INQUIRY INTO THE RETIREMENT OF THE FORMER COMMISSIONER OF POLICE

WRITTEN SUBMISSIONS ON BEHALF OF
THE CHIEF MINISTER, THE HON. FABIAN PICARDO QC,
THE INTERIM GOVERNOR AT THE RELEVANT TIME, MR NICHOLAS PYLE OBE
AND
HER MAJESTY'S ATTORNEY GENERAL FOR GIBRALTAR, MR MICHAEL LLAMAS CMG QC

(TOGETHER "THE GOVERNMENT PARTIES")

-for the Second Preliminary Hearing on 19th September 2022-

Dated: 9th September 2022

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1. These submissions ahead of and for the Second Preliminary Hearing on 19 September 2022 ("**PH2**") deal with the following matters:

   (i) The Section 10 Commissions of Inquiry Act ("**the Act**") points on which the Commissioner has specifically sought submissions from the Core Participants in Attias & Levy's letter dated 2 September 2022 ("**the Inquiry Team's Letter**").

   (ii) Residual issues in relation the policies and provisional list of issues, following the indications of the Commissioner's current views reflected in the Inquiry Team's Letter.

   (iii) Other issues arising from the Agenda for PH2.

   (iv) Issues arising from Mr McGrail's written submissions dated:

   (a) 24 August 2022 ("**McGrail Written 24 August 22**"); and
   (b) 20 July 2022 ("**McGrail Written 20 July 22**")

A. Section 10 of the Act

2. The Commissioner has sought submissions on three specific questions, namely, whether Section 10:

   (a) excludes only the privilege against self-incrimination or extends to exclude all forms of privilege, including legal professional privilege (i.e. legal advice privilege and litigation privilege) and public interest immunity (as is suggested by the words "any privilege" and the subsequent separate reference to the privilege against self-incrimination),

   (b) applies to production of documents to the Inquiry as well as answering questions,

   (c) reserves a discretion on the Commissioner's part as to whether to ask a particular question of a witness in the first place (on the grounds of privilege or immunity).

3. In our view, the relevant legal considerations may be wider in scope than is reflected in the three questions. We make submissions in this respect after we have dealt with the specific questions posed by the Commissioner.

4. In so far as concerns question (a), it is submitted that:

   (i) On its terms, section 10 includes but is not limited to the privilege against self-incrimination i.e., it extends to "exclude" all forms of privilege, including legal professional privilege (i.e. legal advice privilege and litigation privilege). We have placed the word exclude in quotation marks because of what follows below. This is our view based on (i) a natural meaning for the words and sentence construction and (ii) the fact that the words "or on the ground that the answer to such questions will tend to incriminate such person" would be otiose if the previous words "any privilege" was intended to mean only the privilege against self-incrimination.

   (ii) However, we do not think that the effect of this is that the Commissioner is required to disregard and disapply, or is even free to disregard and disapply the principles of privilege in this Inquiry.

   (iii) Staying, for now, with the interpretation of Section 10 on its terms, i.e. its literal interpretation, it is submitted that what it does is to exclude the requested person's

right to assert and rely on privilege (i.e. section 10 withdraws the common law privilege in the circumstances to which it applies), but we do not think that this constrains the Commissioner (as to which see the submissions in relation to question (c), below.

(iv) Public interest immunity. It is submitted that public interest immunity is a rule of public law.[1] It not a privilege, and therefore not caught by section 10 of the Act which applies to "any privilege" -

(a) PII used to be called Crown Privilege. This phrase is no longer used, being inapposite, as Brightman LJ put it in *Buttes Gas & Oil Co v Hammer (No 3)* [1981] QB 223, 262: 'it is not a matter of privilege and it is not confined to the Crown' (see fn 67 para 5.69, *Beer*).

(b) See also Halsbury's Laws of England Fifth Edition Volume 11, para 574. Copy attached for ease of reference.

(c) This is further demonstrated by Section 22 of the UK Inquiries Act which enshrines privilege and public interest immunity separately, the former in subsection (1) and the latter in subsection (2).

