

REASONS FOR THE RULING ON AN APPLICATION BY FATHER CHARLES MACDONALD TO CLARIFY FUNDING

On May 1st, 2006, I issued a Ruling confirming the jurisdiction of the Commission to call alleged victims of historical abuse to testify before the Commission for the purpose of examining the response of the justice system and other public institutions to the allegations.

This Ruling was issued in response to a motion brought by counsel for the Applicant, Father Charles MacDonald, who was seeking an order that the Commission did not have constitutional or other jurisdiction to inquire into specific allegations of sexual abuse or other wrongdoings made by alleged victims against him.

The Applicant also asked that a question by way of a stated case be referred to the Divisional Court regarding this matter. I dismissed this request in my Ruling of May 1st, 2006.

The Applicant has brought a subsequent application seeking clarification of my Ruling on Standing and Funding issued November 17, 2005. In that Ruling, I granted full standing to the Applicant for Phases I and II of this Inquiry in respect to those issues which directly affect his interests. I also recommended funding for one counsel.

The Applicant now argues that the Ruling on Standing and Funding includes funding to appear before the Divisional Court to review my Ruling of May 1st; failing which, the Applicant argues that I have the jurisdiction to recommend to the Attorney General that funding be provided to him and that that the circumstances of the Applicant are such that I ought to recommend funding.

The Applicant further argued orally that I should recommend to the Attorney General that costs be paid to other Parties in the event that costs were adjudicated against him if his judicial review application was to be dismissed by the Divisional Court.

The Citizens for Community Renewal supported the view that the Commissioner has discretion to recommend funding in respect of litigation flowing from Commission proceedings. It proposed criteria to guide the discretion of the

Commissioner in that regard and submitted that an independent assessor be retained to consider the merits of a proposed judicial review application.

The Victims Group essentially supported the arguments made by the Citizens for Community Renewal. The Men's Project agreed with the argument that the Commissioner had the ability to recommend funding for judicial challenges of the Commissioner's decisions.

Not having heard from the Attorney General on this issue, I must now proceed without the benefit of their submission.

Whether the funding that has been granted to the Applicant includes funding for a judicial review to the Divisional Court

I do not agree that the Ruling on Standing and Funding encompasses funding for judicial review applications of my decisions.

The Ruling provides that Parties with full standing will have the right to participate in the Inquiry in a number of ways, such as the opportunity to make opening submissions, access relevant documents or cross-examine witnesses. Those participation rights afforded to Parties only apply to Inquiry proceedings. Funding was directly linked to the grant of standing and to the scope of standing status and does not extend to other matters.

I wish to point out that I do not agree that the Ruling on Standing and Funding creates any legitimate expectation that funding would be made available for judicial review. As indicated, the Ruling on Standing and Funding is directed at Inquiry proceedings only. Furthermore, the doctrine of legitimate expectation does not apply here because no representations were made to the Applicant with respect to funding of judicial review applications, and the relief sought is substantive, not procedural.

Whether the Commission has jurisdiction to recommend funding for judicial review

Pursuant to section 10 of its Order in Council, this Commission may make recommendations to the Attorney General regarding funding to parties:

"10. The Commission may make recommendations to the Attorney General regarding funding to parties who have been granted standing, to the extent of the party's interest, where in the Commission's view the party would not otherwise be able to participate in the inquiry without such funding. Any such funding recommendations shall be in accordance with Management Board of Cabinet Directives and Guidelines."

Rule 58 of the Rules of Practice and Procedure of this Commission also provides that:

“58. The Commission may make recommendations to the Attorney General regarding funding to parties who have been granted standing, to the extent of the party’s interest, where in the Commission’s view the party would not otherwise be able to participate in the inquiry without such funding”

All Parties who have made submissions argued that those provisions enable the Commissioner to make recommendations to the Attorney General for funding to parties with standing, not only with respect to Inquiry proceedings, but also for judicial review of decisions of the Commissioner or other judicial proceedings flowing from the work of the Commission.

According to the Applicant, this is a matter of fairness, and standing to participate at the Inquiry must include the ability for parties to take various procedural steps, including judicial review, in order to protect their legal rights. The Applicant points out that the *Public Inquiries Act* contemplates reviews to the Divisional Court and that the participation in public inquiries thus includes judicial review of decisions made in the course of an inquiry.

The Citizens for Community Renewal stated that *“the opportunity to seek judicial review is essential to ensure legality, fairness and public confidence.”* I gather from the Parties that the denial of funding to parties not having the resources to commence judicial proceedings would mean that those “indigent” parties would not have the same ability to protect their rights as compared to other “wealthy” parties.

I am not convinced that section 10 of the Order in Council and section 58 of the Rules allow the Commissioner to make such funding recommendations. Those provisions are linked to grant of standing and contemplate funding for the participation in the Inquiry. A link may be made to the grant of standing under section 5 of the *Public Inquiries Act*, which, on its face, affords procedural rights for inquiry proceedings only.

In addition, while I am of the view that a judge is, except in the most exceptional of circumstances, quite capable of making an assessment of whether a challenge has merit, as a general rule, I do not believe it proper for the Commissioner to make determinations on whether a judicial challenge of his own decision is significant enough to warrant a funding recommendation. Those are issues related to the administration of justice, which would be more properly dealt with by the office of the Attorney General.

However, this is the first time this issue comes before me. I must say that I am sympathetic to the fairness argument brought by the Parties who have made representations. There is no doubt that some of the issues that will be decided by this Commission might have significant impacts on the conduct of the Inquiry and on the interests of various Parties.

Should Parties disagree with my decisions, they have the strict right to bring such matters before the courts, which may well take a different position. Ideally, and in

the public interest, all Parties should be on the same footing with respect to bringing issues related to the work of the Commission before the courts, regardless of their financial means, so long as the challenge is not frivolous.

Without delving into the merits of a potential judicial review application in this particular case, I believe that it is important to have a determination on the issue of the testimony of alleged victims before this Commission without delay. This Inquiry has already been long in coming.

As I have indicated in the Ruling on the Jurisdictional Motion, I believe that calling alleged victims is essential to the mandate of this Inquiry. On the other hand, I understand that the Applicant would want to have a resolution with respect to the tendering of evidence of alleged victims as this may have an impact on him.

Thus, even if I am not convinced that I can make a funding recommendation for judicial review under section 10 of the Order in Council and section 58 of the Rules, I believe that nothing precludes me from making appropriate suggestions to the Attorney General with respect to the conduct of this Inquiry and related issues.

In fairness, and considering the importance of the issue, I suggest to the Attorney General that funding be provided to the Applicant for two counsel for the preparation of a judicial review application of the Ruling on the Jurisdictional Motion, and one counsel for attendance before the Divisional Court, in accordance with the Management Board of Cabinet Directives and Guidelines.

This suggestion is contingent upon the application being filed and argued in Divisional Court (Toronto) on July 13, 2006. This is a date that the Divisional Court is available to hear this matter, and given the importance of having this matter proceed without delay, I believe it is reasonable that I set a time line to expedite the process.

I am making this suggestion despite my view that, on the basis of the argument before me, section 7 of the *Canadian Charter of Rights and Freedoms* is not engaged.

With respect to the Citizens for Community Renewal, the Victims Group and the Men's Project, who have indicated that they may wish to oppose the application before the Divisional Court, provided that they seek and are granted intervener status before the Court, I suggest that funding be provided to those Parties together for two counsel for the preparation of the written material, and one counsel for attendance before the Divisional Court, also in accordance with the Management Board of Cabinet Directives and Guidelines.

On the issue of costs, I find the claim of the Applicant to be untenable. Every litigant, including the Applicant, should assume the risks associated with bringing matters before the courts.

I note that the Citizens for Community Renewal proposed a process to assess funding applications made by Parties with respect to judicial review proceedings flowing from the work of the Commission. While I appreciate the efforts of this Party, in its current formulation, the proposed process would undoubtedly lead to further delays. As I have said previously, delay is something the Commission strives to avoid.

Finally, considering that I do not believe it proper for the Commissioner to rule on whether judicial challenges of his own decisions should be funded, but recognizing that this raises issues of fairness and public confidence in the Inquiry, I suggest that a process be developed by the Attorney General to assess funding applications made by funded Parties with standing before this Commission for judicial proceedings flowing from the work of the Commission.

I wish to add that this is an exceptional Ruling, which should not be viewed as a precedent for further applications of that nature.

I would thus grant the application, in accordance with my reasons.

I wish to thank counsel for all the Parties who have made submissions on this issue for their thoughtful assistance.

Dated this 13th day of June, 2006

G. Normand Glaude
Commissioner