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1 Order in Council

By His Honour
The Honourable Alan R. Abraham, C.D.
Lieutenant Governor of Nova Scotia

To: The Honourable Mr. Justice T. Alexander Hickman
The Honourable Mr. Justice Lawrence A. Poitras
The Honourable Mr. Justice Gregory Thomas Evans

Greetings:

Whereas it is deemed expedient to cause inquiry to be made into and concerning the public matters hereinafter mentioned in relation to which the Legislature of Nova Scotia may make laws;

Now know ye that I have thought fit, by and with the advice of the Executive Council of Nova Scotia, to appoint, and do hereby appoint you:

The Honourable Mr. Justice T. Alexander Hickman
The Honourable Mr. Justice Lawrence A. Poitras
The Honourable Mr. Justice Gregory Thomas Evans

to be, during pleasure, Our Commissioners under the *Public Inquiries Act* to constitute a Commission under the Chairmanship of the Honourable Mr. Justice T. Alexander Hickman with power to inquire into, report your 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;

The Governor in Council is further pleased to:

(1) **Authorize** the payment to the Commissioners for expenses for travel, reasonable living expenses and other disbursements necessarily incurred in the Inquiry, in accordance with the provisions of the *Judges Act*, R.S.C. 1970, as amended;

(2) **Direct** the Commissioners to retain the services of legal counsel and such other technical, secretarial and clerical personnel who, in the opinion of the Commissioners are required for the purposes of the Inquiry, at remunerations as shall be approved by Management Board and authorize the Commissioners to approve for payment reasonable expenses for travel, accommodation, meals and other disbursements necessarily incurred by such personnel for the purposes of the Inquiry;

(3) **Direct** the Commissioners to arrange for suitable facilities, recording and transcribing equipment and such other administrative matters which, in their opinion, are necessary for the purpose of the Inquiry and authorize the Commissioners to approve for payment any costs incurred in respect to the foregoing matters;

(4) **Order** that remuneration, costs and expenses payable in respect to the Inquiry shall be paid out of the Consolidated Fund of the Province;

(5) **Order** that the Commissioners may adopt such rules, practices and procedures for the purposes of the Inquiry as they, from time to time, may consider necessary for the proper conduct of the Inquiry, and may vary such rules, practices and procedures from time to time as they consider necessary and appropriate for the purposes of the Inquiry;

(6) **Direct** the Commissioners to report their findings and recommendations in the matter of their Inquiry to the Governor in Council.

Given *under my hand and Seal at Arms at the City of Halifax this 28th day of October in the year of Our Lord one thousand nine hundred and eighty-six and in the thirty-fifth year of Her Majesty's reign.*

Provincial Secretary

2 Royal Commission staff

Commissioners:

Chief Justice T. Alexander Hickman, Chairman
Associate Chief Justice Lawrence A. Poitras
The Honourable Gregory T. Evans, Q.C.

Counsel:

George W. MacDonald, Q.C.
David B. Orsborn
W. Wylie Spicer

Commission Executive Secretary:

M. Lois Dyer (January 1, 1987 - August 24, 1987)
Susan M. Ashley (August 25, 1987 - December 1989)

Support Staff:

Administrative Assistant:
Jean Miller (January 28, 1987 - July 15, 1988)
Laurie Burnett (July 18, 1988 - December 1989)

Word Processor:
Laurie Burnett (February 9, 1987 - July 15, 1988)
Barbara Shanks (July 18, 1988 - December 1989)

Receptionist/Secretary:
Janice Cook

Librarian:
Brenda McGilvray

Director of Research:
John E. S. Briggs

Investigators:
Fred Horne
Jim Maloney

Editor:
Stephen Kimber

Public Hearings:

Registrar:
Malcolm Williston (Sydney)
Margaret Kneeland (Halifax)

Ushers:
Wilfred Smith (Sydney)
Peter MacDonald (Halifax)

Court Reporters:
Sydney Discovery Services (Sydney)
Margaret Graham Discovery Services (Halifax)

3
Parties granted standing

Parties with Standing	Counsel
Donald Marshall, Jr.	Clayton Ruby Marlys Edwardh Anne Derrick
John F. MacIntyre	Ronald N. Pugsley, Q.C.
Royal Canadian Mounted Police	James D. Bissell, Q.C.
Correctional Services Canada National Parole Board Department of Justice Canada Department of Solicitor General of Canada	Al Pringle
City of Sydney Police Commission	M. G. Whalley, Q.C.
William Urquhart	Donald C. Murray
Oscar Nathaniel Seale Black United Front	E. Anthony Ross
Attorney General of Nova Scotia Department of Attorney General	Jamie W. Saunders Darrel I. Pink
Union of Nova Scotia Indians	Bruce H. Wildsmith Graydon Nicholas
Estate of Donald C. MacNeil, Q.C.	Frank L. Elman, Q.C. David G. Barrett
Aldophus Evers Richard McAlpine Gary Green	William L. Ryan
Sergeant James Carroll	Charles Broderick
Staff Sergeant. H. F. Wheaton Inspector D. B. Scott	S. Bruce Outhouse, Q.C.
Sergeant Herb Davies	Guy LaFosse
Roland J. Thornhill	John Merrick, Q.C.

Observer Status

Police Association of Nova Scotia	David W. Fisher
Nova Scotia Branch Canadian Bar Association	Gordon F. Proudfoot

4
Notice of Inquiry

The Royal Commission on the Donald Marshall, Jr., Prosecution will commence Public Hearings at 10:00 a.m. on Wednesday, September 9th, 1987 in the Lower Hall, St. Andrew's United Church Hall, on Bentinck Street in the City of Sydney in the Province of Nova Scotia.

Copies of the Terms of Reference may be obtained by writing to the Secretary:

Susan M. Ashley
Commission Executive Secretary
Royal Commission on the Donald Marshall, Jr., Prosecution
Suite 1026 - Maritime Centre
1505 Barrington Street
Halifax, N.S. B3J 3K5

5
Dates and locations of Public Hearings

Date	Location
September 9-11, 1987 September 14-18, 1987 September 21-25, 1987 October 6-9, 1987 October 26-29, 1987 November 2-5, 1987 November 9-10, 1987 November 16-19, 1987 December 7-11, 1987	St. Andrew's United Church Hall Sydney, Nova Scotia
January 11-14, 1988 January 18-20, 1988 January 25-28, 1988 February 1-4, 1988 March 7-9, 1988 March 14-17, 1988 March 21-24, 1988	Lord Nelson Hotel Halifax, Nova Scotia
May 16-19, 1988 May 24-26, 1988 May 30-31, 1988 June 1-2, 1988 June 6-9, 1988 June 20-22, 1988 June 27-28, 1988	World Trade and Convention Centre Halifax, Nova Scotia
September 12-15, 1988 September 19-21, 1988	St. Thomas Aquinas Church Hall Halifax, Nova Scotia
October 31, 1988 November 1-3, 1988	St. Andrew's United Church Hall Sydney, Nova Scotia

6 Alphabetical list of witnesses at Public Hearings

Witness	Transcript	Dates
Judge Robert Anderson	Vol. 50	Feb. 3, 1988
Bruce Archibald	Vol. 30	Nov. 18, 1987
Stephen Aronson	Vol. 55-56	March 14, 1988 March 15, 1988
Thomas Barlow	Vol. 71	May 31, 1988
Keith Beaver	Vol. 30	Nov. 18, 1987
Donald Burgess	Vol. 38-39	Jan. 12, 1988 Jan. 13, 1988
Lawrence Burke	Vol. 20 Vol. 26	Oct. 28, 1987 Nov. 9, 1987
John Butterworth	Vol. 11	Sept. 23, 1987
Judge Felix Cacchione	Vol. 64-65	May 17, 1988 May 18, 1988
James Carroll	Vol. 47-49	Jan. 28, 1988 Feb. 1, 1988 Feb. 2, 1988
Beudah Chant	Vol. 20	Oct. 28, 1987
Maynard Chant	Vol. 5-6	Sept. 15, 1987 Sept. 16, 1987
Gail Chernin	Vol. 29	Nov. 17, 1987
Douglas Christen	Vol. 54	March 9, 1988
Thomas Christmas	Vol. 23	Nov. 3, 1987
Norman Clair	Vol. 89	Sept. 21, 1988
Stanley Clarke	Vol. 38	Jan. 12, 1988
Emily Clemens	Vol. 19	Oct. 27, 1987
Eugene Cole	Vol. 39	Jan. 13, 1988
Gordon Coles, Q.C.	Vol. 77-79 Vol. 85-86 Vol. 88	June 9, 1988 June 20, 1988 June 21, 1988 Sept. 14, 1988 Sept. 15, 1988 Sept. 20, 1988

Paul Cormier	Vol. 87	Sept. 19, 1988
Sandra Cotie	Vol. 18	Oct. 26, 1987
Mary Patricia Csernyik (O'Reilley)	Vol. 18	Oct. 26, 1987
Herb Davies	Vol. 47	Jan. 28, 1988
Howard Dean	Vol. 9	Sept. 21, 1987
Herbert Desmond	Vol. 80	June 22, 1988
The Honourable Terence R. Donahoe, Q.C.	Vol. 90	Oct. 31, 1988
Gregory Ebsary	Vol. 25	Nov. 5, 1987
Mary Ebsary	Vol. 24-25	Nov. 4, 1987 Nov. 5, 1987
Roy Ebsary	Vol. 1-2	Sept. 9, 1987 Sept. 10, 1987
Frank Edwards	Vol. 65-70	May 18, 1988 May 19, 1988 May 24, 1988 May 25, 1988 May 26, 1988 May 30, 1988
Reinhold Endres	Vol. 73-74	June 2, 1988 June 6, 1988
Hugh Feagan	Vol. 83	Sept. 12, 1988
Barbara Floyd	Vol. 18	Oct. 26, 1987
Bernard Francis	Vol. 22	Nov. 2, 1987
Gordon Gale, Q.C.	Vol. 74-76	June 6, 1988 June 7, 1988 June 8, 1988
	Vol. 86	Sept. 15, 1988
	Vol. 88	Sept. 20, 1988
Deborah Gass	Vol. 40	Jan. 14, 1988
The Honourable Ronald Giffin, Q.C.	Vol. 57-59	March 16, 1988 March 17, 1988 March 21, 1988
	Vol. 89	Sept. 21, 1988
	Vol. 90	Oct. 31, 1988

Dana Giovannetti	Vol. 70	May 30, 1988
Eva Gould (Bernard)	Vol. 73	June 2, 1988
Roy Gould	Vol. 21 Vol. 28	Oct. 29, 1987 Nov. 16, 1987
Gary Green	Vol. 38	Jan. 12, 1988
Terrance Gushue	Vol. 15	Oct. 7, 1987
Michael Harris	Vol. 83	Sept. 12, 1988
Eunice Harriss	Vol. 16	Oct. 8, 1987
Patricia Harriss	Vol. 15-16	Oct. 7, 1987 Oct. 8, 1987
Martin Herschorn, Q.C.	Vol. 62-63 Vol. 85-87	March 24, 1988 May 16, 1988 Sept. 14, 1988 Sept. 15, 1988 Sept. 19, 1988
Chief Judge Harry How	Vol. 60-61 Vol. 85	March 22, 1988 March 23, 1988 Sept. 14, 1988
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Charles M. J. Livingstone	Vol. 11	Sept. 23, 1987
Kevin Lynk	Vol. 40	Jan. 14, 1988
Norman Daniel MacAskill	Vol. 17	Oct. 9, 1987
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Melinda MacLean, Q.C.	Vol. 39	Jan. 13, 1988

Innis MacLeod, Q.C.	Vol. 39	Jan. 13, 1988
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George W. MacNeil	Vol. 11	Sept. 23, 1987
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Dr. Maqbul A. Mian	Vol. 14	Oct. 6, 1987
Arthur Mollon, Q.C.	Vol. 29	Nov. 17, 1987
Alexander Muggah	Vol. 32	Dec. 7, 1987
Linda L. Muise	Vol. 11	Sept. 23, 1987
John Mullowney	Vol. 9	Sept. 21, 1987
Dr. Mahmood A. Naqvi	Vol. 14	Oct. 6, 1987
Dr. James O'Brien	Vol. 13	Sept. 25, 1987
Katherine O'Handley	Vol. 29	Nov. 17, 1987
Mr. Justice Leonard Pace	Vol. 72	June 1, 1988
Robert Patterson	Vol. 55	March 14, 1988
Arthur J. Paul	Vol. 23-24	Nov. 3, 1987 Nov. 4, 1987
Dr. Roland Perry	Vol. 80	June 22, 1988

Joel Pink, Q.C.	Vol. 88	Sept. 20, 1988
Raymond Rudolph Poirier	Vol. 14	Oct. 6, 1987
John L. Pratico	Vol. 11-12	Sept. 23, 1987 Sept. 24, 1987
Margaret Pratico	Vol. 13	Sept. 25, 1987
Raymond Quintal	Vol. 84	Sept. 13, 1988
David Ratchford	Vol. 24	Nov. 4, 1987
Douglas Rutherford, Q.C.	Vol. 53	March 8, 1988
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Oscar Seale	Vol. 29	Nov. 17, 1987
Robert Simonds	Vol. 86	Sept. 15, 1988
Eugene Smith	Vol. 37-38	Jan. 11, 1988 Jan. 12, 1988
Catherine A. Soltesz (O'Reilley)	Vol. 19	Oct. 27, 1987
Jack Stewart	Vol. 71	May 31, 1988
David Thomas, Q.C.	Vol. 84	Sept. 13, 1988
Deborah Timmins	Vol. 4	Sept. 14, 1987
William Urquhart	Vol. 52 Vol. 54	March 7, 1988 March 9, 1988
A. E. Vaughan	Vol. 72-73	June 1, 1988 June 2, 1988
Milton Veniot, Q.C.	Vol. 38	Jan. 12, 1988
Archie Walsh	Vol. 40	Jan. 14, 1988
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M. G. Whalley, Q.C.	Vol. 62	March 24, 1988
Harry Wheaton	Vol. 41-47	Jan. 18, 1988 Jan. 19, 1988 Jan. 20, 1988 Jan. 25, 1988 Jan. 26, 1988 Jan. 27, 1988 Jan. 28, 1988
Murray Wood	Vol. 10	Sept. 22, 1987
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List of Exhibits introduced at the Public Hearings