5. In so far as concerns question (b), it is submitted that, by the same token, on its terms, Section 10 plainly applies only to "answering any question put to him by the commissioners", and necessarily does not apply to production of documents i.e. it does not apply to or capture section 8 in so far as that section relates to the production of documents (although it does apply to the part of Section 8(2) that refers to answering of questions put by the commissioners).

6. In so far as concerns question (c), it is submitted as follows:

(i) On a proper construction, Section 10 purports to strip the person questioned of any legal right to privilege that such person may enjoy to shelter him from the obligation

[1] *Phipson on Evidence* Twentieth Edition para 25-04

that otherwise may exist to answer a question. But it does not constrain the Commissioner himself.

(ii) It clearly enables the Commissioner to choose not to ask a particular question of a witness in the first place (on the grounds of privilege or immunity).

(iii) Furthermore, the Commissioner's power in law to establish his own procedure (as previously submitted and, it is submitted, is now clear) remains intact and unaffected by section 10. It is submitted that the Commissioner should exercise his power to set his own procedure to adopt the privilege exceptions established by the common law, for the following reasons:

(a) Section 10 reflects legal principles existing in 1888. While that does not entitle the Commissioner to disregard its clear provisions, it is a reason for interpreting it (in so far as it requires interpretation) and using all the other powers and discretions available to the Commissioner to apply modern legal principles. Just as the Commissioner has done in relation to the principle of open justice.

(b) The principle of open justice has the effect of very greatly increasing the dissemination of documents and information arising in the course of the Inquiry, rendering it still more important that the established legal principles relating to privilege should be available in the context of an inquiry under the Act.

(c) The UK's own Inquiries Act 2005, reflecting modern principles of law and its administration, specifically enshrines the application of privilege. It is respectfully submitted that, as he has done in respect of other matters provided for in the UK Act and regulations, the Commissioner should exercise his power to establish his own procedure to adopt the provisions in section 22 of the UK Act relating to preservation of privilege <u>as a policy in respect of his own procedure</u>.

(iv) Old cases.

(a) We have not found any old cases specifically about the "privilege" provisions in Section 10 or similar provisions in other legislation, but it is informative perhaps to consider the effect, by analogy, of cases that relate to the provision (in section IX of the Election Commissioner Act 1857) relating to the right against self-incrimination, which is also part of section 10.

(b) Cases under this Act did not dilute the effect of such provisions because of their effect on the availability of the privilege shield. Rather the courts explain that the legislature has substituted one privilege (the statutory immunity from prosecution or liability for a statement) for another (the common law privilege shield).

(c) In *R v Hulme* (1869-70) LR 5 QB 377, Blackburn J expressed it in this way (p.384):

"*At common law the witness is entitled to refuse to answer a question that may tend to incriminate him, not only because the answer itself might be evidence against him on a criminal charge, but because it might furnish a link in the chain of testimony which might implicate him in such a charge. Those who decided the common law, originally, thought it was unwise and unjust to make a man, however guilty, criminate himself. The legislature , having taken away from the witness that common law privilege, gives him an immunity by enacting ……..*"

(d) In *R v Price* (1870-71) LR 6 QB 411 Cockburn CJ said as follows (p.416):

"I quite agree with the Attorney-General that if the former statute of 15 & 16 Vict. C. 57 had still remained in force, unaffected by subsequent legislation, this Court could not have interfered. I take the effect of the provisions of 26 & 27 Vict. C. 29, to be this: That in inquiries conducted before these tribunals a witness is no longer to have the privilege of refusing to answer a question if the effect of the answer is to criminate him, but that, on the other hand, he is to have immunity from further proceedings, criminal or civil, to recover penalties, being instituted against him……"

(e) Copies of the reports of these cases are attached hereto for the ease of reference of the Commissioner.

7. The scope may need to be wider

7.1 The scope of the discussion and considerations for the Commissioner may have to be wider than reflected in the three specific questions posed.

