Nova Scotia (Attorney-General) *v.* Nova Scotia (Royal Commission Into Marshall Presecution),

[1989] 2 S.C.R. 788

Donald Marshall, Jr. *Appellant*

v.

Her Majesty The Queen in Right of the Province of Nova Scotia, as represented by the Attorney General of Nova Scotia, and The Royal Commission into the Donald Marshall, Jr. Prosecution *Respondents*

and

The Attorney General of Quebec *Intervener*

indexed as: nova scotia (attorney general) *v.* nova scotia (royal commission into marshall prosecution)

File No.: 21198.

1989: April 19, 20; 1989: October 5.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

on appeal from the supreme court of nova scotia, appeal division

Jurisdiction -- Royal Commission -- Order in Council permitting Commissioners to inquire into and report on "such other related matters which the Commissioners consider relevant to the Inquiry" -- Commissioners ruling that questions as to cabinet discussions but not as to opinions of individual cabinet members relevant to their inquiry -- Whether or not Commission properly exercised its jurisdiction.

A Royal Commission was established by the Province of Nova Scotia to inquire into appellant's prosecution which resulted in his being convicted of a murder he had not committed and in his serving eleven years of his sentence. Its mandate included the power to inquire into such other related matters which the Commissioners consider relevant to the Inquiry. During the course of the Commission's hearings, a former Attorney General of Nova Scotia was asked questions about cabinet discussions of this matter. The Commission, in response to the argument that cabinet proceedings were privileged, ruled that it wished to know the general nature of the cabinet discussions, but would not permit questions relating to the views of individual cabinet members; such individual views were irrelevant to the inquiry. This, it stated, maintained the appropriate balance between cabinet secrecy and the proper administration of justice.

Both the appellant and the respondent Attorney General brought applications for an order in the nature of *certiorari* to challenge this ruling. The appellant's application for an order quashing the Commission's order in so far as it restricted the scope of question of members of

Cabinet was substantially granted by Glube C.J.T.D., but a unanimous Court of Appeal restored the ruling of the Commission. The Crown has now accepted the Commission's ruling. At issue is whether the Commission properly exercised its jurisdiction.

Held: The appeal should be dismissed.

The Commission's authority to consider matters such as those about which the former Attorney General was questioned derived from the words "such other related matters which the Commissioners consider relevant to the Inquiry" in the Order in Council establishing the Commission. The Commission, in essence, could determine what related matters it would enquire into. Its ruling that the views of named cabinet ministers were irrelevant to the inquiry did not refer to "relevance" as used in a court of law, but to what the Commissioners considered relevant to the Inquiry, i.e., it defined the Commission's mandate. If the Commission did not "consider" the "other related matters" to be "relevant to the Inquiry", the question was settled for nothing in the Order in Council otherwise authorized such an inquiry. Neither the appellant nor a court on judicial review could expand the Commission's ruling beyond what the Commission considered relevant.

The Commission could reasonably decide that it was interested in determining what the policies, practices and procedures in cases of this kind were without regard to the identity of the persons no longer in Cabinet who took certain positions.

Cases Cited

Distinguished: *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218; **referred to**: *Re Royal Commission into Metropolitan Toronto Police Practices and Ashton* (1975), 64 D.L.R. (3d) 477; *Smallwood v. Sparling*, [1982] 2 S.C.R. 686; *Carey v. Ontario*, [1986] 2 S.C.R. 637.

Statutes and Regulations Cited

Public Inquiries Act, R.S.N.S. 1967, c. 250.

APPEAL from a decision of the Nova Scotia Supreme Court, Appeal Division (1988), 54 D.L.R. (4th) 153. Allowing an appeal from a decision of Glube C.J.T.D. on an application for *certiorari*. Appeal dismissed.

Clayton Ruby, for the appellant.

Joel E. Fichaud and *Jamie W. S. Saunders*, for the respondent the Attorney General of Nova Scotia.

W. Spicer and *James MacPherson,* for the respondent Royal Commission into the Donald Marshall, Jr. Prosecution.

Robert Décary, Q.C., and *Angéline Thibault*, for the intervener the Attorney General of Quebec.

//*La Forest J.*//

The judgment of the Court was delivered by

LA FOREST J. -- The appellant was convicted of murder in November, 1971 and served eleven years of his sentence. He had not, in fact, committed the offence and he was released from prison. A Royal Commission was established to determine certain questions arising out of the appellant's prosecution.

During the course of the Commission's hearings, questions were asked of a former Attorney General of Nova Scotia, Mr. Giffin, about cabinet discussions of this matter. The respondent Attorney General objected to questions about cabinet proceedings, claiming they were privileged. The respondent Commission, on March 17, 1988, made the following ruling:

> The limited immunity which now attaches to Cabinet documents and discussions in this case is outweighed by the public interest in the Commission having this evidence before it. In as much as we now wish to know the general nature of Cabinet discussions on the Marshall case,

> we will not permit questions relating to the views of individual Cabinet members, as this would lead to the possibility of hearing evidence from all ministers to "set the record straight". Not only would such individual views be irrelevant to this Inquiry, but this process would so encumber this Commission as to lead to absurdity. Further, Cabinet members should be protected from public scrutiny in their discussions leading to the formulation of government policy and in other matters such as, for example, national security. In this case, the public interest argument is such that the limited protection granted should enable this Commission to hear evidence relating to what issues dealing directly with the Marshall case were discussed in Cabinet, and what views were considered in arriving at particular decisions or policies. We feel that this maintains the appropriate and necessary balance between the interests protected by Cabinet secrecy and our interest in the proper administration of justice.
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> . . .
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> In summary, while former and present members of Cabinet may be asked questions dealing directly with the Marshall case, they will not be required to reveal the opinions or comments of individual members of Cabinet expressed during Cabinet meetings. [Emphasis added.]

