

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(Divisional Court)**

B E T W E E N :

THE HONOURABLE G. NORMAND GLAUDE,  
COMMISSIONER OF THE CORNWALL PUBLIC INQUIRY

Applicant

- and -

PERRY DUNLOP

Respondent

**FACTUM OF THE APPLICANT**  
**(Continuation of Stated Case Returnable January 28, 2008)**

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**PART I - OVERVIEW**

1. On November 19, 2007, the Honourable G. Normand Glaude, Commissioner of the Cornwall Public Inquiry (the "Commissioner") stated a case to this Honourable Court asking that it inquire into the refusal of Perry Dunlop to answer questions before the Cornwall Public Inquiry in September and October 2007.
2. After the hearing of the stated case, this Honourable Court found Mr. Dunlop guilty of contempt. In its Order issued December 7, 2007, the Court ordered Mr. Dunlop to attend before the Commissioner on January 14, 2008 to testify and answer questions put to him by Commission Counsel and counsel for parties with standing.
3. Further, this Honourable Court ordered Mr. Dunlop to attend before it on a date to be fixed in order that this Court may deal with the punishment to be imposed upon Mr. Dunlop for his contempt on October 9, 2007, and, in the event that he does not appear before the Commissioner as ordered by this Court, for his contempt of the Court's Order.

4. Mr. Dunlop failed to appear before the Commissioner on January 14, 2008 as ordered.
5. This continuation of the stated case is intended to deal with the following three issues:
  - (i) whether Mr. Dunlop is in further contempt of the Court as a result of his failure to appear before the Commission on January 14, 2008 as ordered;
  - (ii) the proposed procedure for dealing with punishment; and
  - (iii) the punishment for Mr. Dunlop's contempt on October 9, 2007 and, if so found, his further contempt of January 14, 2008.
6. The Commissioner appreciates that in the ordinary course the Attorney General should become involved in prosecutions for criminal contempt so as to maintain the integrity of the justice system in a matter of public importance. The Commissioner anticipates that the Attorney General will participate in the return of this stated case for contempt. The Commissioner submits, though, that this Honourable Court is entitled to the assistance of the Commission on the issue and therefore makes the following submissions.

*Canada Post Corp. v. Canadian Union of Postal Workers (CUPW)*, [1991]  
O.J. No. 2472 (Ont. Ct. Gen. Div.), Supplementary Brief of Authorities,  
Tab 1

## **PART II - THE FACTS**

### **A. The Stated Case**

7. The Commissioner stated a case to the Divisional Court to inquire into the refusal of Mr. Dunlop to answer questions before the Cornwall Public Inquiry (the "Commission" or "Inquiry") on October 9, 2007, and to punish or take steps for the punishment of Mr. Dunlop for that refusal.

**Notice of Application to Divisional Court for Stated Case, dated October  
26, 2007, Applicant's Record for Stated Case, Vol. 1, Tab 1**

8. The hearing of the stated case took place on November 19, 2007. This Honourable

Court found Mr. Dunlop guilty of contempt in oral reasons given from the bench.

9. The Court released its reasons in writing on December 6, 2007. The Court's Order was issued on December 7, 2007 (the "Order"). Mr. Dunlop was ordered to appear before the Commissioner on January 14, 2008 to testify and answer questions put to him by Commission Counsel and counsel for parties with standing. In addition, the Court ordered that Mr. Dunlop attend before it on a date to be fixed in order that it may deal with the appropriate punishment for his contempt.

**Reasons for Decision released December 6, 2007, Supplementary Applicant's Record for Stated Case ("SAR"), Tab 2; Order issued December 7, 2007, SAR, Tab 3**

10. Mr. Dunlop was served with both the reasons and the Order via his counsel, Mr. John Martin. While a copy was sent to Mr. Dunlop's personal email account as well, the Order was served on his counsel on the understanding that Mr. Dunlop does not want to have documents served on him personally at his home.