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Donald Marshall, Jr. Preliminary Inquiry (July 1971)
Statement of Facts (Donald C. MacNeil, October 1971)
Donald Marshall, Jr. Trial (November 2-5, 1971)

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Documents relating to:
Donald Marshall, Jr. Reference (December 1982)

Exhibit 4

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  Reasons for Judgment
Roy Ebsary Preliminary (August 1983)

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Roy Ebsary First Trial (September 1983)

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Documents relating to:
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Documents relating to:
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Exhibit 9

Documents relating to:
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Roy Ebsary Third Trial (January 1985) continued
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Exhibit 11

Documents relating to:
Roy Ebsary
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Scott MacKay
Marvel Mattson

Exhibit 12

Documents relating to:
Maynard Chant
Richard Walsh
John Mullowney
Howard Dean
Michael Bernard MacDonald
John Pratico
Raymond Rudolph Poirier
Dr. Maqbul A. Main

Exhibit 13

Documents relating to:
Dr. Mahmood A. Naqvi
Terrance Gushue
Patricia Harriss
Mary Patricia Csernyik (O'Reilley)
Catherine A. Soltesz (O'Reilley)
Barbara Floyd
Sandra Cotie
Wayne Magee
Lawrence Burke

Exhibit 14

Documents relating to:
Beudah Chant
Roy Gould
Mary Ebsary
Gregory Ebsary
Eugene Smith
William Urquhart

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John F. MacIntyre
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Post - 1971 documents

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Cape Breton Post article (photocopy) (November 4, 1971)

Exhibit 53
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Exhibit 54
Original statement of Terrance Gushue (June 17, 1971)

Exhibit 55
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Exhibit 56
Original statement of Patricia Harriss (June 18, 1971)

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Exhibit 58
Criminal record of Patricia Harriss (Toronto)

Exhibit 59
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Statement of Mary Patricia Csernyik (O'Reilley) (June 18, 1971)

Exhibit 62
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Roy Gould documents

Exhibit 64
Clippings re Membertou

Exhibit 65
Complaints from Indian teenagers re police, signed by Cameron Paul, 1970

Exhibit 66
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Exhibit 67
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Exhibit 68
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Diagram of Sydney Detectives' offices, by David Ratchford

Exhibit 74
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Exhibit 75
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Exhibit 83
Opinion prepared by Bruce Archibald re: The Use of Evidence and the Making of Evidentiary Rulings at the Trial of Donald Marshall, Jr.

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Exhibit 95
Notes prepared by Donald Burgess, RCMP (A-5) (December 6, 1983)

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File of Melinda MacLean/Deborah Gass

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Stephen Aronson's and Frank Edwards' notes

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Harry Wheaton's investigation/lab reports

Exhibit 100
Original statement - Gregory Ebsary (April 19, 1982) witnessed by Harry Wheaton

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Original statement of Donald Marshall, Jr. (1982)

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Handwritten notes of James Carroll

Exhibit 105
Cape Breton Post articles (May 29 - June 5, 1971)

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Cape Breton Post article re remand of Donald Marshall, Jr. (June 15, 1971)

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Transcript of June 1984 Examination of Discovery of Heather Matheson, *MacIntyre* v. *CBC*

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Exhibit 108
Notes taken by Harry Wheaton during 1982 Reference

Exhibit 109
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Three pages from discovery evidence of Heather Matheson, missing from original document Exhibit 106

Exhibit 111
RCMP media guidelines

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Exhibit 114
Original statement from Donald Marshall, Jr. taken by Harry Wheaton (March 9, 1982)

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Fingerprints, Roy Ebsary (April 9, 1970)

Exhibit 122
Criminal Code provisions

Exhibit 123
Correspondence between Felix Cacchione and National Parole Board, House of Commons Justice Committee, MacGuigan, and Correctional Services of Canada

Exhibit 124
Correspondence (September 11, 1981 - February 22, 1983)

Exhibit 125
Correspondence (May 9, 1983 - February 23, 1984)

Exhibit 126
Letter from Chief Justice of Nova Scotia to federal Minister of Justice (May 10, 1983)

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Exhibit 128
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Notes of Brian Williston

Exhibit 130
Newspaper articles containing allegations against William Urquhart

Exhibit 131
Newspaper articles, Hansard clippings, etc., (1982 - 1986)

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Handwritten notes, Stephen Aronson

Exhibit 134
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Exhibit 136
Duties and Functions of Attorney General

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Letter from Felix Cacchione to Gordon Coles (June 7, 1984)

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Letters, agreements, etc., Attorney General's office and Indian Affairs

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Hansard references (1982-1983)

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Job Description, Director (Prosecutions)

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Evaluation form, Crown prosecutors

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Exhibit 151
Photocopies of expense vouchers paid by Crown on behalf of Donald Marshall, Jr.

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Summary of meetings, Frank Edwards and Harry Wheaton

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Draft Report of Thomas Barlow (June 16, 1983)

Exhibit 154
Service history of A. E. Vaughan

Exhibit 155
Comments of A. E. Vaughan re role of Criminal Operations Officer for Nova Scotia

Exhibit 156
Six page memo prepared by A. E. Vaughan entitled "Relationships with RCMP"

Exhibit 157
Federal/Provincial Task Force Report on Compensation of Wrongfully Convicted and Imprisoned Persons

Exhibit 158
Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons

Exhibit 159
Job Description, Director (Criminal)

Exhibit 160
Job Description, Director (Criminal) (1975)

Exhibit 161
Letter from Department of Justice to Gordon Gale re request by the Union of Nova Scotia Indians re "Feasibility Study"

Exhibit 162
Letter from Department of Justice to Attorney General's Department re Nova Scotia Indians Legal Aid needs and a brochure on Research Proposal

Exhibit 163
Letter from K. M. Psychological Services to the Royal Commission on the Donald Marshall, Jr., Prosecution (June 21, 1988)

Exhibit 164
Statement of Facts with respect to the Thornhill matter

Exhibit 165
Booklet of Thornhill documents

Exhibit 166
Assembly Debates re: Letter from Hugh Feagan (RCMP) to the Attorney General

Exhibit 167
Notes of Deputy Commissioner Raymond Quintal (RCMP)

Exhibit 168
Notes of David Thomas

Exhibit 169
Newspaper article (April 18, 1980) - "RCMP Seeking Documentation"

Exhibit 170
R. v. *Ruddock* (February 14, 1978)

Exhibit 171
R. v. *Williams* (November 2, 1978)

Exhibit 172
Chronicle-Herald article (April 12, 1988) - "Chief Judge How Responds to Story Article"

Exhibit 173
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Policy statement: Negotiations with Defence Counsel Concerning Plea and Sentence

Exhibit 175
Photocopies of cases appearing on sentence

Exhibit 176
Press conference with Attorney General Ronald Giffin in early November 1984

8A. Submissions to the Royal Commission

Richard Apostle
Department of Sociology and Social Anthropology
Dalhousie University
Halifax, Nova Scotia
May 11, 1988

Russell Lawrence Barsh
Lawyer
Seattle, Washington
November 28, 1988

James Bissell, Q.C.
Justice Canada
Halifax, Nova Scotia
August 18, 1988

A. Alan Borovoy
General Counsel
Canadian Civil Liberties Association
Toronto, Ontario
January 13, 1989

C. L. Campbell
Director
Atlantic Police Academy
Charlottetown, P.E.I.
August 23, 1988

Ken Chasse
Director of Research
Ontario Legal Aid Plan
Toronto, Ontario
July 22, 1988

Stanley A. Cohen
Coordinator, Criminal Procedure Project
Law Reform Commission of Canada
Ottawa, Ontario
June 4, 1988

Nadine Cooper-Mont
Deputy Solicitor General
Province of Nova Scotia
Halifax, Nova Scotia
October 5, 1988

W. Brent Cotter
Professor, Faculty of Law
Dalhousie University
Halifax, Nova Scotia
November 26, 1988

Ian B. Cowie
Consultant
Ottawa, Ontario
July 30, 1988

Ronald Delisle
Professor, Faculty of Law
Queen's University
Kingston, Ontario
October 13, 1987

Alexander Denny
Grand Captain
Eskasoni, Nova Scotia
June 29, 1988

Richard Gosse
Chairman
RCMP Public Complaints Commission
Ottawa, Ontario
January 19, 1989

Gordon Gregory, Q.C.
Barrister and Solicitor
Fredericton, New Brunswick
July 22, 1988
October 6, 1988

H. Archibald Kaiser
Professor, Dalhousie Law School
Halifax, Nova Scotia
October 19, 1987
June 28, 1988

Carol LaPrairie
Justice Canada
Ottawa, Ontario
June 10, 1988

Dan MacIntyre
Executive Coordinator
Race Relations Directorate of Ontario
Toronto, Ontario
November 16, 1988

Rod McLeod
Barrister and Solicitor
Winnipeg, Manitoba
September 22, 1988

Chris Murphy
Department of Sociology and Social Anthropology
Dalhousie University
Halifax, Nova Scotia
August 25, 1988

Daniel N. Paul
Executive Director
The Confederacy of Mainland Micmacs
Truro, Nova Scotia
June 23, 1988

Roland Penner
Dean, Faculty of Law
University of Manitoba
Winnipeg, Manitoba
October 10, 1988

Roland Perry, M.D.
Chief Medical Examiner of Nova Scotia
Halifax, Nova Scotia
September 6, 1988

Donald J. Purich
Director, Native Law Centre
University of Saskatchewan
Saskatoon, Saskatchewan
December 14, 1988

Viola M. Robinson
President
Native Council of Nova Scotia
Truro, Nova Scotia
June 22, 1988

Marc Rosenberg
Barrister and Solicitor
Toronto, Ontario
June 20, 1988
September 26, 1988

George A. Smith
A/Executive Director
Nova Scotia Police Commission
Halifax, Nova Scotia
May 9, 1988

8B. List of Public Submission to the Commission

The following members of the public made written submissions to the Royal Commission:

Charles Balcom
Middleton, Nova Scotia

Frank Belliveau
Hamilton, Ontario

Lawrence Burton
Sydney, Nova Scotia

Gordon R. Carter
Berwick, Nova Scotia

James Chown
Bible Hill, Nova Scotia

Philip Cohen
Glace Bay, Nova Scotia

Joseph S. Conforti
Weston, Ontario

James William Cruickshanks
Dartmouth, Nova Scotia

D. Porter and Son Limited
New Glasgow, Nova Scotia

Judy Davis
Tatamagouche, Nova Scotia

Vern Dillabaugh
Ottawa, Ontario

Dr. Peter Dockwrey
Halifax, Nova Scotia

Keith M. Dorey
Dartmouth, Nova Scotia

Carol Farmer
Sydney, Nova Scotia

John Lloyd Feener
Bridgewater, Nova Scotia

Don Fraser
Victoria, British Columbia

Edwin Freisting
Prince Albert, Saskatchewan

Cletus D. Hallihan and Mrs. White
Sydney, Nova Scotia

Barbara Johnson
Newport, Nova Scotia

Jean C. MacDonald
Reserve Mines, Nova Scotia

Hugh MacKay
Middle Musquodoboit, Nova Scotia

Hugh MacKinlay
Bedford, Nova Scotia

Mrs. Carson J. McColl
Apsley, Ontario

Mrs. Patricia B. MacCulloch
Hubbards, Nova Scotia

Joseph C. Mullins
Sydney, Nova Scotia

John Newcomb
Lower Sackville, Nova Scotia

Clifford R. Olson
Kingston, Ontario

Keith H. Paris
Halifax, Nova Scotia

J. C. Phinney
Middleton, Nova Scotia

Alex J. Reddick
Dorchester, New Brunswick

Therese Robinson
Centre Burlington, Nova Scotia

Mike Rock
Bridgetown, Nova Scotia

Sharon Scanlan
Bridgetown, Nova Scotia

Allistair K. Scott
Sydney, Nova Scotia

Ron S. Seney
New Germany, Nova Scotia

Raymond Sheppard
Halifax, Nova Scotia

Chiyo Shimizu
Sydney, Nova Scotia

Leona Smith
Jordan Falls, Nova Scotia

St. James' Junior High School
Port aux Basques, Newfoundland

Tom Tasson
Edmonton, Alberta

Douglas W. Trider
Dartmouth, Nova Scotia

John Tucker
Sydney, Nova Scotia

Harry Wilson
Halifax, Nova Scotia

R. G. (Bob) Wilson
Winnipeg, Manitoba

9
Rules of Practice and Procedure

Short Title

1. These Rules may be cited as the Donald Marshall Inquiry Rules.

Application

2. These Rules apply to the Commission established under the *Public Inquiries Act*, R.S.N.S. 1967, c. 250 pursuant to Minute of Council dated the 28th day of October, 1986.

Interpretation

3. In these Rules:

"Act" means the *Public Inquiries Act*, R.S.N.S. 1967, c. 250.

"Chairman" means the person appointed by the Governor in Council to be chairman of the Commission.

"Commission Counsel" means counsel appointed by the Commissioners to assist them in their inquiry.

"Commissioner" means a person appointed by the Governor in Council to conduct the inquiry.

"Commission" means the Donald Marshall Inquiry established pursuant to Minute of Council and the Governor in Council's commission dated the 28th day of October, 1986.

"Governor in Council" means the Governor in Council of Nova Scotia.

Notice of Inquiry

4. (1) Notice of the Inquiry shall be served upon any person, Corporation, Minister of the Crown or Crown agency who, in the Commission's opinion, may have an interest in the Inquiry.

(2) In addition to, or in lieu of the Notice of Inquiry provided for in Subsection (1) of this Section 4, Notice of the Inquiry may be given by publication of the same in the Nova Scotia Gazette and in such Nova Scotia and other Canadian newspapers or other publications as in the opinion of the Commission would be appropriate.

(3) Notice of Inquiry shall set out the time and place appointed for the Inquiry.

Right to be Heard

5. (1) The following persons or their counsel shall have the right to be heard and to examine witnesses heard at public hearings of the Commission:

(a) Commission Counsel;

(b) Any person who in the Commission's opinion ought to be given such right and then upon such terms as the Chairman may direct.