7.2 Unlike the UK Parliament, the Gibraltar Parliament is not sovereign. Its legislative powers are subject to the Gibraltar Constitution, a UK Order in Council, which has primacy over all laws passed by the Gibraltar Parliament (including the Act). To this effect, section 32 of the Constitution provides that "*Subject to this Constitution, the Legislature may make laws for the peace, order and good governance of Gibraltar*." (Emphasis added). See also *In the Matter of the References of the Chief Minister and Her Majesty's Attorney General (Compatibility of Criminal Offences Act 1960, Part XII with Constitution)* [2010 -12 Gib LR 178]. Report is attached for ease of reference.

7.3 Section 7(1) of the Constitution protects the right to respect for a person's private and family life, his home and correspondence ("**the right to privacy**").

7.4 In *R. (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and Another* [2003] 1 A.C. 563, the House of Lords declared Legal Professional Privilege to be "a fundamental human right long established in common law".

(a) Per Lord Hoffmann at [7] and [39] (pp. 606, 607 & 614):

> "7. *Two of the principles relevant to construction are not in dispute. First, LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice. The cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in R v Derby Magistrates Court, Ex p B [1996] AC 487 . It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (Campbell v United Kingdom (1992) 15 EHRR 137; Foxley v United Kingdom (2000) 31 EHRR 637) and held by the European Court of Justice to be a part of Community law: A M & S Europe Ltd v Commission of the European Communities (Case 155/79) [1983] QB 878 ."*

"39. It is of course open to Parliament, if it considers that the revenue require such powers, to enact them in unambiguous terms. But there is also the Human Rights Act 1998 to be borne in mind. The appellants put forward an alternative submission that, if your Lordships agreed with the construction given to section 20(1) by the Court of Appeal, you should make a declaration that it was incompatible with the right to privacy under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (scheduled to the Human Rights Act 1998). In the circumstances it is unnecessary for your Lordships to pronounce upon the point. It is however the case, as I have mentioned, that the European Court of Human Rights has said that LPP is a fundamental human right which can be invaded only in exceptional circumstances: see Foxley v United Kingdom (2001) 31 EHRR 25 p 647, para 44. Mr Brennan said that the public interest in the collection of the revenue could provide the necessary justification but I very much doubt whether this is right. Nor is it sufficient to say simply that the power is not used very often. That is no consolation to the person against whom it is used. If new legislation is passed, it will have to be seen whether it is limited to cases in which the interference with LPP can be shown to have a legitimate aim which is necessary in a democratic society."

7.5 In *Three Rivers (No 6)* [2004] UKHL 48, the House of Lords decided that this applied to public inquiries.

7.6 More importantly still, in Gibraltar, and as stated by Lord Hoffman in para 7 of the *Morgan Grenfell* case, the European Court of Human Rights has found that Article 8 of the Convention (right to privacy) is engaged by Legal Professional Privilege.

7.7 The position is succinctly summarised by *Passmore on Privilege*, Sweet and Maxwell, Third Edition at para 1-051: "Whatever criticism one might make of the reasoning in *Morgan Grenfell*, the reality is that, together with *Derby Magistrates* and *Daly*, this trio of decisions firmly and irrevocably established legal professional privilege under English law as a substantive or fundamental human right, recognised both at common law and under the European Convention on Human Rights and available both within and outside a courtroom." Attached for ease of reference.

7.8 Section 18(8)(a) of the Constitution requires the determination of rights under it to take into account, inter alia, of any judgment of the European Court of Human Rights.

7.9 Section 2(1) of Annex 2 to the Gibraltar Constitution Order provides that:

"*Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations qualifications and exceptions as may be necessary to bring them into conformity with the Constitution*."

7.10 This is the so-called "blue pencil rule", whereby courts can override laws which are inimical to the Constitution, and read them with such minimal changes as will render them in compliance with the Constitution.

