May 7, 1987

SUMMARY OF SUBMISSIONS ON FUNDING

JURISDICTIONAL ARGUMENTS

1. Terms of Reference

(a) "...to retain the services of legal counsel...who in the opinion of the Commissioners are required for the purposes of the Inquiry..."

This argument is advanced by - MacIntyre (Page 13); Evers et al. (Page 10); Donald MacNeil (Page 2); Black United Front (Page 1).

It is argued that this provision in the Terms of Reference permits the Commission to retain counsel and to fund such counsel as an Inquiry expense of the Commission. The Black United Front argues further that it should have the right to name the counsel so retained.

Support for this argument is said to be found in the Grange Commission, the Royal Commission on the Northern Environment, the Alaska Highway Pipeline Inquiry and the Berger Inquiry (MacKenzie Valley Pipeline).

Grange Commission:

Nothing in the Terms of Reference referred to participant funding. However, the persons whose conduct was called into question were apparently represented by provincially-funded counsel. Commissioner Grange reasoned that (see MacIntyre - Page 14) the funding was based on the potential for implication in the

Grange Commission (Continued:

deaths. However, it does not appear that the Commission was involved in the decision to so fund, nor was the Commission's jurisdiction called into question.

The Commission does offer (see MacIntyre Pages 14-15) some gratuitous comments on compensation for Nelles for legal costs involved in the preliminary inquiry, but those comments are not relevant here.

Royal Commission on the Northern Environment:

(See MacIntyre - Appendix F (1)

This Ontario Commission was established in July 1977. Section 7 of the Terms states that:

> "The Honourable, the Minister of the Environment further recommends that 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."

Schedule B set out detailed criteria to assist the Commission in its distribution of funds.

No issue of jurisdiction arose.

Alaska Highway Pipeline Inquiry (Lysyk):

(See MacIntyre - Appendix F (2))

The Terms of Reference for this Federal Inquiry included the following:

> 4 (b) "The Government of Canada shall provide the Inquiry with funds which it may assist in the preparation of briefs and submissions by such groups as the Inquiry considers usefully contribute to the preparation of the Impact Statement".

Alaska Highway Pipeline Inquiry (Continued):

> 7 (c) "The Chairman shall be responsible for the effective functioning of the Inquiry, including the management of funds provided to the Inquiry, on terms and conditions to be approved by the Treasury Board."

Berger Commission (See MacIntyre Appendix F (2):

Mr. Justice Berger recommended to the Government of Canada that funding be provided to various groups to enable them to "participate on an equal footing" with the pipeline companies. As he put it at Page 225:

> "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."

Government saw to it that funds were provided and the participants had to account to the Inquiry for the money spent. No issue of jurisdiction was raised and Commissioner Berger states at Page 226:

> "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."

1. (b) "...to inquire into ... other related matters which the Commissioners consider relevant to the Inquiry."

This argument is raised by the Union of Nova Scotia Indians (Page 1).

The argument is that "the parties who will participate and the terms and means of such participation seem clearly relevant".

No authority is offered for this argument.

(c) "...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,..."

This argument is raised by Oscar Seale - Pages 1-3.

The argument is that the calling of witnesses and compiling other evidence, etc., are the substantive aspects of the Commission's task. Standing and related matters are procedural items which must be addressed prior to the commencement of the substantive phase. It is argued that the jurisdiction to entertain an application for funding is no different from any other question of practice or procedure, including entertaining applications for standing. Support is suggested in Berger, Grange and Parker and that, in each of these cases,

> "It appeared to rest with the discretion of the Commission whether or not to recommend to the Government that funding be provided to the applicants."

This comment appears to be taken from Mr. Justice Parker - Transcript Page 3748 - a lengthy extract is appropriate.

"Some counsel are here because they represent various parties who may be affected by the outcome of this Commission. They, perhaps, are in a different position than some of the other counsel who appear for witnesses, say who are only here to advise their client while that client is giving evidence. Then, again, there are counsel here who have standing because they are interested in the Commission, but they do not act for parties that are being affected or may be affected.

The two that have asked for funding so far are in the last category. They are not acting for parties that may be directly affected by the outcome in the sense that Mr. Stevens is. It is true that, on occasion, funding has been granted to parties. In certain circumstances funding may be justified. A clear case, it would seem to me, would be the Inquiry into the Hospital for Sick Children where certain persons were funded for their costs.

However, so far as this Inquiry is concerned, the Terms of Reference themselves make no reference to public funding. It would, therefore, seem to be in my discretion whether or not I recommend to the Government that funding be provided to the applicants. I am not satisfied that such a request is justified under the present circumstances and I decline to recommend."

There was no argument on the issue of jurisdiction to either entertain an application for or recommend funding.

2. Common Law

The argument is advised that the Commission has common law authority to appoint counsel in certain circumstances.

See MacIntyre - Pages 18-25/Evers et al. - Pages 13-15

The argument is said to be supported by cases which deal with the jurisdiction of the Court to appoint counsel in criminal cases.

Re Ewing and Kearney (1974)

The British Columbia Court of Appeal split 3:2 although whether or not there was an obligation on the State to provide counsel for two accused. The minority (Farris C.J.B.C., and Branca, J.A.) concluded that an accused has an inherent right to a fair trial, and that a fair trial could not be assured without the assistance of counsel. This counsel cannot be obtained because of lack of funds, the minority concluded that the State has an obligation to provide one.

The majority did not agree that counsel was essential for a fair trial in all cases. However, the question was left open that the appropriate action be taken by the Trial Judge in the event that he felt that a fair trial was not possible without counsel in a particular instance. The majority distinguished between the right to retain counsel per se and the right to have counsel provided, but concluded at Page 365:

> I reject the contention that it is always necessary to to appoint counsel but I did not follow that is absolutely 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 certain circumstances a Trial Judge might conclude that defence counsel was essential to a fair trial.

This case deals only with the appointment of counsel, and did not address the matter of funding.

This matter was touched on in Re White and the Queen (1976). The Court concluded that there was no absolute right to have counsel appointed but that the power to sole appoint was a discretionary one resting with the Court in each case and to be applied on the basis of certain principles, set out on Pages 286-287 of the decision and reproduced in MacIntyre at Pages 20-21.

The matter of payment is referred to at Page 287, with the practice evidently being that the Court did not consume itself with the matter of payment. Either no payment was made, or it was made ex gratia by the Attorney General. Interestingly, there is a reference at Page 288 to the Canadian Bar Association Code of Professional Conduct in which it is stated that a lawyer has no right to decline employment where he is appointed as counsel by the Court. Presumably, those advancing the argument that the Commission has power to sole appoint would have to accept the ethical obligation to act without payment.

This argument is premised on the Commission's having similar inherent jurisdiction to a Court. This is apparently based on the potentially significant consequences for any particular participant and on Section 4 of the Public Inquiries Act. (See Evers et al. Page 13).

Section 4 of the Public Inquiries Act:

> 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.

Against us is the position taken by the Supreme Court of Canada in Keable (1978) cited by the Department of the Attorney General on Page 10 of its submission:

> "...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....
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> 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."