(2) Any person wishing to be heard shall apply in writing to the Commission, within any time limits established by the Commission, for the right to be heard and to examine witnesses heard at public hearings of the Commission, and shall state specifically his interest and the extent of standing desired. Provided that the Commission is satisfied that standing is necessary for the protection of such interest, the Chairman may grant standing upon such terms as the Chairman may direct.

(3) At the conclusion of the public hearings of the Commission any person, group or association who has been granted standing in any capacity will have the right at that time to make submissions to the Commission in writing, and, if the Chairman deems it necessary or expedient so to do, to make oral submissions following the filing of such written submission. Any other person, group or association may, upon written application giving reasons for the request, be permitted to make a submission in writing to the Commission at the conclusion of the public hearings.

(4) The Commission may in its discretion hold hearings *in camera* and the Chairman shall decide in the circumstances of that particular case who shall be permitted to attend, which counsel shall be permitted to attend and what conditions may be imposed upon any persons or counsel permitted to attend.

(5) Persons having been granted standing may apply to Commission Counsel to call any witness or witnesses and such witness may be called by Commission Counsel. Any witness so called may in the discretion of Commission Counsel be examined first by Commission Counsel and then, subject to the provisions of Subsection (5) of Section 7 of these Rules, by other persons having the right to be heard and to examine witnesses at public hearings of the Commission in the order designated by the Chairman.

Commission Counsel

6. (1) Commission Counsel shall assist the Commission in the orderly conduct of the Inquiry and ensure that all relevant evidence is submitted to the Commission.

(2) At any public hearing any member of the public may request Commission Counsel, in writing, to ask a particular question of a witness and Commission Counsel may, in his discretion, ask such question.

Inquiry Procedure

7. (1) Prior to the commencement of public hearings for the purpose of hearing witnesses, the Commission may hold procedural hearings for the purpose of determining what persons shall have the right to be heard and for the purpose of having Commission Counsel tender documentary or other evidence which Commission Counsel determines should be tendered in advance of the public hearings for the convenience of the Commission or persons entitled to be heard.

(2) The Notice of Inquiry shall be read at the first public hearing of the Inquiry.

(3) Commission Counsel shall proceed first with the examination of witnesses.

(4) Commission Counsel may examine, cross-examine or re-examine all witnesses.

(5) Other persons having been granted standing may, in such order as the Chairman directs and subject to such terms as may have been imposed upon such right by the Chairman under the provisions of Subsection (1)(b) or (2) of Section 5 of these Rules, cross-examine witnesses called by Commission Counsel.

Presence of Interested Persons

8. At the time and place appointed for holding the Inquiry the Commission may proceed with the Inquiry whether or not persons granted standing or their counsel are present.

Attendance of Witnesses

9. Where the Commission requires the attendance of any witness, either of its own motion or as a result of any application, the Notice to be served on the witness shall be in the form set out in Schedule 1.

Production of Documents

10.(1) Where the Commission requires the production of any document by any person either of its motion or as a result of an application, notice to be served on that person shall be in the form set out in Schedule 2.

(2) Other persons granted standing may apply to Commission Counsel to require the production of any document and Commission Counsel may in his discretion require the production of such document.

Service of Documents

11. Any notice, summons or other document issued under these Rules may be served personally at the address of the person to be served, by certified post, or by such other method of service as the Chairman may direct.

Evidence

12.(1) The Commission may admit as evidence Affidavits, Statutory Declarations, Rogatory Commissions and other evidence made or taken under the laws of Canada or any other country that may be applicable in any case in which the Commission considers it fit and proper to have such evidence presented, and whether such evidence is sworn or unsworn. The Commission may also in its discretion and as the Chairman may direct admit transcripts of related proceedings and statements of individuals whether or not such individuals are available for examination and cross-examination.

(2) Without restricting the generality of Subsection (1), the Commission may admit such written, oral or other evidence as the Commission may in its discretion deem relevant, whether or not the admission of such evidence is in accordance with the normal rules of evidence.

(3) Questions asked and documents and exhibits tendered as evidence in the course of the examination of witnesses called on behalf of the Commission shall not be open to objection merely on the ground that they do or may raise questions or issues that are not contained in or vary from the Terms of Reference contained in the Minute of Council.

(4) Where documentary evidence or a witness is outside the jurisdiction of Nova Scotia or is otherwise not available for Commission hearings, the Chairman or such person or persons as he may designate may be authorized to obtain such evidence in such manner as the Chairman may direct.

(5) Where possible the evidence of witnesses shall be taken under oath or solemn affirmation and witnesses shall be sworn or affirmed in the manner provided by the high courts having jurisdiction over the place where the evidence is taken.

(6) All evidence taken in any manner provided for by these Rules shall form a part of the record of the proceedings of the Commission.

Submissions by Counsel

13.(1) When all evidence has been adduced before the Inquiry, Commission Counsel and other persons granted standing shall have the right to address the Commission *viva voce* in such order as the Chairman directs and Commission Counsel shall have the right to address the Commission first and to make the final submission to the Commission.

(2) The Chairman may direct that written submissions be made by counsel and other persons entitled to be heard in lieu of or in addition to their oral submissions.

The Chairman

14.(1) The Chairman shall rule on any objections raised, determine all matters of procedure not provided for by these Rules and, when in his discretion it is necessary or desirable for the purpose of fully discharging the duties of the Commission, may allow departures from these Rules.

(2) The Chairman shall determine the admissibility of any evidence tendered at such time as he deems fit.

(3) The Chairman or any person designated by him may, in such a manner as the Chairman directs, take evidence *in camera* and in the absence of Commission Counsel or persons having the right to be heard and to examine witnesses at public hearings.

(4) The Chairman or any Commissioner or person designated by the Chairman to take evidence may take such evidence within or without Nova Scotia.

(5) Where by these Rules reference is made to a decision of the Commission, such decision of the Commission shall be enunciated by the Chairman.

Quorum

15. A quorum for public hearings of the Commission shall be not less than two Commissioners.

Adjournments

16. The Commission may adjourn its inquiry from time to time and from place to place.

Amendments

17. These Rules may be amended from time to time by the Commission as it sees fit.

Amendment to Rules of Practice and Procedure

1. Amend Rule 5 (5) to read as follows:

(5) Persons having been granted standing may apply to Commission Counsel to call any witness or witnesses and such witness may be called by Commission Counsel. Any witness so called may in the discretion of Commission Counsel be examined first by Commission Counsel and then, subject to the provisions of Subsection (5) of Section 7 of these Rules, by other persons having the right to be heard and to examine witnesses at public hearings of the Commission in the order designated by the Chairman. *In the event Commission Counsel elect not to call any such witness, the party requesting that such witness be called may apply to the Commission for directions.*

2. Delete Rule 12 (3).

10 Selected Rulings of the Commissioners

A. On the matter of applications for the provision of funding for legal counsel, May 14, 1987

Application has been made on behalf of various parties requesting the Commission to order the Province of Nova Scotia to pay for legal counsel to be retained by such parties or, in the alternative, requesting the Commission to recommend that the Province of Nova Scotia provide such payment. We do not consider it necessary, at this time, to determine whether the Commission has power to order the Province to provide payment for such legal counsel. However, we do believe that, absent any prohibition, it is implicit in the Terms of Reference of any Royal Commission that it has the capacity, and indeed the obligation, to respond to any party who has been granted standing and who raises an issue of participant funding. To refuse to respond to such a request would be inconsistent with a tradition of Royal Commissions, a tradition which encourages full participation in a public and independent forum. In recent times, similar requests have been responded to by then Mr. Justice Berger, Mr. Justice Grange, Mr. Justice Estey and Mr. Justice Parker.

The Commission, if its findings are to be considered credible, must be perceived to be conducting fair Hearings, and to be doing everything possible to ensure that proper representation is provided for all parties whose participation in all, or some particular part, of the Hearings is required. It would be extremely unfortunate, and inconsistent with the proper administration of justice, if a necessary party were prevented from presenting its full story to the Commission due to lack of financial resources. The public interest is unlikely to be served adequately if only some interested groups and parties are represented, since necessarily that would risk having our findings influenced in favour of those parties who are either better organized or better funded.

We consider funding should only be made available if the public interest demands that the cost of such parties should be paid from the public purse, and then only to the extent the parties cannot afford to provide their own counsel. Wherever funding is provided by the Provincial Government to any party, it is our recommendation that the amounts to be paid should be subject to taxation. In this way there should be prevention of costly duplication of work and resources, and adequate protection of public funds.

The Commission is of the opinion that, with the exception of the Attorney General for Nova Scotia, none of the parties granted standing can reasonably take the position that either the public interest or their own interest requires the presence of legal counsel on their behalf throughout the Hearings. The Province of Nova Scotia has retained outside counsel to represent the present and former Attorneys General and the employees of the Department.

Those parties who have been granted standing and who played an important role in the events leading to the arrest and conviction of Donald Marshall, Jr., and who could reasonably assume that their conduct may be attacked, would want their counsel to be present when they are giving evidence themselves and whenever evidence is being adduced which would tend to call their conduct into question. The public interest in having the Hearings conducted fairly demands that such parties not be denied the right to defend vigorously their conduct because of their inability to pay counsel.

In this case the perception of fairness is of particular importance because the Province of Nova Scotia has elected to provide funding for counsel for Donald Marshall, Jr., whose interest is adverse to other parties who have been granted standing. Fairness demands that these parties be given every opportunity to have their interest protected. John F. MacIntyre and the Estate of Donald C. MacNeil,

Q.C. fall into this category and each has advised the Commission that they cannot afford to pay legal counsel. It is our recommendation that payment for such counsel be made by the Province of Nova Scotia.

Another group of parties who have been granted standing, all of whom are, or were, members of the RCMP, may want their counsel present while they are on the witness stand, but it is unlikely they could reasonably suggest that the protection of their individual interests require that independent counsel attend during the presentation of most other evidence. We understand the Federal Government provides funding for counsel for such persons while they are giving evidence, and when they are being interviewed by Commission counsel.

Standing has been granted to the RCMP and counsel has been appointed by that body to represent the interests of the Force, and presumably, all members of the Force to the extent that they were acting in the scope of their employment. It is our understanding that counsel for the RCMP intends to be present during most of the Hearings. The Federal Government recognizes that individual members of the RCMP require independent counsel on occasion. Counsel for the various members of the RCMP have indicated that circumstances could arise, other than when their clients are giving evidence where a conflict might exist between their interests and those of the RCMP. Given the intention of the Federal Government to provide funding to individual members of the Force in certain circumstances, we suggest it is that body to whom these Applicants should look for additional funding.

Those parties who represent the public interest, or groups thereof, fall into a different category. Standing has been granted to the Black United Front and the Union of Nova Scotia Indians. These groups requested standing because they hold the view that discrimination and racism influence the administration of justice in the Province of Nova Scotia, and may have contributed to Donald Marshall, Jr. being convicted and sent to prison. These serious allegations will be considered by the Commission. We believe that the public interest requires, in a proper case, that the point of view of organized and affected minority groups be appropriately represented and articulated. This is such a proper case. The extent of involvement required at the Hearings by counsel for these groups is difficult to predict at this time.

The Commission has also instructed its counsel to confer with both such groups prior to experts being retained by the Commission to carry out research concerning the matters of racism and discrimination.

Finally, we consider the Application of Oscar Nathaniel Seale, father of the late Sandford William Seale. Mr. Seale consistently has maintained the position that his son's reputation was being attacked and damaged without any opportunity having been afforded to the Seale family to respond. His position is comparable to that of the parents of children considered by the Grange Commission to have a sufficient interest in the outcome of that Inquiry to warrant public funding for their counsel. In the submission made on behalf of Mr. Seale it was indicated he cannot afford counsel. It is clear his interest relates only to the events which occurred on the night when this tragedy took place, and we consider he should be provided funding to enable counsel to be present to represent the interest of the family when those events are being considered at the Hearings. During the submission made yesterday, counsel for Mr. Seale indicated he would also be representing the Black United Front, and thereby the costs to be incurred for the representation of Mr. Seale would be less than normally might have been the case.

The Commission accordingly makes the following recommendation to the Governor in Council:

1. *That, consistent with the foregoing principles, public funding for legal counsel be provided John F. MacIntyre, the Union of Nova Scotia Indians, the Black United Front, the Estate of Donald C. MacNeil, Q.C., and Oscar Nathaniel Seale;*

2. *That no funding be provided by the Province of Nova Scotia for Adolphus James Evers, Gary Green, R. A. McAlpine, Herb Davies, H. Wheaton and D. Scott;*

3. *That any accounts rendered for participant funding be reviewed (taxed). Counsel for all Applicants impressed the Commission with their assurances of a responsible approach to the expenditure of public funds, and we believe that taxation of accounts rendered will provide public assurance of such responsibility.*

We recognize that the Governor in Council is not required to accept our recommendations. However, we have unique knowledge concerning the scope of this Inquiry and are in the best position to make recommendations. We expect, therefore, our recommendations will be given serious consideration.

DATED this 14th day of May, 1987 at Halifax, Nova Scotia.

Chief Justice T. Alexander Hickman,
Chairman

Associate Chief Justice Lawrence A. Poitras,
Commissioner

The Honourable Gregory T. Evans,
Commissioner

B. On the matter of whether questions may be put to witnesses who are now or who have been members of the Executive Council of Nova Scotia, relating to Cabinet discussion on the Marshall case, March 17, 1988

(Transcript, Page 10502)

We have been asked to rule whether questions may be put to witnesses who are now or who have been members of the Executive Council of Nova Scotia, relating to Cabinet discussions on the Marshall case. Arguments have been made by Commission counsel, and counsel for Donald Marshall, Jr., the Union of Nova Scotia Indians, the Black United Front and Oscar Seale in support of admitting such evidence, and from counsel for the Attorney General and the RCMP against the proposition.

Two decisions of the Supreme Court of Canada are relevant to the issue and have been considered by us in making our ruling:

Smallwood v. *Sparling et al.*, [1982] 2 S.C.R. 686;
Carey v. *Ontario*, [1986] 2 S.C.R. 637.

