A-282-97
(T-317-97)

CORAM: THE CHIEF JUSTICE
MARCEAU J.A.
McDONALD J.A.

BETWEEN:

THE GOVERNOR IN COUNCIL

Appellant
(Respondent)

- and -

JOHN EDWARD DIXON

Respondent
(Applicant)

REASONS FOR JUDGMENT

MARCEAU J.A.

The Governor in Council is appealing before us the well-publicized decision of the Trial Division that declared ultra vires his Order in Council P.C. 1997-174 relating to the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (hereinafter the Commission or the Somalia inquiry).[1]

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[1] I refer to the Governor in Council as a human representative of the Crown in right of Canada, in accordance with the Interpretation Act, which defines "Governor in Council" as meaning "the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada".

At the outset of the hearing, the appellant acknowledged, through his counsel, that there was an issue as to whether the Court should refuse to hear his appeal on the ground of mootness. Indeed, on receiving the Trial Division decision, the Governor in Council enacted a new order in council limiting the Commission's terms of reference in a manner that satisfied the respondent and followed the prescriptions of the Trial Division judge.[2] The appellant, however, asked the Court to hear and dispose of the appeal despite the apparent dissolution of the tangible and concrete dispute. He emphasized the fact that there was an important issue of public law involved and one that was not likely to come before the Court in the near future.

We agreed to hear the appeal. The trial decision, whether right or wrong, goes to an issue which lies at the heart of the division of responsibilities between the Judiciary and the Executive. Indeed, the case involves the extent to which a court, exercising its proper adjudicative role, should be entitled to interfere with discretionary decisions made by the Governor in Council. It is, therefore, rather unique in the sense that the need for the Judiciary to appreciate its proper adjudicative role in our political framework actually militated in favour of hearing the appeal. Moreover, the respondent remained intent on pursuing the appeal, which preserved the adversarial context and ensured that the issues were well and fully argued before this Court. As is evident from the litigation still pending in the Trial Division, notwithstanding the release of the Commissioners' report on June 30, 1997 (after the oral hearing in this appeal), there may be collateral consequences to the outcome which may have an impact on the final form in which the Commissioners' report remains on public record. Applying the criteria laid down by the Supreme Court in Borowski v. Canada (A.G.),[3] we were of the view that, on balance, it was in the interest of justice for us to hear the appeal, and so we did.

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[2]Order in Council P.C. 1997-456, dated April 3, 1997.

[3][1989] 1 S.C.R. 342.

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The factual context in which the case presents itself is so well known that a very general review should suffice.

The Commission was established under Part I of the Inquiries Act[4] by Order in Council P.C. 1995-442, dated March 20, 1995, to investigate certain aspects of the deployment of Canadian Forces to Somalia on a peace-keeping mission in 1993. Its establishment was motivated in large part by two events which had attracted national media attention: the suspicious death on March 16, 1993 of Shidane Arone, a Somali youth, while in the custody of the Canadian Airborne Regiment Battle Group; and the incidents of March 4, 1993, when one Somali was killed and another wounded near the Canadian Forces base in Belet Uen. The Commission's terms of reference were, however, broadly defined so as to make it both investigative and advisory. The Commissioners were to:

> ... inquire into and report on the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and the actions and decisions of the Department of National Defence in respect of the Canadian Forces deployment to Somalia ...

The Commissioners were further directed, "without restricting the generality of the foregoing", to inquire into and report on nineteen specific issues organized into three temporal phases of the peace-keeping mission: the pre-deployment phase (before January 10, 1993); the in-theatre phase (January 10, 1993 to June 10, 1993) and the post-deployment phase (June 11, 1993 to November 28, 1994). The nineteen specific

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[4]R.S.C. 1985, c. I-11.

issues are reproduced in the trial decision and repeating them here would serve no useful purpose.

In order to accomplish their assignment, in addition to the basic powers given to them by the Inquiries Act, the Commissioners were provided with important related authorizations. They could establish their own procedures, sit wherever and whenever in Canada they wished, rent whatever space and facilities they required, hire experts and others as needed, and sit in camera if they considered it necessary in the public interest.

