfy the need: Legal Aid Act, S.N.S. 1977, c. 11, s. 14.

13. It is respectfully submitted that the essential facts which give rise to the necessity for fully funded and fully prepared counsel exist in this case. With respect to at least having fully-prepared counsel it was stated in Re Ontario Crime Commission, [1962] O.R. 872, at p. 896 (Ont. C.A.):



Any suggestion that the examination and cross-examination of witnesses by counsel for the Commission, and more particularly by counsel for the two political parties, is adequate to elicit all relevant facts concerning the applicants, against whom so much incriminating evidence is being accumulated and widely circulated, fails to carry conviction. It is no improper reflection upon counsel for the two political parties to observe that they may well be more concerned with doing what they deem best calculated to serve their own clients' ends and in so doing with promoting interests perhaps violently opposed to those of the applicants. To impose a dual burden upon these latter counsel might make their position not only embarrassing but intolerable.

This Honourable Commission has indicated that the traditional protective rules of procedure and rules of evidence applicable in the ordinary Courts will not be strictly applied.

This increases the potential for harm to individual witnesses at the hands of counsel for other interests who are not only trained in the law, but who are knowledgeable in the art of advocacy, and the marshalling of facts. The Applicants would be totally unequipped by experience or education to defend themselves or their interests without the assistance of counsel.

16.

14. Finally, it is respectfully submitted that because significant personal interests are involved or potentially involved in the proceedings before this Honourable Royal Commission, that the Canadian Charter of Rights and Freedoms, s. 2 (b), and 7 give constitutional status to the application being made by these Applicants here. It is respectfully submitted that if the nature of proceedings are such that the Applicants would be effectively deprived of their rights to be represented by an agent of their choice, and would prevent them from appropriately protecting their interests, the manner of proceeding should be varied to accommodate the constitutionally-protected interests at stake. As the Supreme Court of Canada has commented in Reference Re s.94 (2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289, at pp. 309-310:

The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

...

...they represent principles which had been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures....This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees.

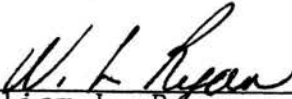
Thus, it is respectfully submitted that under s. 24 (1) [in both the English and French language versions] that this Honourable Commission is of competent jurisdiction by virtue of the Public Inquiries Act, supra, to make the orders requested.

PART III  
RELIEF SOUGHT

It is respectfully submitted that this Honourable Royal Commission should order that the Applicants be provided with funding to permit their participation in the Commission's proceedings to be a meaningful participation. It is speculative at this point to try to state a figure as to the amount of funding which is necessary. However, because these individuals will be provided with funding for counsel during the time of any interviews with Commission Counsel when their own counsel is present, as well as during the time of any actual testimony by these individuals, this application is limited to necessary costs incurred beyond those described - which will be paid by the Federal Government through the Treasury Board. The Applicants seek an Order or recommendation of this Honourable Royal Commission that the Province of Nova Scotia pay the difference between what will be paid by the Treasury Board and the ultimate accounts rendered to these Applicants up to the limits of remunerations as are approved by Management Board for other counsel. It is respectfully submitted that such funding will result not only in assistance to the Commission, but also will achieve the objective of truly just and truly fair proceedings being had before this Honourable Royal Commission.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

  
\_\_\_\_\_  
William L. Ryan  
Stewart, MacKeen & Covert  
Suite 900, 1959 Upper Water St.,  
Halifax, Nova Scotia

APPENDIX "A"

STATUTORY PROVISIONS

Public Inquiries Act, R.S.N.S. 1967, c. 250, s.1, s. 4

**1** The Governor in Council may whenever he deems it expedient cause inquiry to be made into and concerning any public matter in relation to which the Legislature of Nova Scotia may make laws. R. S., c. 236, s. 1.

Governor in Council may order inquiry.

**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 or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court of Nova Scotia. R. S., c. 236, s. 4.

Witnesses and document.

Public Inquiries Act, 1971, R.S.O. 1980, c. 411, s. 5 (2)

Rights of  
persons  
before  
misconduct  
found

(2) No finding of misconduct on the part of any person shall be made against him in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the misconduct alleged against him and was allowed full opportunity during the inquiry to be heard in person or by counsel. 1971, c. 49, s. 5.

Legal Aid Act, S.N.S. 1977, c. 11, s. 14

14 (1) Except as otherwise provided in this Act or the regulations, legal aid may be granted to a person otherwise entitled thereto in respect of any proceeding or proposed proceeding including an appeal

Granting of  
legal aid in  
proceedings

- (a) in the Supreme Court;
- (b) in a County Court;
- (c) in the Provincial Magistrate's Court;
- (d) in a Family Court;

(e) where the applicant is charged with an indictable offence or where an application is made for a sentence of preventive detention under Part XXI of the Criminal Code (Canada);

(f) under the Extradition Act (Canada) or the Fugitive Offenders Act (Canada);

(g) in the Federal Court of Canada; or

(h) in the Supreme Court of Canada.

