

**ROYAL COMMISSION ON THE  
DONALD MARSHALL, JR., PROSECUTION**

**APPLICATION FOR FUNDING**

Held: May 13, and 14, 1987, 10:00 a.m., World Trade and  
Convention Centre, Halifax, Nova Scotia

Before:

- Chief Justice T.A. Hickman, Chairman
- Assoc. Chief Justice L.A. Poitras, Commissioner
- Hon. G.T. Evans, Commissioner

Ms. L. Dyer, Commission Secretary

Counsel:

Mr. G. MacDonald, Q.C., Mr. W. Spicer & Mr. D. Orsborn  
Commission Counsel

Mr. R. Pugsley, Q.C. & Mr. D. Murray: Counsel for John F. MacIntyre

Mr. B. Wildsmith: Counsel for Union of N.S. Indians

Mr. T. Ross: Counsel for the Black United Front and Oscar N. Seale

Mr. J. Rogers for Mr. W.L. Ryan: Counsel for Messrs. Evers,  
McAlpine, & Green

Mr. M. MacDonald: Counsel for Sgt. Herb Davies

Mr. J. Saunders & Mr. D. Pink : Counsel for the Attorney General  
of Nova Scotia

Mr. Jim Bissell & Mr. A. Pringle: Counsel for the R.C.M.P. and  
Correctional Services Canada

Mr. M. G. Whalley, Q.C. : Counsel for the City of Sydney  
Police Commission

Mr. C. Ruby, Ms. M. Edwardh & Ms. A. Derrick: Counsel for  
Donald Marshall, Jr.

Court Reporter: Margaret E. Graham

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May 13, 1987 - 10:00 a.m.

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May I welcome you to the first Public Hearing of the Royal Commission on the Donald Marshall, Jr. prosecution. Since the Commission was created in October, 1986, commission staff have been actively engaged in collecting information on the matters outlined in the terms of reference, voluminous transcripts and other documentation have been reviewed and potential witnesses have been located and interviewed. It was the commission's hope and firm intention to be in a position at this time to commence public hearings on the substantive issues referred to it. However, certain parties granted standing by the commission have expressed their concern that unless financial assistance is made available, they will not be able to adequately present their point of view or protect their interest during the proceedings. These parties have applied formally to the commission to convene a hearing so that representations may be made on this issue. This hearing today has been convened in response to those applications. The applicants have asked the commission to consider requiring the Provincial Government of Nova Scotia to provide funding for legal counsel to be retained by such parties so that they may be fairly represented at the public hearings of the commission. Alternatively, the applicants

OPENING REMARKS - CHAIRMAN

1 have asked the commission to make recommendations to  
2 the Provincial Government that such funding be provided.

3 In January, 1987, advertisements were inserted in  
4 newspapers throughout Nova Scotia asking any person or  
5 party who considered they had an interest in the commission  
6 and who wished to be afforded the opportunity to partici-  
7 pate to apply for standing. Applications were received  
8 and two classes of standing were defined. A grant of  
9 full standing entitles a person to cross-examine witnesses,  
10 make submissions to the commission, and participate fully  
11 in the hearings. A grant of observe status entitles  
12 the party to be present and have questions directed to  
13 witnesses through commission counsel and to file a written  
14 submission with the commission at the appropriate time.  
15 The commission did not request or seek out applications  
16 from anybody.

17 Standing having been granted, various parties now  
18 seek to have the Province of Nova Scotia provide funding  
19 for legal counsel they wish to retain to represent their  
20 interests at the hearing.

21 In effect, these parties are now asking the Commission  
22 to determine whether their participation is in the public  
23 interest to such an extent that the public should incur  
24 the cost of their representation. Such a question can  
25 only be answered in relation to the focus and scope of



OPENING REMARKS - CHAIRMAN

1 the Commission and it is vital, therefore, that we set  
2 out in some detail the scope of the inquiry as we view  
3 it at the present time.

4 The Inquiry was constituted by virtue of Order-in-  
5 Council to make "recommendations to the Governor-in-Council  
6 respecting the investigation of the death of Sanford  
7 William Seale on the 28th and 29th day of May, 1971.  
8 The charging and prosecution of Donald Marshall, Jr.,  
9 with that death. The subsequent conviction and non-  
10 capital murder of Sanford William Seale for which he  
11 was subsequently found...Marshall for which he was found  
12 to be not guilty and such other related matters which  
13 the Commissioners consider relevant to the Inquiry."

14 In order to make meaningful recommendations to govern-  
15 ment, the Commission must, of necessity, review the actual  
16 circumstances of the Donald Marshall case. This includes  
17 the murder investigation, the charging of Mr. Marshall,  
18 the conduct of his trial and appeal, his years in prison,  
19 his eventual acquittal by the Court of Appeal of Nova  
20 Scotia, and the process through which compensation was  
21 granted to him. The two R.C.M.P. reinvestigations of  
22 the murder will also be reviewed. Bringing out the facts  
23 will give the Commission an understanding of what happened.

24 But that is only a beginning. It is not enough to  
25 examine minutely one incident and from that to expect

OPENING REMARKS - CHAIRMAN

1 to suggest changes within a complex system of adminis-  
2 tration of justice. In order to develop meaningful recom-  
3 mendations, the most important part of our mandate, all  
4 contributing or potential contributing factors must be  
5 carefully reviewed within the context of the current  
6 state of the administration of justice in Nova Scotia.  
7 It will be necessary to examine the role of the Attorney  
8 General as a member of cabinet in criminal prosecutions.  
9 The relationship between prosecutors, defence counsel,  
10 and the police, both provincial and R.C.M.P. Who makes  
11 the decisions to prosecute and how and on what basis  
12 these decisions are made. The organization of police  
13 forces in Nova Scotia and how they interact with the  
14 communities they police.

15 Standing has been granted to the Black United Front  
16 and the Union of Nova Scotia Indians. Both of these  
17 groups state that minorities in the province are not  
18 treated fairly or equitably in the justice system and  
19 suggest that racism and discrimination may have contributed  
20 to the conviction of Donald Marshall, Jr. These charges  
21 must be investigated and examined to determine if these  
22 factors play any part in the administration of justice  
23 in Nova Scotia.

24 It should be apparent, therefore, that the acativities  
25 of individual people and of various authorities are to

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1 | be reviewed and questioned and that extremely important  
2 | public issues will be considered by the Commission.

3 | On the basis of understanding what happened to Donald  
4 | Marshall, Jr. and after having analyzed the present func-  
5 | tioning of the criminal justice system in Nova Scotia..  
6 | We will make recommendations for the future which are  
7 | designed to increase the confidence of all Nova Scotians  
8 | in the system of administration of justice.

9 |       It is important also to understand the role which  
10 | the Commission requires its own counsel to perform.  
11 | The Commission has retained counsel and directed them  
12 | to carry out a full investigation of the events to identify  
13 | and interview witnesses, to collect and collate all documen-  
14 | tary evidence necessary for presentation to the Commission.  
15 | To obtain such experts as are necessary to carry out  
16 | research and present opinions to the Commission and to  
17 | do all other necessary and incidental work to insure  
18 | that all issues are considered by the Commission and  
19 | that all relevant and necessary evidence is presented.  
20 | It is the Commission's intention that its counsel will  
21 | call every witness to be heard by the Commission. In  
22 | order that they can properly fulfill their role, Commission  
23 | counsel will not assume the position of advocates for  
24 | any particular point of view. To the extent, therefore,  
25 | that any party wishes to press a particular point of

OPENING REMARKS - CHAIRMAN

1 | view or adopt an adversarial position with another party,  
2 | this must be done through his or her counsel. We have  
3 | asked the parties seeking public funding for legal counsel  
4 | to direct their attention to at least the following issues:  
5 | (a) whether the Commission has any jurisdiction to enter-  
6 | tain the application for funding;  
7 | (b) what relief the Commission has jurisdiction to provide:  
8 | example, order or recommendation;  
9 | (c) the necessity for and the extent of funding required  
10 | by the applicants from the Province of Nova Scotia.

11 | Counsel for all parties granted standing were asked  
12 | if they intended to participate and, if so, they were  
13 | required to submit in advance written briefs of their  
14 | arguments. The following applicants have done so and  
15 | will be heard in the following order:

16 | John F. MacIntyre

17 | Union of Nova Scotia Indians

18 | Black United Front

19 | Oscar Nathaniel Seale

20 | The Late Donald C. MacNeil, Q.C., the Estate of

21 | Officer Adolphus Evers, R.C.M.P.

22 | Officer Richard McAlpine, R.C.M.P.

23 | Officer Gary Green, R.C.M.P.

24 | Sergeant Herb Davies, R.C.M.P.

25 | Staff Sergeant H. F. Wheaton, R.C.M.P.

Inspector D. B. Scott, R.C.M.P.

SUBMISSION - MR. PUGSLEY

1       Once the applicants have been heard, we will ask  
2       counsel for the Attorney General to respond. I would  
3       ask that when counsel rise to present the argument or  
4       submission on behalf of their client that they identify  
5       themselves for the record.

6       I now call upon counsel for John F. MacIntyre.

7       MR. PUGSLEY

8       Mr. Chairman, Members of the Commission, my name  
9       is Ronald Pugsley. I'm appearing as counsel for John  
10       MacIntyre and associated with me is Donald Murray.

11       Mr. Chairman, Members of the Commission. It is my  
12       respectful submission that my client, John MacIntyre,  
13       occupies a very unique position in these hearings. His  
14       investigation, both as to style and content, have been  
15       attacked by Donald Marshall, the key witnesses of the  
16       trial, certain members of the R.C.M.P., the media, and,  
17       indeed, a member of the Sydney City Police Force has  
18       criticized his performance or lack of same at the time  
19       the crime was first reported. One can reasonably  
20       anticipate that the attacks will continue throughout  
21       the course of these hearings and, indeed, be presented  
22       in a far more articulate and precise manner than heretofore.  
23       Not only by the participants themselves but also because  
24       they are represented by able and experienced counsel  
25       retained on their behalf and funded by the Province of

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1 Nova Scotia and the Government of Canada Treasury Board  
2 through the offices of the R.C.M.P.

3 At this point in time, it would appear that John  
4 MacIntyre has the most to lose as a consequence of the  
5 proceedings that will be held. I say "appear" because  
6 it will be my submission if funding is granted, after  
7 the evidence has been adduced, that the extreme criticism  
8 of his actions is unwarranted. Unless he has the services  
9 of counsel, he could be in substantial jeopardy and I  
10 intend no disrespect to the Commission and its able counsel  
11 when I make that comment.

12 In view of the adversarial approach that some of  
13 the counsel who are funded will take, and rightly take,  
14 John MacIntyre requires the services of counsel.

15 But this submission for funding is based on a broader  
16 submission in that John MacIntyre requires fundings for  
17 his protection, although in view of the pivotal role  
18 he played in the investigation, that by itself should  
19 be proper ground on which funding should be awarded.

20 The Commission's mandate is three-fold, and you referred  
21 to that a moment ago yourself, Mr. Chairman. Firstly,  
22 to inquire into; secondly, to report your findings; and,  
23 thirdly, to make recommendations respecting, inter alia,  
24 the investigation of the death of Sandy William Seale  
25 and the charging and prosecution of Donald Marshall,

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1 | Jr., with that death. The point of view of Mr. MacIntyre  
2 | will certainly be advanced by him when he gives viva  
3 | voce evidence whether or not he has counsel there in  
4 | support of him. One would anticipate that it might be  
5 | adduced more cogently if he was examined at the outset  
6 | by his own counsel rather than by others. But that aside,  
7 | the real loss to this Commission, if he is not funded,  
8 | will be in the absence of cross-examination of the critical  
9 | witnesses by counsel for John MacIntyre as well as the  
10 | absence of submissions presenting the MacIntyre view  
11 | at the end of the hearing.

12 | In my submission, this will be a serious deficit,  
13 | a serious void. Mr. MacIntyre's involvement was critical  
14 | throughout the investigation and, indeed, in his presence  
15 | at trial, although he was not, of course, called at trial.  
16 | The three key witnesses, Chant, Pratico, and Harriss,  
17 | subsequent to trial have stated they gave evidence at  
18 | trial because, in part, of what MacIntyre did or said  
19 | to them. Not to have the evidence of these three witnesses  
20 | tested before you by counsel who represents MacIntyre  
21 | and MacIntyre alone will, in my respectful submission,  
22 | create a void that will seriously affect your ability  
23 | to come to the proper conclusions and recommendations  
24 | that you have been charged with making.

25 | John MacIntyre is presently 68 years of age. He

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1 is retired. He lives in Sydney where he has resided  
2 all his life with his wife. In March of 1942, he joined  
3 the City Police Department. In 1950, he was assigned  
4 to the investigation branch. In 1955, he was appointed  
5 detective/sergeant. In June of 1966, sergeant of detectives.  
6 In October of '73, deputy chief of police. In December  
7 of 1976, chief of police and on May 31st, 1984, he retired.  
8 He headed the investigation into the homicide of Sandy  
9 Seale. As a result of that investigation, Donald Marshall,  
10 Jr., was charged with murder and arrested by John MacIntyre.  
11 John MacIntyre had personally interviewed all the key  
12 witnesses in the investigation--Donald Marshall, Jr.,  
13 John Pratico, Robert MacKay, Maynard Chant, Terrance  
14 Gushue, Patricia Harriss, Mary O'Reilly, Catherine Anne  
15 O'Reilly, and others. He reported his findings to the  
16 late Donald MacNeil, Q.C., the crown prosecutor. John  
17 MacIntyre was not called before the Appeal Division of  
18 the Supreme Court of Nova Scotia to give evidence in  
19 1982.

20 Donald Marshall brought action in January of 1983  
21 against John MacIntyre, William Urquhart, who assisted  
22 John MacIntyre, and the City of Sydney for, among other  
23 things, the fabrication of false and misleading evidence  
24 against Donald Marshall, Jr., which allegedly led to  
25 his conviction.



1 I have given to my friend, Mr. MacDonald, copies  
2 of the Originating Notice that were issued on behalf  
3 of Donald Marshall, Jr., and I might just take a brief  
4 moment to refer to the allegations that were made by  
5 him in his civil action against MacIntyre to give the  
6 Commission a feeling for the adversarial position that  
7 I believe that Donald Marshall, Jr.'s counsel will take  
8 at these hearings. He says in part... In the Statement of  
9 Claim, there's a general allegation of negligence in  
10 Paragraph 6(a). Mr. Marshall goes on to allege the defen-  
11 dants, which include MacIntyre, "gave false and misleading  
12 information to Maynard Chant, a witness for the crown  
13 at the trial of the plaintiff in November, 1971 to the  
14 effect that the former had been seen in the vicinity  
15 of the murder by the crown witness, John Pratico. The  
16 defendants exerted pressure on Mr. Chant to state falsely  
17 that he had witnessed the plaintiff stab the deceased.  
18 The defendants coerced John Pratico, a witness for the  
19 crown at the trial of the plaintiff in November, 1971  
20 through threat of imprisonment to state falsely that  
21 he had witnessed the plaintiff stab the deceased. The  
22 defendants pressured Patricia Harriss, a witness for  
23 the crown at the trial of the plaintiff in November,  
24 1971 by means of lengthy and persistent interrogation  
25 on the eve of June 17, 1971 to contradict her initial

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1 statement and falsely testify to a version of events  
2 as suggested to her by the said defendants."

3 These allegations were substantiated by the individuals  
4 I refer to. Patricia Anne Harriss, in an affidavit of  
5 July 22nd, 1982 states that:

6 I recall the night June 17, 1971  
7 vividly and that the said MacIntyre  
8 and Urquhart continuously went  
9 over my knowledge of the events  
10 of the evening of May 28, 1971  
11 and repeatedly told me what I  
12 should have seen on that evening  
13 in Wentworth Park. That again  
14 on the night of June 17/18, 1981,  
15 I was interviewed by the said  
16 MacIntyre and Urquhart and gave  
17 to them a signed written statement  
18 at 1:20 a.m. on June 18, 1987  
19 after having been with them contin-  
20 uously for over five hours.

