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

---

SUBMISSION TO THE COMMISSION WITH RESPECT TO AN APPLICATION BY JOHN F. MACINTYRE FOR FUNDING OF LEGAL COUNSEL

Ronald N. Pugsley, Q.C.,
Stewart, MacKeen & Covert,
Suite 900,
1959 Upper Water St.,
Halifax, Nova Scotia,
COUNSEL ON BEHALF OF
THE APPLICANT

George W. MacDonald,
Royal Commission on the
Donald Marshall, Jr.
Prosecution,
Maritime Centre, Suite 1026,
Halifax, Nova Scotia, B3J 3K5
COUNSEL ON BEHALF OF THE
COMMISSION

Mr. Jamie Saunders and Mr. Darrel Pink,
Patterson Kitz,
Suite 1600, 5151 George St.,
Halifax, Nova Scotia, B3J 2N9
COUNSEL ON BEHALF OF THE
ATTORNEY GENERAL OF
NOVA SCOTIA

I N D E X

PART I

CONSTITUTIONAL STATUS OF COMMISSION

1. The Governor in Council may cause an inquiry to be made into and concerning any public matter in relation to which the Legislature of Nova Scotia may make laws: Public Inquiries Act, R.S.N.S. 1967, c. 250, s. 1. This legislation authorizes the Lieutenant-Governor in Council to cause an inquiry to be made into and concerning any subject-matter over which the provincial Legislature has exclusive jurisdiction under s. 92 of the Constitution Act, 1867: Reference Re A Commission of Inquiry into the Police Department of the City of Charlottetown (1977), 74 D.L.R. (3d) 422, at p. 429 (P.E.I.S.C., in banco); approved in Attorney-General of the Province of Quebec and Jean Keable v. The Attorney General of Canada et al., [1979] 1 S.C.R. 218, at p. 240.

2. An inquiry into alleged specific criminal activities is valid on the basis of s. 92 (14) of the Constitution Act, 1867: Attorney General of Quebec and Keable v. Attorney General of Canada et al., supra, at p. 241. However, this appears to be so only where the terms of reference of the Commission specifically allege

criminal conduct: e.g., Attorney General of Quebec and Keable v. Attorney General of Canada et al., supra, at pp. 226-227; Di Iorio and Fontaine v. The Warden of the Common Jail of the City of Montreal et al., [1978] 1 S.C.R. 152. These cases are complex but their result is perhaps most concisely expressed by Mr. Justice Estey writing a concurring decision in Attorney General of Quebec and Keable v. Attorney General of Canada et al., supra, at pp. 254-255:

> The investigation of the incidence of crime or the profile and characteristics of crime in a province, or the investigation of the operation of provincial agencies in the field of law enforcement, are quite different things from the investigation of a precisely defined event or series of events with a view to criminal prosecution. The first category may involve the investigation of crime generally and may be undertaken by the invocation of the provincial inquiry statutes. The second category entails the investigation of specific crime, the procedure for which has been established by Parliament and may not be circumvented by provincial action under the general inquiry legislation any more than the substantive principles of criminal law may be so circumvented.
>
> The only room left for debate is where the line between the two shall be drawn. The difficulty in ascertaining and describing this line is matched by the importance of doing so.

And later, at p. 258:

> Where the object is in substance a circumvention of the prescribed criminal procedure by the use of the inquiry technique with all the aforementioned serious consequences to the individuals affected, the provincial action will be invalid as being in violation of either the criminal procedure validly enacted by authority of s. 91 (27), or the substantive criminal law, or both. Where, as I believe the case to be here, the substance of the provincial action is predominantly and essentially an inquiry into some aspect of the criminal law and the operations of provincial and municipal police forces in the Province, and not a mere prelude to prosecution by the Province of specific criminal activities, the provincial action is authorized under s. 92 (14).

It is respectfully submitted that it was for these reasons that the Ontario Court of Appeal in Re Nelles et al. and Grange et al. (1984), 9 D.L.R. (4th) 79, at p. 86 stated that:

> While the constitutional validity of the Order in Council is not in issue in this Court, it may be that it would have been vulnerable to question had the limitation not been imposed on the commissioner that he not express any conclusions as to civil or criminal responsibility. This inquiry should not be permitted to become that which it could not have legally been constituted to be, an inquiry to determine who was civilly or criminally responsible for the death of the children or, in the circumstances of this case

in lay language simply: who killed the children?

3. As indicated in the Re Nelles and Grange case, supra, there was a specific limitation on how far the Grange Commission of Inquiry could go, thus avoiding any constitutional concern. See Appendix "C". This Honourable Commission is not so explicitly restricted and thus the constitutional limits of its jurisdiction are less clearly discernible. It is, however, worthy of serious reflection, we submit, that the hearings before this Honourable Commission can progress a long way down the road of providing a basis on which criminal proceedings could later be taken without the Commission itself exceeding the appropriate limits on its constitutional jurisdiction.

PART II

SCOPE OF COMMISSION'S POWERS

4. The Terms of Reference of the Order in Council appointing this Honourable Royal Commission provide in substance (Affidavit of John F. MacIntyre deposed on April 8, 1987, Exhibit "C") that this Honourable Commission is invested:

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

It is respectfully submitted that within the general frame-work of events set out in these Terms of Reference that there is no restriction on the type of "findings" or

"recommendations" which this Honourable Commission might make.

5. The breadth of the Royal Commission's Terms of Reference distinguish this Honourable Commission from others where answers to specific questions or allegations are sought: e.g., the Terms of Reference cited in Re Anderson and Royal Commission into Activities of Royal American Shows Inc. et al. (1978), 82 D.L.R. (3d) 706 (Alta. S.C., T.D.), at pp. 709-710. Indeed, the historical situation was described in Re Ontario Crime Commission, ex parte Feeley and McDermott, [1962] O.R. 872, at pp. 888-889 (Ont. C.A.):

> 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 and inquiry to be made into questions of public interest and the public good is contrasted with private matters or litigation between private parties in which the public has no recognizable interest.
>
> ...
>
> It can be fairly stated that as a general rule there is no absolute right vested in anyone to appear before a Royal Commission except persons

> summoned to the inquiry. Counsel representing persons who claim to have an interest in the proceedings may not appear as of right, but only by leave of the Commissioner. There are, nevertheless, numerous instances in which counsel have been present at such investigations and have examined and cross-examined witnesses. In the United Kingdom it has been the rule rather than the exception to permit persons affected to be represented by counsel with the privilege of calling witnesses and, within proper limits, to examine and cross-examine.

However, this decision itself added to the developing law that recognized that Royal Commissions were becoming used in this country as much as a forum for public inquiry as for conducting a lis between parties adverse in interest. As Mr. Justice Schroeder pointed out at pp. 895-896 of the Re Ontario Crime Commission case, supra:

> Doubtless Royal Commissions can and do serve a very useful purpose, the most familiar of which is the obtaining of information for the foundation of legislation. They are also frequently used in aid of executive action. Public uneasiness and apprehension arising in consequence of wide-spread rumours and insinuations of an extraordinary increase in crime, particularly when it is attributed to concerted efforts of highly organized criminal combines aided and abetted by alleged official laxity, afford strong grounds for an exhaustive inquiry to be made through the instrumentality of a Royal Commission. In the conduct of such an investigation inquiry and publicity are both powerful weapons in coping with this and other characteristic modern social evils. In the prosecution of an inquiry of

this type the proceedings are characterized by less formality than in the conduct of matters before the established Courts, and the Commissioner is not bound to observe the strict rules of evidence or all the niceties of practice and procedure.

In the present inquiry, allegations of a very grave character have been made against the applicants, imputing to them the commission of very serious crimes. It is true that they are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner.

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 concerned 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 interest 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.

6. Today, the common law and, in some jurisdictions statute law, recognize that private individuals may have specific personal stakes in an ostensibly "public inquiry": Re Royal Commission on the Northern Environment (1983), 144 D.L.R. (3d) 416, at p. 419 (Ont. Div. Ct.) and the cases cited therein. It is respectfully submitted that because the Terms of Reference for this Honourable Royal Commission are so broad many parties have been able to claim a significant interest in the proceedings of the Royal Commission. However, it is also respectfully submitted that this has the effect of exposing private interests to the potential of "findings" and "recommendations" by the Royal Commission to a greater extent than might exist with more narrowly framed terms of reference.

7. It is clearly open to the Royal Commission, we submit, within its Terms of Reference, to recommend the laying of criminal charges to the Attorney General of Nova Scotia through the Governor in Council. As Mr. Justice Middleton stated in Re The Children's Aid Society of the County of York, [1934] O.W.N. 418, at p. 421 (Ont. C.A.):

> 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 exist, may be remedied and misconduct, if misconduct exist, may be put an end to and be punished, not by the Commissioner, but by appropriate proceedings against any offending individual.

And, as Mr. Justice Dickson (as he then was) pointed out in Di Iorio v. Warden of the Montreal Jail, supra, at p. 208:

> The Order in Council establishing the Commission of Inquiry requires the Commission only to inquire and report to the Attorney General. The action taken will rest with the Attorney General. It could take the form of establishing new and different techniques or organization within the bodies charged with law enforcement. It could take the form of prosecutions....

Indeed, the power of a Royal Commission is so great and of such potential to cause individual harm that some jurisdictions, such as Ontario, have enshrined in statute that no finding of misconduct on the part of any person shall be made by such a Commission "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.": Public Inquiries Act, 1971, R.S.O. 1980, c. 411, s. 5 (2).

8. It is respectfully submitted that the main purpose of this Honourable Royal Commission's inquiry is to inquire into, report upon, and make recommendations with respect to the apparent injustice of an investigation, charging, prosecution, subsequent conviction and sentencing of Donald Marshall, Jr. for a non-capital murder for which he was subsequently found to be not guilty. It is respectfully submitted that this highlights the obligation of this Honourable Royal Commission to scrupulously avoid any apparent injustice in its own proceedings. Of course, it is understood that this Honourable Royal Commission would not do otherwise than act in accordance with the principles of full rights of natural justice as described in Re Public Inquiries Act and Shulman (1967), 63 D.L.R. (2d) 578, at pp. 581-582 (Ont. C.A.):

> Dr. Shulman should be accorded the privilege, if he so requests, of having his evidence-in-chief upon any allegation which he has made brought out through his own counsel and he should be subject to cross-examination not only by counsel for the Commission but by any person affected by his evidence. Cross-examination, wherever it is permitted, is not to be a limited cross-examination but it is to be cross-examination upon all matters relevant to eliciting the truth or accuracy of the allegations or statements made. Similarly, any person affected by allegations made before the learned Commissioner should be accorded the privilege of examination as a witness by his counsel and should be subject to a right of cross-examination,

> not only by counsel for the Commission but by any person affected by the evidence of that witness.

The complete passage on these points in the cited case is commended to the Honourable Commissioners.

9. Full rights of natural justice have become so crucial in Royal Commission proceedings today that it has been held appropriate that where a Royal Commission or other Commission of Inquiry proposes to make a specific finding against an individual, the Commission should be reconvened to let those specific charges be known and to permit a response by the affected individual: Landreville v. The Queen, [1977] 2 F.C. 726, at p. 758 (F.C.T.D.). It is respectfully submitted that this is so even without a specific provision such as s. 5 (2) of the Ontario Public Inquiries Act, 1971 or s. 13 of the federal Inquiries Act, R.S.C. 1952, c. 154. Just as the Public Inquiries Act, R.S.N.S. 1967, c. 250, s. 4 gives the Honourable Commissioners the same powers, privileges and immunities of Judges of the Supreme Court of Nova Scotia, the environment in which the Honourable Commissioners function must, we submit, be the same as that in which Judges of the Supreme Court of Nova Scotia exercise their powers, privileges, and enjoy their immunities. The requirements of justice thus, we submit, demand a reasonable equality in resources for full participation.

PART III

COMMISSION POWERS WITH RESPECT TO FUNDING

10. The Terms of Reference of this Honourable Commission authorize the payment to the Commissioners "for expenses for travel, reasonable living expenses and other disbursements necessarily incurred in the Inquiry"; direct the Commissioners "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", as well as disbursements incurred by such personnel for the purposes of the Inquiry; authorize the Commissioners to approve for payment any costs incurred with respect to facilities, equipment and other administrative matters; but in addition to that the Terms of Reference provide that the Governor in Council is pleased to:

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

It is respectfully submitted that under the Terms of Reference of the Commission the Honourable Royal Commissioners are entitled to retain and authorize payment for the services

of legal counsel who, in the opinion of the Commissioners, are required for the purposes of the Inquiry. It is respectfully submitted that this entitles the Commissioners to order, in a proper case, that a particular individual appearing before it have counsel, and that the Commission will undertake to fund that counsel as a required expense of the Commission in the interests of justice being done.