7.11 Section 2(1) of Annex 2 to the Constitution necessarily includes conformity with the Section 7 constitutional and Article 8 of ECRR human right of Legal Professional Privilege as per the above cited cases.

7.12 Accordingly, the effect of section 10 of the Act cannot prevail as extant law to the extent that it purports to disapply the availability of Legal Professional Privilege as a shield. That is not in conformity with The Right to Privacy enshrined in Article 7 of the Constitution. The Commissioner must therefore apply the blue pencil rule. See *In the Matter of the References of the Chief Minister and Her Majesty's Attorney General (Compatibility of Criminal Offences Act 1960, Part XII with Constitution)* at [33].

7.13 The Government Parties therefore submit that section 10 of the Act does not constitute the valid or applicable statute law of Gibraltar to the extent that it purports to exclude the legal professional privilege shield, and the Commissioner should, indeed must, ignore those provisions.

B. Policies and Provisional list of issues – issues following the indications of the Commissioner's current views reflected in the Inquiry Team's Letter.

8. In making the following submissions the Government Parties have had regard to the first and second paragraphs of the Inquiry Team's Letter, and they are grateful to the Commissioner for the time-saving early (albeit not final) indication of his position.

9. Documents Protocol

9.1 The Government Parties are content that, if the Commissioner agrees that section 10 does not preclude legal professional privilege and/or public interest immunity the Commissioner should set out in paragraph 13 the applicable tests in the manner and terms set out in the bottom half of page 2 of the Inquiry Team's Letter.

9.2 Subject to the stated further submissions, the Government Parties are content with the Commissioner's indicative position that:

(i) He would be prepared to clarify paragraph 25 to expressly provide for the ability to receive evidence in private, although he does not envisage that this power will be exercised save in truly exceptional circumstances.

Further submission: the clarification should specify that such applications may be made at any time, initially without notice to the other Core Participants, by letter to the Inquiry Solicitor.

(ii) He would prefer to deal with any issues and questions which will attract a claim to privilege (and presumably also public interest immunity) as and when they are raised, whether at the time of disclosure to the Inquiry, dissemination to other parties or at the main hearing.

Further submission: "at the main hearing " should read "at or prior to the main hearing". The point being that issues which a Government Party can anticipate will be raised in examination or cross-examination, and which would, if raised, attract a claim to public interest immunity can be raised in private with the Inquiry Team for resolution ahead of the oral hearing to avoid possible delay and disruption to those hearings.

(iii) He is happy to provide an illustrative list of stakeholders referred to in paragraph 36 and that he envisages that to be the Core Participants.

Further Submission: That should be formulated in terms of "the Core Participants, the other persons or entities mentioned in paragraph 20 of the

Privacy Notice and such other persons as the Commissioner may consider appropriate in discharging his Commission" or words to similar effect.

9.3 The Government parties have no issue with the use by the Inquiry Team members of their personal professional email addresses.

10. Vulnerable Witnesses Protocol

10.1 The Government Parties are content with the indications of position given by the Commissioner in relation to the Vulnerable Witnesses Protocol.

11. Core Participants Policy

11.1 Subject to the further submissions in para 11.2 below, the Government Parties are content with the indications of position given by the Commissioner in relation to the Core Participants Policy.

11.2 Further Submissions:

(i) The advance notice to participant of criticisms or comments that he proposes to make in the final report should be notified :

(a) in manner that does not disclose the findings of fact;

(b) on a confidential (i.e. not for publication) basis; and

(c) only to the person criticized or commented on (i.e about him of her self). It should not include proposed criticisms or comments about "others" as stated in the first paragraph of this section of the Inquiry Team's Letter.

12. Appropriate Policy Document

12.1 The Government Parties are content with the indications of position given by the Commissioner in relation to the Appropriate Policy Document.

13. Privacy Notice

13.1 The Government Parties are content with the indications of position given by the Commissioner in relation to the Privacy Notice.