These were the only two cases referred to us by counsel. Both cases clearly state that there is no absolute immunity attaching to Cabinet documents which could prevent, in all cases, their introduction as evidence. While these cases recognize that such documents must be protected in certain circumstances, they make quite clear that the public interest is a paramount factor that must be considered in deciding the extent of the protection afforded in particular cases. LaForest, J. at p. 670 of the *Carey* case articulates factors that must be considered. He said:

[*The* Smallwood] *case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.*

To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice.

Here, we are not asking for disclosure of Cabinet documents. Cabinet documents relating to the Marshall case have been provided to the Commissioners, who have determined which are relevant to the work of this Inquiry. The Attorney General's Department has been supportive of our attempt to bring relevant documents, from Cabinet and from other Government offices, to this Inquiry. Counsel for the Commission has now asked that in addition to the Cabinet documents, questions be put to a former Attorney General relating to discussions held in Cabinet to give a sense of the general views being expressed in those discussions, but without "naming names" or attributing particular points of view to particular individuals. Counsel for Mr. Marshall has gone a further step and has asked the Commissioners to rule that there is no privilege attached to any Cabinet discussions. Thus counsel would be free to ask for specifics of Cabinet discussion attributable to individual ministers.

In determining whether the relative immunity relating to Cabinet secrecy will be extended to the oral evidence requested in this case, we must first look to the Terms of Reference of this Commission. Our task is to look at matters relating to the wrongful conviction of Donald Marshall, Jr. and "such other related matters which the Commissioners deem relevant to this Inquiry". Among those matters which the Commissioners deem relevant are the Reference to the Appeal Division of the Nova Scotia Supreme Court and the process by which compensation was granted to Donald Marshall, Jr. Surely it was in recognition of the public interest in airing the Marshall matter once and for all that the Government appointed this Inquiry. It is our view that it is clearly in the public interest that these matters concerning the administration of justice of Nova Scotia - and the extremely important consideration that the public have confidence in their justice system - must be raised.

While the more recent *Carey* case deals with the production of Cabinet documents, the *Smallwood* case deals with a subpoena issued to a former provincial Cabinet member to testify before a federal commission. In that case, Madame Justice Wilson says at p. 706:

It appears to me that, in the absence of any statutory provision which would override the common law, the rule with respect to oral testimony is the same as the rule with respect to documents, i.e., it is the rule of 'relative immunity'.

In that case, the Supreme Court of Canada decided that Mr. Smallwood's claim to blanket immunity must fail. In our view, the position of counsel for the Attorney General's Department in invoking absolute privilege as against the Commission which it established, is similar to the approach taken by Mr. Smallwood, which was rejected by the Supreme Court of Canada when it said that he "cannot be the arbiter of his own immunity".

We are sympathetic to the "candour" argument (as was the Supreme Court of Canada) but find that it, when weighed against the public interest argument put by Mr. Spicer, must fail. We note specifically the comments of Mr. Justice LaForest at p. 673 of *Carey*. His comments might have been spoken by the Commissioners in this case:

As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct of the government...

Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts. ...It has a bearing on the perception of the litigant and the public on whether justice has been done.

The limited immunity which now attaches to Cabinet documents and discussion 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 ministers, 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 discussion 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.

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.

C. On the matter of excluding television cameras during the testimony of John Pratico, September 18, 1987

(Transcript, Page 1323)

This is an application made by Commission counsel on behalf of John Pratico who will be a witness before this Commission, that television cameras be excluded while John Pratico is testifying and that he not be subjected to television lights during that period.

According to the evidence available to this Commission, John Pratico is admittedly a fragile individual who has a long history of mental instability. His psychiatrist, Dr. M. A. Mian, Medical Director, Cape Breton Hospital, in his written opinion based on John Pratico's past history and his present clinical condition, states that in his professional opinion:

...it will be detrimental to his mental health and his testamentary capacity if he is given television exposure.

The chief concern of this Commission is to obtain the facts. Freedom of the press [requires the] right to report fully. In that regard, this Commission has had, in my view, the maximum public exposure, the maximum coverage by the media with unrestricted right of access that has been enjoyed before any Canadian Commission.

The right of the press to report fully is secondary only to the Commission's duty to ensure that all relevant evidence is given freely and [without inhibition].

Commission counsel's motion would in no way prevent the media from reporting fully upon the proceedings. It would merely ensure that a witness be allowed to testify without such testimony being impeded by floodlights.

In our view, the public can best be served and protected and the adjudicative role of this Commission discharged fairly and properly by granting the application of John Pratico. It is ordered, therefore, that the order requested by Commission counsel on behalf of John Pratico is granted. There is no order as to costs at this time.

D. On the matter of excluding television cameras during the testimony of Donald Marshall, Jr., June 27, 1988

(Transcript, Page 14350)

Ms. Anne Derrick, as counsel for Donald Marshall, Jr., applies for an order that television cameras and still cameras be excluded from the hearing room while her client is testifying. Her request is objected to by counsel for the Canadian Broadcasting Corporation and ATV. Other counsel for parties with standing did not object to Mr. Marshall's application.

The position put by Ms. Derrick and corroborated by the report of Kris Marinic, a psychologist, is that at this time Donald Marshall, Jr. is "excessively worried, anxious and fearful as well as fatigued and wasted." It is the opinion of Mr. Marinic that Donald Marshall's condition has deteriorated since he last saw him and that Donald Marshall seems to be particularly afraid of the humiliation associated with even further public exposure. Mr. Marinic concludes his report, which is in evidence as Exhibit 163 as follows when referring to Donald Marshall, Jr.:

Given his past experience and the ongoing current stress, in my opinion, the exposure to television cameras and bright lights would compromise his ability to testify. Most likely, his level of anxiety would adversely affect his speech, concentration and memory.

Consequently, not only would he endure more distress, the quality of his testimony would also suffer.

I therefore, recommend that the television equipment be turned off during Mr. Marshall's testimony.

As was said by this Commission when dealing with a similar application on behalf of John Pratico, the right of the press to report fully is secondary only to the Commission's duty to ensure that all relevant evidence is given freely and [without inhibition]. Commissions counsel would in no way prevent the media from reporting fully upon the proceedings. It would merely ensure that a witness be allowed to testify without such testimony being impeded by floodlights.

In that context and based on representations we have heard, we conclude that television cameras and floodlights should be excluded from the hearings to ensure that the Commission obtains that best uninhibited testimony possible from Donald Marshall, Jr.

With respect to the application to exclude still cameras we are not persuaded that their presence will be detrimental to the quality of Donald Marshall, Jr. testifying, provided only one still camera is present in the hearing room at any one particular time and is operated without the benefit of flood, flash or strobe lights and in a manner acceptable to the Commission as being reasonable.

It is ordered, therefore, that television cameras and floodlights be excluded from the hearing room while Donald Marshall, Jr. is testifying before this Commission.

11 Research Program

Public Policing in Nova Scotia

(Volume 2 of this Report)

Researchers

Richard Apostle
Associate Professor, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

Philip Stenning
Associate Professor, Centre of Criminology, University of Toronto, Toronto

Executive Summary

In this study, we examine the major issues involved in choosing a policing philosophy for Nova Scotians. We conclude that the philosophy which is currently reflected in legislation and in police organization and practices in Nova Scotia - according to which local autonomy, variety and choice, are given preference, but are preferred in the context of a significant measure of provincial oversight and influence - is essentially well suited to the policing needs of Nova Scotia. For these reasons, we do not recommend any fundamental changes in the overall structure of the present policing system in the province. Nevertheless, certain changes in policing policy for the province, and in the way it is determined and implemented, are now required. The principal thrust of the recommendations we make is to strengthen, build on and improve the basic structures which are now in place.

While favouring local choice in policing policy and institutions, we also favour a more effective provincial presence and influence over policing policy. This involves adopting reforms which will give the existing provincial bodies more resources to exercise the powers and authority which they already have under the current legislation and contractual (in the case of the RCMP) frameworks. A philosophy of policing, however good it may be in theory, is of little value in the absence of the resources and will which are necessary to implement it. The provision and allocation of adequate resources for effective policing in the province must be a central concern of this Royal Commission in making its recommendations in this area, and of the Government of Nova Scotia in responding to them.

Major Provincial and Municipal Agencies

Among our various recommendations, we give special attention to the need to provide the Nova Scotia Police Commission (NSPC) with adequate personnel and resources to carry out its legislated mandate. The essential benefit of provincial police commissions when they are functioning as they should, draws from their ability to function as sources of independent advice and assistance in resolving the kinds of tensions which inevitably arise between provincial and municipal authorities out of their shared responsibilities for policing. Any attempt by the Department of the Solicitor General to assume the role of the Police Commission in this respect will fundamentally erode this important source of independent advice and assistance. We also recommend that the new Police Review Board should have the requisite independence from the police community and from Government (including the Nova Scotia Police Commission) to be an effective agency. In addition, we make several recommendations designed to ensure capable Board members and staff.

At the same time, we do recognize that the Solicitor General remains the executive authority with ultimate responsibility for determining and approving the

implementation of provincial policy. The "mixed" system of policing in Nova Scotia, and the particular responsibilities which the Solicitor General has assumed from the Attorney General for the RCMP, ensure that there will be many other sources of policy ideas on which she/he will want to draw. In order to receive, sift through and synthesize the information and advice coming from these different sources, identify areas in which there appears to be insufficient information and advice, and take steps to seek out that which is needed, the Minister requires appropriate support services within his/her own Department. To provide for the effective fulfillment of the Solicitor General's executive responsibilities in this regard, we make a series of recommendations, the most important of which is establishing within the Department a position of Executive Director, Policing. The duties of this official should relate exclusively to the fulfillment by the Department of its responsibilities with respect to policing. In conjunction with the creation of the new office and Department of the Solicitor General, we have also recommended the Government carefully review the Police Act and Regulations, and the Provincial Municipal Policing Agreements. The Government should ensure that those powers and responsibilities which formerly belonged to the Attorney General, and which relate primarily to the provision of legal advice and the administration of justice in particular cases, remain the responsibility of the Attorney General and not be transferred to the Solicitor General.

Our research indicates that there is an absence of adequate standards, guidance and support for municipal police governing authorities. We believe that one of the best vehicles for developing standards for municipal police governance would be an active association of municipal police governing authorities, which would provide a forum for the sharing of common experiences and problems and the development of common solutions to these problems. We have therefore recommended that a Municipal Police Governing Authorities Association (MPGAA) of Nova Scotia be formed, with a small staff (e.g., a full time Executive Director, a Research Officer and a Secretary), and with a mandate to provide advice, information and educational services (e.g., through an Annual Conference, regional meetings, etc.) to municipal police governing authorities throughout the province.

Police Organization

One of the real strengths of municipal police department (MPD) organization - providing immediate response to citizen and community concerns - is also a source of some weakness. The focus of most MPDs on providing immediate responses to difficulties as they arise means that they are not as inclined to undertake long-term planning. Neither are they as likely to do systematic evaluations or audits of their performances. There is a need for MPDs to have more deliberate planning processes, and monitoring of the successes and failures of departmental plans. This planning should involve the specification of departmental goals and priorities. It should also lead to the construction of an objective set of job descriptions, job standards, and appraisal systems for evaluating job performances.

Further, the evidence presented in our study demonstrates that small MPDs with low pay standards have the least qualified personnel and low morale. These small MPDs should be encouraged to improve their pay standards (bearing differential living costs in mind). This will require provincial financial support, but it will help ensure the quality and morale of the new personnel joining MPDs.

Another issue which needs to be addressed at the MPD level concerns the inadequacy of their pension plans. A substantial majority of the MPDs now have

pension plans, but many of them, particularly in the smaller departments, are quite new. As a consequence, older members of the MPDs stand to gain little from the plans. Poor pensions affect recruitment, lower morale, and force older men who ought to be moving towards retirement to continue working. An additional problem for many MPDs arises from the considerable penalty clauses for early retirement (almost always defined as prior to 65 years of age). We have recommended that the Nova Scotia Police Commission, with its renewed research mandate, should undertake a comprehensive evaluation of MPD pension plans in cooperation with the Chiefs of Police Association of Nova Scotia (CPANS), the Canadian Union of Public Employees (CUPE), the Police Association of Nova Scotia (PANS) and the proposed Municipal Police Governing Authorities Association (MPGAA). Special attention should be devoted to providing retirement packages for approximately 100 older MPD members (over 50 years of age), and the removal of penalty clauses for early retirement.

In terms of MPD training, we support the need to utilize a regional Police Academy, as well as other available institutions, to establish and maintain the standards being developed by the NSPC. The region is sufficiently small that any attempt to decentralize training will jeopardize what has been accomplished to date. Since criticisms have been made of the training offered by the Atlantic Police Academy, we have recommended that the Solicitor General's Task Force combine its study of training with an assessment of the existing studies on the financial costs to the Province of Nova Scotia for the Atlantic Police Academy's programs.

In terms of investigative capacity and organization, it is clear that the high level of autonomy in detective work which existed in Sydney in the early 1970s does not currently exist in the province. Serious criminal investigations are now subject to closer scrutiny by senior members of all MPDs in the province; however, most MPDs still have not established formal policies or reporting procedures for investigative work. In keeping with the earlier recommendation regarding department plans, we have recommended that MPDs should cooperate with the Nova Scotia Police Commission to produce a uniform set of guidelines for investigative work.

Police/Minority Relations

Our analysis of national data on police racial attitudes, as well as our qualitative data from Nova Scotia, suggests that we can anticipate the continuing existence of negative perceptions of visible minorities. Insofar as the police share community norms, which are prejudiced in a variety of ways, there will be no easy solutions for police/visible minority group relations. Some of the programs now in place are a move in the right direction, but the prospect that another Marshall case may occur because of negative attitudes Whites have towards visible minorities in Canada is one which must be taken seriously.

In view of the current distribution of visible minority group members, and the shortfalls now evident in police/minority relations in the province, we have recommended that special attention should be given to more intensive training for cadets whose first assignment will be in areas of high visible minority concentration. In addition, Detachments and MPDs located in areas of high visible minority concentration should allocate proportionally more of their resources to multicultural training. This training should recognize the considerable differences in the situations and experiences of different visible minority groups in the province. Detachments and MPDs will be individually responsible for ensuring that training in minority issues is delivered on a timely basis. The NSPC will

monitor Detachment and MPD performance in this area.