**Affidavit of Mary C. Simms, sworn January 16, 2008 ("Simms Affidavit"), paras. 5-7, SAR, Tab 4, p. 16; Exhibit B to the Simms Affidavit, SAR, Tab 4B**

**B. Attempts to Arrange for Mr. Dunlop's Re-attendance Before the Commission**

11. On December 11, 2007, Peter Engelmann, Lead Commission Counsel, contacted Mr. Dunlop via email regarding his January 14, 2008 appearance before the Commissioner. Mr. Engelmann offered to meet with Mr. Dunlop to assist in preparing for his testimony and asked to hear from him at his earliest convenience.

**Simms Affidavit, para. 8, SAR, Tab 4, pp. 16-17; Exhibit C to the Simms Affidavit, SAR, Tab 4C**

12. On January 3, 2007, Mr. Engelmann sent a further email message to Mr. Dunlop,

advising that the Inquiry would commence at 1:00 p.m. on January 14, 2008, and asking Mr. Dunlop to contact Commission staff in order that they may assist with his travel and related needs.

**Simms Affidavit, para. 10, SAR, Tab 4, p. 17; Exhibit D to the Simms Affidavit, SAR, Tab 4D**

13. Mr. Dunlop did not respond to Mr. Engelmann's communications.

**Simms Affidavit, paras. 9 & 11, SAR, Tab 4, p. 17**

14. However, Mr. Dunlop did speak with the media, confirming that he did not intend to appear before the Commissioner as ordered.

15. On January 10, 2008, the Cornwall Standard-Freeholder published a Canadian Press article reporting on an exclusive interview with Mr. Dunlop. In the article, entitled "Dunlop refuses to testify: He's lost faith in justice system", Mr. Dunlop is quoted as stating: "I have a lot of reasons, but I'm not going to testify".

**Canadian Press Article, "Dunlop refuses to testify: He's lost faith in justice system" ("CP Article"), Exhibit E to the Simms Affidavit, SAR, Tab 4E, p. 48**

16. On January 11, 2008, Mr. Dunlop participated in an interview with Adrian Harewood of the Canadian Broadcasting Corporation, Radio One program "All in a Day". In the radio interview, Mr. Dunlop again stated that he was not going to attend the Inquiry as ordered.

**Transcript, Canadian Broadcasting Corporation ("CBC"), Radio One program "All in a Day" ("Radio Transcript"), Exhibit F to the Simms Affidavit, SAR, Tab 4F, pp. 52-53**

**C. Events of January 14, 2008**

17. On January 14, 2008, the hearing of the Inquiry commenced at 1:06 p.m. Mr. Dunlop was not in the hearing room. The court officer was asked to call out Mr. Dunlop's name in

the hallway. The officer returned to the hearing room and reported that there was no response.

**Simms Affidavit, para. 14, SAR, Tab 4, pp. 17-18; Exhibit G to the Simms Affidavit, SAR, Tab 4G, p. 70**

18. At the request of the Commissioner, the hearing recessed at 1:13 p.m. and resumed at 1:38 p.m. in order to give Mr. Dunlop time to appear.

**Simms Affidavit, para. 15, SAR, Tab 4, p. 18; Exhibit G to the Simms Affidavit, SAR, Tab 4G, pp. 70-71**

19. Mr. Dunlop was not in the hearing room when the hearing resumed at 1:38 p.m. The court officer was again asked to call out Mr. Dunlop's name in the hallway. The officer returned to the hearing room and reported that there was no response.

**Simms Affidavit, para. 16, SAR, Tab 4, p. 18; Exhibit G to the Simms Affidavit, SAR, Tab 4G, pp. 71-72**

20. The Commission proceeded to other matters, adjourning for the day at 3:35 p.m. At no time did Mr. Dunlop appear before the Commission on January 14, 2008.