13.2 The Government Parties are surprised by Mr McGrail's submissions in relation to the provision of IT services to the Inquiry by the Government's ITLD. The Government Parties submit that Mr McGrail, who criticises the Government parties for "having a case" is not entitled to have the Inquiry conducted on the basis of his apparent belief that no-one and no part of HM Government of Gibraltar can or should be trusted by the Inquiry. The Government (including the Civil Service) is, absent findings to the contrary, entitled to be treated with the respect due to HM Government.

14. List of Issues

14.1 The detail into which the investigation should descend into the specific issues

(i) The Government Parties are content with the Commissioner's indicated position as set out in the Inquiry Team's Letter under the heading "Relevance of issues", for the reasons stated there.

(ii) The Commissioner's approach does not, as submitted on behalf of Mr McGrail, cause the Inquiry to "lose focus" or to "skew the Inquiry away from the core issues". If any approach is open to that criticism, it is that contended for on behalf of Mr McGrail, which would have the Inquiry proceed on the basis that his case theory, namely that he was forced to resign due to interference with the Criminal Investigation, is somehow the core issue for the Inquiry. This has not been established to be any more or less a 'core issue' (in terms of potential relevance to the matters under inquiry) than the issues that he invites the Inquiry to downplay. Indeed it is the case of the Government Parties that there was no such interference and that in any event, that was not a reason or circumstance leading to his retirement. Operation Delhi is only the "central " issue of the Inquiry according to Mr McGrail's case theory. So, with respect, it is Mr McGrail's proposed approach that would "skew the Inquiry".

(iii) Much of Mr McGrail's submissions appear to be an inappropriate attempt to litigate the Inquiry by means of the casting of the list of issues. It is not appropriate to invite the Commissioner at this stage to adjudicate on what may or may not be "strictly issues in the Inquiry" or "relevant facts" or "tangential" according to one or another party's "case theory", and it is not possible for the Commissioner to do so. Were it appropriate to do this, the Government Parties would have by now made very substantial submissions on that subject. The appropriate time to do so is Written and Oral Opening Submissions.

(iv) In the meantime, it is for the Commissioner to decide what issues are relevant to the matter under Inquiry and to investigate them to that extent. This is what the Commissioner has indicated is his current position, and it is respectfully submitted that that is the only possible correct position.

(v) Nevertheless, for the record the Government Parties make the following submissions (with which the Commissioner may take the view he need not trouble himself with at this time) in response to some of the factually incorrect statements upon which Mr McGrail's submissions are premised:

(a) The Chief Minister and Mr Pyle reject Mr McGrail's contention that "*the fact that issues 1.,2 6 and 7 were not referred to the GPA demonstrates that they were not considered issues which bore on the Chief Minister and Mr Pyle's "loss of confidence" at the relevant time, and appear to have been included as "issues" by the Chief Minister and Mr Pyle ex-post facto*" as asserted on Mr McGrail's behalf in para 10 of McGrail Written 24 August 22, or indeed that, given his evidence, that that is even arguable or relevant in the case of the Chief Minister.

(b) Contrary to what is asserted at para 17 of McGrail Written 24 August 22, none of the facts alleged by Mr Pyle or the Chief Minister as having impacted on each of their loss of confidence in McGrail, were unknown to them at "the relevant time".

(c) For example, Mr McGrail submits as an example of this the fact that "at the relevant time" Mr Pyle and Mr McGrail did not have the Metropolitan Report into the Incident at Sea. This ignores one of the principal reasons for loss of confidence linked to the Incident at Sea, which is the then Interim Governor, Mr Pyle took the view that Mr McGrail had intentionally misled him at a critical time about the location of the incident. That has nothing to do with the Metropolitan Police Report.

(d) Contrary to what Mr McGrail submits in para 24 of McGrail Written 24 August 22, repeating submissions that he had made in paras 11(f), 17 and 28 of McGrail Written 20 July 2022, it is absurd to suggest that the factual summary in paras 18-27 of those (latter) submissions are "factually uncontroversial" (para 11(f)) or represent some kind of consensual view of the facts agreed by the Government Parties "taken almost entirely from the evidence of the Chief Minister, Mr Pyle and the Attorney General." To the contrary, those paragraphs represent Mr McGrail's selectively self-serving summary and characterization of the facts.