Authority of  
barrister

(2) Except as otherwise provided in this Act or the regulations, a barrister providing legal aid may draw documents, negotiate settlements or give legal advice necessary to carry out his duties under this Act.



Canadian Charter of Rights and Freedoms, s. 2 (b), 7 and 24 (1)

*Fundamental Freedoms*

2. Everyone has the following fundamental freedoms:

Fundamental freedoms

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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.

Enforcement of guaranteed rights and freedoms

APPENDIX "B"

AUTHORITIES

Attorney General of Quebec and Keable v. Attorney General of Canada et al., [1979] 1 S.C.R. 218

Re The Children's Aid Society of the County of York, [1934] O.W.N. 418 (Ont. C.A.)

Re Nelles et al. and Grange et al. (1984), 9 D.L.R. (4th) 79 (Ont. C.A.)

Re White and The Queen (1976), 73 D.L.R. (3d) 275 (Alta. S.C., T.D.)

Re Ontario Crime Commission, [1962] O.R. 872 (Ont. C.A.)

Reference Re s. 94 (2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289 (S.C.C.)

Royal Commission on the Northern Environment (Ontario)

The Report of the MacKenzie Valley Pipeline Inquiry  
(Berger-Canada)

Alaska Highway Pipeline Inquiry (Lysyk-Canada)

Report of the Royal Commission of Inquiry into Certain Death at the Hospital for Sick Children and Related Matters  
(Grange-Ontario)

[227]

Order in Council

APPENDIX 1



On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that

WHEREAS concern has been expressed in relation to a number of deaths of infants in Cardiac Wards 4A and 4D at the Hospital for Sick Children, Toronto, between July 1st, 1980 and March 31st, 1981, and

WHEREAS concern has been expressed concerning the functioning of the justice system in respect of the instituting and of prosecuting of charges in relation to the said deaths, and

WHEREAS the Government of Ontario is of the view that there is a need for the parents of the deceased children and the public as a whole to be informed of all available evidence as to the deaths and the proceedings arising therefrom, and

WHEREAS it is thought fit to refer these concerns to an inquiry pursuant to the provisions of the Public Inquiries Act, R.S.O. 1980, Chapter 411,

NOW THEREFORE, pursuant to the provisions of the said Public Inquiries Act, R.S.O. 1980, Chapter 411, a commission be issued to appoint the Honourable Mr. Justice S.G.M. Grange who is, without expressing any conclusion of law regarding civil or criminal responsibility:

- 1) to consider the matters disclosed in the Report of the Hospital for Sick Children Review Committee, chaired by the Honourable Mr. Justice Charles Dubin; the report on "Mortality on the Cardiology Service in a Children's Hospital in Toronto, Canada", by the Center for Disease Control and the Ontario Ministry of Health; and the

O.C.1076/83

evidence disclosed at the preliminary hearing in relation to the charges of murder relating to the death of four infants at the Hospital for Sick Children and, having regard to the undesirability of duplicating unnecessarily the work done by them or unnecessarily subjecting witnesses to further questioning, to draw from such reports and preliminary hearing whatever evidence which he deems relevant and appropriate and to thereby dispense with the hearing of any testimony and production of documents or things that he considers appropriate;

- 2) to require the summoning of such witnesses as the Commissioner deems necessary to give evidence under oath and to produce such documents and things as the Commissioner may deem requisite to the full examination of the matters he is appointed to examine and to ensure full public knowledge of the completeness of the matters referred to in these terms of reference;
- 3) to inquire into and report on and make any recommendations with respect to how and by what means children who died in Cardiac Wards 4A and 4B at the Hospital for Sick Children between July 1st, 1980 and March 31st, 1981, came to their deaths;
- 4) to inquire into, determine and report on the circumstances surrounding the investigation, institution, and prosecution of charges arising out of the deaths of the above mentioned four infants;

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AND THAT all Government Ministries, Boards, Agencies and Commissions shall assist the Honourable Mr. Justice to the fullest extent in order that he may carry out his duties and functions, and that he shall have authority to engage such counsel, investigators and other staff as he deems it proper at rates of remuneration and reimbursement to be approved by the Management Board of Cabinet in order that a complete and comprehensive report may be prepared and submitted to the Government,

AND THAT the Ministry of the Attorney General will be responsible for providing administrative support to the Inquiry,

AND THAT Part III of the said Public Inquiries Act be declared to apply to the aforementioned Inquiry.