Order in Council P.C. 1995-442, on establishing the Commission, provided that its report to the federal Cabinet (in both official languages) was to be made no later than December 22, 1995. This deadline, however, was to be extended at the request of the Commissioners, who said, on three subsequent occasions, that they needed more time to complete their inquiry. On July 26, 1995, by Order in Council P.C. 1995-1273, the reporting deadline was extended to June 28, 1996. On June 20, 1996, by Order in Council P.C. 1996-959, it was again extended for another nine months, to March 31, 1997. And finally, on February 4, 1997, Order in Council P.C. 1997-174 was enacted, giving the Commissioners until March 31, 1997 to complete public hearings and until June 30, 1997 to file their final report. The Commissioners' last request for an extension had asked for, at the earliest, a September 30, 1997 reporting date. By letter to the Commission dated January 10, 1997, an official of the Privy Council Office explained why the Governor in Council had refused to push back the deadline by as much as the Commissioners had requested. He stated:

> Although all scenarios proposed in your work-plan were examined, given the Government's desire to pursue solutions as quickly as possible, it was not regarded as being in the national interest to have to wait another year to receive the Commission's input.

It is this last Order in Council, which, like the previous extensions granted by the Governor in Council, pushed back the reporting date for only part of the time suggested by the Commissioners, that was attacked before the Trial Division and declared ultra vires. The attack was launched by the respondent, a former special advisor to the Minister of National Defence at the time of the Somalia incidents. Mr. Dixon had sought full standing before the inquiry in order to make clear the knowledge that he and his Minister had of the Arone death. The Commissioners, however, had refused his request for standing. In their reasons for denial, the Commissioners explained that, because their mandate had been "truncated" by Cabinet's decision to require completion of the public hearings by March 31, 1997, they were unable to investigate the involvement of high-ranking government officials in the Somalia affair, including the possibility that there had been a cover-up of the Arone death. On being advised of the refusal of the Commissioners, the respondent decided to seek relief in the Trial Division of this Court.

The Trial judge allowed the respondent's application for judicial review. She provided three reasons for her conclusion that Order in Council P.C. 1997-174 was ultra vires:

> 1)It does not comply with section 31(4) of the Interpretation Act which requires an order in council which reduces the Mandate in clear terms.
>
> 2)It breaches the rule of law by requiring the impossible of the Commissioners and by placing them in a position where they cannot obey the law.
>
> 3)It breaches the rule of law by not respecting the Commissioners' independence. They are entitled to determine how to investigate their Mandate and when their investigation is sufficient to support findings in their report.[5]

In light of these findings, the Trial judge made, inter alia, the following formal orders and declarations:

> ...

[5]Reasons for the Order, at 33-34.

(4)That Order in Council P.C. 1997-174 is set aside for being ultra vires of the Governor in Council, and that the target dates for the Commission of Inquiry's final report contained in the earlier Orders in Council P.C. 1995-442, P.C. 1995-1273, and P.C. 1996-959 have expired and are of no force and effect; and,

(5)That, to correct the problems of lack of clarity and impossibility of performance identified in connection with Order in Council P.C. 1997-174, the Governor in Council may:

a)issue an Order in Council which imposes final deadlines which allow the Commission of Inquiry the time it reasonably requires to complete its original mandate;

b)or issue an Order in Council which eliminates specified matters from the Commission of Inquiry's mandate and imposes final deadlines which allow the Commission of Inquiry the time it reasonably requires to complete its reduced assignment,

c)or take such other steps as it considers to be appropriate and consistent with the order and reasons herein.

* * *

The learned Trial judge gave lengthy reasons in support of her conclusions. Her reasons betray what appears to me, and I say it with respect, two inconsistencies in her overall reasoning. One is regarding the status of a commission of inquiry; the other, the reporting duty of commissioners. If I take some time to develop these points up-front, my analysis of the grounds upon which the learned judge founded her conclusion that P.C. 1997-174 was ultra vires the Governor in Council will be simplified considerably.

Let us consider first the attitude of the Trial judge in regard to the status of commissions of inquiry. It is well-known that the present Inquiries Act traces its origins to An Act to Empower Commissioners for Inquiring into Matters Connected with the Public Business, to Take Evidence on Oath, passed June 9, 1846, with a preamble that clearly articulated the purpose of enquiries and the concern for the protection of individual reputations:

> Whereas it frequently becomes necessary for the Executive Government to institute inquiries on certain matters connected with the good government of this Province; And whereas the power of procuring evidence under oath in such cases would greatly tend to the public advantage as well as to afford protection

> to Her Majesty's subjects from false and malicious testimony or representations ...[6]

That Parliament enacted the present Inquiries Act with the same purpose and the same concern for the protection of individual reputations is made clear by the whole of the Act and especially by the wording of sections 2 and 3:

> **2.** The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.
>
> **3.** Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission, appoint persons as commissioners by whom the inquiry shall be conducted.