**Simms Affidavit, para. 17, SAR, Tab 4, p. 18; Exhibit G to the Simms Affidavit, SAR, Tab 4G**

**D. Continuation of Stated Case**

21. In light of Mr. Dunlop's failure to appear before the Commissioner as ordered, the Commissioner served notice of this hearing date in accordance with the Order, seeking to deal with Mr. Dunlop's punishment for the October 9, 2007 contempt, his apparent contempt of the Order, and the punishment for that contempt, if so found.

**Notice of Return of Stated Case dated January 15, 2008, SAR, Tab 1**

**PART III - ISSUES AND THE LAW**

22. The Commissioner submits that the issues to be dealt with by this Court are as follows:

- (i) whether Mr. Dunlop is in further contempt of the Court as a result of his failure to appear before the Commission on January 14, 2008 as ordered;
- (ii) the proposed procedure for dealing with penalty; and
- (iii) the punishment for Mr. Dunlop's contempt on October 9, 2007 and, if so found, his further contempt on January 14, 2008.

**A. FAILURE TO APPEAR ON JANUARY 14, 2008: DISOBEDIENCE OF THE ORDER**

23. At the initial hearing of the stated case on November 19, 2007, the Commissioner requested that in the event that the Court found Mr. Dunlop guilty of contempt, it order Mr. Dunlop to purge his contempt before any penalty be imposed. The Court ordered Mr. Dunlop to appear before the Commissioner on January 14, 2008 to testify and answer questions put to him by Commission Counsel and counsel for parties with standing.

**Order, SAR, Tab 3**

24. The transcript of evidence establishes that Mr. Dunlop did not appear before the Commission on January 14, 2008 as ordered.

**Simms Affidavit, paras. 14-17, SAR, Tab 4, pp. 17-18; Exhibit G to the Simms Affidavit, SAR, Tab 4G**

25. The Supreme Court of Canada in *United Nurses of Alberta v. Alberta (Attorney General)* described the gravamen of the offence of criminal contempt as "the open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court."

*United Nurses of Alberta v. Alberta (Attorney General)* (1992), 71 C.C.C. (3d) 225 (S.C.C.), Brief of Authorities, Tab 8, p. 22

26. The *mens rea* to be proven for criminal contempt for disobedience of court orders is knowledge of the order and the intention to act contrary to that order. As per McLachlin J. (as she then was):

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore, when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt.

*United Nurses of Alberta, supra*, Applicant's Brief of Authorities, Tab 8, p. 22

See also, *MacMillan Bloedel Ltd. v. Simpson* (1994), 113 D.L.R. (4th) 368 (B.C.C.A.), Supplementary Brief of Authorities, Tab 2

27. Mr. Dunlop was served with the Court's Order, and its terms were clear and unambiguous. Even if Mr. Dunlop were to allege that the Order was not properly served, it is no defence that an order was not formally served when one is aware of the terms of an order. Mr. Dunlop was clearly aware of the Order: in addition to Mr. Dunlop and his counsel being provided with copies of the Order, Mr. Engelmann corresponded with Mr. Dunlop regarding the Order and Mr. Dunlop's expected January 14, 2008 appearance before the Commissioner.

*Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217, Supplementary Brief of Authorities, Tab 3

Simms Affidavit, paras. 5-8, 10, SAR, Tab 4, pp. 16-17; Exhibits B, E & F to the Simms Affidavit, SAR, Tab 4B, 4C & 4D

28. Further, and in any event, Mr. Dunlop acknowledged the Order in his interviews with

the media. Mr. Dunlop indicated that he was not going to testify despite the Court Order and that he was “prepared to face the consequences” of his disobedience, including incarceration.