21 Her evidence before the Appeal Division of the Supreme  
22 Court of Nova Scotia states, in part:

23 Through the long hours of being  
24 in the police station, my statement  
25 was changed and I was scared  
and didn't want to mention it.  
There was long hours of going  
over it and the word 'purgery'  
was brought up a lot and they  
didn't seem to believe that I  
had seen these two characters.  
All I can say is that it was  
a good many of hours, a lot of  
going over what I had seen that  
night. It was very unpleasant.

26 John Lewis Pratico, who did not give evidence before  
27 the Appeal Division, did, however, file an affidavit  
28 before that court and he said, in part:

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1           That I stated I had witnessed  
2           the murder of Sandy Seale as  
3           referred to in Exhibit "C" herein  
4           as a result of the said John  
5           MacIntyre accusing me of having  
6           been a witness to the murder  
7           and threatening to jail me unless  
8           I stated I did witness the murder  
9           and I was further informed by  
10          the said MacIntyre and Urquhart  
11          as to what I had purportedly  
12          witnessed of the murder and agreed  
13          out of fear with them.

14           The affidavit of Maynard Chant, dated July 14, 1982,  
15           is to the same extent, to the same effect:

16           I gave the statement referred  
17           to in Exhibit "C" to MacIntyre  
18           and Urquhart knowing its contents  
19           were not true because of pressure  
20           from MacIntyre and Urquhart who  
21           insisted I had witnessed the  
22           Seale murder. I was afraid and  
23           because MacIntyre and Urquhart  
24           of the Sydney City Police told  
25           me I had witnessed the murder  
            and was seen by another witness,  
            who I believe was John Pratico.

            And to the same extent, to the same effect, rather,  
            Mr. Chant gave evidence before the Appeal Division of  
            the Supreme Court of Nova Scotia.

            The R.C.M.P. investigation conducted by Sergeant  
            Wheaton says, in part, that I understand that counsel  
            for the Commission has this voluminous document but it  
            says, in part:

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1 "It would appear from this investi-  
2 gation that our two eyewitnesses  
3 to the murder lied in the stand  
4 and that the other main witness,  
5 Harriss, lied as well under pressure  
6 from the Sydney City Police."

7 What individual, and I say this with respect to the  
8 Commission, has the most to lose during the course of  
9 the Commission hearings? It's certainly not Donald Mar-  
10 shall, Jr., although I recognize the importance and the  
11 absolute essential matter of him being represented by  
12 counsel and having a full opportunity to present his  
13 case. And I do not, in any way, disparage that decision  
14 of the Attorney General's office.

15 Each one of the key witnesses in this hearing will  
16 be laying the prime responsibility for the miscarriage  
17 of justice relating to Donald Marshall on John MacIntyre.

18 Requests, as you know, have been directed to the  
19 Attorney General of Nova Scotia for funding of John MacIntyre.  
20 That request has been turned down by the Executive Council,  
21 who have replied in part to me. The only fees for profes-  
22 sional services to be reimbursed by the Provincial Govern-  
23 ment will be those incurred by and on behalf of Donald  
24 Marshall, Jr., and those incurred by the Attorney General's  
25 department in connection with persons who were in the  
direct employ of this department at times relative to  
the Inquiry. There was also a suggestion in a letter  
I received from Mr. Donahoe of funding by the Sydney

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1 City Police Department. I have given to Mr. MacDonald,  
2 your counsel this morning, a letter from Mayor Manning  
3 MacDonald, dated May 11th, 1987 addressed to my client:

4 Dear Mr. MacIntyre:

5 This will confirm our conversations  
6 during the past number of months  
7 concerning your request for funding  
8 for legal counsel for the above-  
9 noted Inquiry. The Sydney Police  
10 Commission has discussed this matter  
11 and I have to inform you that they  
12 feel they cannot grant your request  
13 and that no such funding is avail-  
14 able to you from the Sydney Police  
15 Commission or the City of Sydney."

16 It seems inappropriate and, indeed, unseemly for  
17 the Government of the Province of Nova Scotia to prefer  
18 one citizen over another to fund a person to enable him  
19 to retain independent counsel to bring forth alleged  
20 acts of wrongdoing against another citizen of this province,  
21 who has requested the same advantage of funding but has  
22 been refused.

23 Now what authority does the Commission have to respond  
24 favourably to this request? A mandate of a Commission  
25 which the Chairman referred to this morning stated, in  
part:

"The Governor-in-Council is further  
pleased to, Sub(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."

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1       What are the purposes of the Inquiry? The purposes  
2 of the Inquiry have been set forth by you, Mr. Chairman,  
3 this morning in the broad terms that you have enumerated  
4 to conduct a fair and impartial Inquiry and to insure  
5 that that is done, it is my respectful submission that  
6 the authority is granted to the Commissioners under this  
7 broad mandate to retain services of legal counsel who  
8 are required for the purposes of the Inquiry, is a phrase  
9 that does include retaining services of counsel for John  
10 MacIntyre, for counsel is required for the purposes of  
11 the Inquiry, as I read those broad words to insure that  
12 this Inquiry is conducted not only in fairness to John  
13 MacIntyre, as I said earlier, but I put the question  
14 of funding on a broader scope than that, to insure that  
15 witnesses are tested, witnesses who will be antagonistic  
16 and adversarial to him, to insure that their viva voce  
17 evidence is tested by counsel who have MacIntyre's view  
18 in mind alone.

19       Your Chairman referred this morning to the position  
20 that counsel for the Commission is going to take. A  
21 full investigation of the events; all relevant and necessary  
22 evidence; that counsel will call every witness; but they  
23 are not to assume the position of advocate for any particular  
24 point of view and certainly one would not expect that  
25 counsel for the Commission would assume the position

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1 of John MacIntyre in this Inquiry. But someone must,  
2 Mr. Chairman, someone must take up the cudgels for him  
3 in that regard. In view of the approach, in view of  
4 the slant that will be taken by the key witnesses who  
5 gave evidence at trial, and by Donald Marshall, Jr., himself.

6 So my first submission is that the Commission does  
7 have the power to retain services of counsel for MacIntyre  
8 under the broad words that are set forth in Sub(2).  
9 If that submission does not find favour with you, then  
10 my alternate submission would be that the Commission  
11 should in the strongest of terms make recommendations  
12 to the Province of Nova Scotia that the province fund  
13 counsel for Mr. MacIntyre.

14 And certainly there seems to be adequate precedent  
15 in the past for recommendations of this kind. I refer,  
16 in particular, to the MacKenzie Valley Pipeline Commission,  
17 under Mr. Justice Berger, where the mandate was substantially  
18 similar to the mandate that was granted to the Commission  
19 here. Under the Order-in-Council in March of 1974, in  
20 part, Mr. Justice Berger was authorized to do all things  
21 necessary to provide a full and proper inquiry and under  
22 Sub(d) "to engage the services of counsel to aid and  
23 assist him in the inquiry at such rates of remuneration  
24 and reimbursement as may be approved by the Treasury  
25 Board."

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1 Our Order-in-Council says:

2 "Direct the Commissioners to retain  
3 the services of legal counsel,  
4 et cetera, in the opinions of  
5 the Commissioners who are required  
6 for the purposes of the Inquiry."

7 Substantially similar terms of reference.

8 Mr. Justice Berger commented:

9 "An inquiry of this scope has  
10 to consider many interests if  
11 such an inquiry is to be fair  
12 and complete. All of those interests  
13 must be represented. On my recom-  
14 mendation, funding was provided  
15 by the Government of Canada."

16 The Grange Inquiry, provided under the Order-in-Council  
17 granted April 21st, 1983:

18 "And that he shall have authority  
19 to engage such counsel, investi-  
20 gators and other staff as he  
21 deems it proper at rates of remuneration  
22 and reimbursement to be  
23 approved by the management board."

24 Apparently, his Lordship was requested by the Government  
25 of Ontario to make recommendations to that government  
as to who should have funding for counsel. He responded  
to that request by suggesting that all nurses on the  
Trainor team would have funding to enable each of them  
to retain separate counsel and, in addition, the families  
of each one of the children who had died were granted  
funding for separate counsel as well.



1 | Those two inquiries, in my respectful submission, are of  
2 | some assistance when attempting to focus on recommendations  
3 | that might be appropriately made by this Commission.

4 |       We have a most unusual and unique situation in this  
5 | case. We, sometime after the Order-in-Council was passed  
6 | appointing this Commission, the Nova Scotia government agreed  
7 | to pay all of Donald Marshall's legal fees, or at least initial-  
8 | ly, part of them. Fees with respect to any counsel he retained  
9 | while he was giving evidence before this Inquiry. As a conse-  
10 | quence of representations made by Mr. Ruby on behalf of Mr.  
11 | Marshall, the Province agreed to pay counsel throughout.

12 |       In addition, the Government of Nova Scotia has elected  
13 | to fund all those employed by the Attorney General's Depart-  
14 | ment. The RCMP, the Treasury Board is funding, at least  
15 | in part, RCMP officers who will be called before the Commission  
16 | and I understand that the Sydney City Police, although Mr.  
17 | Whalley is here to speak in the regard, are funding him  
18 | to appear on behalf of certain members of the Sydney City  
19 | Police force.

20 |       How can John MacIntyre be affected by this Commission?  
21 | He can certainly be affected during the course of the hearings  
22 | by evidence given by witnesses, such as Harriss, Pratico  
23 | and Chant and Donald Marshall, factual evidence given by  
24 | witnesses. He can be affected by the opinion evidence given  
25 | by witnesses at this hearing. Sergeant Wheaton, among others,

SUBMISSION - MR. PUGSLEY

1 in the RCMP. He can be affected by the cross-examination  
2 of counsel whose attitude towards him will be adversarial,  
3 particularly the attitude of Donald Marshall's counsel who  
4 is funded. And particularly, the attitude of Sergeant Wheaton,  
5 who is funded, at least in part. So that he can be affected  
6 during the course of the hearings by the evidence given and  
7 by the appearance and activities of counsel.

8 He can also be affected, of course, by the results of the  
9 Commission's findings. And I recognize that there are, of  
10 course, limits on that, that have not been set forth in the  
11 mandate but, as I understand the law, Mr. Justice Dixon as  
12 he then was, in the DeLorean case said,

13 "The Order-in-Council requires the Commission  
14 only to inquire and report to the Attorney  
15 General but the action taken will rest with  
the Attorney General."

16 It could take the form of prosecutions and, presumably, recom-  
17 mendations that are made by this Commission, and you've been  
18 asked for your recommendations could be recommendations that  
19 prosecutions be taken.

20 Mr. Justice Schroeder, in the Ontario Crime Commission  
21 case stated,

22 "In the present inquiry allegations of a very  
23 grave character have been made against the  
24 applicants impugning to them the Commission  
25 of very serious crimes. It is true that  
they are not being tried by the Commission  
but their alleged misconduct has come under  
the full glare of publicity."

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1 Without wanting to trespass, or without trying to be  
2 in a position of advising the Commission as to what are the  
3 limits that are imposed on you, I suppose they're somewhat  
4 similar to the limits imposed on Mr. Justice Grange by the  
5 two Orders-in-Council that were passed by the Ontario government  
6 in May of 1984 and April 1983, "to comment fully on the conduct  
7 of any person provided that such comment does not express  
8 any conclusion of law regarding civil or criminal liability."  
9 But, in any event, the recommendations that are made by this  
10 Commission can certainly have a profound effect on John MacIntyre.

11 With respect to his requirement for funding, reference  
12 is made in the affidavit that is filed before you to his  
13 financial circumstances. I think there is three references,  
14 if I recall correctly, they're near the end of the affidavit.

15 Under paragraph 29, "I've instructed my counsel to make  
16 this application to this Honorable Commission and this applica-  
17 tion is made on my behalf rather on behalf of my counsel.  
18 At the present time my counsel is only retained for the purposes  
19 of this application for funding because I am not in a financial  
20 position to retain them for purposes of representing me through-  
21 out the Royal Commission hearings."

22 And on the previous page, page 12, under paragraph 27  
23 just before, three or four lines before the beginning of  
24 paragraph 28,

25 "I honestly believe that in order to have  
this reasonable opportunity that I must  
be put in a financial position so that I

SUBMISSION - MR. PUGSLEY

1           can retain independent counsel of my choice  
2           for the proceeding before the Royal Commis-  
3           sion."

4           And I believe that there is an earlier reference on  
5           another page, yes, on page 9, paragraph 21.

6           "I am unaware of the nature or extent of  
7           the legal fees which will be required ultimately  
8           to properly present and defend my role  
9           in the investigation, prosecution, convic-  
10          tion and sentencing of Donald Marshall,  
11          Jr., and since I am retired I have limited  
12          resources from which to finance counsel  
13          to adequately appear on my behalf."

14          I wasn't sure, Mr. Chairman, as to what extent you wanted  
15          Mr. MacIntyre, in the material that was laid before you to  
16          go into his personal finances. I thought that that would  
17          be the kind of broad picture, rather than a detail, as to  
18          his personal finances that was all that would be required.  
19          Indeed, I suppose one could almost put forth the argument  
20          that whether or not he was a multi-millionaire or whether  
21          or not he was a pauper should not make any difference.

22          With respect to the key and pivotal role he plays in  
23          these hearings he should have representation and even if  
24          he could afford representation, which he has deposed that  
25          he cannot, that, in my submission, probably should not be  
26          a relevant factor.

27          I assume, Mr. Chairman, that after representations have  
28          been made by and on behalf of the Attorney General of the  
29          Province of Nova Scotia that there might be a short opportunity  
30          for counsel to address a comment in rebuttal. I will not

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1 go into the Attorney General's brief now. I would prefer  
2 to wait until those submissions have been advanced to you.