It had to be clear to the Trial judge, therefore, that a commission of inquiry issued pursuant to the Inquiries Act depends for its existence entirely on the Governor in Council — i.e., the body in which the Executive power of the Canadian government is vested (by constitutional convention, the Cabinet).[7] The Governor in Council, in other words, had the full discretionary authority to establish the Somalia inquiry as a source of information and advice in relation to an important aspect of the governance of this country: our military. How then can the Trial judge arrive at the conclusion that, once created, the Commission somehow acquired independent status, not only with respect to the manner in which it exercised its powers within its terms of reference, but also with respect to its very existence and its institutional structures. Indeed, the Trial judge's decision, in effect, means that the Governor in Council cannot

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[6] Province of Canada Statutes 1846, c. 38 (9 Vict.).

[7] I will pause here for a moment to mention that one may see a jurisdictional issue in the proceedings as instituted. Indeed, cases may be cited for the proposition that the Court does not have jurisdiction to review decisions made by the Governor in Council, since section 18 of the Federal Court Act provides such jurisdiction only with respect to a "federal board, commission or tribunal" which, as defined in section 2 of the Act, does not include the Crown (see, among others, Re Creative Shoes and M.N.R., [1972] F.C. 993, 29 D.L.R. (3d) 89 at 94). The issue was not raised by the parties, and I do not think that it ought to be discussed in detail. Suffice it to say that I am of the view expressed by Rothstein J. in Saskatchewan Wheat Pool v. Canada (1993), 67 F.T.R. 98, that where the Governor in Council acts pursuant to a statute, he is a federal board, rather than an embodiment of the Crown.

determine the duration (nor, by necessary implication, the cost) of a commission of inquiry by imposing reporting deadlines: the most that he can do, says the Trial judge, is to set "target dates". His power to impose a final and imperative reporting date is subject to either acquiescence by the commissioners that they will be ready to report on all the terms of reference by the date chosen, or else a formal restriction of the terms of reference according to what the commissioners determine to be reasonable in view of the state of their inquiry. I fail to understand how, in the context of our public law, such a situation could possibly be allowed to exist. By what principle of public law can a commission of inquiry acquire, once created, the independence and autonomy necessary to allow it to prevail over the will of the Governor in Council as to its structure and its existence? How can the Inquiries Act be interpreted as granting to commissions of inquiry such legal status?

It has often been suggested, expressly or impliedly, especially in the media but also elsewhere, that commissions of inquiry were meant to operate and act as fully independent adjudicative bodies, akin to the Judiciary and completely separate and apart from the Executive by whom they were created. This is a completely misleading suggestion, in my view. The idea of an investigative body, entirely autonomous, armed with all of the powers and authority necessary to uncover the truth and answerable to no one, may well be contemplated, if one is prepared to disregard the risks to individuals and the particularities of the Canadian context. But a commission under section 1 of the Inquiries Act is simply not such a body. It is easy to realize nowadays the tremendous impact that commissions of inquiry, as they now exist, may have on Canadian society, but, in my view, their public importance is not and cannot be the source of a special legal status. No one disputes the necessity of preserving the independence of commissions of inquiry as to the manner in which they may exercise their powers, conduct their investigations, organize their deliberations and prepare their reports. The role they play in our democracy has become much too vital to accept that the manner in which they investigate matters and formulate the conclusions and recommendations that they arrive at, can be freely tampered with or influenced by anyone within or outside the

government of the day, and that applies to any commission, whether or not its investigations relate to the conduct of government officials. And the fact is, in any event, that the Act itself provides for such investigative and advisory independence by explicitly setting out the nature, the general role and the basic powers of commissions of inquiry, even if it does so rather succinctly. All this, however, does not alter, in any way, the basic truth that commissions of inquiry owe their existence to the Executive. As agencies of the Executive, I do not see how they can operate otherwise than within the parameters established by the Governor in Council.