While we recognize that negative racial attitudes go beyond questions of stereotyping, we have also recommended that all MPDs promulgate official policies on stereotyping similar to the ones currently adopted by the RCMP (RCMP Administration Manual III.9) or the Metropolitan Toronto Police Force (Standing Order Number 24).

The analysis we have presented in our study shows that MPDs in the province are generally as progressive as those elsewhere in the country (and in some instance, more progressive) in recruiting members of visible minority groups. Furthermore, these minority group members are generally employed in communities which have larger minority group populations. Nevertheless, there are still units which are nowhere close to being representative of the communities they serve. We have therefore recommended that recruitment of visible minority group members and women should be actively encouraged by both police and government organizations. Both the RCMP and MPDs in the province should establish specific recruitment targets which reflect the distribution of various minority groups in the population. We have also recommended that particular attention should be given to using outreach recruitment methods.

Conclusion

It is clear that our recommendations, taken as a whole, will require substantial additional resources is they are to be implemented. Quality policing cannot be achieved through neglect, and our view is that if quality policing is what Nova Scotians want, they and the Government will have to take more realistic attitudes towards the costs involved.

Peer Review Workshop

An early draft of the research on "Public Policing in Nova Scotia" was vetted by an invited group of police professionals, academics and other interested persons. A workshop to discuss the research was held on August 31, 1988. The following is a list of participants at that workshop:

Researchers

1. *Richard Apostle*, Associate Professor, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

2. *Philip Stenning*, Associate Professor, Centre of Criminology, University of Toronto, Toronto

3. *Don Clairmont*, Professor, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

Reviewers

1. *Professor Jean-Paul Brodeur*, Directeur, Centre Internationale de Criminologie Comparée, Université de Montréal
2. *C. L. Campbell*, Director of Atlantic Police Academy, Charlottetown
3. *Chris Murphy*, Associate Professor, University of Kings College, Halifax

Invited Participants

1. *Bruce Archibald*, Associate Professor, Dalhousie Law School, author of the Royal Commission research study: "Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia" (Volume 6 of this Report)
2. *Superintendent D. Bain*, OIC Administration and Personnel, 'H' Division, RCMP
3. *James Bissell, Q.C.*, Director, Atlantic Region, Justice Canada; Counsel to the RCMP
4. *R. Gerald Conrad, Q.C.*, Executive Director (Legal Services), Department of Attorney General, Province of Nova Scotia
5. *Nadine Cooper-Mont*, Deputy Solicitor General, Province of Nova Scotia
6. *James Crosby*, Canadian Union of Public Employees
7. *Anne Derrick*, Counsel to Donald Marshall, Jr.
8. *Chief Superintendent Don Docker*, Corporate Planning Branch, RCMP Headquarters, Ottawa
9. *David Fisher*, Counsel to the Police Association of Nova Scotia (PANS)
10. *Inspector E. G. Grant*, Acting OIC Criminal Operation, 'H' Division, RCMP
11. *Martin Herschorn, Q.C.*, Director (Prosecutions), Department of Attorney General, Province of Nova Scotia
12. *Burnley (Rocky) Jones*, Black United Front
13. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
14. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
15. *Admiral H. Porter*, former Chairman, Nova Scotia Police Commission
16. *Murray Ritch*, Acting Chairman, Nova Scotia Police Commission
17. *Anthony Ross*, Counsel to the Black United Front and Oscar Seale
18. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
19. *George Smith*, Acting Executive Director, Nova Scotia Police Commission
20. *Al Swim*, Director Personnel and Training, Nova Scotia Police Commission
21. *Chief Harry Vickers*, President, Nova Scotia Chiefs of Police Association
22. *Kit Waters*, Director of Policy and Planning, Department of the Solicitor General, Province of Nova Scotia
23. *Bruce Wildsmith*, Counsel to the Union of Nova Scotia Indians

The Mi'kmaq and Criminal Justice in Nova Scotia

(Volume 3 of this Report)

Researcher

Dr. Scott Clark, G. S. Clark and Associates, Ottawa

Executive Summary

Part 1 of the report deals with the organization of the study. The approach involved focussing on three reserves (Eskasoni, Membertou and Shubenacadie) as rural, urban and semi-urban communities, respectively. Halifax was included as one of the communities for study because of the increasing number of young Native people moving between the city and their reserves. The study concerned aboriginal people living both on and off reserves as "status" and "non-status" Indians. The study was limited, however, in its work with off-reserve individuals.

Four types of information collection were used in the study: interviews, document review, statistical review, and literature review. Interviews were held

with Native people and justice system personnel throughout the province, with a particular focus in the three selected reserve communities and Halifax. The interviews provided the most useful evidence, while the statistical review yielded very little useful information due largely to the fact that most Provincial Government data do not specify whether the individual involved in the justice system is Native or non-Native.

The study employs the concept of *adverse effect* in recognition of the facts (a) that the intent to discriminate is very difficult to prove, and (b) that discrimination may be only one of several causes that result in adverse effects for Natives involved in the criminal justice system. The focus is on systemic or structural problems.

Part 2 briefly examines the aboriginal context in Canada. Canada's aboriginal population of approximately 1,390,000 (in Nova Scotia approximately 11,000) is highly over-represented in federal prisons on a national basis. Similarly, aboriginal people, particularly in their reserve communities, endure socio-economic conditions unthinkable in the rest of Canadian society. These conditions result in much higher suicide rates, alcoholism and family breakdown rates than for Canada as a whole. Ultimately, these conditions bear on the relationship between Native communities and crime.

Section 91(24) of the *Constitution Act, 1867* confers exclusive legislative jurisdiction on the Federal Government with respect to Indians (i.e., status Indians living on-reserve and off-reserve) and lands reserved for Indians. However, currently provincial governments take primary responsibility for the provision of services to status Indians living off-reserve. Aside from some specific on-reserve services provided by the provinces, the Federal Government through the Department of Indian Affairs and Northern Development takes primary responsibility. Federal policy is implemented through the *Indian Act* which enables Band governments to manage most programs on-reserve.

A number of items of unfinished business remain between aboriginal groups and the Federal Government. Priority concerns are constitutional issues, particularly as they relate to aboriginal and treaty rights and claimed rights to self-government, land claims, Indian self-government arrangements, and socio-economic conditions in Indian communities. However, progress has been very slow on these issues because, in large part, of both federal and provincial inabilities to agree on jurisdiction and the authority that should be accorded Indian community governments.

In terms of justice issues, it would appear that federal law will remain supreme on lands reserved for Indians to the extent that Parliament so legislates by virtue of its Section 91(24) authority. As a result it is arguable, for example, that no provincial law may directly or indirectly interfere with a duly enacted "federal" self-government regime on "lands reserved for Indians", including provisions relating to the administration of justice.

In reality, practical considerations will temper these absolute legal concepts, especially in areas relating to the administration of justice. In particular, because of current shared funding arrangements and current shared jurisdictions, the active cooperation of provincial authorities will be essential to the effective exercise of future aboriginal legislative authorities relating to justice matters.

Part 3 of the report introduces the Mi'kmaq context, including the historical relationship between the Mi'kmaq and White society and government, and the current situation facing the Mi'kmaq people. Historically, there has been a process of economic underdevelopment in Mi'kmaq communities. This process has inevitably led to dismaying standards of living characterized, for example, by an unemployment rate in reserve communities of well over 50 percent. When also faced with severe restrictions on their abilities to hunt and fish due to provincial legislation and non-recognition of treaty rights, the unemployment figures become even more significant.

The 13 Bands in Nova Scotia are represented by two umbrella political organizations: the Union of Nova Scotia Indians and the Confederacy of Mainland Micmacs. Aboriginal people living off reserve are represented by the Native Council of Nova Scotia. The Grand Council of the Mikmaw Nation is a long-standing advocacy organization representing all Micmacs.

The three focus reserve communities are examined and are seen to have a number of under-resourced social service programs. Each is represented by a different type of police force: Membertou is policed by the Sydney City Police; Eskasoni by its own Band Police; and Shubenacadie by the RCMP through its Special Constable (i.e., Native) program. Crime rates are significant given the populations but tend to be primarily property offences, followed by assaults.

Part 4 examines the adverse effects for Natives of being involved in the criminal justice system in Nova Scotia. It is stressed at the outset that problems, needs and solutions must be viewed in a community-specific way due to the variation among Native communities on each of these factors. Second, it is noted that in Nova Scotia, as in other parts of the country, a high proportion of Native offences are alcohol related. This might not only reflect the living conditions faced by Native people, it may also result in differential processing by the police, the courts and social services, as has been suggested by other studies in Canada.

Each type of policing represented in the three focus communities and in Halifax appears to have its own deficiencies. The initial question for people living in the communities is: are police supposed to enforce the law, or are they supposed to act first as mediators? This dilemma can result in poor police-community relations, especially in cases where the police constable is from the community he/she is policing.

There are also problems arising from inadequate training, particularly in the areas of interpersonal relations and group dynamics - skills which could contribute successfully to conflict resolution in reserve communities.

Response time to calls from reserves tends to be slow, except in Eskasoni which has a resident police force. The problem may be connected to a certain degree of stereotyping by police that the problems on-reserve are relatively insignificant and will usually have "blown over" by the time the police arrive. This is particularly important when it is realized that no crisis facilities such as women's shelters exist on the reserves. The police, therefore, are the only institutional avenue available to people in immediate danger.

With regard to sentencing, the study was not able to reach conclusions about whether or not there exists sentencing disparity (Native/non-Native) in Nova Scotia. Interviews with Crown prosecutors and defence counsel did, however, suggest that judges apply different criteria for Natives and non-Natives in their

sentencing. In the case of some judges, this favoured Native people; in others it did not. In this connection the imposition of fines is particularly problematic for Native people given their significantly lower income levels compared to non-Natives.

With respect to probation, a disparity was seen in the preparation of pre-disposition reports and pre-sentence reports in that fewer relevant informants were contacted in Native communities than in non-Native cases. As well, options to incarceration are essentially non-existent in Native communities which do not enjoy the same level of fine option and Alternative Measures programs as are available to non-Native communities.

Similarly, there are few institutional supports for offenders returning to their reserves, a fact that tends to be noted by parole officers in the preparation of their assessments. Further, parole officers are obliged to account for prospects for employment in their assessments, a factor which is essentially not applicable to reserve communities. These questions are therefore automatically loaded against Micmac interests in their applications for parole.

Aftercare programs designed to meet the needs of Micmac individuals and communities are non-existent except for the overburdened and underfunded Micmac Friendship Centre in Halifax. This is a real concern in light of the increasing numbers of young Micmacs entering the correctional system.

Access to legal counsel is not a major problem in Nova Scotia except to the extent that legal aid lawyers are generally overburdened with cases and often unable to spend the required time with clients (Native or non-Native). Problems of communication do occur, however, based on a lack of understanding by counsel of the context in which Native people live, and by the client of the role of counsel. Again, this is a reflection of inadequate time available to legal counsel to spend with individual clients. It also suggests the need for public legal education directed at Native people, particularly the young.

Conceptualization of the judicial process and language are common barriers in the courtroom, as well. This is true to the extent that due process can be called into question in some cases. The fact that a Native person has never been called to serve on a jury in Nova Scotia also raises serious questions about the judicial process.

The relevance of the judicial process is a general issue raised frequently by Micmac leaders and others. Because the courts are often some distance from reserves (e.g., Eskasoni), it is often difficult for people to attend court as accused, witnesses or observers. The court, which is already unfamiliar and somewhat intimidating, is physically and conceptually removed from the indigenous processes of social control based on mediation and restitution. Community justice processes are ignored as non-Natives dispense their form of justice in Native communities. Restitution in the form of fines is made to the State, not to the offender's community or to the individual victim. In summary, Natives believe that they have no stake in the court process.

Indigenous processes of conflict resolution such as the extended family and mediation/reconciliation are seen to offer opportunities for the development of community-based justice processes. This is especially timely in view of the self-government development initiatives that are being taken in other parts of the country and that are currently being taken in unique ways in Micmac communities.

Part 5 examines responses to the problems. By way of preamble, the report notes that the challenge for Native groups, including the Micmac, is to define "appropriate justice processes" to suit the needs of their communities. A further challenge exists for the same aboriginal groups and for the Federal and Provincial Governments to reach agreement on new structural relations that will enable changes to be made and to continue working. This will necessarily involve more than the simple "indigenization" for the existing system (i.e., replacing non-Native personnel with Native personnel who would perform the same functions). Finally, it must be recognized that the primary causes underlying problems for Natives in the justice system are related to social and economic conditions, not to the justice system *per se*. It is there that we must focus much of our attention.

In addition to that major area of concern, there are certain outstanding issues that must be resolved:

1. The implementation of an effective constitutional process enabling self-government for aboriginal nations - in order that community governments can plan, coordinate and control policies and programs for their people;

2. The recognition of other aboriginal rights referred to in the *Canadian Charter of Rights and Freedoms* - in order that aboriginal people can again derive economic and cultural strength from their land and resources;

3. The recognition by the Province of Nova Scotia of Micmac treaty rights - in order that the Micmac can exercise their territorial rights to their land base. The current impasse in this area is exemplified in the *Simon* case.

The development of community-based justice systems covers a wide range of possibilities from the implementation of new programs such as alternative measures for young offenders to the application of Micmac customary law through tribal courts. The rate of development leading to a Micmac justice system would be determined by a number of factors:

1. The will and abilities of Micmac people and their leaders to move in this direction;

2. The political will of the Federal and Provincial Governments to resolve outstanding issues and to support the development of an aboriginal justice system;

3. The will of the people of Nova Scotia to support such a development;

4. The identification (and, if necessary, the institution) of a body to do the required development work;

5. The establishment of a tripartite forum (Micmac/Federal/Provincial) for the discussion and negotiation of a Micmac justice system.

The report examines the range of possibilities for the development of community-based or tribal courts, community-based policing, a community-based Native Court Worker program, diversion, fine option and alternative measures programs, and Native Justices of the Peace. Prior and ongoing examples from other parts of the country are examined. More work is required before the applicability and the nature of such developments can be determined. The way to begin, however, is to start tackling some of the problems already defined by initiating pilot projects and closely evaluating the results.

Part 6 of the report presents findings and recommendations.