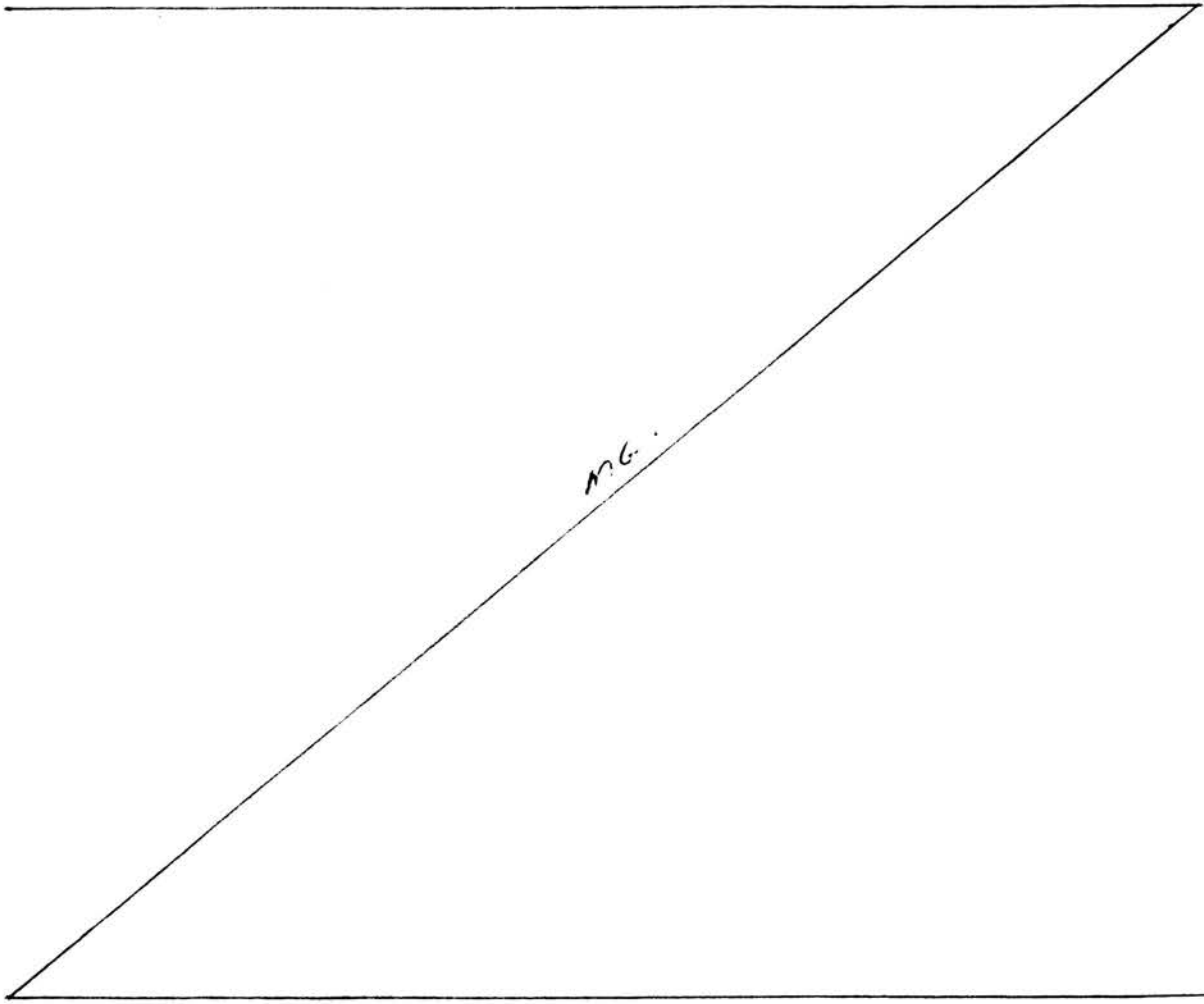
3 CHAIRMAN

4 If anything is raised of substance by counsel for the  
5 Attorney General that you have not dealt with then a very  
6 brief rebuttal, restricted to these points, will be acceptable.

7 MR. PUGSLEY

8 Thank you, Mr. Chairman, those are the submissions on  
9 behalf of John MacIntyre.

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SUBMISSION - MR. WILDSMITH

1 CHAIRMAN

2 Counsel for the Union of Nova Scotia Indians.

3 MR. WILDSMITH

4 My name is Bruce Wildsmith and I am here, as you indicate,  
5 on behalf of the Union of Nova Scotia of Indians.

6 Let me first begin by commending you, you the Commission,  
7 for convening today's hearings and hearing submissions from  
8 parties granted standing on the question of funding. We  
9 know that this is, at least it's our belief that this is  
10 contrary to the wishes of the government, that it's contrary  
11 to the submissions of the Attorney General and we commend  
12 you for the exercise of your independence and wish to make  
13 the point that it gives the Union of Nova Scotia Indians  
14 some hope that useful recommendations will come from this  
15 Commission.

16 I have some nine points that I'd like to make to you.  
17 I don't think that it'll take too long to do this.

18 CHAIRMAN

19 These are the points that you've set forth in your letter  
20 of May 4th?

21 MR. WILDSMITH

22 They are, in part, the points set forward in the letter  
23 which I sent to the Commission. A couple of other points, I think  
24 bear emphasis and a couple of new points which are not contained  
25 in that letter.

SUBMISSION - MR. WILDSMITH

1 CHAIRMAN

2           What we're hoping is that counsel will desist from reading  
3 factums in their entirety but rather...

4 MR. WILDSMITH

5           I certainly don't intend...

6 CHAIRMAN

7           Bring to the attention of Commissioners certain areas  
8 that, in the opinion of counsel, need some elaboration or  
9 emphasis because we've read all the factums.

10 MR. WILDSMITH

11           Thank you.

12           The first point that I wanted to make to the Commission  
13 this morning is on the question of need. I've addressed  
14 that in the letter and I don't propose to go over it again.  
15 I do note that in the submission from the Attorney General  
16 they talk as though full and complete disclosure, this is  
17 their language, "... of each and every aspect of the applicant's  
18 financial circumstances would need to be disclosed."

19           I brought along with me this morning financial statements  
20 from the Union of Nova Scotia Indians if the Commission is  
21 interested in looking at them, to verify the information  
22 that is contained in our submission.

23           The bottom line on it all is that the Union survives  
24 as a result of funding given, principally, by the Federal  
25 Department of Indian Affairs and the Secretary of State and

SUBMISSION - MR. WILDSMITH

1 without funding the Union has not any resources to contribute  
2 towards the work of this Commission.

3       The second point which I would like to make this morning  
4 on the question of funding is that we, the Union of Nova  
5 Scotia Indians, asks that the Commission deal with this question  
6 and insure that funding is in place simply because it's the  
7 right thing to do. We ask that you raise your considerations  
8 beyond lawyerese about jurisdiction, beyond narrow technicalities  
9 about ambiguous words in the terms of reference, beyond prece-  
10 dents, as important as they may be set by other commissioners  
11 and, indeed, beyond The Charter of Rights, a point that was  
12 emphasized in several submissions, including that from Mr.  
13 MacIntyre, although not emphasized orally this morning.

14       We ask you to do this. We say that this is the appro-  
15 priate, the fair and the right thing to do, principally  
16 for two reasons:

17       One, is that it is our belief that all parties granted  
18 standing should be treated the same. And the second reason  
19 indicated in the letter, is that an inquiry in which allega-  
20 tions of racial discrimination plays a central role should  
21 insure that those people allegedly discriminated against  
22 have an ample and full opportunity to participate and put  
23 their point of view forward.

24       The third point I'd like to make is that you, the Com-  
25 mission, do have a choice as to what you do. This is your  
inquiry and you are responsible for what kind of inquiry this is.



SUBMISSION - MR. WILDSMITH

1  
2 I don't wish to address the question of whether you  
3 have the order, you have the power to order the government  
4 to do something. To me, this is beside the issue. The issue  
5 is that you, as an independent body, have the power to comment,  
6 you have the power to recommend. Indeed, in the material  
7 annexed to the submission of Mr. MacIntyre are excerpts from  
8 The Grange Commission and, in particular, one excerpt caught  
9 my attention in which the statement is made concerning Susan  
10 Nelles that the commissioner was asked to provide his opinion.  
11 Indeed, his personal opinion on the question of compensation  
12 for Nurse Nelles and the commissioner had the courage and  
13 the information to go beyond the simple terms of reference  
14 and to provide that kind of perspective and did make a recom-  
15 mendation in her favour.

16 And so we say to you that you have the choice to do  
17 this kind thing and we ask that you exercise that. You have  
18 the independence to make up your own mind to do what was  
19 right and we are optimistic that you will do this.

20 The fourth point, this is a, perhaps, a point of new  
21 information to the Commission. The Union of Nova Scotia  
22 Indians was involved in the original investigation into the  
23 events surrounding the death of Sandy Seale. In particular,  
24 as part of the original investigation it is our understanding  
25 that a person employed by the Union in a native court worker

SUBMISSION - MR. WILDSMITH

1 | program that was in place in Sydney at that time was used  
2 | as a tool or a pawn by the Sydney Police force. In particular,  
3 | it's our information and it's alleged that this individual  
4 | was told that a knife had been found that had fingerprints  
5 | on it and that this information should be communicated to  
6 | Mr. Marshall and, indeed, the court worker accepted this  
7 | as being the truth and communicated this information to Mr.  
8 | Marshall.

9 |       And so the Union does have a direct involvement in the  
10 | events. I should also add that several of the people who  
11 | have been mentioned in commentary surrounding the events  
12 | concerning Mr. Marshall's investigation, are people who are  
13 | presently employed or associated with the Union of Nova Scotia  
14 | of Indians, and so there is some personal involvement between  
15 | the Organization, the individuals in the Organization and  
16 | those past events.

17 |       The fifth point concerns The Charter of Rights. We  
18 | have not addressed this issue in our written submission and  
19 | as I've already indicated, we ask that you look beyond even  
20 | the broad words of The Charter to do what is right in this  
21 | kind of situation.

22 |       But since it was raised in Mr. MacIntyre's brief and  
23 | it has been addressed in the Attorney General's brief, I'd  
24 | like to make two points about The Charter of Rights.

25 |       The first issue is that, I believe, that the Attorney

SUBMISSION - MR. WILDSMITH

1 General's submission misses the mark when it talks about  
2 whether this Commission is a court of competent jurisdiction  
3 to give relief under The Charter. To us, the issue really  
4 is whether this Commission is bound by The Charter and when  
5 the question is phrased that way, the answer, I think, is  
6 quite obvious, that this Commission is acting as an arm or  
7 a branch of government, that it's carrying out a governmental  
8 function. And so The Charter applies to the Commission in  
9 the same way that The Charter applies to actions and activities  
10 of government.

11 So the extent that The Charter does cover activities,  
12 it is indeed relevant and the Commission ought, even if it  
13 can't give relief, ought to conduct itself in accordance  
14 with the mandate of The Charter.

15 The particular provision of The Charter that is of most  
16 relevance to the Union of Nova Scotia Indians is Section  
17 15, the Equality Rights Provision, in particular, the words  
18 in Section 15 that talks about the equal benefit of the law  
19 without discrimination on the basis of race. And I'll come  
20 back to address this question of discrimination on the basis  
21 of race.

22 A further Charter consideration which the Supreme Court  
23 of Canada cases on it to date have made clear is that one  
24 can get a violation of The Charter based on the effect that  
25 actions of government or laws have on individuals, even if

SUBMISSION - MR. WILDSMITH

1 | it is not the purpose or intention of those laws or of those  
2 | individuals to infringe The Charter.

3 |       As a recent example, the Edwards Books case that deals  
4 | with Sunday closing and religious discrimination is a direct  
5 | authority on point for the notion that government activities  
6 | can have the effect of infringing Charter rights even if  
7 | that is not the intention of the legislation.

8 |       The reason I emphasize this question of effect is because  
9 | it is very relevant to issues of discrimination. In particular,  
10 | to the sixth point that I wish to make which is to say a  
11 | few words on the notion of systemic discrimination.

12 |       The Commission has indicated in its opening remarks,  
13 | which we've very much welcomed hearing, that a central focus  
14 | of the Commission is on recommendations, on the way the adminis-  
15 | tration of justice operates and on what the future holds  
16 | in relation to that.

17 |       It's our view that the Commission provides a unique  
18 | opportunity to look at the question of systemic discrimina-  
19 | tion, in other words, the way in which the system operates  
20 | which may, unintentionally, have the effect of discriminating  
21 | against racial minorities. And one of the reasons that it  
22 | has this unique opportunity, it seems to us, is because you  
23 | need not find anyone directly at fault in order to have some  
24 | appreciation of the way in which a system can operate without  
25 | checks and balances that protect racial minorities.

SUBMISSION - MR. WILDSMITH

1           So you need not find somebody intentionally discriminated  
2 against Indians, in this case, or against Blacks, in order  
3 to come to the conclusion that there is something wrong with  
4 the system and that the system could be set up in a way which  
5 operated more favourably towards native offenders.

6           For example, I mentioned the court worker program that  
7 was in place in Sydney in 1971. This particular program  
8 has been discontinued and there is no such court worker program  
9 in place in Nova Scotia at that moment. There is nothing  
10 that is done by government, federally or provincially, to  
11 assist Indians who run afoul of the law.

12           The seventh point I wish to emphasize is that the Union  
13 of Nova Scotia Indians is here today on behalf of all Indians  
14 in the Province of Nova Scotia. The previous submission  
15 placed a great deal of emphasis on who has the most to lose  
16 and certainly in terms of one individual, the previous submission  
17 is probably right. But we wish to make that point that the  
18 events that surround Donald Marshall, Jr. are events that  
19 could have, in our respectful submission, have happened to  
20 any Indian at that particular point in time and, therefore,  
21 all Indians in the province are interested in this issue,  
22 wish to have a voice in it and, indeed, have a greater right,  
23 if we can put it that way, to participate because of the  
24 magnitude of the application of the system upon them.

25           The eighth point which I wish to make concerns the question

SUBMISSION - MR. WILDSMITH

1 of funding and concerns the extent and terms of funding.  
2 And the simple point that I wish to make is that in our view  
3 these matters are negotiable. That this is perhaps not an  
4 all-or-nothing question. It does trouble us that, as far  
5 as we are aware, funding arrangements have been made which  
6 are without limitation, but we have been used to operating  
7 on shoestring budgets. We are used to getting the job done  
8 with less resources than are customarily put into something  
9 and while we think that it is extremely difficult to justify  
10 on principle why Indians, why the Union should be treated  
11 any differently than other people who've received standing  
12 and funding, we nevertheless recognize that there are certainly  
13 realities in this world and we are anxious enough to participate  
14 in the work of this Inquiry, to talk about other forms of  
15 limitations, reasonable limitations that might be imposed  
16 on funding for us and, presumably, on others who are seeking  
17 funding. And those are my submissions.

18 CHAIRMAN

19       Could you give us some indication as to the reasonable  
20 limitations that you have in mind?

21 MR. WILDSMITH

22       I don't think that I could give you anything very precise  
23 at the moment. It seems to me that once the issue of princi-  
24 ple has been resolved, which is whether the Commission will  
25 attempt to make some recommendations on the question of fund-

SUBMISSION - MR. WILDSMITH

1 MR. WILDSMITH

2 ing, it might be more appropriate for those of us seeking  
3 funding to meet and to discuss what kinds of things the Commis-  
4 sion may have in mind. You know, we can think about this  
5 in terms of dollars, we can think about this in terms of  
6 rates, we can think about it in terms of how much partici-  
7 pation a particular group or organization might desire to  
8 have.

9 The simple point that I really want to emphasize is  
10 that the Union is anxious to participate and that means that  
11 if it comes to compromising that principle, we are anxious  
12 enough to see that the work of this Commission comes up with  
13 useful recommendations to proceed on that basis.

14 CHAIRMAN

15 Thank you very much.

16 COMM. POITRAS

17 I just want to ask you, Mr. Wildsmith, how many members  
18 does the Union of Nova Scotia Indians have?

19 MR. WILDSMITH

20 The Union represents all registered Micmacs in the Province  
21 of Nova Scotia and that number is in excess of 10,000.

22 COMM. POITRAS

23 10,000. And are these paid-up members?

24 MR. WILDSMITH

25 No, there is no, how should I put this, the way that

SUBMISSION - MR. WILDSMITH

1 MR. WILDSMITH

2 the Union is structured, all who are registered Indians under  
3 The Indian Act are automatically members. The Union holds  
4 an annual meeting each year which all members are invited  
5 to attend and the real work of the Union is done by the Board  
6 of Directors which consists of all of the chiefs of the thirteen  
7 Micmac bands in Nova Scotia.

8 And the chiefs recently met, as indicated in my submission,  
9 at the end of April, and one of the items on their agenda  
10 was this inquiry and they unanimously passed a resolution  
11 endorsing the Union's participation.

12 COMM. POITRAS

13 I take it no assessment is ever levied against the members.

14 MR. WILDSMITH

15 No, no, that's correct. I've indicated in my submission  
16 all of the funding for the Union comes from government, as  
17 does all the funding for the Indian bands in the province  
18 and, therefore, the bands are not in any position to fund  
19 the Union because they receive all their money from the same  
20 sources.

21 COMM. POITRAS

22 Thank you.

23 COMM. EVANS

24 Mr. Wildsmith, you have indicated that certain people  
25 were involved in the original investigation, particularly,



SUBMISSION - MR. WILDSMITH

1 COMM. EVANS

2 a native court worker who was used as a ...