With respect to the role and responsibilities of the commissioners, the Trial judge's inconsistency is even more striking. The Trial judge repeatedly acknowledges that commissions of inquiry are not courts of law; that their true nature and purpose completely differ from those of courts of law. She had before her two recent judgments of this Court[8] that reaffirmed the long-standing warning against assimilating or equating the two public institutions.[9] And yet, in her reasoning, the Trial judge appears to have failed to recognize, or simply ignored, what may be the main difference between the two. Courts of law are designed, if civil, to settle disputes between opposing parties and, if criminal, to establish guilt or innocence. They must arrive at definitive conclusions; they cannot leave a problem aside for lack of evidence or absence of a clear solution. Briefly put, it is their duty to dispose of the issues brought before them, to judge. Procedural rules regarding such matters as the onus and burden of proof have been developed precisely to allow courts to discharge this duty. Commissions of inquiry, be they investigative or merely advisory, are not, in any way, under the same duty. As investigative bodies, they, of course, are called upon to seek the truth, and no doubt they are ideally suited for uncovering facts that could not be discovered otherwise (precisely because they have broad investigative powers, they are

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[8] Canada (Attorney General et al. v. Royal Commission of Inquiry on the Blood System in Canada et al. (1997), 207 N.R. 1; and The Honourable Gilles Létourneau et al. v. Brigadier-General Ernest B. Beno et al., dated May 2, 1997, Court file n° A-124-97, unreported.

[9] See A.-G. Que. and Keable v. A.-G. Can. et al., [1979] 1 S.C.R. 218 at 243-244, per Pigeon J.

inquisitorial, and they are not subject to the strict rules of evidence that apply to a court of law). Hence, their prestige. But, nowhere do we find the imposition upon them of a duty to conclude. On the contrary, their purpose, which is primarily to advise and to help the government in the proper execution of its duties, is not conducive to settling issues and drawing definitive conclusions. It is the legal duty of the commissioners to report, but that report is limited to explaining what they have done, what they were able to draw from their investigations (in terms of findings of fact) and what advice they are in a position to give to the Executive in light of those findings. It may be unusual for an Order in Council setting up a commission of inquiry to be as detailed as was P.C. 1995-442. But, the designated issues were simply meant to establish the terms of reference and to delimit the Commission's range of investigative powers in view, I suppose, of the extremely sensitive field of activity involved. The Governor in Council obviously could not require the Commissioners to determine, as a court of law, all of the issues mentioned in their terms of reference.

* * *

I now come to the reasons upon which the learned Trial judge based her conclusion that Order in Council P.C. 1997-174 was ultra vires.

The first ground — namely, that it had not been passed in the manner required by subsection 31(4) of the Interpretation Act[10] — is premised on what is, in my respectful opinion, a misapprehension of the source of the power of the Governor in Council to revoke, amend or vary the appointment or the terms of appointment of a

[10]R.S.C. 1985, c. I-21. The provision in question reads thus:

> **31.** (4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.

commission of inquiry. That power comes from the Inquiries Act itself, not the Interpretation Act, as it flows by necessary implication from the broad and unconditional power to appoint commissions conferred upon the Governor in Council by the Inquiries Act. The Interpretation Act contains rules of interpretation; it does not confer powers. It is true that subsection 31(4) speaks of manner and form, but this is simply meant to underscore that the implicit power to repeal, amend or vary an existing order must be exercised by means of an order enacted pursuant to the same act of Parliament and under the same consent requirement or conditions, if any, imposed by that act. Subsection 31(4) is merely an interpretive provision. It does not go to the substance of the regulation-making power, and it certainly does not provide a court with the jurisdictional basis to review the reasonableness of a validly enacted exercise of discretion.

It may well be that the refusal of the Governor in Council to extend the life of the Commission for the entire period requested by the Commissioners was motivated by political expediency, but that is simply not the business of the Court. It is a well-established principle of law and a fundamental tenet of our system of government, in which Parliament and not the Judiciary is supreme, that the courts have no power to review the policy considerations which motivate Cabinet decisions. Absent a jurisdictional error or a challenge under the Canadian Charter of Rights and Freedoms,[11] where Cabinet acts pursuant to a valid delegation of authority from Parliament, it is accountable only to Parliament and, through Parliament, to the Canadian public, for its decisions. In other words, the validity of an Order in Council is measured against the statutory conditions precedent to its issuance, and not by its content. Dickson J. (as he then was) made this point clear in Thorne's Hardware v. The Queen, when he stated:

> Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an Order in Council on

[11] Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11.

> jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.[12]

The two other grounds invoked by the Trial judge to declare Order in Council P.C. 1997-174 to be ultra vires — namely, the incompatibility of its requirement with the independence of the Commission and the impossibility for the Commissioners to discharge their duty within the time frame imposed on them — are directly related to the inaccurate views that the Trial judge held regarding the role of the Commissioners and the nature of their report, which I have already criticized. It is obvious that these grounds have no substance whatever if, as I think it is, the role of the Commissioners is not to decide issues definitively and their report is not intended to pronounce judgment, but merely to explain the results of their work and the opinions (in terms of conclusions and recommendations) which they were able to form given the time and resources available to them; no more, no less. The independence of the Commissioners as to the evaluation of the evidence and the possibility for them to express a view is in no way affected, and their ability to provide a complete and adequate report, in this sense, is indisputable. Again, the right of the Commissioners to decide when they have sufficient evidence to make a particular conclusion or recommendation is certainly not jeopardized by the Governor in Council exercising the right he alone has to decide when it is time to call for the Commission's report and advice. Likewise, the definition of terms of reference establishing the scope of the Commission's powers to investigate will, I suppose, suggest the framework of its report, but it cannot detract, when it comes to the content of such report, from the Commissioners' duty to remain within the limits of their findings and the conclusions they could have reached.

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[12](1983), 143 D.L.R. (3d) 577 (S.C.C.). See also Reference re Section 16 of the Criminal Law Amendment Act, 1968-69, [1970] S.C.R. 777 at 782; Reference re Chemical Regulations, [1943] S.C.R. 1 at 12; Attorney General of Canada v., Inuit Tapirisat et al., [1980] 2 S.C.R. 735 at 753; Attorney General for Canada v. Hallett and Carey, [1952] A.C. 427 at 446; and Gouriet v. Union of Post Office Workers, [1978] A.C. 435.

In my judgment, therefore, the Trial judge could not hold, as she did, that the impugned Order in Council P.C. 1997-174 was ultra vires. The Order in Council was properly enacted pursuant to Part I of the Inquiries Act. It was valid on its face. Only an improper view as to the powers of the Governor in Council conferred upon him by Parliament and a misconception regarding the legal status of commissions of inquiry could permit her to conclude that the Governor in Council acted in a manner contrary to law.

It is even my opinion finally that, once the Trial judge ascertained that the impugned order was validly enacted pursuant to Part I of the Inquiries Act, she ought to have dismissed the application for judicial review on the basis that there were no other justiciable issues raised by the application. As I have said, the policy considerations which motivated the Governor in Council's decision to put an end to the life of the Somalia inquiry by June 30, 1997 may have been debatable or perhaps even suspect. But, it is a debate that a court of law, properly confined to its adjudicative role, ought not to have considered.[13]

I would, therefore, allow the appeal, quash the orders and declarations made by the Trial judge, and declare that the impugned Order P.C. 1997-174 was intra vires the Governor in Council.

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[13] In Auditor General v. Minister, E.M.R. et al., [1989] 2 S.C.R. 49 at 90-91, Dickson C.J. explained the concept of justiciability as follows:

> As I noted in Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 459, justiciability is a "doctrine ... founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes", endorsing for the majority the discussion of Wilson J. beginning at p. 460. Wilson J. took the view that an issue is non-justiciable if it involves "moral and political considerations which it is not within the province of the courts to assess" (p. 465). An inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity.

"Louis Marceau"
J.A.

"I agree.
Julius A. Isaac, C.J."

"I agree.
F.J. McDonald, J.A."

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CORAM: THE CHIEF JUSTICE
MARCEAU J.A.
McDONALD J.A.

BETWEEN:

THE GOVERNOR IN COUNCIL

Appellant
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- and -

JOHN EDWARD DIXON

Respondent
(Applicant)

Heard at Ottawa, Ontario, on Wednesday, June 25, 1997.

Judgment rendered at Ottawa, Ontario, on Thursday, July 17, 1997.

REASONS FOR JUDGMENT BY: **MARCEAU J.A.**

CONCURRED IN BY: **THE CHIEF JUSTICE**
McDONALD J.A.

IN THE FEDERAL COURT OF APPEAL

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REASONS FOR JUDGMENT