Peer Review Workshop

An early draft of the research on "Mi'kmaq and Criminal Justice in Nova Scotia" was vetted by an invited group of academics, community leaders and other interested persons. A workshop to discuss the research was held on June 16, 1988. This discussion was considered in preparing later drafts of the research. The following is a list of participants at that workshop:

Researcher

Dr. Scott Clark, G. S. Clark and Associates, Ottawa

Reviewers

1. *Dr. Carol LaPrairie*, Senior Policy Analyst, Justice Canada, Ottawa
2. *James R. MacLeod*, Native lawyer and member of Evaluation Steering Committee, Northern Paralegal Project; Taylor, McCaffrey, Chapman, Winnipeg
3. *Professor Fred Wien*, Vice-Chair, Dalhousie Senate; former Director, Maritime School of Social Work, Dalhousie University, Halifax

Invited Participants

1. *Marie Battiste*, Ph.D. Ed., Eskasoni
2. *Alison Bernard*, Chief, Eskasoni
3. *Alex Christmas*, President, Union of Nova Scotia Indians; former Chief, Membertou
4. *Dan Christmas*, Executive Assistant to President, Union of Nova Scotia Indians
5. *Allan Clark*, Provincial Coordinator for Native Affairs, Department of Community Services, Nova Scotia
6. *Alex Denny*, Grand Captain of Grand Council of the Mikmaw Nation
7. *Anne Derrick*, Counsel to Donald Marshall, Jr.
8. *Noel Doucette*, Commissioner of the Nova Scotia Human Rights Commission; former President of Union of Nova Scotia Indians and former Chief, Chapel Island
9. *Bernie Francis*, representing Terry Paul, Chief, Membertou
10. *Roderick Googoo*, Vice-President, Union of Nova Scotia Indians; Chief, Whycocomagh
11. *Sakej Henderson*, Advisor and non-practicing lawyer representing the Grand Council of the Mikmaw Nation
12. *Russell Juriansz*, Lawyer, Blake, Cassels and Graydon, Toronto; former General Counsel, Canadian Human Rights Commission
13. *Doug Keefe*, Department of the Attorney General, Province of Nova Scotia
14. *John Knockwood*, Chief, Shubenacadie
15. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
16. *Reg Maloney*, Vice-President, Union of Nova Scotia Indians; former Chief, Shubenacadie
17. *Catherine Martin*, Coordinator, Micmac Professional Careers Project, Henson College, Dalhousie University
18. *Graydon Nicholas*, Counsel to the Union of Nova Scotia Indians
19. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
20. *Viola Robinson*, President, Native Council of Nova Scotia
21. *Anthony Ross*, Counsel to the Black United Front and Oscar Seale
22. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
23. *Bruce Wildsmith*, Counsel to the Union of Nova Scotia Indians

Discrimination Against Blacks in Nova Scotia: The Criminal Justice System

(Volume 4 of this Report)

Researchers

Dr. Wilson Head, President, Federation of Race Relations Organizations; formerly of the Faculty of Social Work, Atkinson College, York University, Toronto

Winston Barnwell, Department of Education, Dalhousie University, Halifax, Research Assistant

Professor Don Clairmont, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

Executive Summary

This study of Blacks and the Criminal Justice System in Nova Scotia had as its chief objective a systematic description and analysis of the attitudes, experiences and suggestions of Blacks, especially with respect to the police, courts and the correctional system. It has been guided by several general hypotheses and employed a variety of research methodologies. Attention has been given also to historical and contextual considerations including the history of the Black experience in Nova Scotia, current demographic and socio-economic patterns and the comparative views and experiences of the majority White population.

The three major research strategies employed were in-depth interviews with especially informed individuals and focus groups, a large survey of Blacks and non-Blacks in selected areas of Nova Scotia, and an examination of racial differences in sentencing for theft convictions in the Halifax/Dartmouth metropolitan area. In addition, as a companion piece to this study, an additional and more intensive analysis of sentencing patterns in the case of assault convictions was subsequently conducted. Overall, the diverse methodologies strongly supported the study's guiding hypotheses and yield a consistent set of findings. These results are systematically detailed in summary form in Part 5 of this Report. Prejudice and discrimination against Blacks in all major institutional sectors of society, including the criminal justice system, is perceived to exist by the population at large, more so among Blacks but commonly by non-Blacks as well. As indicated in the special in-depth key informant interviews, the existence of prejudice and discrimination in the justice system is confirmed by those most experienced with all aspects of the justice system. The examination of sentencing patterns also indicated that, whatever the ultimate reasons may be, whether strictly "legal" or reflective of socio-economic and other "extra-legal" factors, for the same type of offence Blacks received somewhat more severe sentences and were less likely to receive the more lenient type of sentences (i.e., discharges).

In advancing recommendations the authors have taken into account not only the views of participants in this research but also the considered experiences of scholars and practitioners from elsewhere in Canada. In "placing" the recommendations, three important contextual factors and three major issues were noted. The former included the long history of the burden of Blacks' oppression (from slavery and Jim Crow practices to economic marginality and continuing socio-economic disadvantage), the fact that Blacks constitute a relatively small proportion of the Nova Scotian population, and the pattern of a limited, reactive approach to prejudice and discrimination on the part of government departments and agencies and within the criminal justice system *per se*. The major issues cutting across all areas of recommendations, be they the police, courts, correctional system or monitoring agencies, included the emphases accorded to technical/liberal (education, public awareness) as opposed to power (new laws, putting Blacks in

positions of influence) strategies, dealing at the individual or at the structural level, and the extent to which changes and reforms must also be programmed and aggressively monitored.

Detailed recommendations were advanced with respect to policing and the court system since these were the two areas highlighted in the research. Concern was focussed on police standards, police training in the areas of human rights and multiculturalism, and the relatively impermeable ethos and structure of the police organization vis-à-vis Blacks and other special groups. Better training both at the entry level and beyond, more minority presence in police organizations, more positive leadership by the Police Commission and police management, and more independent civilian review of police actions were called for. Most importantly perhaps was the clear need for more contact and linkages of an everyday sort where input and understanding could develop. At the level of the court system similar recommendations for training, sensitivity, minority representation, and aggressive proactive leadership were noted. In addition, specific recommendations were advanced concerning the appointment of special court workers to liaise with offenders and regularly report on proceedings, the shoring-up of legal aid resources and the development of a fine option program. As for the correctional system, in addition to similar recommendations, it was noted with regret that there seems to have been a move away from the rehabilitative emphasis and that two local programs which assisted the Black inmate/ex-inmate have recently been terminated for lack of resources; programs such as these need to be strengthened, not eliminated.

In addition to the police, courts and correctional systems, there are important roles related to management, planning and monitoring of the criminal justice system. Much more should be done in these areas by the Nova Scotia Police Commission, the Attorney General, the Human Rights Commission and perhaps the Ombudsman's Office. Detailed recommendations have been advanced with respect to these organizations. Of course the criminal justice system is but one institution of society. Important changes have to be made to eliminate prejudice and discrimination in education and employment. Making changes, eliminating prejudice and especially discrimination requires vigorous pressure by Blacks themselves. Most importantly they require strong leadership by the Provincial Government. Benign neglect as a strategy will not do.

Peer Review Workshop

An early draft of the research on "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System" was vetted by a group of academics, community leaders and other interested persons. A workshop to discuss the research was held on June 15, 1988. This discussion was considered in preparing later drafts of the research. The following is a list of participants at that workshop:

Researchers

1. *Dr. Wilson Head*, President, Federation of Race Relations Organizations; formerly of the Faculty of Social Work, Atkinson College, York University, Toronto

2. *Winston Barnwell*, Department of Education, Dalhousie University, Halifax, Research Assistant

3. *Professor Don Clairmont*, Department of Sociology and Social Anthropology, Dalhousie University, Halifax

Reviewers

1. *Dr. P. Anthony Johnstone*, Executive Director, Nova Scotia Human Rights Commission
2. *Dan McIntyre*, Race Relations Commissioner, Province of Ontario
3. *Professor G. L. Watson*, Department of Sociology and Anthropology, University of Prince Edward Island

Invited Participants

1. *Bruce Archibald*, Associate Professor, Dalhousie Law School, author of the Royal Commission research study: "Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia" (Volume 6 of this Report)
2. *Yvonne Atwell*, President, Black United Front
3. *Jacqueline Barkley*, Department of Social Work, Izaak Walton Killam Children's Hospital
4. *Delvina Bernard*, Program Coordinator, Youth Employment Skills Canada Inc., Halifax
5. *Anne Derrick*, Counsel to Donald Marshall, Jr.
6. *John Embree*, Department of Attorney General, Province of Nova Scotia
7. *Jim Fanning*, Department of Attorney General, Province of Nova Scotia
8. *Russell Juriansz*, Lawyer, Blake, Cassels and Graydon, Toronto; former General Counsel, Canadian Human Rights Commission
9. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
10. *James H. Morrison*, Dean of Arts, St. Mary's University, Halifax
11. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
12. *Joyce Robart*, Chairperson, Black United Front, Association of Black Social Workers, Halifax-Dartmouth Justice Committee
13. *Anthony Ross*, Counsel to the Black United Front and Oscar Seale
14. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
15. *Gerald M. Taylor*, Executive Director, Black United Front
16. *Bruce Wildsmith*, Counsel to the Union of Nova Scotia Indians

Walking the Tightrope of Justice

An examination of the Office of Attorney General in Canada with Particular Regard to its Relationships with the Police and Prosecutors and the Arguments for Establishing a Statutorily Independent Director of Public Prosecutions

A Series of Opinion Papers

(Volume 5 of this Report)

Researcher

Professor Emeritus John Ll. J. Edwards, Faculty of Law and Centre of Criminology, University of Toronto

Preface

Many inherent qualities, it may be surmised, are essential if public confidence in the administration of justice is to be sustained. Nowhere is this more evident than in the institution and conduct of criminal prosecutions. Among the central criteria by which the justice system is publicly judged are fairness and evenhandedness in the handling of the criminal proceedings, the absence of any perception of bias or political interference on the part of those exercising police and prosecutorial authority, as well as professional competence and integrity throughout the system. Not infrequently, the public focus is directed towards the highest echelons in the system and this perforce includes the Attorney General and the senior public officials in the department of government responsible for the machinery of justice.

Such has been the experience in recent years of several of the Canadian provinces, from the east coast to the west coast, but none have had to endure the intensity and depth of the public inquest established by the Government of Nova Scotia into all the circumstances surrounding the Donald Marshall, Jr., prosecution. This has led this Royal Commission to expand the range of its inquiry into all facets of the current provincial justice system and, in particular, the handling of other cases involving prominent political figures. Whatever the outcome of this prolonged public examination may be, and whatever recommendations emanate from this Royal Commission, it can be stated with total confidence that the ensuing implications will affect the future justice policies of every jurisdiction in Canada, federal as well as provincial.

The series of opinions contained in this volume represent my endeavours to assist the Commission of Inquiry in identifying the major points of weakness in the prevailing constitutional systems relating to the investigation and prosecution of crime. The opinions build upon my previous work as reflected in "The Law Officers of the Crown" (1964) and "The Attorney General, Politics and the Public Interest" (1984), both of which centred, in the main, on the English offices of the Attorney General, Solicitor General and Director of Public Prosecutions. It is to be noted, however, that the direct historical lineage between the original office of the Attorney General in England and Wales and that of its Canadian counterparts is expressly acknowledged in every federal and provincial statute that defines the functions, powers and responsibilities of the Attorney General in our constitutional arrangements. Accordingly, much attention is devoted in the chapters that follow to assessing the experience of the wide range of countries, throughout the Commonwealth and in the United States of America, which have adapted the role of the Attorney General to meet their individual circumstances.

A short while before my present association with this Royal Commission began, in the course of the Tenth Viscount Bennett Memorial Lecture at the University of New Brunswick in October 1986, I set forth some of the specific recommendations for change that I regarded as necessary conditions for the restoration of waning public confidence in the integrity of the justice system. Some of the provincial governments have seen fit to publicly adopt these suggestions for reform, or to indicate their intention of so doing. I cannot help, however, harbouring reservations as to the level of understanding that accompany the proposed reforms. Among the major questions that need to be addressed in any restructuring of the machinery of government in the justice area is the separation of ministerial responsibility, respectively, for policing and prosecutions, and determining the parameters for the new alignments. This move, begun by the Federal Government in 1966, has now been implemented by the majority of the provinces.

Another, and perhaps more contentious, issue is the problem whether to transform the office of Attorney General into a non-political, public service appointment or to retain its traditional status, so far as Canadian history is concerned, as an elective member of the Government, with a seat in the legislature and in the Cabinet. This subject, and the arguments that can be advanced in support of both sides of one of the central questions facing the Commission, *viz.*, the future role of the Attorney General in Nova Scotia, are canvassed fully in the concluding chapters of the present study. At the end I come down in favour of retaining the *status quo* so far as the Attorney General's membership in the Cabinet and the legislature is concerned. If the experience of a broad range of Commonwealth countries is reviewed, in which both the non-political and political models of the Attorney General's office are exemplified, the conclusion is inescapable that adherence to the fundamental qualities of independence and accountability are pre-

eminently dependent upon the personal attributes and standards of the holder rather than adherence to an ostensibly non-partisan, non-political office of Attorney General. Even were the latter option to attract favourable support, if we accept the doctrine of ministerial responsibility to the legislative body as the bedrock of our system of parliamentary democracy, another Minister of the Crown would have to be designated in place of the Attorney General with all the same fundamental issues of direction and control remaining to be determined.

Far from dismissing constitutional principles and legislative prescriptions as important safeguards against abuses in the administration of justice, I devote considerable time in the opinions that follow to an analysis of the Director of Public Prosecutions as it has evolved in England, its original home, in many of the newly independent countries of the Commonwealth, and, notably in more recent years, in Australia at both the federal and state levels. It is worth noting at once that, during the period in which the present inquiry has been engaged in fulfilling its mandate, both the Premier of Nova Scotia and the Attorney General have publicly stated their ideas as to what changes would be necessary to avoid a repetition of the allegations associated with a number of high profile prosecutions in that province. At different times the emphasis has inclined towards the setting up of an independent Director of Public Prosecutions who would "report directly to the Legislature and have the same independence as the Auditor General and the Ombudsman". An alternative proposal has envisaged the creation of a United States styles Special Prosecutor's office - presently described as the office of Independent Counsel under U.S. federal laws - with more limited jurisdiction to handle politically sensitive prosecutions that involve senior officials in government. As will be seen in the ensuing series of opinions, I reject both these proposed solutions as inadequate to the pressing problems portrayed in the evidence tendered before this Royal Commission.