**CP Article, Exhibit E to the Simms Affidavit, SAR, Tab 4E, p. 48**

**Radio Transcript, Exhibit F to the Simms Affidavit, SAR, Tab 4F, pp. 52-54, 57**

29. Mr. Dunlop’s disobedience of the Order was “open, continuous and flagrant”. Not only did Mr. Dunlop fail to appear as ordered, but he spoke to the media in advance of the January 14, 2008 hearing date, publicized his intention to disobey the Order and attacked the integrity of the Commission, bringing the administration of justice into disrepute. The article, “Dunlop refuses to testify: He’s lost faith in justice system” reported Mr. Dunlop’s position as follows:

A former police officer credited with bringing to light explosive allegations of widespread child sexual abuse in eastern Ontario says he convinced the dark stories that have divided the community are true – **but he says he won’t testify before a public inquiry because he says the justice system hasn’t listened to him for 15 years.**

Perry Dunlop, a decorated former officer from Cornwall, Ont., has been scheduled to testify but he told The Canadian Press in an exclusive interview **he won’t be there because he’s lost faith in the justice system. ...**

“I don’t have much of a choice, really, so I’ll face whatever ... **I have a lot of reasons, but I’m not going to testify,**” he said.

“**I’m saying our judicial system is broken and they haven’t listened to me for 15 years, and I have no faith. Absolutely no faith, none.**” [Emphasis added]

**CP Article, Exhibit E to the Simms Affidavit, SAR, Tab 4E, p. 48**

30. In his interview with CBC Radio One, Mr. Dunlop made the following statements about why he would not testify as ordered:

*...Perry Dunlop: **The reason I’m not testifying is that I believe that the commissioner’s in a conflict of interest in that he’s a current***

sitting judge and he works of [sic] the AG's office and the A.G. is under question in this...on this file and I feel that he's in conflict there and he's also...He won't admit to being in conflict but I think considering the church is really heavily involved in this inquiry, it should be obvious that we should have had somebody that wasn't perhaps so tied in with the church or on that side of it.

**And I don't think the mandate is right.** It's just...It's not set up and I've sort of been on the outside since day one, if you look at my involvement, you know, 15 years ago, they came down hard on me and it seems that that's been their attitude and it continues to this day. It's not to look at the pedophile and what they did. It's to hammer the policeman that came forward and I just have no faith. **I feel it is very toxic.** ...

And, you know, you walk away from the system and just with your head down saying what's it all about? **So I have no faith is a big one and we've been through so much as a family and just to put my girls through this and again, and also the fact that the commission lied to get us there.** They said you won't be forced to testify and that.

It's just really toxic for me. ...

*Adrian Harewood: But do you not think that your input, because you've expressed a lack of faith in Commissioner Normand Glaude, do you not think that your input could be helpful to this inquiry, that perhaps you could push them in another direction?*

*Perry Dunlop: Yes, well, I don't think this is...I don't think this is the vehicle. I've really lost faith as I watch how they rip apart the victims and people coming forward and they're not asking the right questions.* They seem to be skirting the issue of the truth and of the bad guys and it's sort of set up in a way sequentially that they should have brought the institutions at the first and said what did you do? And then sort of blended it backwards.

And I will tell my story and Helen will tell her story and we'll perhaps write a book. ...

In just feel that **this is not the venue, that I just have no faith in this whole...this whole inquiry.** And I am sad that I can't tell my story, but rest assure we will tell our story and we will tell Canadians. ...

**Radio Transcript, Exhibit F to the Simms Affidavit, SAR, Tab 4F, pp. 52-54**

31. The Commissioner submits that Mr. Dunlop knew, or at least was reckless as to the fact that these comments would depreciate the authority of both this Honourable Court and

the Commission and bring the administration of justice into disrepute.

32. The Commissioner submits that Mr. Dunlop should be found guilty of criminal contempt for his disobedience of the Order. The evidence shows, beyond a reasonable doubt, that Mr. Dunlop had knowledge of the Order, which he deliberately disobeyed in an open, continuous and flagrant manner, with the intent and knowledge or a least recklessness as to the fact that it would bring the administration of justice into disrepute.