11. The question of when an individual involved in proceedings before a Royal Commission should have funding independent of his own individual means is not a new question. Recently, in Re Nelles et al. and Grange et al., supra, it was pointed out at p. 86 that Nurses Nelles and Trayner were independently funded by the Province of Ontario because, in the words of Commissioner Grange:

> 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.

This was a distinct issue in that Inquiry from the question of whether Nurse Susan Nelles should be compensated for her legal fees in defending against the charges which were laid against her with respect to the baby deaths at the Hospital for Sick Children in Toronto. This latter

matter was dealt with at pp. 220-222 of the Royal Commission's Report where Commissioner Grange stated, inter alia, that:

> 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.
>
> ...
>
> 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.
>
> ...
>
> 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.

Thus, it appears from this case that it may be appropriate to fund an individual for legal expenses incurred where:

1. The individual may be found to have been implicated with responsibility for the subject-matter of the Inquiry;

2. The case is notorious;

3. The case is unusual;

4. The case is complicated, difficult and protracted; and

5. Even if there existed at some time a legitimate and reasonable belief that sufficient evidence existed to show criminal wrongdoing on the part of the individual.

See Appendix "D".

12. We respectfully submit that it is not enough to claim lack of funds to hire counsel through a reasonably short inquiry by a specialized administrative

tribunal where the potential harm to the individual is merely a suspension of economic privileges. See Appendix "E". That, of course, is not the situation before this Commission.

13. That this Honourable Royal Commission has the power to order funding for legal counsel is suggested by the decisions in Re Royal Commission on the Northern Environment, supra; the Alaska Highway Pipeline Inquiry (the "Lysyk Inquiry"); and The Report of the MacKenzie Valley Pipeline Inquiry (the "Berger Inquiry"). The authority to provide funding of legal counsel for parties appearing before them was found to be implicit from the mandates to ensure that in the course of its inquiries justice was done. For example, the Royal Commission on the Northern Environment's mandate specifically established the criteria to be used in assessing how claims for funding were to dealt with. Nothing in its Terms of Reference or the criteria of funding related to funding of counsel. However, that Commission did pay legal fees and other disbursements "at rates of remuneration and reimbursement approved by the Management Board of Cabinet". The level of funding differed in accordance with the level of interest of a particular claimant. The relevant portions of these Inquiry Reports are set out in Appendix "F". It is respectfully submitted that if funding is appropriate where environmental security is in jeopardy, so too is it appropriate where personal security is in jeopardy. Also, funding should be commensurate with the potential jeopardy faced.

14. The regular Courts have, on occasion, had to deal with this question of counsel appointment and counsel funding as well. The more recent law on the subject has involved criminal matters. In Re Ewing and Kearney and The Queen (1974), 18 C.C.C. (2d) 356 (B.C.C.A.), former Chief Justice Farris stated, in dissent, at p. 360 that:

> (1) An accused person is entitled to a fair trial.
>
> (2) He cannot be assured of a fair trial without the assistance of counsel.
>
> (3) If, owing to the lack of funds, he cannot obtain counsel, the State has an obligation to provide one.

The matter was considered again in Re White and The Queen (1976), 73 D.L.R. (3d) (Alta. S.C.,T.D.), where at p. 286 Mr. Justice McDonald stated that:

> I would not go so far as to assert that there cannot be a fair trial in any case if the accused is unrepresented by counsel, or that, if counsel is appointed by the Court, the state has an obligation in law to provide counsel. (I used the word "state" as meaning the executive arm of Government. It may be that Farris, C.J.B.C., was using "state" in a broader sense, including the legislature and the judiciary). Rather, I adopt the passage

> quoted from the judgment of Seaton, J.A. [in Re Ewing and Kearney]....

That passage to which Mr. Justice McDonald referred was as follows:

> I reject the contention that it is always necessary to appoint counsel but it does not follow that it is never necessary to appoint counsel. The trial Judge is bound to see that there is a fair trial. Because of the complexity of the case, the accused's lack of competence or other circumstances a trial Judge might conclude that defence counsel was essential to a fair trial. In the past when a trial Judge thought that he could not secure a fair trial without counsel for the defence, he approached the Attorney General or the Bar. Under similar circumstances today he might contact the Legal Aid Society. If a trial Judge concluded that he could not conduct a fair trial without defence counsel and his requests for counsel were refused, he might be obliged to stop the proceedings until the difficulties had been overcome. Our law would not require him to continue a trial that could not be conducted properly. The matter was discussed in obiter in Vescio v. The King, supra, particularly at p. 169 C.C.C., p. 727 D.L.R., p. 147 S.C.R.:
>
> > To speak through counsel is the privilege of the client, and such an appointment is made in circumstances in which for various reasons the accused assuming him to be of sufficient understanding, though he desires the benefit of counsel, is not in a position to obtain it; and in the interest of justice counsel should and will be assigned for his assistance.

Having adopted these authorities, Mr. Justice McDonald in Re White, supra, described the situation which existed before him 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 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.

Thus, in the Courts when counsel was requested it was Mr. Justice McDonald's view that the appropriate criteria to consider would be as he stated at pp. 286-287:

> 1. Is the accused not in a position financially to retain counsel himself? It is true that this inquiry may be a difficult one, but no more difficult than many other matters a Court is required to inquire into without the assistance of counsel. The Judge may wish

the accused to swear under oath, orally or by affidavit, as to his financial circumstances.

2. Is the case one in which the Legal Aid Society may grant the legal aid certificate? If so, an adjournment may be granted to enable the accused to apply to the Society.

3. What is the educational level of the accused? Apart from formal education, are there other reasons for which it can be said that he is competent to defend himself without counsel? For example, does he have the language skills which would enable him to express himself adequately in the English language?

4. Does the case appear to be complex in the sense of raising any question of fact or of law as to which an accused is likely to be at significant disadvantage if he is unrepresented by counsel?

5. Does the case appear to be one raising any question of fact or of law as to which without the benefit of counsel an accused is likely to find it difficult to marshall relevant evidence?

6. Is the case one which may result in the imprisonment of accused, in the event of conviction?

There may well be other relevant considerations which should be considered in the circumstances of a particular case.

15. The Legal Aid Act, S.N.S. 1977, c. 11, s. 14, does not provide authority for the Nova Scotia Legal Aid Commission to grant a certificate where the matter involves appearance before a provincial Royal Commission. With respect to the other factors recited by Mr. Justice McDonald in the Re White case, the Honourable Commissioners are respectfully referred to the Affidavit of John F. MacIntyre filed in this proceeding and deposed to on April 8, 1987. It is respectfully submitted that the Honourable Commissioners may also wish to take notice of the fact that parties who will be appearing before the Commission and who have antagonistic or at least inconsistent interests to that of the Applicant already have fully funded and fully prepared counsel. The Honourable Commissioners are again referred to the remarks of Mr. Justice Schroeder in Re Ontario Crime Commission, supra, at p. 896:

> 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.

Or, as Chief Justice Farris (as he then was) stated at pp. 357-358 of Re Ewing and Kearney, supra:

> The issue to be determined is: Can these two young people be assured of a fair trial when they have to defend themselves without the assistance of counsel? In my opinion, to ask the question is to answer it, and the answer is an emphatic no.
>
> Our criminal justice is administered under the adversary system; that is to say, a system where when a conflict arises between a citizen and the State the two are to be regarded as adversaries. The conflict is to be resolved by fighting it out according to fixed, sometimes rather arbitrary rules. The tribunal trying the matter settles the dispute on the basis of only such evidence as the contestants choose to present. In such a proceeding there are rules of procedure and rules of evidence that can only be properly understood and applied after years of training and experience. For this reason, the Crown in this case, as it does in most criminal cases, employs counsel who are trained in the law. This means not only trained in the rules of evidence and rules of procedure but knowledgeable in the art of advocacy, in the marshalling of facts and in the case law. The prosecutor not only has this advantage but he has the resources of the State and the power of a police force behind him. Anyone who has prosecuted an assize or who has conducted prosecutions in any Court knows what it means to have such power available. Into such

> an arena two eighteen-year-old youths are projected, totally unequipped by experience or education to defend themselves against such a powerful adversary. In my opinion, it is unrealistic in the extreme to believe that in such a contest these accused can be assured of a fair trial without the assistance of counsel.
>
> It is equally unrealistic to believe that the assistance and guidance of the trial Judge are adequate substitutes for representation by counsel. It is not the function of a trial Judge to act as counsel for either party. Further, without briefing, interviewing of witnesses in preparation, the benevolence of the trial Judge cannot be equated with the dedication of counsel.
>
> If I am correct in these views the next question is: Does the accused have the right to have counsel provided for him by the State where he is unable to obtain one himself? Again in my view he does have such a right. Lord Chief Justice Goddard in R. v. Clewer (1953), 37 Cr. Atp. R. 37 at p. 40, said: "...the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial". Implicit in this is not only that it should appear that he is having a fair trial but that he in fact is having such a trial.

Mr. Justice Branca concurred with this dissenting opinion. Interestingly, the third judgment in the case by Mr. Justice Taggart did not entirely reject the reasoning expressed in the dissent. He stated at pp. 361-362 that:

> I agree also that the trial Judge is bound to see that an accused has a fair trial. If he concludes that the trial cannot be a fair one if the accused is unrepresented, the Judge ought to ensure that his view is communicated to the Legal Aid Society. I prefer, however, to express no opinion as to what the Judge may do if in spite of his view that the accused should be represented, counsel is not appointed. That problem does not present itself for decision in this case and, given the present policies applicable to the provision of legal aid, it seems to me highly unlikely it will ever arise. In these circumstances I prefer to say nothing on the subject until the problem is raised for our consideration.

While the proceedings before this Honourable Commission are not criminal proceedings which may result in imprisonment, it is respectfully submitted that similar principles apply where other significant harms may be perpetrated upon an unrepresented individual before the Royal Commission.

16. It is respectfully submitted that while the common law and the Terms of Reference of this Honourable Commission are sufficient to establish the Commission's authority to order that the Applicant receive full funding for counsel for full participation in the Royal Commission, this Honourable Royal Commission will wish to consider the constitutional underpinning which the Applicant can give to its argument pursuant to the Canadian Charter of Rights and Freedoms.

17. The Charter provides in s. 2 (b) that:

> Every one has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;....
>
> Chacun a les libertes fondamentales suivantes:
>
> ...
>
> (b) liberte de pensee, de croyance, d'opinion et d'expression, y compris la liberte de la presse et des autres moyens de communication;....

The freedom to express oneself is fundamental in our society, particularly in judicial and quasi-judicial proceedings. The cases previously cited in this Brief are just a few of the examples of the important role which counsel can play in expressing a position on behalf of a client before a Royal Commission. It is respectfully submitted that this provision of the Charter raises to constitutional status the right of any individual to express himself through another. As was explained in The Queen v. Assessment Committee of Saint Mary Abbotts, Kensington, [1891] 1 Q.B. 378, at pp. 382-383 by Lord Esher, M.R.:

> The assessment committee have been called a court or tribunal, and spoken of as exercising judicial functions.... I do not think that they are a court or a tribunal exercising judicial functions in the legal acceptation of the terms. The question here is whether, being such as they are, they have a right to say that a person may not appoint any agent he pleases to appear in support of an objection made by him to the list. There is, in my opinion, nothing in law which authorizes them to limit, as they have done, the rights of persons to whom the legislature has given the right of making objection to the list. I think such persons have a right to appear themselves or by any agent authorized by them.

Lord Justice Fry in the same case described the right of a person to appear by an agent of some sort as a "common law right". This authority was approved by Mr. Justice Southey in Re Men's Clothing Manufacturers Association of Ontario et al. and Arthurs et al. (1979), 104 D.L.R. (3d) 441 (Ont. Div. Ct.). At p. 444 of that decision he stated that:

> It is not questioned that the association, the company, and the union are all entitled to appear at the arbitration hearing and to be heard by the learned arbitrator. The only way in which they can appear is by natural persons acting as their agents. By ruling that the applicants could not be represented by legal counsel, the learned arbitrator limited the parties in their choice of agents, by denying them the right to retain as agents

> a particular class of persons whose members are widely retained in such matters in other industries. In my judgment, the learned arbitrator had no authority thus to limit the rights of persons who were clearly entitled to appear before him by agents, and he erred in law in so doing. As a general rule, in my judgment, a party entitled to be represented by an agent before a domestic tribunal, cannot be restricted by the tribunal in the choice of its agent, in the absence of an applicable rule or agreement containing such restriction. That is not to say that the tribunal cannot exclude persons who have misconducted themselves or are otherwise clearly inappropriate.

It is respectfully submitted that, independent of s. 10 (b) of the Charter, the freedom of expression in s. 2 (b) of the Charter raises an established common law right to constitutional status. It is a fundamental freedom of everyone to express himself, and here the French version of the Charter is perhaps more demonstrative of the meaning of the section, through "autres moyens de communication". Thus, it is respectfully submitted that this Honourable Commission will be sensitive to ensure that this freedom of the Applicant's is not infringed or denied because of any refusal to provide necessary funding to enable counsel to be retained on his behalf.

18. Section 7 of the Canadian Charter of Rights and Freedoms provides that:

> Every one 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.
>
> Chacun a droit a la vie, a la liberte et a la securite de sa personne; il ne peut etre porte atteinte a ce droit qu'en conformite avec les principes de justice fondamentale.

Matters of "life, liberty and security of the person" are varied and not susceptible of precise and limited definition. It is respectfully submitted that their content in any particular case will depend on the facts of a particular case. However, the Supreme Court of Canada has given some guidance in Reference Re s. 94 (2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289 (S.C.C.), at pp. 299-301 that meaning will be ascribed to each of the elements (life, liberty and security of the person) which make up the right contained in s. 7. It is respectfully submitted that fundamentally these would include matters which affect the physical, mental and social well-being of an individual in society. This appeared to be confirmed by Mr. Justice Lamer's conclusions with respect to the fundamental justice and deprivation of rights issue. As he stated 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.

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have 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 and, as Frankfurter J. wrote in McNabb v. U.S. (1942), 318 U.S. 332 at p. 347, "the history of liberty has largely been the history of observance of procedural safeguards". This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees.

It is respectfully submitted that the Charter, s. 7 mandates any body which has the ability to deal with an individual for a State purpose - as does this Honourable Royal Commission - to follow procedures and provide remedies which reflect the basic tenets and principles and other components of our legal system. It is respectfully submitted that because the proceedings of this Honourable Royal Commission have the potential to have a serious and significant impact upon the Applicant's civil, penal, and social status interests that the Applicant is entitled to the same respect for his dignity and worth as if the proceedings were truly penal or civil. Indeed, a more astute deference to this individual dignity might well be required where the individual is only one of many participants in the proceedings, does not have carriage of those proceedings, and has no ability to demand a conclusive judicial ruling passing on the legitimacy of his entire involvement in the matter before this Honourable Royal Commission. Therefore, it is respectfully submitted that s. 7 of the Charter supports an obligation on the part of this Honourable Royal Commission to ensure that the Applicant has the ability to exercise his rights in balance with and to the fullest extent that parties with antagonistic or inconsistent interests will be able to do in the same forum. In this Honourable Royal Commission it is respectfully submitted that fairness and justice

requires that this Honourable Royal Commission ensure that the Applicant is provided with adequate funding to retain all necessary counsel and advice for full participation in the Commission proceedings which others are already guaranteed.

19. The Charter also provides in s. 12 that:

> Every one has the right not to be subjected to any cruel and unusual treatment or punishment.
>
> Chacun a droit a la protection contre tous traitements ou peines cruels et inusites.

It is respectfully submitted that careful attention must be paid to the combined meaning of this provision as drawn from both the French and English versions. While the English version appears to permit or require the imposition of such cruel or unusual treatment or punishment before a remedy can be claimed, the French version strictly translated would suggest that everyone has the right to be protected from all cruel or unusual treatments or punishments. It is not suggested here that there is any possibility of cruelty with respect to treatment or punishment of the Applicant as a result of the institution or proposed proceedings of this Honourable Commission. It is respectfully submitted, however, that the current position of the Applicant as deposed to in his Affidavit of April 8, 1987 suggests circumstances where it has become incumbent upon this Honourable Royal Commission to protect the Applicant against unusual treatment. As Mr. Justice Lamer pointed out in

Reference Re s. 90.94 (2) of the Motor Vehicle Act, supra, this is one of the rights that is illustrative of the meaning, in criminal or penal law, or 'principles of fundamental justice'". The circumstances of the calling of this Commission are certainly unusual. It is within the scope of the Commission and intended to consider matters of alleged criminal conduct which those with authority could have pursued through the normal criminal law channels. Instead, a much more public procedure has been adopted which will not be restricted by the usual protective rules of evidence or other dignity-protecting procedures which are a hallmark of our criminal justice system. To this extent, however, the interest of the Applicant may be little different from that of other individuals affected by this inquiry. It is respectfully submitted that what makes the Applicant's position unique and gives rise to this Honourable Commission's protective role is the Applicant's relationship to the other vitally interested parties: Donald Marshall, Jr., the Nova Scotia Attorney General, and the R.C.M.P. Each of these are appearing with provided counsel. The conduct of proceedings would show that the Applicant was being treated in an unusual manner to his detriment having regard to this circumstance because the Applicant's potential jeopardy has been made to appear greater than that of the other vitally interested parties. Because of the adversarial nature of the relationships between parties

before the Honourable Commission, or at least the potential inconsistencies in their relative positions, to have full funding provided for some but not for the Applicant would constitute, in our respectful submission, the kind of "unusual treatment" against which this provision of the Charter was designed to protect.

20. The interest under s. 15 of the Charter is essentially the same as that expressed with respect to s. 12. Visible inequality between parties with antagonistic or inconsistent interests could severely impair the integrity of any conclusions reached by this Honourable Royal Commission. Actual inequality could actually impair the integrity of Commission conclusions. In addition, it is respectfully submitted that s. 15 does not permit this Honourable Royal Commission to stand by, powerless to mitigate the effects of a decision which is clearly contrary to the spirit, language and intention of a supreme law of this country. Section 15 (1) provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> La loi ne fait acception de personne et s'applique egalement a tous, et tous ont droit a la meme protection et au meme benefice de la loi, independamment de toute discrimination, notamment des discriminations fondees sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'age ou les deficiences mentales ou physiques.

The Applicant is, we respectfully submit, equal before and under the law and has the right to equal protection and equal benefit of the law under which Donald Marshall, Jr., and the individuals who have been connected at one time or another with the Nova Scotia Department of the Attorney General are being supplied with counsel. It scarcely need be said that this latter group of individuals contains persons who were the Applicant's superiors in the criminal justice system at the time of the events into which this Honourable Commission is inquiring. Having given these individuals funded counsel as well as the individual who at one time expressed a formal intention to sue the Applicant civilly with respect to the matters before the Honourable Royal Commission, but to refuse the same treatment to the Applicant, is to deprive the Applicant of equal benefits under the Executive Council's Orders. It is respectfully submitted that the only remedy which can rectify the existing inequality (if the Applicant is not otherwise granted full funding on a scale similar to that granted to Donald Marshall, Jr.) would be to order that the Applicant be fully funded through this Honourable Royal Commission on the same scale as the funding which is being provided to Donald Marshall, Jr. It is respectfully submitted that a consideration of the Terms of Reference

of this Honourable Royal Commission and the French and English versions of s. 24 (1) of the Charter would permit this Honourable Royal Commission to act in this matter and prevent any suggestion of miscarriage of justice through inequality in position before this Honourable Royal Commission.

PART IV

RELIEF SOUGHT

21. It is respectfully submitted that this Honourable Royal Commission should order that the Applicant be provided with full funding to permit his participation in the Commission's proceedings to be a meaningful participation which will not only result in assistance to the Commission but also achieve the objective of truly just and truly fair proceedings being had before this Honourable Royal Commission.

22. The Applicant has, in addition to his application for funding, sought an adjournment from the Commission as an alternative remedy. The Applicant undertakes to exercise all haste in preparing counsel should funding be provided so as to be ready to participate in the proceedings of the Commission at this Honourable Royal Commission's convenience. In the event that this Honourable Royal Commission does not feel that it has the authority to grant funding to the Applicant, or does not grant that relief for any other reason, the Applicant reserves the right to ask at that time that the proceedings of this Honourable Royal Commission be adjourned sufficiently to permit the concurrent proceedings to be filed in the Supreme Court of Nova Scotia between the Applicant and the Attorney

General of Nova Scotia to proceed to a final determination.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Ronald N. Pugsley, Q.C.

Donald C. Murray

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.

Inquiries Act, 1952, R.S.C. 1952, c. 154, s. 13

Notice to persons charged.

13. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel. R.S., c. 99, s. 13.

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

Granting of legal aid in proceedings

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

(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, 10 (b), 12, 15 (1), 24, 32, 52

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.

Arrest or detention

10. Everyone has the right on arrest or detention

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment. Treatment or punishment

15.—(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Equality before and under law and equal protection and benefit of law

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

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. Exclusion of evidence bringing administration of justice into disrepute

Application of Charter

32.—(1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Primacy of Constitution of Canada

52.—(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act ;

(*b*) the Acts and orders referred to in the schedule ; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Constitution Act, 1867, s. 92 (14)

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

APPENDIX "B"

AUTHORITIES

Reference Re A Commission of Inquiry into the Police Department of the City of Charlottetown (1977), 74 D.L.R. (3d) 422 (P.E.I.S.C., in banco)

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

Di Iorio and Fontaine v. The Warden of the Common Jail of the City of Montreal et al., [1978] 1 S.C.R. 152

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

Re Anderson and Royal Commission into Activities of Royal American Shows Inc. et al. (1978), 82 D.L.R. (3d) 706 (Alta. S.C.T.D.)

Re Ontario Crime Commission, ex parte Feeley and McDermott, [1962] O.R. 872 (Ont. C.A.)

Re Royal Commission on the Northern Environment (1983), 144 D.L.R. (3d) 416 (Ont. Div. Ct.)

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

Re Public Inquiries Act and Shulman (1967), 63 D.L.R. (2d) 578 (Ont. C.A.)

Landreville v. The Queen, [1977] 2 F.C. 726 (F.C.T.D.)

Re Ewing and Kearney and The Queen (1974), 18 C.C.C. (2d) 356 (B.C.C.A.)

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

The Queen v. Assessment Committee of Saint Mary Abbotts, Kensington, [1891] 1 Q.B. 378

Re Men's Clothing Manufacturers Association of Ontario et al. and Arthurs et al. (1979), 104 D.L.R. (3d) 441 (Ont. Div. Ct.)

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

APPENDIX "C"

Executive Council

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 4B 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

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;

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 _____
Attorney General

Concurred _____
Chairman

Approved and Ordered April 21, 1983
Date

_____
Lieutenant Governor

Ontario
Executive Council

Order in Council

APPENDIX 2

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
Date

Lieutenant Governor

O.C. 1412/84

APPENDIX "D"

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

Ontario

ST

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.

861/50116 TUE JUN 24,1986 PAGE: B5
BYLINE: KEVIN COX
CLASS: ROB
DATELINE: Calgary AB
WORDS: 486

** ASC begins inquiry into Abacus as director tries last-minute ** ** stall **

BY KEVIN COX
The Globe and Mail

CALGARY

After seven years of investigations, charges and lawsuits, a public inquiry began yesterday into the affairs of Abacus Cities Ltd., an Alberta boom-time real estate developer gone bankrupt.

But even as the Alberta Securities Commission began the inquiry into charges that two Abacus directors, its chairman and its president were involved in issuing misleading prospectuses and overstating the company's profits from 1979 to 1982, a director, John Sherman, made a last effort to have the hearing adjourned.

Mr. Sherman, fellow director Halet Hallatt, former Abacus president Kenneth Rogers and former chairman William Rogers, face charges of making false or misleading statements on several prospectuses and failing to fairly represent the company's position in year-end statements. Abacus, which said it held $307-million in assets in June, 1978, was placed in receivership in 1979 and forced into bankruptcy two years later. Its board of directors included Harvie Andre, now Associate Minister of Defence, who was an opposition member of Parliament when the company went into receivership.

Mr. Sherman told the hearing he could not afford to have a "law or" represent him through the estimated three weeks of hearings. His lawyer, Marlin Moore, told the commission yesterday that he was bowing out of the case at his client's request.

Mr. Sherman, now running two small businesses out of Vancouver, said he needed four months to prepare his case. He said the ASC's news releases about the Abacus case have "subjected me to serious and irreparable damage in my business and consulting activity." And, regardless of the outcome of the hearing, he will ask the Alberta Court of Appeal to rule on whether the ASC has the right to try the case.

"My penalty and punishment is the cost of these proceedings," Mr. Sherman said, noting that the most severe penalty the commission can impose is a ban on trading of securities in Alberta. He now does business solely in British Columbia.

The case is further complicated by a series of civil law suits between the former directors and the Bank of Montreal and the original receiver and bankruptcy trustee, Thorne Riddell Ltd.

Christopher Evans, representing Kenneth and William Rogers, said there will be "an antagonistic relationship" between his clients and Thorne Riddell. He said that on May 6, 1986, the Calgary bankruptcy trustee, Collins Barrow Ltd., was appointed the joint trustee of Abacus and is now suing Thorne Riddell and the Bank of Montreal for $300- million, alleging that there was conspiracy to damage Abacus and a conversion of the company's assets.

The objections to the proceedings were overruled by ASC chairman William Ridruchney, who said there was no valid reason to further delay the proceedings.

Ronald Baines, an ASC investigator told the hearing that Abacus had issued several prospectuses in 1978 listing unaudited profits of $3.9-

million to June 30, most of which was accounted for from management "fees" from several Calgary land transactions. But the company's audited year-end financial statements said the income from management "fees" and the land transactions was deferred income and not included in the annual financial picture.

The allegations against the Abacus officials led to criminal charges against the four individuals, but the proceedings were stayed by the Alberta Attorney-General last year after a provincial court judge ruled they had been improperly instituted.

Since then, the Abacus officials have tried unsuccessfully to have the case thrown out, arguing that the commission is both prosecutor and judge of the case.

ADDED SEARCH TERMS: finance bankruptcies

* * * END * * *

Ontario

FINAL REPORT AND RECOMMENDATIONS

J.E.J. Fahlgren,
Commissioner

June 1985

the ROYAL COMMISSION on the NORTHERN ENVIRONMENT

ORDERS IN COUNCIL

ORDER IN COUNCIL 1900/77

Copy of an Order-in-Council approved by His Honour the Administrator of the Government of the Province of Ontario, dated the 13th day of July, A.D. 1977.

The Committee of Council have had under consideration the report of the Honourable the Minister of the Environment, wherein he states that,

Recognizing that major enterprises and related technologies in that part of Ontario that is north or generally north of the 50th parallel of north latitude for the use of natural resources could have significant beneficial and adverse effects on the environment, as defined in Schedule A, for the people of Ontario and in particular those people of Ontario who live north of the 50th parallel.

Recognizing further that any such effects on the environment are hereby declared to be a matter of public concern,

Recognizing further that the purpose of the Environmental Assessment Act, 1975, is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment,

The Honourable the Minister of the Environment recommends that the Honourable Mr. Justice Patrick Hartt, a Justice of the Supreme Court of Ontario, be appointed a commission pursuant to the provisions of the Public Inquiries Act, 1971, effective the 13th day of July, 1977:

1. to inquire into any beneficial and adverse effects on the environment as defined in Schedule A, for the people of Ontario of any public or private enterprise, which, in the opinion of the commission, is a major enterprise north or generally north of the 50th parallel of north latitude, such as those related to harvesting, supply and use of timber resources, mining, milling, smelting, oil and gas extraction, hydro-electric development, nuclear power development, water-use, tourism and recreation, transportation, communications or pipelines;

2. to inquire into methods that should be used in the future to assess, evaluate and make decisions concerning the effects on the environment of such major enterprises;

3. to investigate the feasibility and desirability of alternative undertakings north or generally north of the 50th parallel of north latitude, for the benefit of the environment as defined in Schedule A;

4. to report and make such recommendations to the Minister of the Environment from time to time and as expeditiously as possible with respect to the subject matter of the inquiry as the commission deems necessary and desirable to carry out the purpose of the Environmental Assessment Act, 1975.

The Honourable the Minister of the Environment further recommends that

5. all the ministries, boards, agencies and committees of the Government of Ontario be directed to assist the commission to the fullest extent,

6. the commission be authorized to engage such counsel, research and other staff and technical advisers as it deems proper for the purpose of carrying out the commission at rates of remuneration and reimbursement to be approved by the Management Board of Cabinet;

7. the commission be authorized to distribute funds to such persons as in its discretion, having regard to the criteria in Schedule B, it deems advisable for the purpose of ensuring effective participation by the public in the inquiry.

The Committee of Council concur in the recommendation of the Honourable the Minister of the Environment and advise that the same be acted on.

Certified,

Deputy Clerk, Executive Council.

Schedule A

"Environment" means,

(i) air, land or water,

(ii) plant and animal life, including man

(iii) the social, economic and cultural conditions that influence the life of man or a community,

(iv) any building, structure, machine or other device or thing made by man,

(v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man,
or

(vi) any part or combination of the foregoing and the interrelationships between any two or more of them,

in or of Ontario.

Schedule B

CRITERIA FOR FUNDING OR PARTICIPATION IN INQUIRY

These criteria are intended to assist the commission in distributing the available funds in the fairest possible way so as to ensure effective public participation in the inquiry.

1. Representation of Wide Range of Interest

The parties assisted should be representative of the various interests which are directly or indirectly affected by the matters subject to the inquiry. It may not be feasible or practicable to fund representatives of all or any groups to the extent they feel necessary or desirable.

2. Avoidance of Duplication

Consideration may be given to encouraging the coalescence of individuals or groups with similar interests. An incentive could be provided to groups or individuals who are willing to work together and combine their presentations for the inquiry.

3. Representation of Various Geographic Areas

Funding may be allocated to representatives of concerned groups or individuals who do not live or work immediately adjacent to the proposed development but who have substantial and direct interest in the subject matter of the inquiry.

4. Allocation of Limited Funds

Within the context of the above criteria, in determining which applications for funding should be accepted, the commission may give consideration to the following specific guidelines:

- the applicant for funding should be one who the commission is satisfied, has a direct and substantial interest in the subject-matter of the inquiry,

- it should be clear to the commission that separate and adequate representation of that interest will make a necessary and substantial contribution to the hearing,

- those seeking assistance should have an established record of concern for, and should have demonstrated their own commitment to, the interests they seek to represent,

- it should be shown to the satisfaction of the commission that those seeking assistance do not have sufficient financial resources to enable them to represent adequately that interest in the hearing under consideration, and will require the assistance to enable them to do so,

- those seeking assistance should have a clear proposal as to the use they intend to make of the funds, and should be willing to make a commitment to account for the funds.

5. Determination of Specific Requirements

In determining whether to provide assistance and the amount of assistance to provide, the commission may consider:

- the length of time required for preparation of the presentation,

- non-monetary subsidies or other monetary inputs available to the individual or group applying for assistance,

- the number of paid employees who will be participating in the preparation of the presentation,

- the number of people represented by the group.

ORDER IN COUNCIL 2316/78

Copy of an Order-in-Council approved by Her Honour the Lieutenant Governor, dated the 2nd day of August, A.D. 1978.

The Committee of Council have had under consideration the report of the Honourable the Minister of the Environment, wherein he states that,

> WHEREAS, pursuant to Order-in-Council numbered OC-1900/77 dated the 13th day of July A.D. 1977, Mr. Justice Patrick Hartt of the Supreme Court of Ontario was appointed a commission pursuant to The Public Inquiries Act, 1971, and directed to inquire into the beneficial and adverse effects of enterprises north or generally north of the 50th parallel of north latitude, to identify and evaluate alternatives thereto, and to carry out other duties; and
>
> WHEREAS Mr. Justice Hartt in April of this year issued an interim report in which he made various recommendations, including recommendations as to the further conduct of the inquiries and investigations to be carried out by the commission;

The Honourable the Minister of the Environment therefore recommends that, pursuant to the provisions of the Public Inquiries Act, 1971, a Commission be issued to appoint Mr. J. Edwin J. Fahlgren of Cochenour, Ontario, in the place and stead of Mr. Justice Patrick Hartt, for the purpose of carrying out the inquiries, investigations and other duties set out in Order-in-Council numbered OC-1900/77, that the Commissioner receive remuneration and reimbursement at rates to be approved by Management Board of Cabinet, and that this appointment be effective on and after the 2nd day of August, 1978.

The Committee of Council concur in the recommendations of the Honourable the Minister of the Environment and advise that the same be acted on.

Certified,
Deputy Clerk, Executive Council.

ORDER-IN-COUNCIL 3679/81

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

the Order-in-Council numbered OC-1900/77 dated the 13th day of July, 1977 as amended by Order-in-Council numbered OC- 2316/78 dated the 2nd day of August, 1978, be further amended by adding the following paragraph:

"AND THAT effective from the 1st day of January, 1982, the Ministry of the Attorney General will be responsible for providing administrative support to the commission and will also be responsible for ensuring that the commission complete its activities within the constraints established by the Management Board of Cabinet Policy on the Administration of Royal Commissions".

Recommended by the Minister of the Environment

Concurred by the Chairman

Approved and Ordered December 23, 1981 by the Lieutenant Governor

PUBLIC FUNDING PROGRAM

The Commission, throughout its lifespan, has provided financial assistance to groups and individuals to assist them in taking an active role in the inquiry. This program of Public Funding was initiated through the Commission's Order in Council 1900/77 which specifically authorized the Commissioner "...to distribute funds to such persons as in its discretion, having regard to the criteria in Schedule B (of the Order in Council) it deems advisable for the purpose of ensuring effective participation by the public in the inquiry."

Schedule B was intended to assist the commission in distributing the available funds in the fairest possible way so as to ensure effective public participation in the inquiry. It specified the following points:

"1. *Representation of Wide Range of Interests*

The parties assisted should be representatives of the various interests which are directly or indirectly affected by the matters subject to the inquiry. It may not be feasible or practicable to fund representatives of all or any groups to the extent they feel necessary or desirable.

2. *Avoidance of Duplication*

Consideration may be given to encouraging the coalescence of individuals or groups with similar interests. An incentive could be provided to groups or individuals who are willing to work together and combine their presentations for the inquiry.

3. *Representation of Various Geographic Areas*

Funding may be allocated to representatives of concerned groups or individuals who do not live or work immediately adjacent to the proposed development but who have a substantial and direct interest in the subject matter of the inquiry.

4. *Allocation of Limited Funds*

Within the context of the above criteria, in determining which applications for funding should be accepted, the commission may give consideration to the following specific guidelines:

- *the applicant for funding should be one who the commission is satisfied, has a direct and substantial interest in the subject matter of the inquiry,*

- *it should be clear to the commission that separate and adequate representation of that interest will make a necessary and substantial contribution to the hearing,*

- *those seeking assistance should have an established record of concern for, and should have demonstrated their own commitment to, the interests they seek to represent.*

- *it should be shown to the satisfaction of the commission that those seeking assistance do not have sufficient financial resources to enable them to represent adequately that interest in the hearing under consideration, and will require the assistance to enable them to do so,*

- *those seeking assistance should have a clear proposal as to the use they intend to make of the funds, and should be willing to make a commitment to account for the funds."*

Early Funding - Mr. Justice Hartt

During the period July, 1977 - August, 1978 under Mr. Justice Patrick Hartt, $403,092 was awarded to and spent by groups and individuals to prepare for and participate in the Commission's inquiry. No formal application process was set into place to make these awards. Decisions were made internally by the Commission as each request for financial assistance was received.

The Table below details funding awarded during this early stage of the Commission's inquiry.

TABLE X-1

Funding Awards July 1977 - August 1978

RECIPIENT	Amount Spent
Grand Council Treaty #9	$ 170,636
National Survival Institute	4,171
Grand Council Treaty #3	170,928
Mental Health Timmins	85
Northwestern Ontario Municipal Association	6,683
Tri Municipal Committee	47,323
Town of Sioux Lookout	1,266
James Bay Education Centre	2,000

Commissioner Fahlgren's Approach

Under Commissioner Fahlgren a more formal approach to the awarding of financial assistance was instituted.

The Commission established a Funding Advisory Committee to consider and make recommendations to the Commissioner on applications for funding during the 1978/1979/1980 period. The Committee was set up to ensure a fair and unbiased distribution of the funds available. The Committee members were selected from nominations made by active participants in the Commission's work and was composed of five northerners and one Commission staff member.

For the Funding Period September to November, 1982 (Phase IV), the Commission did not utilize the Funding Advisory Committee. During this period, an internal committee of staff members was set up to make recommendations to the Commissioner on each application.

Brochures explaining the Commission's formal Funding Program and application forms were prepared and widely distributed for each phase of funding. Timing, budgets and application limits for each phase were as follows:

Phase I

November 15, 1978 to March 31, 1978
Budget: $125,000
Application limit: $10,000

Phase II

September 10, 1979 to February 28, 1980
Budget: $230,000
Application limit: $10,000

Phase III

December 1, 1979 to February 29, 1980
Budget: $40,000
Application limit: $5,000

Phase IV

September 1, 1982 to November 10, 1982
Budget: $350,000
Application limit: $10,000

Applicants who were successful in having their request for financial assistance approved were required to sign a Letter of Agreement stating that the funds would only be used for the intended purpose in accordance with the approved budget, that proper accounting procedures would be met and that deadlines for completion of the project would be observed.

In all cases, an amount ranging from 10 to 25 per cent of the approved award was held back pending completion of the project and receipt by the Commission of a satisfactory financial accounting of the funds.

Program Assessment

Table II lists the recipients of financial assistance during the formalized funding program under Commissioner Fahlgren. The table indicated the recipients of the funding, the amount spent and whether the project was satisfactorily completed. The Commission can only confirm that the project was undertaken and completed and that the money spent and accounted for. No effort has been made on an individual basis to indicate whether the Commission believes that good value was received for the money. In some instances this would be impossible to evaluate as in the case of a project whose sole purpose was for community participation, issue awareness or local decision making. As for projects that required funding for research or for the preparation of submissions, the Commission is prepared only to indicate if the report or submission was received and the money satisfactorily accounted for. No specific evaluation on an individual basis will be made.

TABLE X-II

Phase I November 15, 1978 - March 31, 1979

RECIPIENT	Amount Spent
James Burr and William Napier (Waterloo)	$ 1,265
Conservation Council of Ontario (Toronto)	3,235
James Bay Cree Society (Moose Factory)	4,575
William Moses (Timmins)	5,867
Moose Band Council (Moose Factory)	1,834
Northern Development Research Group (Toronto)	4,885

Northwestern Ontario Internationl Women's Decade Coordinating Council (Thunder Bay)	$ 8,752*
Osgoode Hall Law School, Public Interest Advocacy Centre (Toronto)	7,000
Ontario Metis and Non-Status Indian Association (Zone 3)	4,465
Pollution Probe Foundation (Toronto)	4,196
Town of Sioux Lookout (Sioux Lookout)	4,257
Thunder Bay and District Labour Council (Thunder Bay)	5,670
Bert Trapper (Moosonee)	1,492
Grand Council Treaty #3 (Kenora)	6,511
Winisk Band Council Advisory Board (Winisk)	4,637
White Dog Band (White Dog)	150*

* Project not completed or financial accounting not received.

Phase II September 10, 1979 - February 28, 1980

RECIPIENT	Amount Spent
Timiskaming Environmental Action Committee (Kenabeek)	$ 8,866
Northern Ontario Women's Conference Committee (Sudbury)	4,000
Noract (Hearst)	8,940
Michael Zudel (Timmins)	2,000
Gary Clark (Timmins)	2,160*
Energy Probe (Toronto)	7,399
Stanley Hunnisett (Big Trout Lake)	9,524
Northern Ontario Research & Development Institute (Hearst)	9,679
Conservation Council of Ontario (Toronto)	7,500
Canada Environmental Law Research Foundation (Toronto)	9,361
Pollution Probe (Toronto)	4,700
Northern Development Research Group (Toronto)	7,847
Canadian Paperworkers Union (Toronto)	4,528
Fort Albany Band (Fort Albany)	7,543*
Big Island Reserve #93 (Morson)	7,712*
Northwestern Ontario Prospectors Association (Thunder Bay)	1,653
Dr. Roger Suffling (Waterloo)	9,047
Ontario Metis & Non-Status Indian Association (Zone 2) (Thunder Bay)	990
Webequie Settlement Committee (Webequie)	6,795
Lake Nipigon Metis Association (Thunder Bay)	5,203
Native Education Advisory Council (Thunder Bay)	10,143

* Project not completed or financial accounting not received.

Phase III December 1, 1979 - February 28, 1980

RECIPIENT	Amount Spent
Transport 2000 Canada (Ottawa)	$ 3,106
Jean Trudel (Hearst)	4,395
Wa Wa Ta Native Communications Society (Sioux Lookout)	3,645*
Bruce D. Ralph (Ignace)	4,142
Mark & Wendy MacMillan (Ignace)	2,924
Pollution Probe (Toronto)	5,325
Terry Graves (Charlton)	7,580
Long Dog Lake Community (Long Dog Lake)	1,776*
Association des Francophones du Nord-Ouest de l'Ontario (Thunder Bay)	4,237
Thunder Bay National Exhibition Centre (Thunder Bay)	4,935
Inter-Agency Coordinating Committee (Red Lake)	1,748
Fort Severn Band (Fort Severn)	7,299
Naganawit Corporation (Kenora)	350*

* Project not completed or financial accounting not received.

Phase IV September 1, 1982 - November 10, 1982

RECIPIENT	Amount Spent
Martin Falls Band (Ogoki Post)	$ 5,120
Rocky Bay Indian Band (MacDiarmid)	9,353
Canadian Environmental Law Research Foundation (Toronto)	9,922
Conservation Council of Ontario (Toronto)	9,230
David Sewell (Timmins)	3,539
James Bay Tribal Council (Moose Factory)	11,641
Wildlands League (Toronto)	9,595
New Post Band #69 (Cochrane)	14,620
Moose Factory Band (Moose Factory)	5,649*
Fikret Berkes (St. Catharines)	800
Savant Lake Native Community (Savant Lake)	5,349
Brian McMillan/David Peerla (Thunder Bay)	5,716
Moosonee Metis and Non-Status Indian Association (Moosonee)	8,935*
Association Canadienne Francaise d'Ontario, Regionale de Timmins (Timmins)	10,070
Canadian Society of Environmental Biologists, Ontario Chapter (Toronto)	9,893

* Project not completed or financial accounting not received.

Parks for Tomorrow (Kakabeka Falls)	$ 9,973
Former Chiefs Committee (Winisk)	4,086
Chief Thomas Fiddler/James Stevens (Sandy Lake & Thunder Bay)	8,834
Sidney Fels (Thunder Bay)	2,525
Armstrong Metis Association (Armstrong)	14,148
Economic Development Sub-Committee (Thunder Bay)	8,325
David Martin (Thunder Bay)	2,487
Attawapiskat Band Council (Attawapiskat)	15,110
Ontario Metis Association (Zone 1) (Sioux Lookout)	1,747*
Deer Lake Band (Deer Lake)	9,064
Armstrong Wilderness Outfitters Association (Armstrong)	1,450
Frontier College (Toronto)	3,350
Bearskin Lake Band (Bearskin Lake)	4,870*
Lake Nipigon Metis Association (Thunder Bay)	2,400
Muskrat Dam Band (Muskrat Dam)	8,800
Cochrane Tourist Outfitters Association (Cochrane)	10,024
Association of Canadian Universities for Northern Studies (Ottawa)	2,500
Development Education Centre (Toronto)	9,957
Sioux Lookout Trappers Council (Sioux Lookout)	6,297
Lac Seul Band (Lac Seul)	9,834
Northern Ontario Tourist Outfitters Association (North Bay)	10,000
Amikwiish (Geraldton)	3,396*
R.G. Brisson (Cochrane)	1,665*
North Caribou Lake Band (Weagamow Lake)	3,478*
Concerned Women's Group (Iroquois Falls)	6,806
Town of Iroquois Falls (Iroquis Falls)	5,454
Town of Sioux Lookout (Sioux Lookout)	1,250
Sioux Lookout Chamber of Commerce (Sioux Lookout)	300
Red Lake Chamber of Commerce (Red Lake)	5,053
Sachigo Lake Band (Sachigo Lake)	7,000
Martin Falls Band (Ogoki)	3,079
Naganawet (Kenora)	4,650
Noract (Hearst)	5,000
Reeve S. Leschuk (Ear Falls)	4,586

* Project not completed or financial accounting not received.

Under this program, 99 different awards of financial assistance were made totalling $572,773, of which 15 recipents failed to either satisfactorily complete their project or submit a proper financial accounting.

Funding for Major Participants

The Commission realized that its formal programs for funding, with their relatively small application budget limits and short time frames, were not appropriate for those it considered to be potentially major participants in the inquiry. Accordingly, in addition to the formal programs, funding was made available to organizations with significant interests in the Commission's mandate.

The following major groups or organizaitons received funding from the Commission and spent the amounts indicated.

Kayahna Area Tribal Council	$456,000
Fort Severn Band	58,364
Grand Council Treaty #9	297,397
Ontario Metis Association	65,642
Pehtabun Chiefs Tribal Council	93,148
Windigo Tribal Council	35,465
Central Tribal Council	20,535
Fort Hope Band	241,261

Travel to Hearings

The area covered by the Commission's mandate was extensive, with great distances between communities, and with travel difficult and costly.

For the Commission to hold hearings that were accessible to the public north of 50, there were basically two options: take the hearings to the people or bring the people to the hearings.

The time and expense required to take the hearings to the people of most communities, particularly the remote locations, could not in all conscience be contemplated. However, for the public to willingly participate in a more limited number of hearing locations would have required a commitment from the Commission to cover travel costs for participants to present oral versions of their written submissions. In some cases participants were required to appear if their submissions were funded by the Commission. Not all participants requested travel assistance but those who did were required to show a need that if such assistance was not available they would otherwise be unable to participate further. Those receiving travel assistance were required to submit documented claims and reimbursement was subject to the same guidelines and limits for travel expenses as those set down for employees of the Commission.

Cross-Examination at Formal Hearings

Funding was made available to parties granted standing at formal hearings to engage counsel, to research and to undertake cross-examination.

Those who were granted standing and who required funding for legal fees and/or travel are listed below.

RECIPIENT	Amount Spent
Kayahna Area Tribal Council	$ 14,347
Red Lake District Chamber of Commerce	5,979
Deer Lake Band	5,226
Northern Ontario Tourist Outfitters	6,170
Summer Beaver Community	16,394
Sioux Lookout Trappers Council	945*

* Travel only

Northern Frontier Northern Homeland

RT OF THE MACKENZIE VALLEY PIPELINE INQUIRY

olume Two

Terms and Conditions

Mr. Justice
THOMAS R. BERGER

APPENDIX 1
The Inquiry Process

The Inquiry Process

It is often said that commissions of inquiry have had little or no impact on public policy in Canada. I think this is wrong, as a glance at our history will show. The report of the Rowell–Sirois Commission, appointed in 1937, led to a rearrangement of taxing powers between the federal government and the provinces. The Rand Inquiry into the dispute between the Ford Motor Company and the United Auto Workers in Windsor in 1949, which resulted in the Rand formula, has been regarded ever since as a watershed in labour-management relations in Canada. The Hall Commission on Health Services had and continues to have a great impact on governments, the health professions, and the provision of health services in our country. The recommendations of the Norris Commission, which investigated the disruption of shipping on the Great Lakes, resulted in a major union being placed under government trusteeship.

Commissions appointed by provincial governments have also been influential. The Meredith Commission, appointed in 1911 in Ontario, led to the establishment of Workmen's Compensation Boards first in Ontario and then throughout the country. The Hall–Dennis Commission, appointed by the government of Ontario, and the Parent Commission, appointed by the government of Quebec, have both had a great impact on education in Canada.

There have also been joint federal-provincial commissions of inquiry, such as the McKenna–McBride Commission, whose recommendations regarding Indian reserve lands in British Columbia were adopted, for good or ill, by both governments.

We are all aware of the continuing influence in our federal system today of the recommendations of the Royal Commission on Bilingualism and Biculturalism. The recommendations of the LeDain Commission have been influential in moulding social attitudes toward the non-medical use of drugs in our society. Then, of course, the recommendations of the Royal Commission on the Status of Women constitute a standard against which the progress of the federal government and the provincial governments toward the enactment of legislation to establish equality for women can be measured.

Thus the work of commissions of inquiry has had a significant influence on public policy in Canada. They have brought new ideas into the public consciousness. They have expanded the vocabulary of politics, education and social science. They have added to the furniture that we now expect to find in Canada's storefront of ideas. And they have always had real importance in providing considered advice to governments. This is their primary function. But in recent years, Commissions of Inquiry have begun to take on a new function: that of opening up issues to public discussion, of providing a forum for the exchange of ideas.