In my recommendations to the Royal Commission I have sought to adhere closely to the dual objectives of, first, ensuring ministerial accountability on the floor of the legislature, and since the advent of the Charter in the courts, for the exercise of prosecutorial power, and, secondly, reinforcing the realities of independence with respect to the handling of individual cases by the creation of a statutory office of Director of Public Prosecutions. I emphasize the statutory nature of the proposed office to distinguish it from the existing office that, in various provinces across Canada, bears the same title but which is held by a public servant with no statutory authority or security of tenure in his own right. I reject the notion of a Director of Public Prosecutions who is absolutely independent operating outside the ambit of the principles of ministerial responsibility. In short, the Attorney General will remain as the Minister of the Crown ultimately responsible to the legislature for the handling of every prosecution instituted or terminated at the instance of the State.

What is proposed is an office of Director of Public Prosecutions with functions, powers and lines of accountability spelt out in careful detail by way of a statutory enactment, and who will on a daily basis preside over the entire system of public prosecutions. Normally, the Attorney General should not be involved at all in the making of prosecutorial decisions. In the event, however, that extraordinary considerations affecting the public interest induce the Attorney General to assume his ultimate authority, the governing statute will require the Attorney General to commit his directions to writing and then ensure that these instructions are promptly tabled both in the legislature and in the most publicly accessible source of information as to the activities of the government, such as the *Royal Gazette*. Parallel with this recommendation is the need to publish for general consumption

the Attorney General's guidelines that spell out the policies and considerations governing prosecutorial discretion. An encouraging beginning in this direction, in some parts of Canada, has already taken place. It is hoped that more will follow as the philosophy of greater openness gains wider recognition. The statutory procedures outlined in the concluding parts of this study will ensure that there is the fullest measure of public accountability, the proper insulation of the Director of Public Prosecutions from potentially damaging political interference, and at the same time the safeguarding of the Attorney General's ultimate powers of direction consonant with his constitutional responsibilities for the administration of justice.

Peer Review Workshop

A draft of the research on "The Role of the Office of the Attorney General" was vetted by a group of academics, lawyers and other interested persons. A workshop to discuss the research was held on September 29, 1988. The following is a list of participants at that workshop.

Researcher

Professor Emeritus John Ll. J. Edwards, Faculty of Law and Centre of Criminology, University of Toronto

Reviewers

1. *Gordon Gregory, Q.C.*, former Deputy Attorney General, New Brunswick
2. *Professor Roland Penner, Q.C.*, Faculty of Law, University of Manitoba; former Attorney General, Manitoba
3. *Marc Rosenberg*, Barrister, Greenspan and Rosenberg, Toronto

Invited Participants

1. *James Bissell, Q.C.*, Director, Atlantic Region, Justice Canada, Counsel to the RCMP
2. *Stanley Cohen*, Coordinator, Criminal Procedure Project, Law Reform Commission of Canada, Ottawa
3. *R. Gerald Conrad, Q.C.*, Executive Director (Legal Services), Department of Attorney General, Province of Nova Scotia
4. *Nadine Cooper-Mont*, Deputy Solicitor General, Province of Nova Scotia
5. *Anne Derrick*, Counsel to Donald Marshall, Jr.
6. *Chief Superintendent Don Docker*, Corporate Planning Branch, RCMP Headquarters, Ottawa
7. *Gordon Gale, Q.C.*, Director (Criminal), Department of Attorney General, Province of Nova Scotia
8. *Martin Herschorn, Q.C.*, Director (Prosecutions), Department of Attorney General, Province of Nova Scotia
9. *Doug Hunt*, Assistant Deputy Minister (Criminal), Ministry of the Attorney General, Ontario
10. *Chief Superintendent Leahy*, C.O. 'H' Division, RCMP, Halifax
11. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
12. *Christine Mosher*, Department of the Solicitor General, Province of Nova Scotia
13. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
14. *Al Pringle*, Justice Canada; Counsel to the RCMP
15. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
16. *Kit Waters*, Director of Policy and Planning, Department of the Solicitor General, Province of Nova Scotia

Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia

(Volume 6 of this Report)

Researcher

Professor Bruce P. Archibald, Faculty of Law, Dalhousie University, Halifax

Robert Bayne, Dalhousie Law School, Research Assistant

Judy MacDonald, Dalhousie Law School, Research Assistant

Executive Summary

This study examines the structure and administration of Nova Scotia's prosecution service, and the manner in which prosecutorial discretion is exercised within the province. In essence it examines one division of the province's "public law firm" and after identifying its weaknesses proposes methods by which it might be improved.

Looking first to organizational structure, regional offices are proposed to coordinate decision-making in the field and to create an effective middle level of management. With the head office thus freed from day-to-day involvement in routine cases, the study proposes appointment of a Director of Criminal Justice Policy Development to assist those with direct operational responsibilities in the elaboration of longer term policies and reforms. A specialized senior prosecutions unit is recommended for handling complex or lengthy cases which might disrupt personnel assignments in regular units, and also for training personnel. Improvements in the efficiency of the prosecution service through modernized research facilities, adequate administrative support, comprehensive continuing education and personnel evaluation are recommended. Finally, the maintenance of a highly trained staff through payment of competitive salaries and advancement through an appropriate career path is recognized as a high priority need.

The exercise of prosecutorial discretion is analyzed through a series of legal and policy issues, which are all linked by a concern to assure openness, accountability and freedom from partisan political interference in the administration of criminal justice. Three sets of recommendations, however, deal with these broad issues, and are linked to the administrative structure of the prosecution service. The first is a recommendation that the general instructions or guidelines by which Crown prosecutors govern their conduct be published and made available to accused persons, legal professionals and the public at large. The second is that the process by which prosecuting officers are engaged be structured so that merit is, and is seen to be, the primary criterion in hiring prosecutors. The third is the creation of the office of Director of Public Prosecutions (DPP). The DPP should be appointed for a fixed term, have responsibility for the daily management of the prosecution service and, in the event of disagreement, be subject to the Attorney General's direction in particular cases only through written and, ultimately, public instructions. It is recommended that in such a system the Attorney General retain responsibility for general criminal justice policy development and the promulgation of general guidelines or instruction for the operation of the prosecution service. In other words, the DPP would have operational independence while ultimate control and political accountability to the legislature would rest with the Attorney General.

A number of specific issues (identified through empirical research) are addressed concerning problems in the manner in which prosecutorial discretion is

exercised in the province. Clarification of the police duty to investigate offences and the public right to lay charges free from interference by Crown prosecutors is highlighted. The Crown's right to terminate any proceedings in the public interest is discussed, and there is proposed a clearly articulated list of factors which can and cannot be taken into account when terminating prosecutions in the public interest, even in the face of evidence which could sustain a conviction. Both issues of police independence and public interest factors in prosecutions are intended to assure public confidence in the non-partisan fairness of the criminal justice system.

Recommendations are made which relate to the procedural fairness of the criminal trial process. Improvements in the guidelines for disclosure of the Crown's case to the defence are put forward. Similarly, recommendations are made concerning police disclosure to Crowns as a precondition of Crown disclosure to defence. The regularization of plea discussions is advocated, by means of the adoption of enforceable rules, to ensure that guilty pleas flowing from such discussions are obtained in an open, voluntary, accurate and fair manner. These proposals on plea negotiation make special reference to the situation of the unrepresented accused. Important technical recommendations are made concerning pre-trial conferences, use of summaries to trial judges and use of preliminary transcripts in non-jury trials. Finally, guidelines are proposed concerning the propriety of informal contact between Crown counsel and judges.

While this study did not make a wide ranging examination of problems faced by visible minorities caught up with the criminal justice system, it does propose that the Attorney General develop diversion programs and sentencing alternatives in consultation with visible minority communities. It also proposes that Crown prosecutors receive special training about the nature of adverse effects of discrimination in the criminal justice system, and the manner in which they may carry out their duties so as to assist in reducing such discrimination.

Peer Review Workshop

An early draft of the research on "Prosecuting Officers and the Administration of Justice in Nova Scotia" was vetted by a group of lawyers and other interested persons. A workshop to discuss the research was held on June 23, 1988. This discussion was considered in later drafts of the research. The following is a list of the participants at that workshop.

Researcher

Professor Bruce P. Archibald, Faculty of Law, Dalhousie University, Halifax, Nova Scotia

Reviewers

1. *Ken Chasse*, Director of Research, Ontario Legal Aid Plan, Toronto
2. *Gordon Gregory, Q.C.*, former Deputy Attorney General, Province of New Brunswick
3. *Marc Rosenberg*, Barrister, Greenspan and Rosenberg, Toronto

Invited Participants

1. *James Bissell, Q.C.*, Director, Atlantic Region, Justice Canada, Counsel to the RCMP
2. *Lorenne Clark*, Barrister and Solicitor, Digby

3. *Stanley Cohen*, Coordinator, Criminal Procedure Project, Law Reform Commission of Canada
4. *Professor Brent Cotter*, Associate Dean, Faculty of Law, Dalhousie University
5. *Anne Derrick*, Counsel to Donald Marshall, Jr.
6. *William Digby, Q.C.*, Director, Nova Scotia Legal Aid
7. *Pat Duncan*, Barrister and Solicitor, Halifax
8. *Martin Herschorn, Q.C.*, Director (Prosecutions), Department of Attorney General, Province of Nova Scotia
9. *Professor Archie Kaiser*, Faculty of Law, Dalhousie University
10. *William MacDonald, Q.C.*, Deputy Attorney General, Province of Nova Scotia
11. *Robert Parker*, Crown Prosecutor, Nova Scotia
12. *Darrel Pink*, Counsel to the Department of Attorney General, Province of Nova Scotia
13. *Adrian Reid*, Crown Prosecutor, Province of Nova Scotia
14. *Anthony Ross*, Counsel to the Black United Front and Oscar Seale
15. *Jamie Saunders*, Counsel to the Department of Attorney General, Province of Nova Scotia
16. *Bruce Wildsmith*, Counsel to the Union of Nova Scotia Indians

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List of participants at the Consultative Conference
Halifax, November 24-26, 1988

Professor Bruce Archibald - Dalhousie Law School, Halifax; author of Commission research study entitled "Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia" (published as Volume 6 of this Report)

Bromley Armstrong - Labour Relations Board of Ontario, Toronto (Speaker)

Stephen Aronson - Barrister and Solicitor, Ottawa

Susan Ashley - Commission Executive Secretary, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax

Yvonne Atwell - Black United Front, Halifax

Davies Bagambiire - Barrister and Solicitor, Halifax

Russel Barsh - Lawyer, Washington, D. C. (Speaker)

Marie Battiste - Grand Council of Micmacs, Eskasoni, Nova Scotia

Thomas Berger - Barrister and Solicitor, Vancouver (Chair of Consultative Conference)

Sherry Bernard - Black United Front, Halifax

James Bissell, Q.C. - Director, Atlantic Region, Justice Canada, Halifax

Honourable Alan Blakeney, P.C., Q.C. - Barrister and Solicitor,Toronto; former Premier of Saskatchewan

John Briggs - Director of Research, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax

David J. Bright - Chair, Criminal Law Subsection, Canadian Bar Association, Nova Scotia Branch, Halifax

Fred Caron - Senior Counsel, Office of Aboriginal and Constitutional Affairs, Justice Canada, Ottawa

Linda Carvery - President, Congress of Black Women, Halifax

Professor Innis Christie - Dean, Dalhousie Law School, Halifax

Alex Christmas - President, Union of Nova Scotia Indians, Sydney

Kevin Christmas - Union of Nova Scotia Indians, Sydney

Professor Don Clairmont - Dalhousie University, Halifax; consultant to the Commission and co-author of Commission research study entitled "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System" (published as Volume 4 of this Report)

Gerald Clarke - Executive Director, Black Educators Association of Nova Scotia, Halifax

Stan Cohen - Coordinator, Criminal Procedure Project, Law Reform Commission of Canada, Ottawa

Nadine Cooper-Mont - Deputy Solicitor General of Nova Scotia, Halifax

Thelma Costello - Executive Director, Public Legal Education Society of Nova Scotia, Halifax

Professor Brent Cotter - Director, Dalhousie Legal Aid, Halifax

Judge Jean-Charles Coutu - Provincial Court of Quebec, Coordinating Judge for the Itinerant Court of the District of Abitibi, Rouyn-Noranda (Speaker)

Ian B. Cowie - Consultant, Ottawa

Chester Cunningham - Executive Director, Native Counselling Services of Alberta, Edmonton (Speaker)

Robert Depew - Department of Indian Affairs and Northern Development, Self-Government Negotiations Branch, Ottawa

Anne Derrick - Barrister and Solicitor, Halifax

Frank Edwards - Crown Prosecutor, Sydney

Professor John Edwards - Faculty of Law, University of Toronto, Special Advisor to the Commission and author of a series of Opinion Papers for the Royal Commission entitled "Walking the Tightrope of Justice: An Examination of the Office of Attorney General" (published as Volume 5 of this Report) (Speaker)

Honourable Gregory T. Evans, Q.C. - Commissioner, Royal Commission on the Donald Marshall, Jr., Prosecution, Toronto

Dana Giovannetti - Barrister and Solicitor, Department of Attorney General of Nova Scotia, Halifax

Chief Roderick Googoo - Vice-President (Cape Breton), Union of Nova Scotia Indians, Whycocomach, Nova Scotia

Associate Chief Justice Alvin Hamilton - Commissioner, Aboriginal Justice Inquiry, Winnipeg

Dr. Wilson Head - Federation of Race Relations Organizations, Toronto; co-author of Commission's research paper entitled "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System" (published as Volume 4 of this Report)

Sakej Henderson - Grand Council of Micmacs, Eskasoni, Nova Scotia

Chief Justice T. Alexander Hickman - Chairman, Royal Commission on the Donald Marshall, Jr., Prosecution, St. John's

John Hylton - Social Development Office, City of Regina

Professor Michael Jackson - University of British Columbia Law School, Vancouver (Speaker)