### **B. PROCEDURE FOR DEALING WITH PENALTY**

33. The procedure for dealing with Mr. Dunlop's punishment will depend on whether he attends before the Court at the hearing on January 28, 2008.

34. If Mr. Dunlop is in attendance at the hearing, the Commissioner submits that the Court should proceed to impose a fit sentence. As discussed in further detail below, the Commissioner seeks some period of incarceration for Mr. Dunlop's contempt(s).

35. However, if Mr. Dunlop is not in attendance, the Commissioner submits that punishment should not be imposed in his absence. An order for incarceration should not be made until after the respondent has appeared in person before the Court either voluntarily or pursuant to a warrant for his arrest.

*Kiler v. Jacobson*, [1992] O.J. No. 606 (Ont. Gen. Div.), at p. 3 (Q.L.),  
Supplementary Brief of Authorities, Tab 4

*Society of Composers, Authors and Music Publishers of Canada v. Trillion  
Investment Corp. (c.o.b. Copper John's Tavern)*, [1999] F.C.J. No. 319 at  
para. 6, Supplementary Brief of Authorities, Tab 5

36. Mr. Dunlop should have the opportunity to put forward his position on sentence, including identifying any mitigating factors that ought to be considered by this Honourable

Court, before a sentence is imposed. As Mr. Dunlop has thus far refused to appear before this Honourable Court voluntarily, the Commissioner submits that the appropriate procedure would be for the Court to issue a warrant directing the arrest of Mr. Dunlop and his production before the Court on a date to be fixed, so the Court may proceed to impose a fit sentence.

**C. APPROPRIATE PUNISHMENT FOR CONTEMPT**

37. This Honourable Court has found Mr. Dunlop guilty of contempt for his refusal on October 9, 2007 to answer questions before the Commission without lawful excuse. The Commissioner submits that this Court ought to punish him for that contempt and, in the event that he is found guilty of contempt for failing to obey the Order, for this second contempt.

38. The power of the Court to punish for contempt is considered necessary to assert the Court's authority and prevent undue interference with the proper administration of justice. As stated by McLachlin J.:

Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

*United Nurses of Alberta, supra*, Brief of Authorities, Tab 8, p. 21

39. The Commissioner submits that Mr. Dunlop's refusal to answer questions posed to him before the Commission, and his subsequent refusal to comply with this Court's order, put the administration of justice into disrepute and therefore merits punishment.

***i) The First Contempt: Refusal to Testify Without Lawful Excuse***

40. In finding him guilty of contempt, this Court concluded that Mr. Dunlop has knowledge and information that “goes to the very heart of the mandate of the Commission” and that he had no lawful excuse for his refusal to answer questions before the Commission on October 9, 2007. Rather, he refused to answer questions because he said that he has no faith in the Ontario justice system or the mandate of the inquiry; he is a “scapegoat”; the process is a cover-up; he was forced to appear against his will; and he could add nothing to his “will state”.

**Reasons for Decision, paras. 7 & 8, SAR, Tab 2, p. 7**

41. Mr. Dunlop’s contempt of the Commission merits sanction. It is not for Mr. Dunlop to declare that he has “no faith” in the Commission and “doubts anything positive will be achieved” by it and simply refuse to testify. As noted by Justice Blair in the following oft quoted statement:

No society which believes in a system of even-handed justice can permit its members to ignore, disobey, or defy its laws and its courts' orders at their whim because in their own particular view it is right to do so. A society which countenances such conduct is a society tottering on the precipice of disorder and injustice.

***Surgeoner v. Surgeoner* (1992), 6 C.P.C. (3d) 318 at 319, [1992] O.J. No. 299 (Gen. Div.), Supplementary Brief of Authorities, Tab 6**

42. That Mr. Dunlop refused to testify before a commission of inquiry rather than a court does not reduce the seriousness of his disobedience. Public inquiries have a long history in Canada and are an important part of our legal and political fabric. In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, *infra* Cory J. described the history and role of commissions of inquiry in these terms:

