1987

IN THE MATTER OF: The Royal Commission on the Donald Marshall, Jr. Prosecution

- and -

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

- and -

IN THE MATTER OF: John F. MacIntyre and an application for funding of legal counsel

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SUBMISSION ON BEHALF OF THE DEPARTMENT OF THE ATTORNEY-GENERAL

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

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

INTRODUCTION

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

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

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

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

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

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

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

NATURE OF A COMMISSION OF INQUIRY

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

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

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

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

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

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

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

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

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

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

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

THE ORDER IN COUNCIL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FUNDING

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

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

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

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

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

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

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

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

POWERS OF COMMISSIONS OF INQUIRY

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

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

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

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

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

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

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

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

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

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

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

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

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

CHARTER OF RIGHTS AND FREEDOMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

JAMIE W. S. SAUNDERS

DARREL I. PINK

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

A. EVERS, G. GREEN
R.A. MACALPINE

1987

IN THE MATTER OF: The Royal Commission on the Donald Marshall, Jr. Prosecution

- and -

IN THE MATTER OF: An Application for Funding of Legal Counsel by:

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

- and -

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

- and -

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

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

William L. Ryan,
Stewart, MacKeen & Covert,
1959 Upper Water St.,
Halifax, Nova Scotia
COUNSEL OF BEHALF OF
THE APPLICANTS

George W. MacDonald,
Royal Commission on
the Donald Marshall, Jr.
Prosecution,
Maritime Centre, Suite 1026,
Halifax, N.S., 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

NATURE OF APPLICATIONS

1. The Governor in Council has caused an inquiry to be made into and concerning the investigation of the death of Sandford William Seale on the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall, Jr., with that death; the subsequent conviction and sentencing of Donald Marshall, Jr., for the non-capital murder of Sandford William Seale for which he was subsequently found to be not guilty; and such other related matters which the Commissioners consider relevant to the Inquiry; all pursuant to the Public Inquiries Act, R.S.N.S. 1967, c. 250, s. 1. The Applicants have been connected with the Royal Canadian Mounted Police over the course of years since the initial date of reference of the Inquiry (May 28, 1971), and indeed were employed with the Royal Canadian Mounted Police at that time. Each of the individual Applicants has had involvement with the matters under inquiry since May 28, 1971, which will be sketched briefly below.

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

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

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

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

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

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

NO MENTION of Grange

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

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

ADOLPHUS JAMES EVERS

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

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

R.A. MACALPINE

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

identification and analysis evidence was given by Sandra Catherine Mrazek.

CONSTABLE GARY GREEN

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

APPLICATION FOR FUNDING

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

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

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

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

PART II

ROYAL COMMISSION POWERS WITH RESPECT TO FUNDING

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

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

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

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

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

They were funded because:

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

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

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

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

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

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

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

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

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

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

This Honourable Commission has indicated that the traditional protective rules of procedure and rules of evidence applicable in the ordinary Courts will not be strictly applied. This increases the potential for harm to individual witnesses at the hands of counsel for other interests who are not only trained in the law, but who are knowledgeable in the art of advocacy, and the marshalling of facts. The Applicants would be totally unequipped by experience or education to defend themselves or their interests without the assistance of counsel.

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

> The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.
>
> ...
>
> ...they represent principles which had been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.
>
> We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures....This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees.

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

PART III

RELIEF SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

APPENDIX "A"

STATUTORY PROVISIONS

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

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

Governor in Council may order inquiry.

4 The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court of Nova Scotia. R. S., c. 236, s. 4.

Witnesses and document.

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

Rights of persons before misconduct found

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

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

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 and 24 (1)

Fundamental Freedoms

2. Everyone has the following fundamental freedoms: Fundamental freedoms

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

Life, liberty and security of person

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

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

APPENDIX "B"

AUTHORITIES

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

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

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

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

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

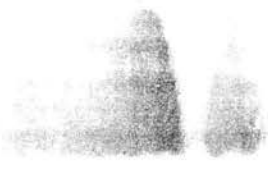
Reference Re s. 94 (2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289 (S.C.C.)

Royal Commission on the Northern Environment (Ontario)

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

Alaska Highway Pipeline Inquiry (Lysyk-Canada)

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



APPENDIX "C"

Ontario 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 4D at the Hospital for Sick Children, Toronto, between July 1st, 1980 and March 31st, 1981, and

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

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

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

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

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

O.C.1076/83

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

2) to require the summoning of such witnesses as the Commissioner deems necessary to give evidence under oath and to produce such documents and things as the Commissioner may deem requisite to the full examination of the matters he is appointed to examine and to ensure full public knowledge of the completeness of the matters referred to in these terms of reference;

3) to inquire into and report on and make any recommendations with respect to how and by what means children who died in Cardiac Wards 4A and 4B at the Hospital for Sick Children between July 1st, 1980 and March 31st, 1981, came to their deaths;

4) to inquire into, determine and report on the circumstances surrounding the investigation, institution, and prosecution of charges arising out of the deaths of the above mentioned four infants;

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 _____ Concurred _____
Attorney General 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 [signature] Attorney General

Concurred [signature] Chairman

Approved and Ordered May 24, 1984
Date

[signature] Lieutenant Governor

OC 1412/84

ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

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

CHIEF JUSTICE T. ALEXANDER HICKMAN
CHAIRMAN

ASSOCIATE CHIEF JUSTICE LAWRENCE A. POITRAS
COMMISSIONER

THE HONOURABLE
MR. JUSTICE GREGORY THOMAS EVANS
COMMISSIONER

APPENDIX "D"

PROVINCE OF
NOVA SCOTIA

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

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

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

G R E E T I N G:

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

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

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

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

the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall Jr., with that death; the subsequent conviction and sentencing of Donald Marshall Jr., for the non-capital murder of Sandford William Seale for which he was subsequently found to be not guilty; and such other related matters which the Commissioners consider relevant to the Inquiry;

The Governor in Council is further pleased to:

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

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

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

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

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

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

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

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

PROVINCIAL SECRETARY

APPENDIX "E"

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

The Honourable Mr. Justice

Samuel G. M. Grange

Supreme Court of Ontario

Commissioner

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

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

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

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

(h) Compensation

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

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

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

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

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

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

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

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