Gerald E. LeDain, who headed the Royal Commission on the Non-Medical Use of Drugs, discussed this emerging function in a lecture delivered at Osgoode Hall Law School on March 15, 1972:

> It was our search for the issues and a general perspective, as well as a sense of social feasibility – what the society was capable of – that made us conduct the kind of hearings we did.... We were looking also for the range of attitudes and wanted to hear from those most deeply involved. These hearings made a deep impression on us. At times they were very moving. One of the things we discovered is that we need public opportunities for the exchange of views on vital issues. The hearings provided a public occasion for people to say things to each other that they had obviously never said before. I think that a public inquiry can respond to the need for some extension of the regular electoral process on the social level, a process in which the public can contribute to the identification and discussion of the issues. [*Law and Social Change*, edited by Jacob Ziegel, p.84]

The Law Reform Commission of Canada, in a working paper published earlier this year, enlarged upon this function of commissions of inquiry:

> Finally, as democratic as Parliament may be, there is still an important need in Canada for other means of expressing opinions and influencing policy-making – what Harold Laski called "institutions of consultation." There are, of course, the

"traditional ways": establishing pressure groups, giving speeches, writing to the newspaper, and so on. But these traditional means are not always adequate. Today the need for other avenues of expression and influence is often focussed in greater demands for *public participation*. Increased participation allows those individuals and groups to express their views to public authorities. It also provides more representative opinion to decision-makers, so as to properly inform them of the needs and wishes of the people. [Law Reform Commission, *Commissions of Inquiry*, p.15]

If commissions of inquiry have become an important means for public participation in democratic decision-making as well as an instrument to supply informed advice to government, it is important to consider the way in which inquiries are conducted and whether they have the means to fulfil their perceived functions. Given the interest the public has had in the Mackenzie Valley Pipeline Inquiry, it may be useful to say something about the way in which it was conducted.

The Inquiry's Mandate

The Mackenzie Valley Pipeline Inquiry was appointed to examine the social, economic and environmental impact of a gas pipeline in the Northwest Territories and the Yukon, and to recommend the terms and conditions that should be imposed if the pipeline were to be built. We were told that the Arctic Gas pipeline project would be the greatest project, in terms of capital expenditure, ever undertaken by private enterprise. We were told that, if a gas pipeline were built, it would result in enhanced oil and gas exploration activity all along the route of the pipeline throughout the Mackenzie Valley and the Western Arctic.

But the gas pipeline, although it would be a vast project, was not to be considered in isolation. The Government of Canada, in the Expanded Guidelines for Northern Pipelines (tabled in the House of Commons on June 28, 1972), made it clear that the Inquiry was to consider what the impact would be if the gas pipeline were built and if it were followed by an oil pipeline.

So the Inquiry had to consider the impact on the North of an energy corridor that would bring gas and oil from the Arctic to the mid-continent. In fact, under the Pipeline Guidelines, we had to consider two corridors, one corridor extending from Alaska across the Northern Yukon to the Mackenzie Delta, and a second corridor from the Mackenzie Delta along the Mackenzie Valley to Alberta.

The Inquiry, when it was established, was unique in Canadian experience because, for the first time, we were to try to determine the impact of a large-scale frontier project before and not after the fact. The Inquiry was asked to see what could be done to protect the North, its people and its environment, if the pipeline project were to go ahead.

Let me repeat the words of the Order-in-Council: social, environmental and economic impact. I dare say they conferred as wide a mandate upon the Inquiry as any government has ever conferred upon any Inquiry in the past. The merit in such a wide mandate is clear. Impacts cannot be forced into tidy subject compartments. The consequences of a large-scale frontier project inevitably combine social, economic and environmental factors. In my opinion a sound assessment could not have been made if the analysis of impact had been divided up, if, for instance, environmental impact had been hived off for separate analysis.

The Pipeline Application Assessment Group

Concurrently with the establishment of the Inquiry, the Government of Canada established a Pipeline Application Assessment Group. This group, headed by Dr. John G. Fyles of the Geological Survey of Canada, consisted of public servants seconded by the Department of Indian Affairs and Northern Development, the Department of Energy, Mines and Resources, and the Department of the Environment, and by the Governments of the Northwest Territories and the Yukon Territory, and others outside the public service, who were retained in a consultative capacity. The task of the group was to review the material filed by Arctic Gas, the consortium seeking to build the pipeline. In their initial filing, in March 1974, Arctic Gas deposited with the government 32 volumes of material amounting to thousands of pages of technical information. The Assessment Group spent eight months reviewing this material and prepared a report to assist the Inquiry and the National Energy Board in its work, as well as government departments and agencies. Once the Inquiry got under way, many members of the Assessment Group transferred to the Inquiry staff.

Environment Protection Board

I should also mention the Environment Protection Board. The precursors of Arctic Gas and Foothills funded a group of scientists and engineers, all of them men of the highest competence in their various fields, to provide an independent examination of the environmental impact of a gas pipeline from Prudhoe Bay through the Mackenzie Valley to Alberta. The group, known as the Environment Protection Board and headed by Mr. Carson Templeton of Winnipeg, a distinguished engineer, was provided with $3.5 million, and after four years of study, published a lengthy report that was, in many respects, critical of the Arctic Gas proposal.

The report of the Environment Protection Board was of great assistance to the Inquiry. The Board was an intervenor at the Inquiry, and its members and staff gave evidence.

The oil and gas industry was responsible for this innovation. The industry established the Board, funded it, and did not seek in any way to interfere with its work or to dictate what should appear in its report. This represents a new departure for private industry. The precedent was followed at the Alaska Highway Pipeline Inquiry by Foothills Pipe Lines (Yukon) Ltd., which established and funded a similar board of scientists and engineers, once again headed by Mr. Templeton.

The Board wrote a report for Foothills, the report was made public, and the members of the Board testified at the Inquiry.

Preliminary Hearings

Preliminary hearings were held soon after the establishment of the Mackenzie Valley Pipeline Inquiry. At that time, I wrote to Arctic Gas, the environmental groups, the native organizations, the Northwest Territories Association of Municipalities, the Northwest Territories Chamber of Commerce, the Government of the Northwest Territories and the Government of the Yukon. I advised them of my appointment, and asked them for any submissions they wished to make regarding the way in which the Inquiry should be conducted. In April 1974, I held hearings at Yellowknife, Inuvik and Whitehorse, and in May, at Ottawa, and again at Yellowknife in September. Thirty-seven submissions were made at the preliminary hearings. These were very useful: it became apparent that the environmental groups and the native organizations would require time to get ready for the main hearings, and that they, as well as the Northwest Territories Association of Municipalities and the Northwest Territories Chamber of Commerce, would require funds to prepare for and to participate in the hearings. It also became evident that rules would have to be laid down for the production of all the information in the possession of government, industry and other interested parties. I therefore issued rulings on these matters, which are reproduced in Appendix 2 of this volume.

Production of Studies and Reports

The Government of Canada gave the Inquiry the power to issue subpoenas to get the evidence it needed. We sought to ensure that all studies and reports in the possession of the pipeline companies and the other parties should be produced, so that no study or report bearing on the work of the Inquiry would be hidden from view. I ruled that each party – the pipeline companies, and each of the intervenors – would have to prepare a list of all of the studies and reports in their possession relating to the work of the Inquiry, and that the lists should be circulated among all the participants. The Government of Canada, of course, had in its possession many studies and reports relating to the work of the Inquiry. Commission Counsel was therefore made responsible for providing a list of them.

This procedure allowed any party to call upon any other party to produce a copy of any study or report that was listed. If a party were to refuse to produce a document, then an application could be made to the Inquiry for a subpoena. Of course, any claim of lawful privilege would have had to be considered by the Inquiry. All concerned cooperated: no one had to apply for a subpoena at any time during the Inquiry.

In recent years, the Government of Canada has carried out a multitude of studies through its Environmental-Social Committee, Northern Pipelines, Task Force on Northern Oil Development. These studies cost $15 million. The oil and gas industry has carried out studies on the pipeline that we were told cost something like $50 million. Our universities have been carrying on constant research on northern problems and northern conditions. It would have been no good to let all these studies and reports just sit on the shelves. Where these reports contained evidence that was vital to the work of the Inquiry, it was essential that they be opened and examined in public, so that any conflicts could be disclosed, and where parties at the Inquiry wished to challenge them, they had an opportunity to do so. It meant that opinions could be challenged and tested in public.

It also raised the quality of debate at the Inquiry. Arctic Gas supported their application with much detailed and valuable technical information and indeed with considerable original research. This material, together with the reports of the Pipeline Application Assessment Group, the Environment Protection Board and government studies, permitted the Inquiry to engage in a detailed analysis of issues – to get to the heart of matters as diverse as frost heave and the seasonal movements of marine mammals – rather than deal with them at the level of vague generalization.

As a consequence, all parties at the Inquiry had to be equipped to analyze all of this material and to be in a position to respond to technical questions arising from it. This raises the matter of funding intervenors.

Funding Intervenors

An inquiry of this scope has to consider many interests. If such an inquiry is to be fair and complete, all of these interests must be represented.

A funding program was established for those groups that had an interest that ought to be represented, but whose means would not allow it. On my recommendation, funding was provided by the Government of Canada to the native organizations, the environmental groups, northern municipalities, and northern business, to enable them to participate in the hearings on an equal footing (so far as that might be possible) with the pipeline companies – to enable them to support, challenge, or seek to modify the project.

These groups are sometimes called public interest groups. They represent identifiable interests that should not be ignored, that, indeed, it is essential should be considered. They do not represent the public interest, but it is in the public interest that they should be heard. I ruled that any group seeking funding had to meet the following criteria:

1. There should be a clearly ascertainable interest that ought to be represented at the Inquiry.

2. It should be established that separate and adequate representation of that interest would make a necessary and substantial contribution to the Inquiry.

3. Those seeking funds should have an established record of

concern for, and should have demonstrated their own commitment to, the interest they sought to represent.

4. It should be shown that those seeking funds did not have sufficient financial resources to enable them adequately to represent that interest, and that they would require funds to do so.

5. Those seeking funds had to have a clearly delineated proposal as to the use they intended to make of the funds, and had to be sufficiently well-organized to account for the funds.

In funding these groups, I took the view that there was no substitute for letting them have the money and decide for themselves how to spend it, independently of the government and of the Inquiry. If they were to be independent, and to make their own decisions and present the evidence that they thought vital, they had to be provided with the funds and there could be no strings attached. They had, however, to account to the Inquiry for the money spent. All this they have done.

Let me illustrate the rationale for this by referring to the environment. It is true that Arctic Gas carried out extensive environmental studies, which cost a great deal of money. But they had an interest: they wanted to build the pipeline. This was a perfectly legitimate interest, but not one that could necessarily be reconciled with the environmental interest. It was felt there should be representation by a group with a special interest in the northern environment, a group without any other interest that might deflect it from the presentation of that case.

Funds were provided to an umbrella organization – the Northern Assessment Group – that was established by the environmental group to enable them to carry out their own research and hire staff, and to ensure that they could participate in the Inquiry as advocates on behalf of the environment. In this way, the environmental interest was made a part of the whole hearing process. The same applied to the other interests that were represented at the hearings. The result was that witnesses were examined and then cross-examined not simply to determine whether the pipeline project was feasible from an engineering point of view, but to make sure that such things as the impact of an influx of construction workers on communities, the impact of pipeline construction and corridor development on hunting, trapping and fishing, and the impact on northern municipalities and northern business, were all taken into account.

The usefulness of the funding that was provided has been amply demonstrated. All concerned showed an awareness of the magnitude of the task. The funds supplied to the intervenors, although substantial, should be considered in the light of the estimated cost of the project itself, and of the funds expended by the pipeline companies in assembling their own evidence.

I do not suggest that the funding of intervenors is appropriate in all inquiries – that would depend on the nature of the inquiry. But I can speak to its usefulness in this instance.

Hearings

We sought to avoid turning the Inquiry into an exclusive forum for lawyers and experts. Unless you let outsiders in, an inquiry can become a private, club-like proceeding. This problem presents itself most acutely when you want to hear from the experts but when you want equally to hear from ordinary people who could be affected by the impact of the project.

It was inevitable that conflict would arise if the hearing process in which the public would be entitled to participate was the same as that at which the evidence of engineers, biologists, economists and so on, would be heard and cross-examined – a process necessitating the pre-eminent role of lawyers. That conflict had to be resolved. We therefore decided to hold two types of hearings: formal hearings and community hearings.

We decided to hold formal hearings at Yellowknife, where expert witnesses for all parties could be heard and cross-examined, and where the proceedings would, in many ways, resemble a trial in a courtroom. It was at Yellowknife that we heard the evidence of the experts: the scientists, the engineers, the biologists, the anthropologists, the economists – the people who have studied northern conditions and northern peoples.

The formal hearings began with an overview of the North. Commission Counsel presented a series of witnesses, all of them authorities in their fields, who discussed in a general way the geography, history, flora, fauna, and economy, of the Mackenzie Valley and the Western Arctic. For the Inquiry and the participants, this evidence provided a useful back-drop against which to place the detailed evidence that came later.