Both the appellant and the respondent Attorney General brought applications for an order in the nature of *certiorari* to challenge this ruling. The Attorney General's application sought to have the ruling quashed in so far as it related to the scope of questioning of members of the Executive Council (the provincial cabinet), for an order prohibiting questions of members of cabinet relating to cabinet discussions, and for an order declaring that the contents of cabinet discussions are immune from disclosure. The appellant's application was for an order quashing the Commission's order in so far as it restricted the scope of questioning of members of cabinet, both past and present. The appellant's application was substantially granted by Glube C.J.T.D., but a unanimous Court of Appeal restored the ruling of the Commission.

The appellant then sought and was granted leave to this Court. The Crown has now accepted the Commission's ruling. It has supplied all relevant cabinet documents and has permitted

questioning of the cabinet ministers, subject to the Commission's qualification that their names need not be divulged.

The case before us is then reduced to a very narrow issue, whether the Commission properly exercised its jurisdiction. For an answer to that question, one must turn to its mandate. The Order in Council by which, pursuant to the *Public Inquiries Act*, R.S.N.S. 1967, c. 250, the Commission was set up, gave it the following power:

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

The present matter does not fall within the individual items preceding the words I have emphasized. That is clear in the Order in Council's own terms and it becomes all the more apparent when one considers that all the matters referred to in those items took place in 1971 and that the questions respecting cabinet discussions related to events that occurred primarily in 1982, and at the earliest 1978 when Mr. Giffin entered cabinet following a change of government. Thus the only authority given the Commission to consider matters such as those about which Mr. Giffin was questioned was the words "such other related matters which the Commissioners consider relevant to the Inquiry". In short, the Order in Council left it to the Commission to determine what related matters it would enquire into.

The Commission determined that "we now wish to know the general nature of Cabinet discussions on the Marshall case", including "issues dealing directly with the Marshall case", and "what views were considered in arriving at particular decisions or policies". The views of named cabinet ministers were, in its opinion, "irrelevant to this Inquiry".

This is not "relevance" in the sense ordinarily used in a court proceeding -- where the issues are determined by the pleadings and the evidence must be "relevant" to those issues. The argument of counsel for the appellant was directed to the latter question and so was beside the point. Here, the Commission's opinion of "relevance" defines the issues themselves, i.e., the mandate. The Order in Council gave this discretion only to the Commission. If the Commission did not "consider" the "other related matters" to be "relevant to the Inquiry", that, it seems to me, settles the question. There is nothing in the Order in Council that otherwise authorizes an inquiry into that matter. What the appellant seeks to do is to expand the Commission's ruling beyond what the Commission considers relevant. That he cannot do. Nor can a court on judicial review. The Order in Council gave to the Commission, and to the Commission only, power to define these other related matters which the Commissioners consider relevant.

No argument was made that the Commission's decision was unreasonable, and I need not consider this matter. It was quite reasonable for the Commission to decide, particularly on matters not central to its mandate, as is the case here, that it is interested in determining what the policies, practices and procedures in cases of this kind are, without regard to the identity of the persons no longer in cabinet who took certain positions.

Counsel for the appellant, however, sought to enlist the authority of this Court's decision in *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218, and drew attention to the following remarks of Pigeon J. at p. 249:

> Therefore his [Commissioner's] decisions as to the proper scope of his inquiry, the extent of the questioning permissible, and the documents that may be required to be produced, are all open to attack, as was done before the Ontario Divisional Court in *Re Royal Commission and Ashton*. [Emphasis added.]

In interpreting this passage, it is important to refer to the case mentioned by Pigeon J., *Re Royal Commission into Metropolitan Toronto Police Practices and Ashton* (1975), 64 D.L.R. (3d) 477. There the Ontario Divisional Court had this to say at p. 485:

> I think that it is now fair to characterize the statutory powers of the Court under the present legislation as being supervisory only, *i.e.*, confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction.

In *Keable*, this Court stated that a court could review the proper scope of the Commission's inquiry in the sense set forth in *Ashton*. A court may, therefore, confine the Commission to its terms of reference, including disallowing questions outside those terms of reference. But nothing in *Keable* authorizes a court to expand the terms of reference of a Commission and, in consequence, the scope of questioning beyond that defined in or extended in the manner prescribed by the Order in Council.

On this basis, I need not consider the arguments of the appellant which, as I indicated, are relevant to a court proceeding for the settlement of a dispute between competing parties. There it is the parties who frame the issues, and one of the court's functions then becomes that of determining the relevance of evidence. Here we have an investigative body which is given a discretion to expand its terms of reference to related matters it considers relevant. The role of those appearing before the Commission is then limited to presenting their points of view on the matters within the mandate as so defined.

It also becomes unnecessary to decide whether an investigatory commission of the kind involved here has power to compel the production of cabinet documents within the principles enunciated in *Smallwood v. Sparling*, [1982] 2 S.C.R. 686, and *Carey v. Ontario*, [1986] 2 S.C.R. 637. Nor is it necessary to consider whether the appellant has standing to raise the issues he has put forward.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Ruby & Edwardh, Toronto.

Solicitors for the respondent Her Majesty The Queen in right of Nova Scotia as represented by the Attorney General of Nova Scotia: Patterson, Kitz, Halifax.

Solicitors for respondent Royal Commission into the Donald Marshall, Jr. Prosecution: McInnes, Cooper & Robertson, Halifax.

Solicitors for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.