3 MR. WILDSMITH

4 Tool or a pawn?

5 COMM. EVANS

6 Tool is what you called him...

7 MR. WILDSMITH

8 Yes.

9 COMM. EVANS

10 And has that person, that individual's name been made  
11 known to Commission counsel?

12 MR. WILDSMITH

13 Commission counsel have not dealt with me on this issue  
14 and I have not provided that name. As my instructions become  
15 clearer from the Union, new cards come down you might say,  
16 new pieces of information, and this is one that was recently  
17 drawn to my attention.

18 COMM. EVANS

19 Yes, I would think it would be rather unfair to make  
20 the comment that somebody was used as a tool and, yet, no  
21 provision is made for that person to come and give evidence  
22 before the Inquiry...

23 MR. WILDSMITH

24 Certainly.

25 COMM. EVANS

Or to be interviewed by Commission counsel.

SUBMISSION - MR. WILDSMITH

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MR. WILDSMITH

Certainly.

COMM. EVANS

Thank you.

CHAIRMAN

Thank you, Mr. Wildsmith.

Counsel for the Black United Front?

*MG.*

SUBMISSION - MR. ROSS

1 For the record, Mr. Chairman, and Honourable Commissioners,  
2 my name is Anthony Ross and I am here representing the  
3 Black United Front, and as your list of...as your order  
4 would indicate I am also representing Oscar Seale. Rather  
5 than be called to the podium twice, I think it might  
6 very well be appropriate that at this point I address  
7 the concerns of the Black United Front and then move  
8 directly on to the concerns of Oscar Seale, if that is  
9 permitted.

COMM. SECRETARY

11 That is the correct order.

MR. ROSS

13 Thank-you.

14 I would draw to the attention of the Commission,  
15 Mr. Chairman, that it was just yesterday that I was retained,  
16 not in the full legal sense of the word retainer, in  
17 that funding is yet a question by the Black United Front.  
18 And, if reference is made to page 2 of the submission  
19 of May the 4th, 1987, on behalf of the Black United Front,  
20 one recognizes that the Black United Front itself has  
21 demonstrated an interest in the Inquiry and in their  
22 letter to you they're indicating that even on the question  
23 of funding that they do not have the necessary skills,  
24 training or expertise to demonstrate from a legal stand-  
25 point why funding for legal counsel must be provided.

SUBMISSION - MR. ROSS

1 This in itself is a very important statement, Mr. Chairman,  
2 and I would suggest that had the hearings been so arranged  
3 that all persons with standing had to apply for funding  
4 through the Commission it might have made a substantial  
5 amount of good sense, if not necessarily good law.

6 By that I mean that the Attorney General's Department  
7 and all of the departments which are now currently funded  
8 would have to jump through the same hurdles that the Black  
9 United Front and Oscar Seale must jump through in the  
10 event that funding is to be granted.

11 Reference has been made to the case of Donald Marshall  
12 and the fact that he has been funded. And, to use the  
13 words of the Attorney General, as reported in the local  
14 press, it's from gavel to gavel.

15 I must point out that on behalf of the Black United  
16 Front and of Seale, Oscar Seale, this is not a case against  
17 the funding of Marshall. It is a case for the funding  
18 of the Black United Front and of Oscar Seale if the par-  
19 ticipation and the involvement of the Seale family, the  
20 willing involvement of the Seale family, is to really  
21 have any impact on the hearings themselves. As far as  
22 the Black United Front is concerned the submission for  
23 standing, or in their submissions for standing, appended  
24 thereto was the results of a survey, a study, which looked  
25 at the legal system as it addressed the problems at the

SUBMISSION - MR. ROSS

1 | the lower court level, of course, which involved black  
2 | people. And if that is to be accepted, even part way,  
3 | it's sufficient of an indictment of the system, that I  
4 | would suggest, that one ought to take a hard look at  
5 | the system to see how it functions when minority groups  
6 | are involved.

7 | I do not propose to belabour the point and go through  
8 | step by step all the difficulties that minority groups  
9 | might have suffered because I do not think that this  
10 | is the correct forum for it, at least not at this time.

11 | But to address the question specifically before  
12 | us, the question of funding, I must on behalf of the  
13 | Black United Front and on behalf of Oscar Seale refer  
14 | to the submission which I advanced on behalf of Oscar  
15 | Seale. In that submission I made an effort to distinguish  
16 | between matters of substance and matters of procedure.  
17 | I did not try to find any substantial amount of law because  
18 | it is my view that no law is binding on this Commission,  
19 | although it might be, to some degree, persuasive.

20 | As one looks at the commissions of recent times,  
21 | the one which most closely appears to parallel this Inquiry  
22 | is the Grange Commission. And why? Because in the Grange  
23 | Commission what was being looked at was an aspect of  
24 | the administration of the justice system and also a situation  
25 | where Susan Nelles was apparently charged for something

SUBMISSION - MR. ROSS

1 that could not have been substantiated.

2 With those optics on the one hand and what we currently  
3 know about the circumstances of the death of Sandy Seale,  
4 and the charging of Junior Marshall and what has trans-  
5 pired since, it appears as though there has been a weakening,  
6 there has been a breakdown, there has been a malfunction  
7 within the framework of the justice system. If this  
8 is to any degree accepted and if the proceedings with  
9 the Grange Commission are to be in any way persuasive,  
10 one must then recognize that as far as the Grange Commission  
11 is concerned Oscar Seale stands in the similar position  
12 to the parents of the children who died at the hospital,  
13 and Junior Marshall stands pretty much where the...where  
14 Susan Nelles would stand. But because of the new element  
15 that has been introduced, the question of minorities,  
16 I would ask that a very broad, a very liberal view be  
17 taken of the question of funding. If one wants to look at  
18 our guiding document, the Charter, I would suggest that  
19 equality provisions enshrined in Section 15 could very  
20 well address the application of Mr. Seale on an equal  
21 footing as one would look at the funding of Donald Marshall.  
22 And, in the overall scope of things, from a broader perspective,  
23 one could consider Section 27 of the Charter which requires,  
24 which requires some consideration and some recognition  
25 of the multicultural heritage of Canada to recognize

SUBMISSION - MR. ROSS

1 | that all groups are entitled, all groups are entitled  
2 | to the same level of comfort when dealing with the justice  
3 | system in particular, and in a broader extent most activities  
4 | in this country.

5 |       Reference was made by Mr. Wildsmith to systemic  
6 | discrimination. Again, I do not propose to dwell heavily  
7 | on this point. Sufficient to say that that in itself,  
8 | although a substantive matter, and something on which  
9 | certain specific recommendations could be made by this  
10 | Commission, it appears to show itself at this point with  
11 | respect to the question of funding, with respect to the  
12 | question of funding, and I would ask that the Commission  
13 | pardon legal counsel who are arguing for funding because  
14 | the Commission isn't blind. The Commission recognizes  
15 | that the lawyers are saying, "Sure we would like to be  
16 | involved in this Inquiry, sure we'd like to work for  
17 | you, but we cannot work for free." Sometime ago I guess  
18 | they might have been classified as champerty. I don't  
19 | know what they would be classified as before this Commission.  
20 | But whatever it is, I ask that the Commission recognize  
21 | that without the involvement of counsel on behalf of  
22 | the persons who have been granted standing their effectiveness  
23 | will be substantially diminished.

24 |       Mr. Seale himself is retired. The scope of the  
25 | Inquiry is not yet fully defined, and it is almost impossible

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1 to even give Mr. Seale a budget of what could be the  
2 projected costs. I am asking that neither Mr. Seale nor  
3 the Black United Front be put through any more rigorous  
4 an examination than would have been expected of Mr. Marshall  
5 or any other group which is now being paid by the public  
6 purse, directly or indirectly.

7 In my letter to the Commission I identified all  
8 of the groups which now have funding, which now have  
9 standing, and to a large extent all of those, who are  
10 not here arguing for funding, are being funded directly  
11 or indirectly from the public purse. It's a very, very  
12 important issue.

13 I identified five criteria in my recommendation,  
14 in my request for funding, and I will indicate that these  
15 for a large extent came directly from the requirements  
16 as set out in the Berger Commission.

17 Having yourselves, through Commission counsel, determined  
18 what, if any, impact the applicants for standing could  
19 have before the Commission, certain people were granted  
20 full standing. The full standing gave them an opportunity  
21 to attend and an opportunity to be heard, which included  
22 the rights of examination, cross-examination, and being  
23 able to put your case forward. Within this environment it  
24 is very obvious that we're working with all the trappings  
25 of a court system, although the Commission is not bound



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1 by anything other than its own rules. And because of  
2 the trappings from here, from where I stand, I would  
3 suggest to the Commission that without funding it would  
4 be tantamount to be a revocation of standing.

5 To a very large extent I embrace the submission  
6 of Mr. Pugsley on behalf of his client, and of the Union  
7 of Nova Scotia Indians. A, I compare Mr. Pugsley's position  
8 with that of Mr. Seale and the Union of Nova Scotia Indians  
9 with that of the Black United Front, except that in Mr.  
10 Pugsley's situation, regardless of the outcome of the  
11 Inquiry, Mr. Seale does not really stand in any specific  
12 jeopardy. However, it must be recognized that Mr. Seale  
13 and his entire family, those that are left, are secondary  
14 and continuing victims of what happened in 1971, and  
15 for all intents and purposes they are without relief  
16 unless such relief is granted by this Commission.

17 On the question of jurisdiction, one can look at  
18 the submission, a paper delivered by Mr. Justice E. Patrick  
19 Hart of the Ontario Supreme Court. It was delivered  
20 to the Canadian Judicial Conference in Halifax on August  
21 6th or August 11th, 1972. One of things that Mr. Justice  
22 Hart did in his submission was try to demonstrate and  
23 to delineate the general, as opposed to inherent, jurisdictions  
24 of the Court. And how it...and I would suggest that  
25 the delineation is quite applicable as far as this Inquiry

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1 | is concerned. The general jurisdiction being one of  
2 | substance, and the inherent jurisdiction addressing matters  
3 | of procedure and practise.

4 | I refer then, Mr. Chairman, and finally to the terms  
5 | of reference. The government when they wrote these terms  
6 | of reference, and I refer to Article 5, ordered that  
7 | "The Commission may adopt such rules, practises and procedures  
8 | for the purpose of the Inquiry as they from time to time  
9 | may consider necessary for the proper conduct of the  
10 | Inquiry, and may vary such rules, practises and procedures  
11 | from time to time as they consider necessary and appropriate  
12 | for the purpose of the Inquiry." I'll suggest, Mr. Chairman,  
13 | that the entire jurisdiction could be founded within  
14 | that one paragraph. You are, therefore, at liberty,  
15 | and I would suggest it would be...very respectfully,  
16 | of course, I would suggest it would be remiss on the  
17 | part of the Commission not to hear any and all applications  
18 | which could be relevant to the proper conduct of the  
19 | Inquiry.

20 | Then we move to point B, having heard, having heard  
21 | applications for funding what is the jurisdiction of the  
22 | Commission. The question is are your hands tied? And,  
23 | if your hands are tied then I would suggest that, and  
24 | again very respectfully, that you would not be able to  
25 | perform your function in full. The Commission must be

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1 fully independent. If it is in your wisdom that the  
2 proper conduct of the Inquiry requires meaningful involvement,  
3 meaningful involvement by Oscar Seale and meaningful  
4 involvement by the Black United Front then one must  
5 recognize the constraints under which these people operate.  
6 And, if funding be the avenue to the proper conduct of  
7 the Inquiry then funding must be arranged somehow. Then  
8 it is, is it a matter of ordering it or is it a matter  
9 of recommending?

10 I would suggest that there does not appear to be  
11 a limitation, again in the terms of reference. If it  
12 is recommended, and the Government of Nova Scotia is  
13 of the view that they are refusing to follow the recommendation,  
14 then the council or the committee, the Commission, has  
15 got some options. One of them is not to proceed until  
16 that matter of funding is resolved. The second one is  
17 to give a direct order, and why you can give a direct  
18 order is that the fund, the fund itself has been identified  
19 in the terms of reference. In Article 4 it said, "Order  
20 that remuneration, cost, expenses payable in respect  
21 of the Inquiry shall be paid out of the consolidated  
22 fund of the Province of Nova Scotia."

23 So, I think, (A), there's a general and specific  
24 authority in paragraph 5. (B), there's the identification  
25 of funding, of a fund in paragraph 4.

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1           Then it rests finally with the last inquiry of the  
2 Commission as to quantum of funding. With respect to  
3 quantum of funding I have some difficulty, I have some  
4 difficulty not in a...not to determine quantum but to  
5 determine quantum in the context of the Black United  
6 Front and Oscar Seale. When, in fact, the other groups,  
7 which are now being funded from the public purse, there  
8 was no requirement of a means test for anything for them.  
9 My view is that equality and apparent fairness requires  
10 that those that who have been given standing be given  
11 the same kind of funding right across the board.

12           Mr. Chairman, members of the Commission, those are  
13 my submissions and I thank you.

14 CHAIRMAN

15           Mr. Ross, so that I can be clear now on your position,  
16 you are acting for Mr. Seale and the Black United Front.

17 MR. ROSS

18           Yes, Mr. Chairman.

19 CHAIRMAN

20           And with respect to funding, am I to assume that  
21 the funding for both Mr. Seale and the United Black Front.

22 MR. ROSS

23           Black United Front.

24 CHAIRMAN

25           Black United Front rather, will be in the terms

SUBMISSION - MR. ROSS

1 CHAIRMAN [Cont'd.]

2 of the one and the same counsel.

3 MR. ROSS

4 Absolutely.

5 CHAIRMAN

6 Yourself.

7 MR. ROSS

8 Well, I would have to...

9 CHAIRMAN

10 You're not looking at...

11 MR. ROSS

12 I would very likely have co-counsel with me.

13 CHAIRMAN

14 I see. All right.

15 COMM. EVANS

16 But they won't be independent. One won't be appearing  
17 for the Seale family and one for the Black United Front.

18 MR. ROSS

19 No. No, no, Mr....no.

20 COMM. POITRAS

21 Mr. Ross, I'd like to ask you the same questions.  
22 How many members would the Black United Front have?

23 MR. ROSS

24 The Black United Front I do not know that it has  
25 a specific membership list. The Black United Front is

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1 MR. ROSS [Cont'd.]

2 a provincial corporation put together pursuant to the  
3 Societies Act, and it was a response to what has been  
4 seen as an apparent threat of violent change if other  
5 change did not come, and this was back in the 1960's.  
6 It is absolutely funded through the Department of Social  
7 Services with some assistance from the Secretary of State.  
8 It is intended to operate more as a pressure group than  
9 anything else. As far as membership per se is concerned,  
10 I do not know that there are any specific requirements  
11 for membership. It is a group pretty much dedicated  
12 to the advancement of the cause of black people in the  
13 Province of Nova Scotia. So that there is no opportunity  
14 to identify your membership list and say, look, everybody  
15 contribute a certain amount and we provide matching funds.  
16 It just doesn't work that way. The funding comes absolutely  
17 from the government.

18 COMM. POITRAS

19 Well, how is it representative of the black people  
20 of Nova Scotia if there are no members? I don't quite  
21 understand that.

22 MR. ROSS

23 Well, I don't know that I can address that question  
24 specifically. (A), because of the fact that I was just  
25 retained yesterday afternoon and I did not have an

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1 MR. ROSS [Cont'd.]

2 opportunity to sit with the directors of the Black United  
3 Front and to get a full understanding of the internal  
4 working. But the point is that they were granted standing,  
5 and I do believe that the standing must mean something.

6 CHAIRMAN

7 Thank-you, Mr. Ross.

8 Now, the next person or applicant to be heard is  
9 the Estate of the late Donald C. MacNeil. A factum was  
10 filed.

11 MR. G. MacDONALD

12 Yes, Mr. Chairman. As you know, a factum was filed  
13 on behalf of the Estate of the late Donald C. MacNeil,  
14 Q.C., who was the Crown Prosecutor at the Marshall trial.  
15 In the submission it was noted that counsel who had been  
16 retained for the Estate was doubtful of his ability to  
17 attend today because of lack of funding, and there is  
18 no one present today representing that estate.

19 CHAIRMAN

20 Well, we...the position of the Estate is set forth  
21 very clearly in the representation and factum filed by  
22 Frank Elman, Q.C., on their behalf.

23 MR. G. MacDONALD

24 Yes, Mr. Chairman, and also in their application  
25 for standing as to why they should be present.

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1 CHAIRMAN

2 All right. Officer Adolphus Evers.

3 MR. ROGERS

4 Mr. Chairman, I'm John Rogers appearing on behalf  
5 Mr. Ryan, who is counsel for Adolphus Evers, Gary Green  
6 and R.A. McAlpine.

7 CHAIRMAN

8 You say now Evers, McAlpine and Green. Do you propose  
9 to deal with the all three at this time.

10 MR. ROGERS

11 I propose to deal with all three at the same time.  
12 They are...I recognize that they are separate applications.

13 CHAIRMAN

14 All right.

15 MR. ROGERS

16 Each of these three individuals are either regular  
17 or civilian members of the R.C.M.P. and as you are aware  
18 each of the applicants has been connected with the R.C.M.P.  
19 since the initial date of reference of the Inquiry and  
20 have had involvement with the matters under inquiry.  
21 In a few moments I will detail to some extent their involve-  
22 ment, but that's been referred to in my submissions.

23 By these applications Messrs. Evers, Green and McAlpine  
24 respectfully request that this honourable Commission  
25 order or recommend that they be reimbursed by the Province



SUBMISSION - MR. ROGERS

1 of Nova Scotia for any legal fees incurred in this matter,  
2 over and above the very restrictive legal expenses which  
3 the Federal Government has agreed to pay.

4 With respect to the federal funding available to  
5 my clients, a letter was received by Mr. Ryan from Mr.  
6 Bissell of the Department of Justice in the same form  
7 as that appended to the submissions of my learned friend,  
8 Mr. Outhouse, on behalf of Inspector Scott and Staff  
9 Sergeant Wheaton. Although further clarification is  
10 being sought, at this time it would appear that the Federal  
11 Government would only pay the fees of my clients in three  
12 particular circumstances, which are enumerated in that  
13 letter. That's first, when they were required to appear  
14 and testify before a Commission of Inquiry, secondly  
15 when they are requested to meet informally with the Commission  
16 or Inquiry, and thirdly, when they are requested to be  
17 interviewed by Commission counsel or Commission investigators  
18 on any matter arising out of the performance of their  
19 duties.

20 It does not even appear clear from the correspondence  
21 from the Department of Justice that this...that the fund-  
22 ing includes preparation time for each of the three situations  
23 outlined.

24 In order to permit the applicants meaningful participation  
25 in the Commission's proceedings there are costs which

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1 will be incurred, other than those paid by the Federal  
2 Government, and these may be substantial. In addition  
3 to instructing their own counsel and permitting their  
4 counsel to prepare them, including the extensive time  
5 which would be required to familiarize oneself with  
6 the lengthy documentation which exists in this case,  
7 the necessary attendances before the Commission on procedural  
8 matters prior to the commencement of hearings and the  
9 hearing of pre-hearing motions, there may also be time  
10 required to attend before the Commission when witnesses  
11 whose evidence might affect the applicants is being given.

12 It's respectfully submitted on behalf of the applicants  
13 that they cannot be fairly represented without counsel  
14 being involved throughout to advise them and to protect  
15 the positions they have taken in the past and will take  
16 before this Commission.

17 Although there is difficulty in assessing what the  
18 ultimate costs involved would be, the applicants are  
19 not in a position to personally afford even a large expense  
20 which would be incurred in preparing the applicants to  
21 give their own evidence.

22 My submissions on this application will be brief.  
23 A lengthy brief has been submitted on behalf of the applicants  
24 by Mr. Ryan and I do not propose to cover in detail the  
25 matters raised in that brief.

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1 I, however, propose to speak on three issues. First,  
2 number of comments on the nature of the involvement of  
3 each of the three applicants with reference to the matters  
4 before the Inquiry. Secondly, the implications or possible  
5 implications of the involvement of the applicants in  
6 the proceedings. And thirdly, some brief submissions  
7 concerning the Commission's powers with respect to funding.

8 First concerning the involvement of Adolphus Evers.  
9 He is a civilian member of the R.C.M.P. and has been  
10 in charge of the Hair and Fibre Section of the R.C.M.P.  
11 Crime Laboratory since 1970. He testified at the original  
12 trial of Donald Marshall and subsequently was involved  
13 in the 1982 reinvestigation. Indeed, in the Appeal Division  
14 rehearing the Crown Prosecutor submitted, "That perhaps  
15 more than any other single factor his evidence will prove  
16 to be the key in the ultimate resolution of this case."  
17 However, the Appeal Division in its decision on the rehearing  
18 commented on Mr. Evers' evidence and described it as,  
19 "Highly speculative and by itself it would not be of  
20 much force in determining the guilt or innocence of the  
21 appellant."

22 With respect to Mr. McAlpine, he is also a civilian  
23 member of the R.C.M.P. and he is employed in the Serology  
24 Section at the Halifax department of the R.C.M.P.. He  
25 had involvement with the same exhibits and materials

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1 as Mr. Evers but his first involvement was during the  
2 reinvestigation in 1982.

3 With respect to Cst. Gary Green, he is a member  
4 of the R.C.M.P. who was contacted in approximately 1974  
5 by Donna Elaine Ebsary with information alleging that  
6 her father had committed the Seale killing and that she  
7 tried to get action taken on this by the Sydney City  
8 Policy. Upon receiving this information Cst. Green also  
9 contacted the city police and he had no further involve-  
10 ment in this matter.

11 What are the implications of the involvement in  
12 these proceedings for my clients? It's respectfully  
13 submitted that the main, not the only purpose of this  
14 honourable Commission is to seek out reasons why the  
15 administration of justice in Nova Scotia permitted Donald  
16 Marshall, Jr., to be convicted of murder for which he  
17 was eventually acquitted. The possibility, therefore,  
18 exists that this Commission will find or conclude that  
19 there was some wrongdoing within the bodies which supported  
20 the originally successful prosecution of Donald Marshall,  
21 Jr. There is authority that if this honourable Commission  
22 does find wrongdoing of some sort it may recommend proceedings  
23 to put an end to and punish such wrongdoing. In that  
24 regard I refer you to the case of Re Childrens' Aid Society  
25 of the County of York. A decision of the Ontario Court

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1 of Appeal.

2 The potential for this honourable Commission in  
3 a full exercise of its mandate to come to conclusions  
4 adverse to the applicants which might bear on their civil  
5 responsibility, or otherwise, really exists. Even if  
6 in particular cases the potential for criminal or civil  
7 proceedings arising out of this Commission's Inquiry  
8 is slight, the individual applicants must have also...must  
9 also have concern for findings which may expose them  
10 to scorn in the eyes of the public and particularly those  
11 that would have an impact on the standing of these individuals  
12 within the R.C.M.P. force.

13 It is apparent, we submit, that because of the number  
14 and nature of interventions filed before this Commission,  
15 that each of the individual applicants here may be cross-  
16 examined up to eight times during the course of the proceedings.  
17 It's difficult, if not impossible, for anyone to speculate  
18 as to the directions or as to the scope of these cross-  
19 examinations no matter how limited the involvement  
20 of these individuals might appear in review of the documents  
21 or even from the direct examination contemplated by Commission  
22 counsel themselves. And each witness is going to be  
23 examined and cross-examined in minute detail with respect  
24 to their involvement and no doubt there will be some  
25 inquiry...some at the Inquiry who will wish to make them

1 the object of criticism.

2 This Commission has indicated that the traditional  
3 rules of procedure and evidence applicable in ordinary  
4 courts are not going to be strictly applied. This, I  
5 submit, increases the potential for harm to individual  
6 witnesses at the hands of counsel for other interests  
7 who are not only trained in the law but who are knowledgeable  
8 in the art of advocacy and the martialling of facts.  
9 The applicants would be totally unequipped, by experience  
10 or by education, to defend themselves or their interests  
11 without the assistance of counsel.

12 If I turn to submissions concerning the Commission's  
13 powers with respect to funding, I believe in considerable  
14 detail these have been discussed in the briefs of the  
15 various parties in addition to the comments this morning.  
16 I don't wish to repeat what's already been said

17  
18  
19  
20  
21 MG  
22  
23  
24  
25

SUBMISSION - MR. ROGERS

1 in support of the position that the Commission has the  
2 authority to order or to recommend the funding for the  
3 applicants to permit their meaningful participation in  
4 the Commission's proceedings.

5 It is respectfully submitted that this Commission  
6 has, by its terms of reference, the authority to order  
7 or to recommend that the Province of Nova Scotia pay the  
8 difference between that paid by the Federal Government  
9 and the ultimate accounts rendered to these applicants  
10 up to the approved amount by the management board.

11 It is respectfully submitted that what is needed  
12 for the purposes of the inquiry is that what is necessary  
13 in the interest of justice being done and appearing to  
14 be done. Already today there's been reference to the  
15 passages of Commissioner Mr. Justice Grange in his report  
16 which was reported by the Ontario Court of Appeal. And  
17 I won't quote that again, but I refer you to a citation  
18 in 9 D.L.R. 4th at Page 79. The Grange Commission's terms  
19 of reference with respect to engaging counsel in substance  
20 are no different than those that are contained in this  
21 honourable Commission's terms of reference.

22 In addition, there have been other recent Canadian  
23 Royal Commissions that have decided that the provision  
24 for funding for legal counsel for parties appearing for  
25 them was implicit in their mandate to ensure that justice  
was done and appeared to be done and I refer you in that

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1 regard to the Berger Commission, the Lysek Commission  
2 and the Ontario Northern Environment Commission.

3 In the terms of reference of all of those Royal Commis-  
4 sions there was no explicit authority to provide funding  
5 for legal counsel for parties appearing, but each did  
6 as a result of the general authority to order that what  
7 was required to be paid for the purpose of the Royal Commis-  
8 sion was indeed paid.

9 In conclusion, it is respectfully submitted that this  
10 honourable Commission should order the applicants be provided  
11 with funding to permit their participation in the Commission's  
12 proceedings to be a meaningful participation because  
13 these individuals will be provided with funding for counsel  
14 during the time of any interviews with the Commission  
15 while their own counsel is present and as well as during  
16 the time any actual testimony is given by these individuals.  
17 This application is limited to the necessary costs incurred  
18 beyond those described as being that which will be paid  
19 by the Federal Government through the Treasury Board.

20 It is respectfully submitted that such funding will  
21 result not only in the assistance to the Commission but  
22 also will achieve the objective of truly just and truly  
23 fair proceedings being had before this honourable Commission.

24 Thank you, those are my submissions.  
25



1 CHAIRMAN

2 Mr. Rogers, you had indicated to us and it's also  
3 in the brief the three areas of work where professional  
4 advice and counsel will be furnished your clients--all  
5 of which seemed to relate to inquiries and/or evidence  
6 which are related to services performed by them in the  
7 course of their employment. Can you tell us what the  
8 position of the Treasury Board of Canada is with respect  
9 to the issue that you raised again this morning that other  
10 witnesses may, in their testimony, call into question  
11 the competency of your clients in the performance of their  
12 duties in the course of their employment?

13 MR. ROGERS

14 Mr. Chairman, it's my understanding from review of  
15 the correspondence and discussions with Mr. Ryan that  
16 it's the position of the Department of Justice that funding  
17 for attendance by counsel during examination of other  
18 witnesses will not be provided.

19 CHAIRMAN

20 Even with respect to witnesses whose testimony may  
21 call into question the professional services rendered  
22 by your clients in the course of their employment?

23 MR. ROGERS

24 That is my understanding.  
25

SUBMISSION - MR. ROGERS

1 CHAIRMAN

2 Has that been put them, that's what I'm...

3 MR. ROGERS

4 That has been put them, as well, the issue of time  
5 for preparation in the three areas that were outlined  
6 by the Justice Department.

7 CHAIRMAN

8 Have you had any indication from the appropriate  
9 person or persons in authority that the government of  
10 Canada, through the Treasury Board or through the Royal  
11 Canadian Mounted Police, would be persuaded by any recommenda-  
12 tions that come from this Commission in that regard?

13 MR. ROGERS

14 All I can say that I'm aware of is the correspondence  
15 which I referred to in my submissions and that was we  
16 received a letter in a similar form to that which Mr.  
17 Outhouse received and we responded to that with some inquir-  
18 ies and we've had no response to date.

19 CHAIRMAN

20 Thank you, Mr. Rogers. Next, Sergeant Herb Davies.

21 MR. M. MacDONALD

22 Mr. Chairman, members of this honourable Commission,  
23 my name is Mr. Mike MacDonald, personal counsel for Mr.  
24 Herb Davies, sergeant of the R.C.M.P.

25 It is my proposal, if it pleases this honourable

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1 Commission, to restrict my comments to Issue (c) only.  
2 That is, Mr. Davies' necessity for, and the extent of funding  
3 required, relative to his appearance before this honourable  
4 Commission.

5 Issues (a) and (b) have been referred to in my brief  
6 filed with the Commission. As well, I echo the remarks  
7 of Mr. Ryan in his very able and detailed written submission,  
8 which, of course, has been supplemented by Mr. Rogers  
9 on behalf of three previous members of the R.C.M.P. referred  
10 to.

11 Dealing with Issue (c), Mr. Davies has been granted  
12 standing before this honourable Commission. Inherent  
13 in his appointment is a recognition that Mr. Davies has  
14 in fact a unique and specific contribution to make to  
15 the inquiry. Mr. Davies, along with Staff Sergeant Wheaton  
16 was integrally involved in the 1982 re-investigation and  
17 dealt directly with Mr. MacIntyre.

18 Mr. Davies, no doubt, will be submitted to a forum  
19 which will be adversarial. From this will flow the potential  
20 for Commission's findings or indeed recommendations, which  
21 may in fact be adverse to Mr. Davies. He will be subject  
22 to detailed and no doubt vigorous cross-examination by  
23 counsel for participants with conflicting interests.

24 Counsel, to properly prepare, must spend considerable  
25 time examining the available material. Counsel for Mr.

SUBMISSION ~ MR. M. MACDONALD

1 Davies ought to be present at least to cross-examine witnesses  
2 who may give testimony in conflict to that of Mr. Davies.  
3 Counsel must prepare detailed submissions with Mr. Davies'  
4 interests in mind.

5 Mr. Davies does not have personally the resources  
6 to fund counsel efforts to this extent.

7 Mr. Chairman, I wish to qualify my written submission  
8 when it refers to a request for funding for a presentation  
9 during the entire investigation. Mr. Davies' input into  
10 the investigation is really restricted to the 1982 re-  
11 investigation and thus would require counsel, I would  
12 submit, to be present for cross-examination of witnesses  
13 who may give adverse or conflicting testimony to that  
14 of Mr. Davies, to counsel Mr. Davies through his own testi-  
15 mony. For reasonable time to prepare for the inquiry  
16 and for reasonable time to make final submissions to this  
17 honourable Commission.

18 Of course, Mr. Davies seeks only the difference between  
19 the ultimate accounts rendered for these services and  
20 the funds approved by the Treasury Board for the R.C.M.P.

21 It is submitted that the mandate of this honourable  
22 Commission is to a great extent to unveil all of the facts.

23 The degree of conflicting testimony, allegations  
24 of wrongdoing and the repercussions that may flow from  
25 there are to a great extent yet to be determined.

SUBMISSION - MR. M. MACDONALD

1           At this stage it is submitted, therefore, it is not  
2 a question of degree of involvement at this stage. With  
3 the greatest respect to my learned friend Mr. Pugsley,  
4 I would submit it is not a question of who stands to gain  
5 or lose the most, but the ultimate question is, is there  
6 an interest to be protected in light of the adversarial  
7 forum and the potential conflict. Who stands to gain or  
8 lose the most obviously will be determined, to some extent  
9 at least, by this honourable Commission. I would submit  
10 with respect that Mr. Davies indeed has an interest to  
11 be protected and ultimately it is in everyone's best interest  
12 that those who do have an interest to be protected be  
13 afforded legal counsel and that funding for this counsel  
14 be either ordered or recommended by this honourable Commis-  
15 sion supplementary to the funding to be provided by the  
16 Treasury Board.

17           On behalf of Mr. Davies, I certainly would welcome  
18 any recommendations to the Treasury Board from this honour-  
19 able Commission, but ultimately would ask that if in fact  
20 funding for the areas already detailed is not provided  
21 by the Treasury Board, that the Commission either recommend  
22 or order that it be paid ancillary to the costs of this  
23 inquiry.

24           I make all of these submissions, Mr. Chairman, with  
25 the greatest respect.

SUBMISSION - MR. M. MACDONALD

1 CHAIRMAN

2 Mr. MacDonald, I assume from your comments that you antici-  
3 pate that your involvement as counsel will be somewhat  
4 more limited than counsel for some of the other parties  
5 in that your client is concerned only with the re-investiga-  
6 tion.

7 MR. M. MacDONALD

8 That's correct, Mr. Chairman. In my initial written  
9 submissions, I wanted to qualify that to the board. In  
10 my initial submissions, I indicated that Mr. Davies was  
11 in fact integrally involved in the investigation generally,  
12 but it actually is for the 1982 re-investigation. But  
13 that certainly would not take away, I would submit, the  
14 significance of his participation.

15 CHAIRMAN

16 I'm not querying the significance. I'm only trying  
17 to get a handle on the anticipated cost.

18 MR. M. MacDONALD

19 Indeed, exactly.

20 CHAIRMAN

21 Now we have Staff Sergeant H.F., Harry F. Wheaton  
22 and Inspector Donald V. Scott. The Commission is in receipt  
23 of a factum dated May 5, 1987 from Mr. S. Bruce Outhouse  
24 of Blois, Nickerson, Palmeter and Bryson, setting forth  
25 the position of their clients and asking that funding

SUBMISSION - MR. M. MACDONALD

1 CHAIRMAN

2 be provided their clients insofar as legal fees are concerned.  
3 Also indicating they did not intend to appear.

4 Does counsel for the Commission have anything to  
5 add?

6 MR. G. MACDONALD

7 No, Mr. Chairman, there's no one here for those two  
8 individuals.

9 CHAIRMAN

10 Well, again, we will take the factum as submitted,  
11 which we've already perused and it will be part of our  
12 consideration when we deliberate with respect to these  
13 applications.

14 Counsel for the Attorney General?

15 MR. RUBY

16 Excuse me, before you do that, if I might have a  
17 moment. My name, sir, is Clayton Ruby and I'm counsel  
18 for Marshall and I have a submission which I propose to  
19 deliver to you as representation on behalf of Mr. Marshall  
20 on the question of funding. I spoke with counsel for  
21 the Attorney General and since my position is not going  
22 to be concurrent to theirs but rather opposed to it, I  
23 thought it more appropriate that I speak before they did  
24 so that they'd have a reply. If I may have your leave.

25

1     CHAIRMAN

2           Well, I'd like some indication as to the purpose  
3 of that, Mr. Ruby, bearing in mind that this Commission  
4 while it's not been directly involved, I guess take note  
5 of the fact that items appearing in the press suggest  
6 that your client, Donald Marshall, had been provided with  
7 funding. And the purpose of this application, as I under-  
8 stand it, is on behalf of those who as of now have not  
9 been successful or successful in any way of persuading  
10 the government of Nova Scotia that they too should enjoy  
11 the same benefits that have ostensibly been provided Donald  
12 Marshall, Junior, and the Attorney General of Nova Scotia  
13 and his predecessors in office and employees and former  
14 employees.

15           I'm not clear what it is that you're driving at.  
16 We've had very able representation made on behalf of the  
17 Union of Nova Scotia Indians and the Black United Front  
18 plus the fact that we haven't received any factum from  
19 you.

20           Now at this stage in the proceedings, I don't think  
21 we're too concerned with sticking rigidly to the rules  
22 and the procedure which we most assuredly will do when  
23 the hearings start. When we ask for a submission to be  
24 made and it isn't made, then there will be no point in  
25 people coming along and saying "We really didn't believe



CHAIRMAN

1 | you intended to do what you said." We most assuredly  
2 | do. But without interpreting this as a constraint, based  
3 | on the fact that a factum was not filed, I would like  
4 | you to give the Commission some indication as to what  
5 | it is you propose to pursue here and on whose behalf.

6 | MR. RUBY

7 | Certainly, you're quite correct, Mr. Chairman, that  
8 | the counsel for Mr. Marshall does not want to bring an  
9 | application for funding before the Commisison.

10 | COMM. EVANS

11 | He doesn't want a revocation of it.

12 | MR. RUBY

13 | Touché. If I may assist though, I'm confident that  
14 | the submission will assist the Commissioners in dealing  
15 | with this very complicated and difficult issue of funding.  
16 | Certainly Mr. Marshall will be affected if, by a decision  
17 | which subsequently proved to be attackable in the courts,  
18 | some party decided to take this Commission to court to  
19 | halt its proceedings, further to delay them, these are  
20 | all matters which are of great concern to Mr. Marshall.  
21 | And it is in the light of that that I ask permission  
22 | to make representations to you on what we submit will  
23 | be the appropriate funding decision in part that you're  
24 | going to have to make. I'm confident that that submission  
25 | will be helpful to you. You, of course, will give it

MR. RUBY

1 what weight you see fit. But it is because of Mr. Marshall's  
2 interest in the proceedings and in the consequences which  
3 may flow from an adverse decision to some of the applicants  
4 here, for example, from you. We want to make at least  
5 some points with regard to them.

6 CHAIRMAN

7 Why don't we recess for ten minutes. We need a short  
8 break.

9 -RECESS 11:42 - 11:55-

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SUBMISSION - MR. RUBY

1 MR. CHAIRMAN

2       It's my understanding from the position put by counsel,  
3 or the Commission's understanding, rather, of the position  
4 put by Counsel for Donald Marshall, Jr., that he would  
5 like to be heard with respect to any difficulties that  
6 may be created for his client arising out of the conclusions  
7 and decisions that we will make at the end of this hearing  
8 and not with respect to the applications that we have  
9 heard and that are before us, because we do not believe  
10 it would be appropriate, indeed it would be presumptuous.  
11 I'm sure Mr. Ruby realizes this, too, for him to make  
12 representation for or against the applications that we  
13 are dealing with today. So that in the context of putting  
14 before the Commission at this time, rather than awaiting  
15 the submission of the Attorney General of Nova Scotia,  
16 what I gather from your comments, Mr. Ruby, is a position  
17 that's somewhat at variance from what you believe counsel  
18 for the Government of Nova Scotia will take and how this  
19 affects or may affect your client. Please proceed.

20 MR. RUBY

21       Let me just make what I propose to do and subject  
22 to your ruling, of course, is to deal with two of the  
23 applications. The position I propose to take and put  
24 before you...

25 CHAIRMAN

Which two applications are you speaking of now?

SUBMISSION - MR. RUBY

1 MR. RUBY

2       The position I propose to take is this. I want to  
3 deal with some legal questions of what your jurisdiction  
4 is and our position in respect of that. And then I want  
5 to submit the position that with regard to the individual  
6 applicants, we're not taking a position. We have nothing  
7 to say about the matter. But with regard to the two  
8 groups that have applied, I believe I have a submission  
9 that has not been made which will assist you in dealing  
10 with the merits of that application. I may say that  
11 I...

12 CHAIRMAN

13       Well, we're not prepared to hear you on that. We've  
14 heard counsel for both the two organizations--the Union  
15 of Nova Scotia Indians and the Black United Front, and  
16 they have very ably in a highly professional manner put  
17 to us, both through their factum and in their argument,  
18 the factors that they believe should be taken into account  
19 by us when we deal with their applications. So we will  
20 hear you on matters relating to Donald Marshall. We  
21 will not hear you on matters relating to other applicants.  
22 They can take care of themselves, and have done so very  
23 well, indeed.

24       So you may proceed with respect to any observations  
25 you wish to make on the law and any concern you may have

SUBMISSION - MR. RUBY

1 CHAIRMAN, Cont'd.

2 with respect to the effect upon your client of our decision.

3 So will you please proceed?

4 MR. RUBY

5 First with respect to the question of the law. It's  
6 my submission that you do have jurisdiction to recommend  
7 to the Government of Nova Scotia what level of funding  
8 and what funding ought to be granted by them and provided  
9 by them. That recommending power has been acted upon  
10 absent specific authorization by a number of Royal Commis-  
11 sions you've been already referred to. If I am correct  
12 in that submission, then it becomes unnecessary to deal  
13 with the rather more difficult question of whether you  
14 have the power to order the government to retain counsel  
15 or yourselves have the power to retain counsel directly  
16 for a party or someone granted standing.

17 So it's my submission that the safest and best course  
18 for this Commission is to avoid the legal issue of whether  
19 you have the right to order or to direct or to pay yourself  
20 for a person granted standing, but rather to take the  
21 more accepted, in terms of tradition, route of making  
22 recommendations. It is inconceivable, with the greatest  
23 respect, that this government or any government would  
24 not accept and act upon the recommendations so made if  
25 you choose to make them.

SUBMISSION - MR. RUBY

1       The second part of my submission has to do with the  
2 effect on Mr. Marshall of a decision and I propose..Mr.  
3 Chairman, you will stop me if you feel I'm treading upon  
4 your earlier ruling. But I propose to take the position  
5 before you that if the Black United Front and the Union  
6 of Nova Scotia Indians are not granted standing in terms  
7 of funding by you, that the burden of exploring the very  
8 difficult social issues, which are going to be a large  
9 part of your decision when it comes to recommendations,  
10 will then fall upon primarily the Commission counsel  
11 and the counsel for Donald Marshall, Jr.

12       In that respect, I sort out the Commission into two  
13 aspects. The easy aspect, the easy part, is finding  
14 out what happened. That's what you gentlemen do every  
15 day of your lives. You're trained to do that by back-  
16 ground and by experience and by education. Far more  
17 difficult is an assessment of the social impact of issues  
18 such as racism. Donald Marshall, Jr., does not wish to  
19 have to bear the responsibility of raising those issues,  
20 calling evidence on them, performing the social analyses.  
21 And the reason is, in my respectful submission, applicable  
22 not only to him but also to Commission counsel on whose  
23 shoulders that burden will also fall to some extent in-  
24 evitably, it's this. No one can understand the impact  
25 of the criminal justice system upon the Indian community

SUBMISSION - MR. RUBY

1 in Nova Scotia and the Black community in Nova Scotia  
2 as well as and with the same sensitivity as those communi-  
3 ties themselves. They have a unique perspective. Donald  
4 Marshall, Jr., understands to some extent because he's  
5 lived the life of a native Indian person in Nova Scotia.  
6 But the broader issues should be borne and put forward  
7 to you by the communities themselves. So I don't speak  
8 as they do of interest in the issues. From my point  
9 of view, as Donald Marshall's counsel, we need their  
10 help. And, respectfully, no one can speak for the Black  
11 community except the Black community. No one can speak  
12 for the Indian community except the Indian community.  
13 We do not wish to assume that burden.

14 Thank you.

CHAIRMAN

16 Mr. Ruby, before you leave, on your first submission,  
17 wherein you ask, you suggest that the Commission has  
18 the authority to recommend, you said both the level of  
19 funding and what funding. May I have your views on the role  
20 of the taxing master in that context? I assume that  
21 any expenditure of public funds in particular and probably  
22 it relates as well to the private sector, that the payor  
23 has a right to ask for taxation to insure that the, even  
24 where there has been an agreement as to amount, to insure  
25 that the services have been performed. Are you including

SUBMISSION - MR. RUBY

1 CHAIRMAN, Cont'd.

2 in that broad definition on the level of funding the  
3 right of taxation?

4 MR. RUBY

5 Yes, it's inconceivable to me that this Commission  
6 or the government should issue a blank cheque for legal  
7 funding. And the traditional method in almost all the  
8 provinces of dealing with this matter is through taxation  
9 by an independent court official. That provides a safe-  
10 guard to the public that the money is being well spent  
11 and a safeguard to the government that, in fact, there  
12 has been no abuse. At the same time, it provides an  
13 assurance to the counsel that services reasonably rendered  
14 will, in fact, be paid. It's a regime under which lawyers  
15 have lived for years. We all understand it well and  
16 it served well in the past. So I would assume and recommend  
17 to you that that be part of and incorporated in any recommen-  
18 dation you make.

19 CHAIRMAN

20 Thank you very much.

21 MR. RUBY

22 Thank you, Mr. Chairman.

23 CHAIRMAN

24 Counsel for the Attorney General?  
25



SUBMISSION - MR. SAUNDERS

1 MR. SAUNDERS

2 Mr. Chairman, it is a privilege for myself to appear  
3 before this Commission and address the matters that seem  
4 to be of interest to this Commission, and sitting beside  
5 me is Mr. Pink, and what I propose to do...

6 CHAIRMAN

7 Would you identify yourself for the record? We have  
8 to feed things into these machines. They're beyond my  
9 comprehension.

10 MR. SAUNDERS

11 Mr. Chairman, my name is Jamie Saunders and I'm appearing  
12 on behalf of the Attorney General of Nova Scotia and  
13 the Department of the Attorney General, and with me is  
14 my partner and colleague, Darrel Pink.

15 Bearing in mind your earlier comments that we not  
16 spend too much time referring to the briefs and materials  
17 that are already on file with the Commission, what I  
18 propose to do, Mr. Chairman, is just review quickly some  
19 of the more significant points that we attempted to address  
20 in that written brief and then conclude by addressing  
21 some of the comments made by learned counsel in their  
22 addresses before this Commission this morning.

23 Your Commission has addressed three points. The  
24 first question as identified in learned counsel, Mr.  
25 MacDonald's letter to me, was whether this Commission

SUBMISSION - MR. SAUNDERS

1 had the authority to entertain an application for funding.  
2 And, secondly, the question was what remedy or disposition  
3 ought a Commission like this give. Could it give a remedy  
4 or could it give an order? And the third question was  
5 the necessity and requirement for funding by your client.

6 And with your Chairmanship's permission, I would  
7 like to address the first two points and my friend, Mr.  
8 Pink, beside me, were the Commission to have any questions  
9 to deal with the Charter, then Mr. Pink would like to  
10 respond to those questions. I will concentrate, instead,  
11 on the law as it is applicable to those first two points  
12 raised by Commission counsel.

13 Mr. Chairman, members of the Commission, we have  
14 reviewed in our written material where a Commission of  
15 Inquiry gets its authority. And it's clear based on  
16 the authorities and jurisprudence that we've tried to  
17 enunciate in our brief that a commission gets its authority  
18 from the statute in the province by which an inquiry  
19 may be established and secondly, gets its authority from  
20 the terms of reference which are found within the Order-  
21 in-Council. We've reproduced and other counsel have  
22 reproduced the text of the Public Inquiries Act and I  
23 think it's clear without argument that what that authorizes  
24 the Commission to do is inquire into and by virtue of  
25 Section 4, various powers are given to a commission to

SUBMISSION - MR. SAUNDERS

1 exercise its own process. For example, to compel the  
2 attendance of a witness before it and to compel the product-  
3 ion of documentation.

4 Turning now to the terms of reference that are set  
5 forth in the Order-in-Council, and I think your commissioners  
6 and you, Mr. Chairman, will want to pay careful heed  
7 to what is set forth because that is the language that  
8 establishes the perimeters, it seems to me, with greatest  
9 respect, of what a commission such as this may do and  
10 upon which it may embark.

11 I take it that you, Mr. Chairman, and members of  
12 the Commission, have at hand the text of the Order-in-  
13 Council?

14 CHAIRMAN

15 Yes.

16 MR. SAUNDERS

17 And in your remarks at the outset, Mr. Chairman,  
18 you referred to the scope of this inquiry and you enunciated  
19 the realm of this Commission to deal with the power to  
20 (a) inquire into (b) report their findings and (c) make  
21 recommendations. And I concentrate on those three key  
22 phrases at the beginning of the Order-in-Council.

23 And then secondly, to deal with, and they are specified,  
24 the points that are going to be coming before this Commiss-  
25 ion. First, the investigation of the death of Mr. Seale.

SUBMISSION - MR. SAUNDERS

1 Second, the charging and prosecution of Mr. Marshall  
2 for which he was subsequently found not guilty, and then  
3 finally "and such other related matters which the Commission-  
4 ers consider relevant to the inquiry." And in a moment  
5 I would like to address members of the Commission on  
6 that last phrase "and such other related matters which  
7 the Commissioners consider relevant to the inquiry."

8 Before doing that, let me say this in passing, that  
9 there seems to be no dispute among the papers filed before  
10 the Commission and in argument that I heard this morning  
11 that a Royal Commission has no authority to order the  
12 government to do anything. And if that is so, Mr. Chairman,  
13 then I would propose then getting on to the next point,  
14 that is to say, whether or not a commission of inquiry  
15 has the authority to make a recommendation to government  
16 which, after all, established the Commission in the first  
17 instance.

18 I will rely upon the authorities set forth in our  
19 factum for the proposition that a Royal Commission has  
20 no authority, no jurisdiction to order a government to  
21 do a thing or to take a step. So turning then, Mr. Chairman,  
22 to the second part, and that is the authority of a  
23 Royal Commission to recommend, it seems to me in the  
24 comments made by my learned friends this morning and  
25 as I read their factum that they are suggesting to this

SUBMISSION - MR. SAUNDERS

1 Commission that there is some inherent power or inherent  
2 authority in a Royal Commission to make a recommendation.  
3 We say with the greatest of respect, Members of the Commission,  
4 that what authority and jurisdiction a Commission draws  
5 is confined to the terms of reference established in  
6 the Order-in-Council. And that what this Commission is  
7 doing is looking into those points that are addressed  
8 on the first page of the Order-in-Council and which were  
9 explored by the Chairman in his opening remarks. It  
10 does not give this Commission, we say, with the greatest  
11 of deference, authority to recommend something that is  
12 not considered within those terms of reference. And  
13 the matter of funding is not addressed, gentlemen, in  
14 the terms of reference and in the Order-in-Council.  
15 And we say that by referring to the text of the Order-  
16 in-Council, this Commission has no inherent authority  
17 to make such a recommendation.

18 I made brief comment on the phrase "and such other  
19 related matters which the Commissioners consider relevant  
20 to the inquiry." Well, surely to give meaning to that  
21 phrase, we must look at the words that make it up. "And  
22 such other related matters." We say with respect that  
23 that entitles the Commission to establish its own rules  
24 of practice and procedure, which they did and which were  
25 circulated among counsel at the first meeting on April 13.

SUBMISSION - MR. SAUNDERS

1 | And those rules of practice and procedure clearly have  
2 | to do with the matters that are before set out. That  
3 | is to say, the investigation of the original murder,  
4 | the subsequent conviction and the appeal.

5 | In other words, the phrase "and such other related  
6 | matters" refers back to the text of the Order-in-Council.  
7 | It does not say "any other matters." It says "and such  
8 | other matters related." And so I say, with respect, that  
9 | that takes us back to the three ultimate considerations  
10 | of this Commission.

11 | CHAIRMAN

12 | Will you indicate the relevance of Paragraph 5 in  
13 | the Order-in-Council?

14 | MR. SAUNDERS

15 | Certainly, Mr. Chairman. Paragraph 5 on Page 2 is  
16 | the jurisdiction of this Commission to create and circulate  
17 | the rules of practice and procedure which were in fact  
18 | done on April 13. Orders that the Commissioners may  
19 | adopt such rules, practices, and procedures for the purposes  
20 | of the inquiry. And so we say that that clearly gives  
21 | this Commission the authority to do what it did in passing  
22 | upon the rules, deciding who would have standing, deciding  
23 | who would have the opportunity to cross-examine witnesses  
24 | and to state clearly on the record that it would be Commis-  
25 | sion counsel who would lead evidence on direct and counsel

SUBMISSION - MR. SAUNDERS

1 for parties given status have the opportunity to cross-  
2 examine.

3 CHAIRMAN

4 I'm not quarreling with you there, but I just wanted  
5 to be certain I understood what you were saying earlier,  
6 that I thought you said, but I may have been unable to  
7 hear what you were saying. That the rules of procedure  
8 that have been prepared and passed, adopted by the Commiss-  
9 ion and I emphasize, you know, this does not restrict  
10 us from changing the rules in the future. I thought,  
11 and I understood you to say that our authority to do  
12 that came under the provision "and such other related  
13 matters which the Commissioners consider relevant to  
14 the inquiry." Is that what you're saying?

15 MR. SAUNDERS

16 Mr. Chairman, I did, but only as example. Not to  
17 say that that was the only place that what you have set  
18 up as rules of practice gained its authority, but rather  
19 to explain as best I can that whatever is done by this  
20 Commission must relate to those three critical features  
21 that are set forth in the paragraph above it. And that  
22 the funding or wherewithal of a...

23 CHAIRMAN

24 I understand what you're saying now. Whether I agree  
25 with it is something else.

SUBMISSION - MR. SAUNDERS

1 MR. SAUNDERS

2       Thank you.       "And that the funding or wherewithal  
3 of a particular participant granted status by this Commiss-  
4 ion" is not a "such other related matter" which the Commiss-  
5 ion should consider relevant to the inquiry. The financial  
6 status of a participant granted status some seventeen  
7 or sixteen years after the incident which gave rise to  
8 the investigation is not, in my respectful submission,  
9 something that can be described as "a related matter  
10 which the Commissioners consider relevant to the inquiry."

11       My friends have suggested, Mr. Chairman and members  
12 of the Commission, that Clause 2 of the Order-in-Council,  
13 that is to say, "to retain the services of legal counsel,"  
14 is broad enough to permit this Commission to authorize  
15 the retention of counsel on behalf of anyone or all of  
16 the seventeen parties granted full status and to compel  
17 payment of such retainer by the Province of Nova Scotia.

18       We point out to the members of the Commission that  
19 the wording is not "to retain on behalf of all applicants  
20 granted standing before the Commission." Rather, and  
21 instead, the wording is "to retain the services of legal  
22 counsel." And we say that that imports nothing more  
23 than what this Commission did, I believe, in November  
24 of last year when it engaged counsel on its own behalf.

25 We say that that does not and cannot be so broadly interpreted



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1 as to say that this Commission can then authorize the  
2 retention of counsel for any one of the seventeen participants  
3 and to have such retention paid for by the Province of  
4 Nova Scotia.

5 Turning to some cases which were mentioned by my  
6 friends in their written facta, Mr. Chairman and members  
7 of the Commission, they referred to the Royal Commission  
8 on the Northern Environment and I have referred to that  
9 decision, the divisional court, and in particular the  
10 remarks of Mr. Justice Linden. And that is in our brief  
11 of materials and case law. I say with the greatest of  
12 respect that the Court went out of its way in that case  
13 to say that they were not making a determination which  
14 would affect the decision to be taken by proper officials  
15 on the overall question of funding. So that there is  
16 nothing in the decision of the divisional court in that  
17 case which stands for the proposition that a Royal Commis-  
18 sion can recommend that participants be funded by a provin-  
19 cial government. At Page 88 of the decision of Mr. Justice  
20 Linden and I quote very briefly:

21 The third caveat is that there is nothing in  
22 this decision which is meant to influence the  
23 Commissioners or others in relation to the  
24 question of funding of the participants with  
25 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 for full  
participation. That is a distinct question  
that will be determined by those responsible  
for those matters.

SUBMISSION - MR. SAUNDERS

1 And so I draw that...what I respectfully submit is a  
2 distinction to be made and an important one in the remarks  
3 of the divisional court in that case.

4 We don't have a very clear wording with respect to  
5 funding as they did and as the Court explored in the  
6 Bortolotti case, members of the Commission. You'll recall  
7 that that's a decision taken by the Ontario Court of  
8 Appeal and again it's referred to in the materials.  
9 Contrast the wording of the Order-in-Council that we  
10 have here with the Order-in-Council in that instance.

11 And I'm quoting:

12 All matters referred to this Commission shall  
13 be heard and determined in proceedings of an  
14 adversarial nature. The Ministry of Housing,  
15 former landowners, president, former agents  
16 and officials of what now forms part of the  
17 Ministry of Housing will be entitled to be  
18 represented by counsel, who shall be paid by  
19 the Ministry of Housing. The reasonable costs  
20 of counsel and any appraisals required et cetera,  
21 shall be borne by the Ministry of Housing.

22 So again I draw to the Commission's attention the distinction  
23 between that very clear wording in that instance and  
24 the language that we have as appears in the terms of  
25 reference in our case.

I've listened very carefully to the remarks made  
by my learned friends as to the risk to which their clients  
may be put during the obvious scrutiny of a Commission  
such as this and they've presented those positions eloquently.

SUBMISSION - MR. SAUNDERS

1 But I say with deference that the reasons that they have  
2 canvassed for the Commission are reasons for the granting  
3 of full status as a participant and not reasons why this  
4 Commission has authority to make any recommendation to  
5 government for funding for such a participant.

6 My learned friend, Mr. Pugsley, in making remarks  
7 on behalf of Mr. MacIntyre has addressed the matter of  
8 Mr. MacIntyre's reputation and that he will be under  
9 the glare of scrutiny and that his activities may be  
10 the result of sanction or may result in sanction. I  
11 say with the greatest of respect that appearance is not  
12 enough and we must presume that you, members of the Commission,  
13 have very carefully reviewed the criteria before which  
14 an applicant became a full status participant. And I  
15 assume that you had discussions among yourselves in order  
16 to make that determination in March of this year. That  
17 having been done, we say with respect that that doesn't  
18 give this Commission authority to then recommend funding  
19 for those participants. Because that's not the law.  
20 We say that there can be no recommendations of this Commission  
21 at whatever date which can legally affect any participant  
22 who appears before this Commission. We are all, after  
23 all, witnesses appearing before this Royal Commission  
24 and although we have full status participation and are  
25 able to cross-examine the witnesses who are called by

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1 | learned Commission counsel, we are still witnesses.  
2 | And any person who appears from my department or Mr.  
3 | MacIntyre appears or any R.C.M.P. officer or any other  
4 | witness is only that and that does not give this Commission  
5 | or any other the jurisdiction to make a recommendation  
6 | that government ought to pick up the tab for that. And  
7 | because this Royal Commission has no authority, based  
8 | on the jurisprudence that we've put in our submissions  
9 | to you, to make a decision which would have a legal effect  
10 | on someone, then we say with deference that there is  
11 | no authority in this Commission to compel or in other  
12 | ways require funding for that kind of participant.

13 |       So we say in conclusion on that point, members of  
14 | the Commission, that there is no inherent jurisdiction  
15 | and among other authorities we have the decision taken  
16 | in the Keable Commission decision that there is no inherent  
17 | authority. That a Royal Commission does not have the  
18 | inherent authority as a superior court and I don't think  
19 | I need canvass other cases this morning on that point.

20 |       My learned friend, I believe Mr. Ross made the argument  
21 | that the phrase "Rules of Procedure" ought to be inter-  
22 | preted broadly enough that the commissioners could then  
23 | compel the province to fund. And I say, with respect,  
24 | that surely any reading of Section 5, which deals with  
25 | the rules that you commissioners have put in place cannot

SUBMISSION - MR. SAUNDERS

1 be expanded so as to include any authority in yourselves  
2 to compel or require the government to do anything.

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*mc*

SUBMISSION - MR. SAUNDERS

1 My friend Mr. Ross has also drawn to your Commissioners'  
2 attention that section of the Order-in-Council, specifically  
3 number 4, which says that the Commission can order re-  
4 muneration, costs and expenses payable in respect to  
5 the Inquiry out of the consolidated fund of the Province.  
6 I just draw to your Commissioners' attention that it's  
7 not this Royal Commission which orders that such payment  
8 come out of the consolidated fund, rather one must go  
9 back to the preamble sentence which begins "All of the  
10 numbered terms of reference..." And I say it's very  
11 clear that it's the Governor-in-Council which is pleased  
12 to, and then several things are enumerated. So I say  
13 that it's the Governor-in-Council that would order under  
14 4 that such remuneration be paid under the consolidated  
15 fund and that that does not give jurisdiction to the  
16 Commission to so order.

17 I believe I've addressed the first two points in  
18 learned Commission counsel's letter to all of us, Mr.  
19 Chairman. We say that the Commission has no authority  
20 to recommend on a matter that is not enunciated in the  
21 Order-in-Council, and if the Chair or members of the  
22 Commission have any questions dealing with the Charter  
23 then my colleague, Mr. Pink, would be happy to respond.

CHAIRMAN

25 The issues with respect to the Charter have been

SUBMISSION - MR. SAUNDERS

1 CHAIRMAN [Cont'd.]

2 canvassed very fully by counsel in their briefs and you  
3 have responded in your brief. Indeed one counsel suggested  
4 that we go beyond the Charter, I'm sure which is to the  
5 delight of the Fathers of Confederation. But...so we  
6 don't deem it necessary to hear any further submission  
7 on the Charter.

8 MR. SAUNDERS

9 Thank-you, Mr. Chairman. Those are our submissions.

10 CHAIRMAN

11 Now, counsel for the applicants, or at least Mr.  
12 Pugsley indicated that he may wish to respond to any  
13 issues raised by the...by counsel for the Attorney General,  
14 particularly if they are unanticipated and you...did  
15 you hear anything that you didn't anticipate, Mr. Pugsley?

16 MR. PUGSLEY

17 I only have two very short comments, Mr. Chairman  
18 and members.

19 I'm surprised and disappointed at the position taken  
20 by the Attorney General's department in connection with  
21 the question of recommendations from this Commission  
22 for funding. Most enlightened provinces in this country  
23 have directly requested commissions of this kind to give  
24 its recommendations with respect to funding. As I under-  
25 stand the position taken by my friends, they not only

MR. PUGSLEY [Cont'd.]

1 do not want your recommendations, they say you can't give  
2 them, which I find surprising and disappointing.

3 My friend acknowledges that you have the liberty  
4 to award status. He acknowledges that you were acting  
5 within your mandate in so doing. My only comment is  
6 that status without funding is really an illusionary  
7 right here. That if there is no funding, there will be  
8 no participation by counsel and the full status that  
9 was intended in your designation will simply not be able  
10 to be carried out. Thank-you, Mr. Chairman.

11 CHAIRMAN

12 Let's see the order we have. Now, Mr. Wildsmith,  
13 do you wish to respond.

14 MR. WILDSMITH

15 Just very briefly, Mr. Chairman. The Attorney General's  
16 submission has engaged in the very lawyerese that I  
17 commented on in my opening remarks. It all seems to  
18 boil down to the Order-in-Council. Our submission to  
19 you, just to re-emphasize it is to say that you, as honourable  
20 gentlemen, have a choice, and we are simply asking that  
21 you do the honourable thing.

22 CHAIRMAN

23 Mr. Ross.

24 MR. ROSS

25 Thank-you, Mr. Chairman. As I look, Mr. Chairman,



MR. ROSS [Cont'd.]