(e) Contrary to what Mr McGrail submits (para 8 McGrail Written 20 July 22) the Government Parties and Mr McGrail do indeed have "two competing versions of the facts" which are now before the Inquiry. It is not the Government Parties that are behaving as if this were partisan litigation. But it is naïve of Mr McGrail to think that, having made such grave allegations of wrongdoing against the Government Parties, they will not have "a case" or will not defend themselves against those allegations. To suggest that this amounts to "victim-blaming" of Mr McGrail is ridiculous.

[redacted]

[redacted]

14.2 The GPA process

(i) The Government Parties are content with the proposed addition of the issue relating to the Gibraltar Police Authority process, in the terms indicated in the Inquiry Team's Letter.

(ii) It would be inappropriate to include language about motivation for applying pressure on Mr McGrail in relation to the investigation when it has not been established or found that pressure was applied

(iii) The Government Parties would not be content with proposed issues 12 and 13 contended for in para 20 of McGrail Written 24 August 22. They plainly lack the necessary neutrality of language for a list of issues.

14.3 Issue 5.3

(i) The Government Parties are content with the Commissioner's indicated amendment to Issue 5.3.

(ii) The Government Parties also agree that the Commissioner is able to evaluate the facts that he finds and to draw conclusions from them for the purpose of making recommendations. This must be implicit in the Commissioner's power to make recommendations. It is difficult to see how and on what basis recommendations could be made without an evaluation of the facts found and drawing conclusions from them.

(iii) However, the Government Parties do not agree that the Commissioner has power to come to judgments in "judgmental terms" about any person (as opposed to evaluating the facts). This is not mere semantics.

(iv) The Commissioner's current view on this point appears to be based on a consideration of submissions made on behalf of Mr McGrail in McGrail Written 24 August 22. But those submissions appear to be incomplete or incorrect, as follows.

(v) At para 16 of McGrail Written 24 August 22, it is submitted that "One of the primary purposes of a public inquiry is to ensure accountability which can include identifying wrongdoing, blameworthy conduct , or culpability by individuals, organisations and organs of the state." (Underlining added for emphasis). It adds that "An important role of a public inquiry is to make findings of fact".

(vi) The language of that submission is taken directly from *Beer* para 1.04. But Beer is not there stating powers available in law to an inquiry separately from the statute regulating them, or the Commission establishing it, or the common law. He is merely describing the purposes to which inquiries can be put by those convening them and writing their terms of reference. This much is clear from the preceding para 1.03 in *Beer* itself:

"*Historically, the establishment of facts was often the limited purpose of the inquiry, with responsibility for the interpretation of those facts, making findings of culpability, and advancing recommendations for change being left to others – such as parliament, minister, and/or the courts. More recently, however, public inquiries have been required to do all of these things, perhaps as Parliament and ministers have been unwilling, or unable, to do so themselves*." (underlining added for emphasis).

Inquiries have been "required" to do so by their terms of reference, not because they had the inherent power to do so. See also Beer para 2.01: "*The purposes of a public inquiry may include* [the purposes referred to in paras 1.02-1.09]" (our underling for emphasis).

(vii) The inescapable legal reality is that the Commissioner has only the powers and the Inquiry has only the purposes given to him and it, respectively, in the Act or in the Commission. Neither extends to making judgmental findings of culpability in relation to persons. The purposes of this Inquiry have been determined by the Commission establishing it.

(viii) While references to UK statute law may be a useful source of inspiration for procedural matters in respect of which the Commissioner is free to adopt whatever procedure he chooses, UK law has no application, and is irrelevant, to matters of the Commissioner's powers and the Inquiry's purposes.