At the formal hearings, all the participants were represented: the two pipeline companies, the native organizations, the environmental groups, the Northwest Territories Association of Municipalities and the Northwest Territories Chamber of Commerce. All were given a chance to question and challenge the things that the experts said, and all were entitled, of course, to call expert witnesses of their own. Lawyers represented most of the participants. But non-lawyers acted as counsel for some groups, and quite effectively, too: Carson Templeton for the Environment Protection Board, Jo McQuarrie for the Northwest Territories Mental Health Association and David Reesor for the Northwest Territories Association of Municipalities.

At the same time, community hearings were held in each city and town, settlement and village in the Mackenzie Valley, the Mackenzie Delta and the Northern Yukon. We held hearings at 35 communities in the Mackenzie Valley and the Western Arctic. At these hearings, the people living in the communities were given the opportunity to speak in their

own language and in their own way. I wanted the people in the communities to feel that they could come forward and tell me what their lives and their experience led them to believe the impact of a pipeline and an energy corridor would be.

In this way, we tried to have the best of the experience of both worlds: at the community hearings, the world of everyday, where most witnesses spend their lives, and, at the formal hearings, the world of the professionals, the specialists, and the academics.

I appointed Michael Jackson, Special Counsel to the Inquiry, as Chairman of a Committee on Community Hearings. This Commmittee comprised representatives of each of the participants and it considered such matters as the timing of community hearings – (having regard, among other things, for the seasonal activities of northern people), the procedure to be adopted at such hearings, and the role of the participants and their lawyers.

One of the first matters the Committee had to deal with related to the issue of cross-examination of witnesses. The object of the community hearings was to give all people an opportunity to express their concerns without worrying about what they might well regard as harassment by lawyers. The Committee suggested a variety of ways in which the function of cross-examination could be fulfilled by procedures that would not dissuade people from testifying. One such technique was to invite representatives of both Arctic Gas and Foothills to make a presentation to the Inquiry whenever it appeared to them that people were misinformed or whenever they wished to correct what they felt was a mistaken view of their proposals. In this and other ways, without it ever being necessary formally to restrict the right to cross-examination, the community hearings were conducted, not within a procedural framework in which only lawyers felt comfortable, but within a framework which permitted northern people, native and white, to participate fully.

Many people in the communities of the North do not speak English, and could be understood only through interpreters. For them, the experience of testifying was sometimes strange and difficult, and we did not want to place any impediment at all in the way of their speaking up and speaking out. A fairly wide latitude was given. Even at the formal hearings, we did not insist upon a too rigid observance of legal rules of admissibility, for that might have squeezed the life out of the evidence. I see no difficulty in this. The reasons for insisting upon a strict observance of rules of evidence at civil or criminal trials, do not obtain at a public inquiry relating to questions of social, environmental and economic impact. What is essential is fairness and an appropriate insistence upon relevance.

In order to give people – not just the spokesmen for native organizations and for the white community, but all people – an opportunity to speak their minds, the Inquiry remained in each community as long as was necessary for every person who wanted to speak to do so. In many villages a large proportion of the adult population addressed the Inquiry. Not that participation was limited to adults. Some of the most perceptive presentations were given by young people, concerned no less than their parents about their land and their future.

I found that ordinary people, with the experience of life in the North, had a great deal to contribute. I heard from almost one thousand witnesses at the community hearings – in English (and occasionally in French), in Loucheux, Slavey, Dogrib, Chipewyan and in the Eskimo language of the Western Arctic. They used direct speech. They seldom had written briefs. Their thoughts were not filtered through a screen of jargon. They were talking about their innermost concerns and fears.

It is not enough simply to read about northern people, northern places and northern problems. You have to be there, you have to listen to the people, to know what is really going on in their towns and villages and in their minds. That is why I invited representatives of the companies that wanted to build the pipeline to come to these community hearings with me. Arctic Gas and Foothills sent their representatives to every hearing in every community.

The contributions of ordinary people were therefore important in the assessment of even the most technical subjects. For example, in Volume One, I based my discussion of the biological vulnerability of the Beaufort Sea not only on the evidence of the biologists who testified at the formal hearings, but also on the views of the Inuit hunters who spoke at the community hearings. The same is true of sea-bed ice scour, and of oil spills; they are complex, technical subjects but our understanding of them was nonetheless enriched by testimony from people who live in the region.

It became increasingly obvious that the issue of impact assessment is much greater than the sum of its constituent parts. For example, when North America's most renowned caribou biologists testified at the Inquiry, they described the life cycle, habitat dependencies and migrations and provided a host of details about the Porcupine caribou herd. Expert evidence from anthropologists, sociologists and geographers described the native people's dependency on caribou from entirely different perspectives. Doctors testified about the nutritional value of country food such as caribou, and about the consequences of a change in diet. Then the native people spoke for themselves at the community hearings about the caribou herd as a link with their past, as a present-day source of food and as security for the future. Only in this way could the whole picture be put together. And only in this way could a sound assessment of impact be made.

When discussion turned to issues relating to social and cultural impact, economic development, and native claims, the usefulness of obtaining the views of local residents was equally important. This was nowhere more apparent than in the consideration of native claims. At the formal hearings,

land use and occupancy evidence was presented through prepared testimony and map exhibits. There the evidence was scrutinized and witnesses for the native organizations were cross-examined by counsel for the other participants. By contrast, at the community hearings, people spoke spontaneously and at length of both their traditional and their present-day use of the land and its resources. Their testimony was often painstakingly detailed and richly illustrated with anecdotes.

The most important contribution of the community hearings was, I think, the insight it gave us into the true nature of native claims. No academic treatise or discussion, formal presentation of the claims of native people by the native organizations and their leaders, could offer as compelling and vivid a picture of the goals and aspirations of native people as their own testimony. In no other way could we have discovered the depth of feeling regarding past wrongs and future hopes, and the determination of native people to assert their collective identity today and in years to come.

We had not heard the native people speak with such conviction of these things in recent years. Thus it is not surprising that the allegation should have been made that the testimony given by the native people was not genuine, that in some fashion they had been induced to say things they did not believe. Of course, such allegations reflect a lingering reluctance to take the views of native people seriously when they conflict with our own notions of what is in their best interests. But the point is this: such allegations, advanced in order to discredit the leaders of the native organizations, lose their force when measured against the evidence of band chiefs and band councillors from every community in the Mackenzie Valley and the Western Arctic, and against the evidence of the hundreds of native people who spoke to the Inquiry. These allegations have not, indeed, been made by anyone who was at the community hearings.

From the beginning, it was clear that we were dealing with an issue of national interest and importance. The Order-in-Council establishing the Inquiry contemplated hearings in the provinces as well as in the northern territories. We received many requests from Canadians in the South who wished to have an opportunity to contribute to the debate. So we took the Inquiry to ten of the major cities of Canada, from Vancouver in the west to Halifax in the east. These hearings took approximately one month. Thus the Inquiry, and through it the government, was able to draw on the views of a multitude of ordinary Canadians.

The Media

The Inquiry faced, at an early stage, the problem of enabling the people in the far-flung settlements of the Mackenzie Valley and the Western Arctic to participate in the work of the Inquiry. When you are consulting local people, the consultation should not be perfunctory. But when you have such a vast area, when you have people of four races, speaking seven languages, how do you enable them to participate? How do you keep them informed? We wished to create an Inquiry without walls. And we sought, therefore, to use technology to make the Inquiry truly public, to extend the walls of the hearing room to encompass the entire North. We tried to bring the Inquiry to the people. This meant that it was the Inquiry, and the representatives of the media accompanying it – not the people of the North – that were obliged to travel.

At the same time, we made it plain to the media that we regarded them as an essential part of the whole process. We sought to ensure that they were given every opportunity to provide an account of what was being said by all parties at the Inquiry. We tried to counter the tendency, all too frequent in the past, to treat the work of a Commission of Inquiry as a private affair. So we invited the press, radio, television and film makers into the hearing room. They did not obtrude: this was a public inquiry. The things that were said were the public's business, and it was the business of the media to make sure that the public heard those statements. Of course, this approach cannot always be followed. Certainly in the case of a purely investigatory inquiry, where specific allegations of wrongdoing have been made, different considerations prevail.

The CBC's Northern Service played an especially important part in the Inquiry process. The Northern Service provided a crew of broadcasters who broadcast across the North highlights of each day's testimony at the Inquiry. Every day there were hearings, they broadcast both in English and in the native languages from wherever the Inquiry was sitting. In this way, the people in communities throughout the North were given a daily report, in their own languages, on the evidence that had been given at both the formal hearings and the community hearings. The broadcasts meant that when we went into the communities, the people living there understood something of what had been said by the experts at the formal hearings, and by people in the communities that we had already visited. The broadcasters were, of course, entirely independent of the Inquiry.

No one could be expected to understand all the intricacies of the pipeline proposal and its consequences, but so far as we could provide some understanding of the proposal and what it would mean to northerners, we attempted to do so. The media in a way served as the eyes and ears of all northerners, indeed of all Canadians, especially when the Inquiry visited places that few northerners had ever seen and few of their countrymen had even heard of.

Commission Counsel and Inquiry Staff

Commission Counsel, Ian Scott, Q.C. (who was assisted throughout by Stephen Goudge), took the position that he was independent, and free to test and to challenge the evidence of witnesses of all parties. In addition, he regarded it as his job to

ensure that all relevant evidence was assembled and presented to the Inquiry so that no vital area was left unexplored. He questioned witnesses in order to establish the content and implications of every theory of social, environmental and economic impact. To secure this objective, the Inquiry staff were largely under the direction of Commission Counsel. They were engaged in reviewing the evidence that was brought forward at the hearings, and in assembling the evidence to be presented to the Inquiry by Commission Counsel.

The corollary was, of course, that Commission Counsel and the Inquiry staff were not allowed to put their arguments privately to the Inquiry. I ruled that the recommendations the Inquiry staff wished to develop should be presented to the Inquiry by Commission Counsel at the formal hearings. This the staff did at the close of the formal hearings, when their 800-page submission was made public.

Ordinarily, the proposals of Commission Counsel would not have been made public in this way. However, I felt they should be made public so that all participants at the Inquiry would have the fullest opportunity to challenge, support, modify or ignore their proposals. This procedure has been followed by many regulatory tribunals in the United States and I think it is a good one. It gave the pipeline companies, the native organizations, the environmental groups, northern business and northern municipalities a chance to criticize the submissions that Commission Counsel put forward on behalf of himself and the Inquiry staff. I, of course, was not bound in any way by the proposals of Commission Counsel, any more than I considered myself bound by the proposals that any other participant made.

Assessment of Impact

One of the complaints made to the Inquiry by northerners from time to time was that there had already been a plethora of committees, task forces, hearings and reports into some at least of the questions that the Inquiry was examining. Indeed, we came across many of them. But each of these reports and studies had largely been confined to a narrow subject. This has been a major flaw in impact assessment. Each department of government has tended to examine the impact of any given proposal solely within the confines of its own departmental responsibilities. Until this Inquiry was appointed, there was no basis on which an overview of the impact of the pipeline project could be made.

There has been another flaw in assessment of impact. Typically, impact assessments have focused on the individual project, and have not taken into account the cumulative effect of the project and the developments that are associated with it or that may follow. In the past, this tendency has been evident in the North, so that even when departments collaborated on a study of impact, that study was unduly confined. This limitation, which distorts rather than enlightens, represents the worst aspect of conventional impact assessment. It also suggests the necessity for developing a methodology that sufficiently comprehensive to encompass a wide range variables, a variety of conflicting interests, and a realistic spa of time.

If you are going to assess impact properly, you have t weigh a whole series of matters, some tangible, som intangible. But in the end, no matter how many experts ther may be, no matter how many pages of computer printout may have been assembled, there is the ineluctable necessity o bringing human judgment to bear on the main issues. Indeed when the main issue cuts across a range of questions spanning the physical and social sciences, the only way t come to grips with it and to resolve it is by the exercise o human judgment.

Inquiries and Government

A final word about the role of the Commission of Inquiry *vis-à-vis* the role of the Government, the role of the adviser *vis-à-vis* the role of the decision-maker. A Commissioner of Inquiry has – or ought to have – an advantage that Ministers and senior executives in the public service do not have: an opportunity to hear all the evidence, to reflect on it, to weigh it, and to make a judgment on it. Ministers and their deputies, given the demands that the management of their departments impose upon them, usually have no such opportunity.