1 at the letter of March 13, 1987, from the executive secretary  
2 of the Commission to Mr. Seale advising him that he was  
3 granted standing, the operative standing, said "This  
4 will entitle to be present, cross-examine witnesses and  
5 present a full submission." Now, if this is the standard  
6 letter which was sent to all parties, I really think that  
7 it's beyond the scope of the standing to really entertain  
8 the submissions on behalf of the Attorney General and  
9 I would suggest that it is absolutely inconsistent with  
10 the concept of an independent inquiry to have the Attorney  
11 General at this time attempting to really hamstring the  
12 Inquiry as far as interpreting its terms of reference  
13 is concerned.

14 CHAIRMAN

15 No one is going to hamstring the Inquiry.

16 MR. ROSS

17 I appreciate that.

18 CHAIRMAN

19 You can allay your fears on that.

20 MR. ROSS

21 Thank-you. Thank-you. That's the position, Mr.  
22 Chairman.

23 CHAIRMAN

24 Mr. Rogers.  
25

MR. ROGERS

1 I have no further submissions, Mr. Chairman, thank-  
2 you.

3 CHAIRMAN

4 Mr. MacDonald.

5 MR. MacDONALD

6 I have no further submissions, Mr. Chairman, thank-  
7 you.

8 CHAIRMAN

9 Have I covered all the counsel for the applicants?  
10 That's all we have to hear this morning, Mr. MacDonald.

11 COMM. EVANS

12 I'd like to ask Mr. Saunders a question.

13 CHAIRMAN

14 All right.

15 COMM. EVANS

16 Mr. Saunders, without prejudging this matter at  
17 all, it seems to me that this Inquiry is in the call  
18 to investigate a matter which is of great public interest,  
19 and witnesses who appear before this Commission are witnesses  
20 called to assist the Commission in the resolution of  
21 the problem which has been handed to them by the government.  
22 And, in discharging that responsibility there is always  
23 the possibility that someone may be prejudicially affected  
24 by that finding, that is, some witness who appears. On  
25 the surface it would appear a bit unfair that a person

6-6  
COMM. EVANS [Cont'd.]

1 | who is called to give evidence at the Commission and  
2 | who might be prejudicially affected does not have the  
3 | right to have legal representation to protect his interest.  
4 | I gather from what you...I appreciate what you have told  
5 | me. But in looking at other commissions of inquiry throughout  
6 | the country, they seem to be a bit at variance with what  
7 | you have indicated to us. I know that in the Pickering  
8 | one certainly it was set out, a particular resolution  
9 | that they should be funded but there have been other  
10 | commissions that do not have the same wording where funding  
11 | has been provided. I think I'm right in that.

12 | MR. SAUNDERS

13 | Yes, you are, Commissioner Evans. I guess my reaction  
14 | to that is that in my reading of those decisions the  
15 | question of whether a commission had the discretion to  
16 | recommend funding did not come before the commission.  
17 | In some, for example, I understand in Grange the government  
18 | indicated to the commission that it would be receptive  
19 | to recommendations and they were forthcoming. I am not  
20 | here on behalf of the Province of Nova Scotia, rather  
21 | only a department of that government. And I speak not  
22 | for the province or its attitude in this matter, sir.

23 | COMM. EVANS

24 | But in the Grange inquiry, by whom was the submission  
25 | made on behalf of the government?

MR. SAUNDERS

1 I don't know. I don't know. I only gain this from  
2 discussions with Mr. Lamick who appeared as commission  
3 counsel in that instance.

4 COMM. EVANS

5 I understood it may have been made by the Attorney  
6 General...

7 MR. SAUNDERS

8 I have no idea.

9 COMM. EVANS

10 ...as an officer of the Crown.

11 MR. SAUNDERS

12 I have no idea, sir.

13 COMM. EVANS

14 I'm not positive. I just suspect that's what had  
15 happened.

16 MR. RUBY

17 I have a submission if I might. I, and I suspect  
18 others are concerned about what might be the schedule  
19 you have in mind for the hearings in the fall. Might  
20 I invite you to assist counsel by indicating what you've  
21 got planned so we can plan our own schedules for the  
22 fall.

23 CHAIRMAN

24 We keep planning and then people intervene and play  
25 havoc with our planning. But the announced date for the

CHAIRMAN[Cont'd.]

1 opening of public hearings in Sydney, Nova Scotia, is  
2 Wednesday, September the 9th, 1987. We anticipate sitting  
3 that week, the following week and the week of the 21st.  
4 The week of September the 28th we have other judicial  
5 duties that are mandatory that we perform. We run into  
6 some difficulties as of now in October, the first three  
7 weeks, and I realize that counsel for all parties needs  
8 some time in between to take...to participate in other  
9 hearings that they have in courts, et cetera. As of  
10 now we are most likely to come back again on Monday,  
11 the 26th of October, still at Sydney, and we will be  
12 sitting in November...we are having a little... I'm  
13 a bit uncertain as to how many weeks we will be sitting  
14 in November at this time. What we're hoping to do is  
15 at a meeting of the Commission very soon to finalize  
16 as best we can the schedule and that schedule will be  
17 submitted to all counsel. Now, I realize there is no  
18 way we can accommodate all counsel.

19 Well, I'm sorry, it's just been drawn to my attention...  
20 this is what happens when you change every day. We will  
21 not be here the first...we will not be sitting the first  
22 two weeks in November, but we will be sitting again commencing  
23 the 16th of November...gee, where are we now?  
24 October. Have I got you all confused now? Let me  
25 start again. We are going to open in Sydney on the 9th

CHAIRMAN [Cont'd.]

1 of September and we will sit in Sydney until Friday the  
2 25th of September. Then we start again on, sorry, on  
3 October the 6th and we sit the 6th, 7th, 8th and 9th  
4 still in Sydney. We will not be sitting the weeks of  
5 the 12th and 19th of October. But we sit...we commence  
6 again on October the 26th in Sydney and we will continue  
7 in Sydney until we finish our hearings in Sydney. It  
8 is anticipated that there will also be lengthy hearings  
9 in Halifax.

10 MR. RUBY

11 When you say a week do you mean a full five day  
12 week or are you talking of something else?

13 CHAIRMAN

14 A full five-day week. Well, we may adjourn for  
15 statutory holidays and Boxing Day is out and Christmas  
16 Day is a holiday in Newfoundland.

17 I thank counsel for their submissions and for the  
18 concise manner in which the submissions were made today  
19 really supplementary to the briefs that have been filed.  
20 We have reviewed the briefs a great deal during our meetings  
21 over the past few days and the Commission is conscious  
22 of the fact that there is a great deal of urgency in  
23 getting this issue out of the way so that we can get  
24 on with doing the other work that has to be done. Mind  
25 you there is so much work to be done by Commission counsel

CHAIRMAN[Cont'd.]

1 and research people who we will have to have retained  
2 and will retain in areas not directly involved in the  
3 presentation of evidence, that we can use every day we  
4 have between now and September in doing that work. But  
5 I don't want...we don't want unnecessary delays.

6 With that in mind, therefore, we propose adjourning  
7 until two o'clock tomorrow afternoon when we will reconvene  
8 in this building and we will make known our decision  
9 with respect to this morning's applications.

10 ADJOURNED to 2:00 p.m. - May 14, 1987

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1 May 14, 1987 - 2:00 p.m.

2 DECISION RE FUNDING

3 CHAIRMAN

4 This is a decision of the Royal Commission on the Donald  
5 Marshall, Jr., prosecution on the matter of applications for the  
6 provision of funding for legal counsel.

7 Application has been made on behalf of various parties  
8 requesting the Commission to order the Province of Nova Scotia to  
9 pay for legal counsel to be retained by such parties, or in the  
10 alternative, requesting the Commission to recommend that the  
11 Province of Nova Scotia provide such payment.

12 We do not consider it necessary at this time to determine  
13 whether the Commission has power to order the province to provide  
14 payment for such legal counsel; however, we do believe that absent  
15 any prohibition, it is implicit in the terms of reference of any Royal  
16 Commission that it has the capacity and indeed the obligation to  
17 respond to any party who has been granted standing and who raises  
18 an issue of participant funding. To refuse to respond to such a  
19 request would be inconsistent with a tradition of Royal Commissions,  
20 a tradition which encourages full participation in a public and  
21 independent forum. In recent times similar requests have been  
22 responded to by then Mr. Justice Berger, Mr. Justice Grange, Mr.  
23 Justice Estey and Mr. Justice Parker.



1           The Commission, if its findings are to be considered credible,  
2 must be perceived to be conducting fair hearings and to be doing  
3 everything possible to ensure that proper representation is provided  
4 for all parties whose participation in all or in some particular part of  
5 the hearings is required. It would be extremely unfortunate and  
6 inconsistent with the proper administration of justice if a necessary  
7 party were prevented from presenting its full story to the  
8 Commission due to lack of financial resources. The public interest is  
9 unlikely to be served adequately if only some interested groups and  
10 parties are represented, since, necessarily, that would risk having  
11 our findings influenced in favour of those parties who are either  
12 better organized or better funded.

13           We consider funding should only be made available if the  
14 public interest demands that the cost of such parties should be paid  
15 from the public purse, and then only to the extent the parties cannot  
16 afford to provide their own counsel. Wherever funding is provided  
17 by the province government to any party, it is our recommendation  
18 that the amounts to be paid should be subject to taxation. In this  
19 way there should be prevention of costly duplication of work and  
20 resources and adequate protection of public funds.

21           The Commission is of the opinion that with the exception of the  
22 Attorney General of Nova Scotia, none of the parties granted standing  
23 can reasonably take the position that either the public interest or  
24 their own interest requires the presence of legal counsel on their  
25 behalf throughout the hearings. The province of Nova Scotia has  
26 retained outside counsel to represent the present and former

1 Attorneys General and the employees of the department. Those  
2 parties who have been granted standing and who played an  
3 important role in the events leading to the arrest and conviction of  
4 Donald Marshall, Jr., and who could reasonably assume that their  
5 conduct may be attacked, would want their counsel to be present  
6 when they're giving evidence themselves and whenever evidence is  
7 being adduced which would tend to call their conduct into question.  
8 The public interest in having the hearings conducted fairly demands  
9 that such parties not be denied the right to defend vigorously their  
10 conduct because of their inability to pay counsel.

11 In this case, the perception of fairness is of particular  
12 importance because the Province of Nova Scotia has elected to  
13 provide funding for counsel for Donald Marshall, Jr., whose interest is  
14 adverse to other parties who have been granted standing. Fairness  
15 demands that these parties be given every opportunity to have their  
16 interest protected. John F. MacIntyre and the estate of Donald C.  
17 MacNeil, Q.C., fall into this category and each has advised the  
18 Commission that they cannot afford to pay legal counsel. It is our  
19 recommendation that payment for such counsel be made by the  
20 Province of Nova Scotia.

21 Another group of parties who have been granted standing, all  
22 of whom are or were members of the R.C.M.P., may want their  
23 counsel present while they're on the witness stand, but it is unlikely  
24 they could reasonably suggest that the protection of their individual  
25 interest require that independent counsel attend during the  
26 presentation of most other evidence.

1           We understand the federal government provides funding for  
2 counsel for such persons while they are giving evidence and when  
3 they are being interviewed by Commission counsel.

4           Standing has been granted for the R.C.M.P. and counsel has  
5 been appointed by that body to represent the interests of the force  
6 and all members of the force, to the extent that they were acting in  
7 the scope of their employment.

8           It is our understanding that counsel for the R.C.M.P. intends to  
9 be present during most of the hearings. The federal government  
10 recognizes that individual members of the R.C.M.P. require  
11 independent counsel on occasion. Counsel for the various members  
12 of the R.C.M.P. have indicated that circumstances could arise other  
13 than when their clients are giving evidence where a conflict might  
14 exist between their interest and those of the R.C.M.P.

15           Given the intention of the federal government to provide  
16 funding to individual members of the force in certain circumstances,  
17 we suggest it is that body to whom these applicants should look for  
18 additional funding.

19           Those parties who represent the public interest or groups  
20 thereof fall into a different category. Standing has been granted to  
21 the Black United Front and the Union of Nova Scotia Indians. These  
22 groups requested standing because they hold the view that  
23 discrimination and racism influence the administration in the  
24 Province of Nova Scotia and may have contributed to Donald  
25 Marshall, Jr., being convicted and sent to prison. These serious  
26 allegations will be considered by the Commission. We believe that

1 the public interest requires, in a proper case, that the point of view  
2 of organized and affected minority groups be appropriately  
3 represented and articulated. This is such a proper case. The extent  
4 of involvement required at the hearings by counsel for these groups  
5 is difficult to predict at this time. The Commission has also  
6 instructed its counsel to confer with both such groups prior to  
7 experts being retained by the Commission to carry out research  
8 concerning the matters of racism and discrimination.

9 Finally, we considered the application of Oscar Nathaniel Seale,  
10 father of the late Sanford William Seale. Mr. Seale consistently has  
11 maintained the position that his son's reputation was being attacked  
12 and damaged without any opportunity having been afforded to the  
13 Seale family to respond. His position is comparable to that of the  
14 parents of children considered by the Grange Commission to have a  
15 sufficient interest in the outcome of that inquiry to warrant public  
16 funding for their counsel.

17 In the submission made on behalf of Mr. Seale, it was indicated  
18 he cannot afford counsel. It is clear that his interest relates only to  
19 the events which occurred on the night when this tragedy took place  
20 and we consider he should be provided funding to enable counsel to  
21 be present to represent the interests of the family when those events  
22 are being considered at the hearings. During the submission made  
23 yesterday, counsel for Mr. Seale indicated he would also be  
24 representing the Black United Front and thereby the costs to be  
25 incurred for the representation of Mr. Seale would be less than  
26 normally might have been the case.

1           The Commission accordingly makes the following  
2 recommendations to the Governor-in-Council:

3           (1) That consistent with the foregoing principles, public  
4 funding for legal counsel be provided John F. MacIntyre, the Union of  
5 Nova Scotia Indians, the Black United Front, the estate of Donald C.  
6 MacNeil, Q.C. and Oscar Nathaniel Seale.

7           (2) That no funding be provided by the Province of Nova Scotia  
8 for Adolphus James Evers, Gary Green, R.A. McAlpine, Herb Davies, H.  
9 Wheaton and D. Scott.

10           (3) That any accounts rendered for participant funding be  
11 reviewed, taxed. Counsel for all applicants impressed the  
12 Commission with their assurances of a responsible approach to the  
13 expenditure of public funds and we believe that taxation of accounts  
14 rendered will provide public assurance of such responsibility.

15           We recognize that the Governor-in-Council is not required to  
16 accept our recommendations, however, we have unique knowledge  
17 concerning the scope of this inquiry and are in the best position to  
18 make recommendations. We expect, therefore, our recommendations  
19 will be given serious consideration.

20           The Commission would like to thank counsel for their  
21 attendance here yesterday and the manner in which counsel  
22 conducted themselves in the presentation of their arguments and the  
23 succinct way in which the positions being put on behalf of their  
24 clients was presented to this Commission, and we are optimistic in  
25 the belief that such approach is one that we will receive and can

1 anticipate receiving when the hearings commence in Sydney, Nova  
2 Scotia, in September.

3 We're also particularly impressed with the obvious intelligent  
4 approach that the press who covered the hearing yesterday took in  
5 reporting this today. It indicated to us that they indeed had a very  
6 responsible knowledge of this very sensitive but important issue.

7

REPORTER'S CERTIFICATE

105.

MARGARET E. GRAHAM DISCOVERY SERVICE

I, Margaret E. Graham, Court Reporter, certify that the foregoing is a true and accurate transcript of all the evidence taken by way of recording and reduced to typewritten copy.



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MARGARET E. GRAHAM

DATED THIS 19 day of May , 19 87 , at Dartmouth,  
Nova Scotia.