Recommended *[Signature]* Attorney General  
Concurred *[Signature]* Chairman

Approved and Ordered April 21, 1983  
Date *[Signature]* Lieutenant Governor




On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that

WHEREAS by Order-in-Council numbered OC-1076/83 and dated the 21st day of April, 1983, the Honourable Mr. Justice S. G. M. Grange was appointed a Commissioner under the Public Inquiries Act to inquire into a number of deaths at the Hospital for Sick Children and the proceedings arising therefrom; and WHEREAS the Commissioner has requested confirmation of the intent and purpose of paragraph four of the terms of reference set out in the said Order-in-Council; and

WHEREAS it is appropriate that the intent and purpose of paragraph four of the said Order-in-Council be confirmed: NOW THEREFORE, Paragraph four of the said terms of reference be amended to add, after the word "infants" in the said paragraph, the following words:

"and, without restricting the generality of the foregoing, the Commissioner may receive evidence and submissions and comment fully on the conduct of any person during the course of the investigation, institution, and prosecution of charges arising out of the deaths of the above-mentioned four infants, provided that such comment does not express any conclusion of law regarding civil or criminal responsibility."

Recommended   
Attorney General

Concurred   
Chairman

Approved and Ordered May 24, 1984  
OC 1412/84 Date

  
Lieutenant Governor

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

MARITIME CENTRE, SUITE 1026, 1505 BARRINGTON STREET, HALIFAX  
NOVA SCOTIA, B3J 3K5 902-424-4800

CHIEF JUSTICE T. ALEXANDER HICKMAN  
CHAIRMAN

APPENDIX "D"

ASSOCIATE CHIEF JUSTICE LAWRENCE A. POITRAS  
COMMISSIONER

THE HONOURABLE  
MR. JUSTICE GREGORY THOMAS EVANS  
COMMISSIONER

PROVINCE OF  
NOVA SCOTIA

BY HIS HONOUR  
THE HONOURABLE ALAN R. ABRAHAM, C.D.  
LIEUTENANT GOVERNOR OF NOVA SCOTIA

THIS IS A TRUE COPY OF THE TERMS OF REFERENCE OF THE  
ORDER IN COUNCIL APPOINTING THE ROYAL COMMISSION

TO: THE HONOURABLE MR. JUSTICE T. ALEXANDER HICKMAN  
THE HONOURABLE MR. JUSTICE LAWRENCE A. POITRAS  
THE HONOURABLE MR. JUSTICE GREGORY THOMAS EVANS

G R E E T I N G :

WHEREAS it is deemed expedient to cause inquiry to be made into and concerning the public matters hereinafter mentioned in relation to which the Legislature of Nova Scotia may make laws;

NOW KNOW YE THAT I have thought fit, by and with the advice of the Executive Council of Nova Scotia, to appoint, and do hereby appoint you:

THE HONOURABLE MR. JUSTICE T. ALEXANDER HICKMAN  
THE HONOURABLE MR. JUSTICE LAWRENCE A. POITRAS  
THE HONOURABLE MR. JUSTICE GREGORY THOMAS EVANS

to be, during pleasure, Our Commissioners under the Public Inquiries Act to constitute a Commission under the Chairmanship of the Honourable Mr. Justice T. Alexander Hickman with power to inquire into, report your findings, and make recommendations to the Governor in Council respecting the investigation of the death of Sandford 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 Sandford 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;

The Governor in Council is further pleased to:

(1) AUTHORIZE the payment to the Commissioners for expenses for travel, reasonable living expenses and other disbursements necessarily incurred in the Inquiry, in accordance with the provisions of the Judges Act, R.S.C. 1970, as amended;

(2) DIRECT the Commissioners to retain the services of legal counsel and such other technical, secretarial and clerical personnel who, in the opinion of the Commissioners are required for the purposes of the Inquiry, at remunerations as shall be approved by Management Board and authorize the Commissioners to approve for payment reasonable expenses for travel, accommodation, meals and other disbursements necessarily incurred by such personnel for the purposes of the Inquiry;

(3) DIRECT the Commissioners to arrange for suitable facilities, recording and transcribing equipment and such other administrative matters which, in their opinion, are necessary for the purpose of the Inquiry and authorize the Commissioners to approve for payment any costs incurred in respect to the foregoing matters;

(4) ORDER that remuneration, costs and expenses payable in respect to the Inquiry shall be paid out of the Consolidated Fund of the Province;

(5) ORDER that the Commissioners may adopt such rules, practices and procedures for the purposes of the Inquiry as they, from time to time, may consider necessary for the proper conduct of the Inquiry, and may vary such rules, practices and procedures from time to time



as they consider necessary and appropriate for the purposes of the inquiry;

(6) DIRECT the Commissioners to report their findings and recommendations in the matter of their Inquiry to the Governor in Council.

GIVEN under my hand and Seal at Arms  
at the City of Halifax this 28th day  
of October in the year of Our Lord  
one thousand nine hundred and  
eighty-six and in the thirty-fifth  
year of Her Majesty's reign.