(ix) References in McGrail Written 24 August 22 to the provision of the Commission that the Commissioner shall "inquire, as he shall in his absolute discretion consider appropriate" (e.g. para 23) (our underlining for emphasis) are inapposite in this respect. The word "as" plainly shows that this means that the Commissioner may go about the investigation as he (lawfully) pleases. It does not speak to the terms of reference or purpose of the inquiry, let alone provide an unlimited scope in respect of either.

(x) The language of para 17 of McGrail Written 24 August 22 is taken from the Canadian case of *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*. *Beer* comments extensively on this case at paras 2.132 – 2.138. But that was a case in which section 13 of the Canadian Inquiries Act made it clear that inquiries had the power to make findings of misconduct (See Beer paras 2.132 and 2.134). The case was about whether the Inquiry made the right findings of fact to underpin the findings of misconduct.

(xi) The importance of this in relation to the issue in hand was made clear by Cory J delivering the judgment of the Canadian Supreme Court:

(a) Para 38:

> "*Section 13 of the Act makes it clear that commissioners have the power to make findings of misconduct. In order to do so, commissioners must also have the necessary authority to set out the facts upon which the findings of misconduct are based, even if those facts reflect adversely on some parties*."

(b) Para 40:

"The appellants do not appear to challenge the power of a commissioner to make findings of fact; their objection is to the commissioner's assessment of those facts. However, in my view, the power of commissioners to make findings of misconduct must encompass not only finding the facts, but also evaluating and interpreting them. This means that commissioners must be able to weigh the testimony of witnesses appearing before them and to make findings of credibility. This authority flows from the wording of s. 13 of the Act, which refers to a commissioner's jurisdiction to make findings of "misconduct". According to the Concise Oxford Dictionary (8th ed. 1990), misconduct is "improper or unprofessional behaviour" or "bad management". Without the power to evaluate and weigh testimony, it would be impossible for a commissioner to determine whether behaviour was "improper" as opposed to "proper", or what constituted "bad management" as opposed to "good management". The authority to make these evaluations of the facts established during an inquiry must, by necessary implication, be included in the authorization to make findings of misconduct contained in s. 13. Further, it simply would not make sense for the government to appoint a commissioner who necessarily becomes very knowledgeable about all aspects of the events under investigation, and then prevent the commissioner from relying upon this knowledge to make informed evaluations of the evidence presented."

A copy of the report of this case is attached for the Commissioner's ease of reference.

(xii) Accordingly, it is submitted that the correct position is as follows:

(a) The Commissioner may plainly make findings of fact. Those findings of fact may reflect badly on an individual and indeed harm his reputation.

(b) The Commissioner may evaluate the facts and draw conclusions from them, for any purpose within his powers, namely, <u>for the purposes of making recommendations.</u>

(c) Absent any statutory vires for it (as under section 13 of the Canadian Inquiries Act), or its inclusion in his terms of reference, the Commissioner

does not have power to make judgments in "judgmental terms" about any person.

(d) It may be that this is no different from what is intended by the statements in the paragraph at the top of page 7 of the Inquiry Team's Letter, in which case these submissions are unnecessary.

14.4 Mr Pyle's stated intention to invoke Section 13 of the Police Act

(i) In relation to the proposed amendment of Issue 9 (not 13 as appears in the letter and in Mr McGrail's submissions), the proposed formulation would appear to contain a statement of disputed (and possibly erroneous) fact, and is thus inappropriate.

(ii) Mr Pyle's evidence (see para 17 of his Sworn Statement) is that on the 5th June (not the 6th June) he told Mr McGrail as follows: "I said that whilst I had not made up my mind as to whether I would use the powers invested in me, I would be prepared to do so." This is markedly different to what is stated as a fact in the proposed re-formulation of issue 9.

(iii) Also, if the issue of Sir David's imminent arrival is to be linked in the same issue with an appropriately worded reference to Mr Pyle's reference to his powers under section 13, then the relevance of the former to the latter should not be assumed in the formulation of the issue. Perhaps "This will include consideration of the relevance (if any) of Sir David's ……etc".

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9th September 2022