A Commissioner of Inquiry is bound to take full advantage of these advantages, remembering that he must leave the final decision to those elected to govern. This is why I felt throughout the Inquiry that it would be wrong to take the evidence summarily or to arrive at a decision in haste. If you do that, you have lost the great advantage that the work of a Commission of Inquiry can offer to government. There are cases, such as the Alaska Highway Pipeline Inquiry, when (for reasons that were well understood) an inquiry must be carried out according to a deadline. But such cases are exceptional.

As the Law Reform Commission has said:

> In a parliamentary democracy, Parliament is supreme. There is no matter beyond the competence of the elected representatives of the people. Nor, because Parliament is democratic and representative, is there a forum better able or more qualified for debating and deciding policy questions confronting Canada.
>
> But for some tasks, the legislature may need and seek assistance. Parliament's strength is also its weakness; its political responsiveness to the current concerns of Canadians makes it difficult for legislators to grapple with complex problems that are not of immediate political concern and require considerable time for their solution.
>
> In politics, a day can be a lifetime. There are often no hours to devote to subtle but significant problems, requiring sustained inquiry and thought. The decision may ultimately rest with the legislature; but the legislature needs very good advice. [Law Reform Commission, *Commissions of Inquiry*, p. 14.]

Advisory commissions of inquiry occupy an important

place in the Canadian political system. They supplement in a valuable way the traditional machinery of government, by bringing to bear the resources of time, objectivity, expertise, and by offering another forum for the expression of public opinion.

All of this cost money. The Inquiry, by the end of fiscal year 1976-1977, cost $3,163,344. When this cost is added to the funds that were provided to the native organizations, the environmental groups, northern municipalities and northern business, which came to $1,773,918, you get a total expenditure of $4,937,262 in public funds. I should add that expenditures in the current fiscal year relating largely to preparation and publication of my report put this figure today over $5.3 million.

The work of the Inquiry took many months (the hearing began on March 3, 1975, and ended on November 19, 1976). I had to if the Inquiry was to be fair and complete. Neverthe less, the Inquiry was completed in good time. Volume One which dealt with the broad issues of social, environmenta and economic impact, and contained the basic recommenda tions of the Inquiry, was available to the Government on May 9 of this year. These basic recommendations appear on the whole to have been acceptable to the Government of Canada If the assessment made by the Inquiry has prevailed in the minds of decision-makers, it is perhaps in considerable measure a result of the process of the Inquiry.

APPENDIX 2
Inquiry Documents

There are, of course, several documents that pertain to the Inquiry. It is impossible to reproduce them all here, so I have limited myself to the five most essential items.

The Order-in-Council appointed me as the Commissioner of this Inquiry and defined my mandate.

The letter from the Honourable Jean Chrétien referred the application of Canadian Arctic Gas Pipeline Limited, and the letter from the Honourable Judd Buchanan referred the application of Foothills Pipe Lines Ltd.

The Preliminary Rulings I and II set out the procedures and rules of conduct for the Inquiry.

CANADA

PRIVY COUNCIL · CONSEIL PRIVÉ

P.C. 1974-641

21 March, 1974

WHEREAS proposals have been made for the construction and operation of a natural gas pipeline, referred to as the Mackenzie Valley Pipeline, across Crown lands under the control, management and administration of the Minister of Indian Affairs and Northern Development within the Yukon Territory and the Northwest Territories in respect of which it is contemplated that authority might be sought, pursuant to paragraph 19(f) of the Territorial Lands Act, for the acquisition of a right-of-way;

AND WHEREAS it is desirable that any such right-of-way that might be granted be subject to such terms and conditions as are appropriate having regard to the regional social, environmental and economic impact of the construction, operation and abondonment of the proposed pipeline;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Indian Affairs and Northern Development, is pleased hereby, pursuant to paragraph 19(h) of the Territorial Lands Act, to designate the Honourable Mr. Justice Thomas R. Berger (hereinafter referred to as Mr. Justice Berger), of the City of Vancouver in the Province of British Columbia, to inquire into and report upon the terms and conditions that should be imposed in respect of any right-of-way that might be granted across Crown lands for the purposes of the proposed Mackenzie Valley Pipeline having regard to

...2

(a) the social, environmental and economic impact regionally, of the construction, operation and subsequent abandonment of the proposed pipeline in the Yukon and the Northwest Territories, and

(b) any proposals to meet the specific environmental and social concerns set out in the Expanded Guidelines for Northern Pipelines as tabled in the House of Commons on June 28, 1972 by the Minister.

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL is further pleased hereby

1. to authorize Mr. Justice Berger

(a) to hold hearings pursuant to this Order in Territorial centers and in such other places and at such times as he may decide from time to time;

(b) for the purposes of the inquiry, to summon and bring before him any person whose attendance he considers necessary to the inquiry, examine such persons under oath, compel the production of documents and do all things necessary to provide a full and proper inquiry;

(c) to adopt such practices and procedures for all purposes of the inquiry as he from time to time deems expedient for the proper conduct thereof;

(d) subject to paragraph 2 hereunder, to engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants as he deems necessary or advisable, and also the services of counsel to aid and assist him in the inquiry, at such rates of remuneration and reimbursement as may be approved by the Treasury Board; and

(e) to rent such space for offices and hearing rooms as he deems necessary or advisable at such rental rates as may be approved by the Treasury Board; and

2. to authorize the Minister of Indian Affairs and Northern Development to designate an officer of the Department of Indian Affairs and Northern Development to act as Secretary for the inquiry and to provide Mr. Justice Berger with such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants from the Public Service as may be requested by Mr. Justice Berger.

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL is further pleased hereby to direct Mr. Justice Berger to report to the Minister of Indian Affairs and Northern Development with all reasonable despatch and file with the Minister the papers and records of the inquiry as soon as may be reasonable after the conclusion thereof.

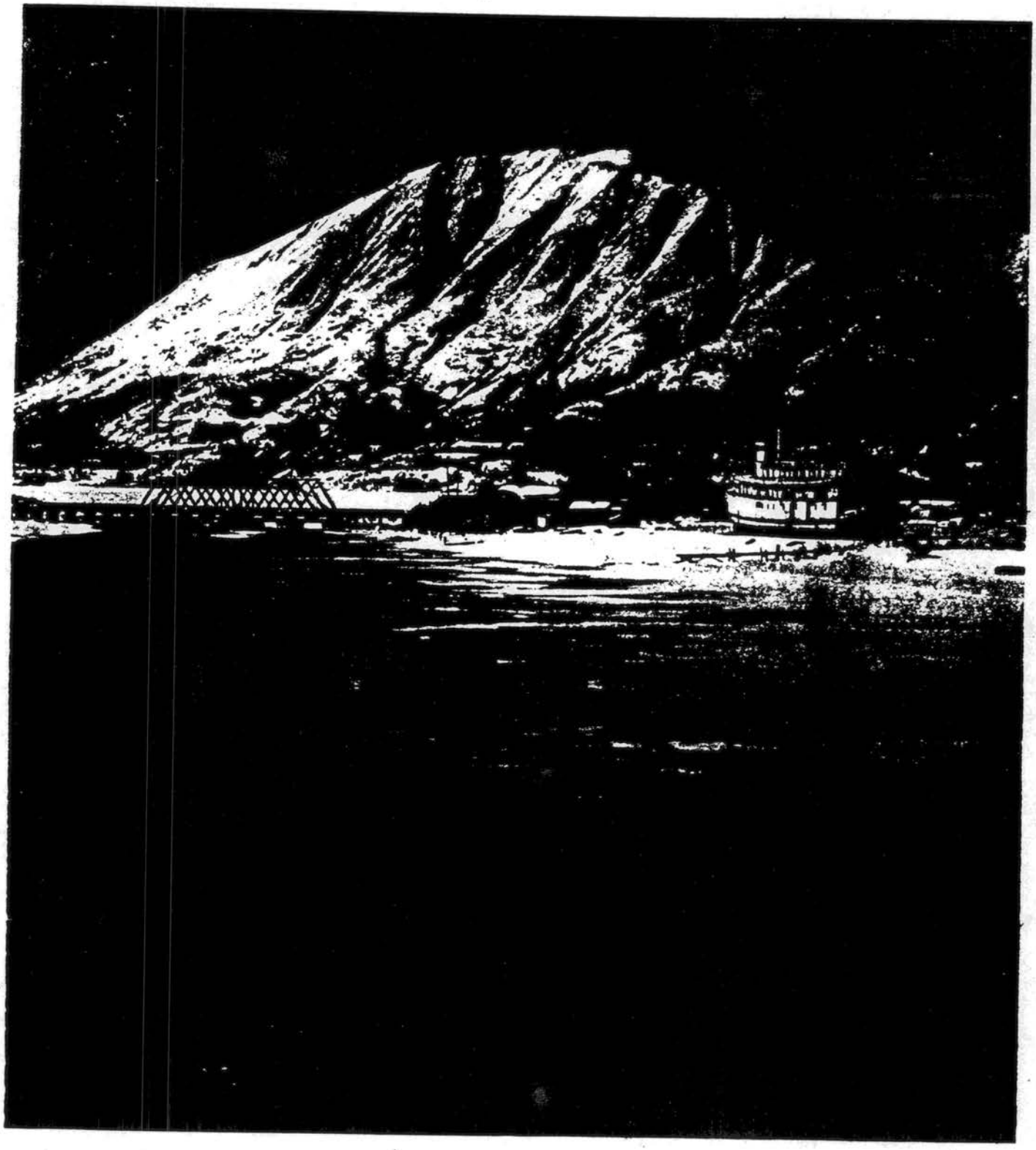
HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, with the concurrence of the Minister of Justice, is further pleased hereby, pursuant to section 37 of the Judges Act, to authorize Mr. Justice Berger to act on the inquiry.

Certified to be a true copy

Assistant Clerk of the Privy Council

Alaska Highway Pipeline Inquiry

Kenneth M. Lysyk, Chairman
Edith E. Bohmer
Willard L. Phelps



Appendices

Appendix A
Terms of Reference

1. The Board of Inquiry shall be composed of:

   (a) A Chairman appointed by the Minister of Indian and Northern Affairs.

   (b) One member nominated by the Yukon Territorial Council.

   (c) One member nominated by the Council for Yukon Indians.

2. The Board of Inquiry shall prepare and submit to the Minister of Indian and Northern Affairs a preliminary socio-economic impact statement concerning the construction and operation of the proposed Alaska Highway gas pipeline. This statement should identify:

   (a) the principal socio-economic implications of the Alaska Highway Pipeline *proposal;*

   (b) the attitude to the proposal of the inhabitants of the region it would affect;

   (c) possible deficiencies in the application of the proponent;

   (d) possible courses of action that might be taken to meet the major concerns which are identified and to correct any major deficiencies in the application.

3. To this end, the Inquiry shall:

   (a) Ensure, with the co-operation of the proponent, that information concerning the proposed pipeline is made available to Yukon communities.

   (b) Seek the views of interested communities, individuals, and organizations within the Yukon.

   (c) Hold public hearings in the Yukon to receive submissions and to facilitate the provision of information in response to questions raised before the inquiry.

   (d) Review the application for construction of the pipeline, in order to identify:

      (i) areas in which additional information should be provided by the proponent; and

      (ii) further studies that may be required.

   (e) Advise the Minister of Indian and Northern Affairs of the measures that should be taken, including arrangements for a further inquiry, to produce a final socio-economic impact statement upon which specific terms and conditions could be developed for the construction and operation of the pipeline in the event that the Alaska Highway application receives approval in principle.

4. The Government of Canada shall provide the inquiry with funds with which it may:

   (a) Engage staff and use for other purposes to assist Inquiry members in the review and assessment of the application, in the public hearings, and in the drafting of the preliminary socio-economic impact statement.

   (b) Assist in the preparation of briefs and submissions by such groups as the Inquiry considers could usefully contribute to the preparation of the impact statement.

5. A member of the Environmental Assessment and Review-Panel established by the Minister of the Environment will be present at the public hearings held by the Inquiry and will draw the attention of the Environmental Panel to any environmental matters that may be raised in those hearings.

6. The Inquiry shall adopt such methods and procedures as from time to time it may consider appropriate.

7. The Chairman shall be responsible for the effective functioning of the Inquiry, including:

   (a) the engagement, direction, and discharge of such accountants, engineers, technical advisors, clerks, reporters, and other assistants as he deems necessary, including the services of counsel, to aid and assist in the Inquiry;

   (b) the rental of offices and hearing rooms;

   (c) the management of funds provided to the Inquiry, on terms and conditions to be approved by the Treasury Board.

8. The Inquiry shall submit its report and the preliminary socio-economic impact statement to the Minister of Indian and Northern Affairs by August 1. Minority or supplementary reports may be submitted by any member of the Board who wishes to do so.