PROVINCIAL SECRETARY

**Report of the  
Royal Commission of Inquiry  
into  
Certain Deaths at the  
Hospital for Sick Children  
and Related Matters**

**The Honourable Mr. Justice  
Samuel G. M. Grange  
Supreme Court of Ontario  
Commissioner**



Mr. Sopinka has stated these propositions to be self-evident. I will assume their truth for the purpose of argument. Upon that assumption, I can only agree that the Crown was obstinately hanging on to an untenable theory. At the same time, I must commend the Crown for leading the evidence that showed that the theory was untenable.

I think where the complaint falls down is that it assumes the Crown must always see things correctly, and if it fails to do so it is somehow acting improperly. It is said the Crown never wins and the Crown never loses. That may be so, but Crown counsel is a lawyer, and it is in the nature of lawyers to be hard to dissuade from the validity of their case. Mr. McGee testified, and I accept his evidence, that he continued to believe to the end of the Preliminary Inquiry that Susan Nelles was the culprit in the death of Justin Cook, that she was the most likely culprit in the deaths of babies Miller and Pacsai, and that he should obtain a committal for the first and perhaps for the others as well. No doubt Crown counsel should stop the prosecution when he believes the accused is innocent; but equally he must continue it if he believes her guilty. When there is doubt in the midst of a prosecution it is not for the Crown to resolve that doubt; that is for the Judiciary. Mr. McGee left it to Judge Vanek; Judge Vanek resolved that doubt. That is the way our system works.

I come to the end then, attaching no great blame to anyone; I can put it no better than did Mr. Cooper in a conversation with Mr. McGee after the discharge:

You did your job; I did mine.  
The Police did theirs; the Judge  
did his. The system worked.

(h) Compensation

The system worked but it exacted a price and that price was paid by Susan Nelles. Should she be compensated? Our law does not require compensation, but I have been asked to give my personal view and, as I have said, I intend to comply with that request.

Before I do so, I should deal with the problem raised in question (3) of the jurisdictional questions. The answer is that knowing what I now do, I would not recommend the arrest or the charge or the prosecution of Susan Nelles for the deaths of any of the babies. Besides all of the evidence I have outlined, much of which was known to Judge Vanek, and brought about his decision, there is now further evidence not available to him. Dr. Kauffman, whose testimony on all matters pharmacological I find most convincing, gave his estimate of the probable time of administration of the overdose of digoxin to Justin Cook. The ante-mortem blood sample was taken about 4:30 a.m., ten minutes after the cardiac arrest and Dr. Kauffman's opinion was that the dosage would have had to be administered at least one hour before that to account for the distribution to tissue. He said further that the time could be as much as two or three hours before; thus bringing the time of administration to somewhere between 1:30 a.m. and 3:30 a.m., during which time Susan Nelles was relieved for close to an hour. Dr. Kauffman also gave his opinion that it was quite possible that the administration of the overdose to Allana Miller took place either into the I.V. line or the buretrol (a medication chamber in the I.V. line controlling the rate of flow) at times when Susan Nelles was not attending the baby. It follows from this that there is not only no evidence of exclusive opportunity in her for the deaths of Justin Cook and Allana Miller, but there is evidence of equally good opportunity in others.

It follows that there was not then in fact sufficient evidence (although there was legitimate belief that there was) nor is there now sufficient evidence to justify her committal for trial. In a perfect world, she would not have been arrested, charged or prosecuted.

Yet she was, and in the course of it she suffered quite apart from her loss of reputation and her mental anguish, very substantial legal costs. I think she should be compensated for those costs. This was not only a notorious case (and the notoriety continues to this date), but a very unusual one as well. The Preliminary Inquiry occupied forty-one days of evidence and four days of argument. It was extremely complicated and extremely difficult. She needed (and obtained) very good counsel.

I know that her civil claim embraces much more than her legal expenses, but I do not recommend any further

payment. As I have said, the law does not now require any compensation in any amount, and any proposals for reform of that law that I have seen do not propose any greater payment than out-of-pocket loss in the absence of long incarceration. I recommend that payment here because the case was notorious, difficult, and lengthy and because there was not then in the result and there is not now sufficient evidence to commit her for trial.

I therefore recommend that Miss Nelles be compensated for her reasonable solicitor and client costs from the time of her arrest to the time of her discharge at the end of the Preliminary Inquiry. She has already been paid her reasonable costs of this Commission. If she lost any income, which I understand she did not, I recommend that she be paid that as well. I am not permitted to make, and I do not make, any comment on the merits of the civil action. I think, however, that it would be unreasonable for her to accept compensation and still pursue her action. She must make her choice.

I think it would be a reasonable condition of this ex gratia payment that the civil action of Susan Nelles v. Her Majesty the Queen et al. be dismissed on consent without costs.