Dr. P. Anthony Johnstone - Executive Director, Nova Scotia Human Rights Commission, Halifax

Burnley (Rocky) Jones - Halifax (Speaker)

Professor Archie Kaiser - Dalhousie Law School, Halifax

Stephen Kimber - Halifax

Serge Kujawa, Q.C. - General Counsel (Criminal), Department of Justice, Province of Saskatchewan, Regina (Speaker)

Dr. Carol LaPrairie - Senior Policy Analyst, Justice Canada, Ottawa

George W. MacDonald, Q.C. - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax

William MacDonald, Q.C. - Deputy Attorney General of Nova Scotia, Halifax

Professor Wayne MacKay - Dalhousie Law School, Halifax

Reg Maloney - Vice-President (Mainland), Union of Nova Scotia Indians, Hants County

Morris Manning, Q.C. - Barrister and Solicitor, Toronto (Speaker)

Howard McCurdy, M.P. - for Windsor-Walkerville, Ontario

Dan McIntyre - Executive Coordinator, Race Relations Directorate, Ministry of Citizenship, Province of Ontario, Toronto (Speaker)

Carol Montagnes - Director, Policy and Program Development, Ontario Native Council on Justice, Toronto

John Moore, Q.C. - President, Nova Scotia Barristers Society, Halifax

Professor Brad Morse - University of Ottawa Law School; Director of Research, Aboriginal Justice Inquiry, Winnipeg

Barbara Murphy - Legal Services Society of British Columbia, Vancouver

Graydon Nicholas - President, Union of New Brunswick Indians, Fredericton

Chief Joe Norton - Grand Chief of the Mohawks, Kahnawake, Quebec (Speaker)

David B. Orsborn - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, St. John's

Dr. Bridglal Pachai - Executive Director, Black Cultural Centre, Dartmouth

Daniel N. Paul - Executive Director, Confederacy of Mainland Micmacs, Shubenacadie

Chief Lawrence Paul - Confederacy of Mainland Micmacs, Shubenacadie

Lloyd Perry, Q. C. - Barrister and Solicitor, Toronto

Darrel I. Pink - Barrister and Solicitor, Halifax

Associate Chief Justice Lawrence A. Poitras - Commissioner, Royal Commission on the Donald Marshall, Jr., Prosecution, Montreal

Al Pringle - Barrister and Solicitor, Justice Canada, Halifax

Professor Don Purich - Director, Native Law Centre, University of Saskatchewan Law School, Regina

Professor Edward Renner - Department of Psychology, Dalhousie University, Halifax

Joyce Robart - Black United Front, Association of Black Social Workers, Halifax

Viola Robinson - President, Native Council of Nova Scotia, Truro

Marc Rosenberg - Barrister and Solicitor, Consultant to Law Reform Commission of Canada, Toronto

Anthony Ross - Barrister and Solicitor, Dartmouth

Tom Sampson - Chair, First Nations of South Island Tribal Council, Mill Bay, British Columbia

Jamie W. S. Saunders - Barrister and Solicitor, Halifax

Chief Judge Murray Sinclair - Commissioner, Aboriginal Justice Inquiry, Winnipeg

Professor Brian Slattery - Osgoode Hall Law School, York University, Toronto

Amos Smalling - National Black Coalition, Vancouver

Rita Smith - Confederacy of Mainland Micmacs, Shubenacadie

W. Wylie Spicer - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax

Professor Philip Stenning - Centre of Criminology, University of Toronto; consultant to the Commission and co-author of Commission research paper entitled "Public Policing in Nova Scotia" (published as Volume 2 of this Report)

Professor Samuel Stevens - University of British Columbia Law School, Vancouver (Speaker)

Carolyn Thomas - Moderator, African United Baptist Federation, Halifax

Esmeralda Thornhill - Director of Education, Quebec Human Rights Commission, Montreal (Speaker)

R. H. Vogel, Q.C. - Barrister and Solicitor, Vancouver (Speaker)

Florence Walsh - Native Council of Nova Scotia, Truro

H.A.J. (Gus) Wedderburn - Barrister and Solicitor, Halifax

Juanita Westmoreland-Traore - President, Quebec Cultural Communities and Immigration Council, Montreal

Professor Bruce Wildsmith - Barrister and Solicitor, Dalhousie Law School, Halifax

Castor Williams - Barrister and Solicitor, Halifax

Dolly Williams - Congress of Black Women, Halifax

Roy Williams - Metropolitan Toronto Police Commission, Toronto

Max Yalden - Chief Commissioner, Canadian Human Rights Commission, Ottawa

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Opinion
prepared by Professor Bruce P. Archibald, Faculty of Law, Dalhousie University

The Use of Evidence and the Making of Evidentiary Rulings at the Trial of Donald Marshall, Jr.

(This Opinion was entered as Exhibit 83 in the Public Hearings of the Royal Commission)

Introduction

The purpose of this opinion is to assess the use of evidence and the making of evidentiary rulings at the trial of Donald Marshall, Jr. It is undertaken in response to the request made by George W. MacDonald, Counsel to the Royal Commission on the Donald Marshall, Jr., Prosecution, that I review the transcript of the trial in order to comment on the various rulings on evidentiary points and also on objections which might have been made but were not. I have also made certain recommendations for reform which flow from my analysis of what transpired during the Marshall trial.

The method utilized here has been to examine the transcript to assess the actions of counsel for the Crown and for the defence, as well as those of the presiding judge in the light of evidentiary law and criminal trial procedure as applicable in November of 1971 (although sources published after 1971 will be referred to where they nevertheless reflect the law at that time). In doing so, an attempt has been made to assess the situation from the point of view of the participants at that time with the knowledge of the facts surrounding the death of Sandy Seale and of the applicable law which they had or *ought reasonably* to have had in the circumstances. While a review in 1987 has the benefit of hindsight, the participants involved in the trial cannot be assessed as if they had or even ought to have had knowledge of all of the facts which have become a matter of general public knowledge and which led to the conviction of another man in relation to the crime with which Donald Marshall, Jr. was charged and found guilty in 1971. In particular this opinion will concentrate on matters which were not raised in Mr. Marshall's appeal to the Nova Scotia Supreme Court, Appeal Division. (See *Regina* v. *Marshall* (1972), 8 C.C.C.(2d) 329)

The most crucial parts of this opinion present an overview of certain problematic evidentiary issues raised at the trial of Donald Marshall, Jr., and analyze in some detail the examination and cross-examination of the witness John Pratico. However, the analysis of these specific issues at the Marshall trial are preceded by a presentation of the nature and purpose of evidentiary law in a criminal trial in order to set the specific issues in a meaningful context. Thus, this opinion is divided into four parts entitled, respectively: (i) General Principles of the Law of Evidence; (ii) An Overview of Problematic Evidentiary Issues at the Trial; (iii) Hearsay, Out of Court Statements and Impeaching Witnesses: the Evidence of John Pratico; and (iv) General Conclusions.

I General principles of the law of evidence

The rules of evidence applied in Canadian criminal trials are designed to give effect to a process of dispute resolution which is adversarial in nature. Conduct of the trial is primarily in the hands of counsel for Crown and defence while judge and jury take a relatively passive role. A classic Canadian description of this method of inquiry is given by Evans, J. A. in *Phillips* v. *Ford Motor Company* (1971), 18 D.L.R.(3d) 641 (Ont. C.A.) at p. 661:

Our mode of trial procedure is based on the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value

in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matter in controversy. A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of research director; it is a forum established for the purpose of providing justice for the litigants. Undoubtedly a Court must be concerned with truth, in the sense that it accepts as true certain sworn evidence and rejects other testimony as unworthy of belief, but it cannot embark upon a quest for the "scientific" or "technological" truth when such an adventure does violence to the primary function of the Court, which has always been to do justice, according to law.

It is recognized, however, that a trial judge may have a special duty in certain circumstances in a criminal trial to safeguard the liberty of the subject by taking a more active role which, in extreme cases, might even include the judge calling witnesses. (See *Regina* v. *Cleghorn*, [1967] 1 All E.R. 996; *Regina* v. *Brown* (1967), 3 C.C.C. 210 (Que. Q.B. App. Side) and *Regina* v. *Bouchard* (1973), 12 C.C.C.(2d) 554 (N.S. Co. Ct.))

The law of evidence consists of a large and sometimes confusing body of rules which regulate the adversarial trial process and balance a number of competing interests in this process, including: (a) the ascertainment of the true facts at issue; (b) assuring fairness as between Crown and defence in the presentation of evidence; (c) assuring public confidence in the fairness and impartiality of a criminal trial; and (d) the elimination of unjustifiable expense and delay. (See E. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation*, 1956, *The King* v. *Barbour*, [1938] S.C.R. 465, and S. A. Schiff, *Evidence in the Litigation Process*, Carswell, Toronto, 1983, Vol. 1, p. 11.)

The first principle of the law of evidence is that of *relevance*. *Only* relevant evidence is admissible at trial, and *all* relevant evidence is admissible unless excluded by some particular rule of evidence. (See James Thayer, *A Preliminary Treatise on Evidence at the Common Law*, 1898, pp. 264-266, and *Morris* v. *R.* (1984), 7 C.C.C.(3d) 97 (S.C.C.)) Evidence is relevant where it tends to prove a fact in issue, that is, where the presentation of the evidence tends to show that a fact which must be proved existed, or at least that such an inference is more likely given the evidence tendered than without it. This is a matter of both logic and experience. (See R. J. Deslisle, *Evidence: Principles and Problems*, Carswell, Toronto, 1984, pp. 4-6.)

A clear distinction must be made, however, between the *relevance* of evidence and its *weight*. The threshold test of relevance for the admissibility of evidence is not a difficult one to meet. Evidence may be relevant to an issue and therefore admissible, but far from conclusive on that issue, particularly in light of the requirement in criminal cases that the guilt of the accused be proved beyond a reasonable doubt. Thus, evidence that the gun which killed the victim belonged to the accused will be relevant to proving the accused's guilt, but it might have little weight in the absence of other relevant evidence of the accused's motive or opportunity to commit the crime or in the face of clear evidence of an alibi. To use the metaphor employed by one commentator, it takes many bricks to make a wall. If the "wall" is proof of guilt beyond a reasonable doubt, the required quantity of "relevant bricks" will depend upon their size, shape and weight.

While relevance to a fact in issue may be the first principle of the law of evidence, it is equally true that the vast bulk of evidentiary law consists of a body of "exclusionary rules" which prevent the admission in the proceeding of relevant

evidence for a variety of reasons of policy. For example, "hearsay" evidence is excluded for a number of reasons: out of court statements may be unreliable since they are not given under oath, and their admission may be unfair to the opposing party who will be unable to cross-examine the declarant concerning such facts as his or her bias, opportunity for observation, ability to remember, or capacity to accurately describe the events perceived. A witness' statement that "X *said* he saw the accused commit the offence" may therefore be highly relevant, but the hearsay rule has been developed by the courts to exclude such testimony out of concerns about reliability and fairness. (See E. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept", (1948) 62 Harv. L. Rev. 177)

The general approach of the law of evidence, then, is that relevant evidence is admissible unless excluded by a particular rule. A judge is not free to exclude evidence on the basis of his or her personal views but must apply pre-existing standards or principles. However, it is widely accepted that a Canadian judge in a criminal trial has the authority to exclude relevant evidence in the absence of a *particular* exclusionary rule where there is "evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling". (*The Queen* v. *Wray,* [1971] S.C.R. 272 at 293) (Of course, since the advent of the Charter of Rights and Freedoms in 1982, courts may exclude evidence obtained by a Charter breach in accordance with the broader and more flexible standard of whether "having regard to all the circumstances, the admission of it in the proceeding would bring the administration of justice into disrepute." - Charter, Section 24(2))

One of the most confusing aspects of the application of the law of evidence in practice is the principle that evidence which is inadmissible for a particular purpose according to one rule may be admissible for a different purpose by means of another rule. For example, in a negligence action arising out of any automobile accident, the hearsay rule would prevent the defendant from testifying that a mechanic told him his brakes were in good order when the purpose is to refute the plaintiff's allegation that faulty brakes had *caused* the accident. The court would want evidence directly from the mechanic on this issue. On the other hand, such a statement from the defendant about what the mechanic said would be admissible on the issue of whether the defendant had acted negligently in failing to have his brakes tested further. In the second instance, the hearsay rule would not apply to exclude the testimony. Proper procedure in such cases of "conflicting " rules is usually for the judge to admit the evidence, that is let the question be answered, but to instruct the jurors that they are limited in the use which they can make of such answers. In the example given, the jury would be told that the defendant's testimony on the mechanics' statement could be used in determining whether the defendant was negligent but not in determining the cause of the accident. (See S. A. Schiff, *Evidence in the Litigation Process,* Carswell, Toronto, 1983, Vol. I, p. 73) (This type of occurrence in fact happened in the Marshall trial when Maynard Chant was declared to be an adverse witness. He had made a prior statement inconsistent with the testimony he gave at trial. The presiding judge, in accordance with established practice, told the jury that they could not accept the prior statement as evidence but could take into account the fact that he made it in determining whether to believe his statements on the witness stand in the trial.) Needless to say, there is some skepticism about the effectiveness of such limiting instructions, but the technique is widely used and thought to be a practical necessity.

The final general comments on the law of evidence relate to the manner in which evidentiary rules are invoked, applied and enforced, both at a trial and through the mechanism of appeal. Trial judges presiding in an adversarial setting

are rightly loath to interfere with the conduct of the case by counsel. Thus, where competent opposing counsel does not object, a judge may allow relevant testimony to continue, where the evidence might be technically inadmissible, in order not to interrupt the flow of otherwise proper testimony. This, of course, is a matter of judgment because a judge in a criminal trial, even in the absence of objection from opposing counsel, must not admit in evidence testimony which would result in an *unjust* trial. (*Colpitts* v. *The Queen*, [1965] S.C.R. 739) In the event of a dispute over whether a judge has exercised proper judgment in this regard, the only remedy is to take the matter on appeal. However, the law on criminal appeals is such that a mere finding of a trivial or technical misapplication of the law of evidence will not result in a new trial or a reversal of the original verdict. *Criminal Code* Section 613(1)(b)(iii) [now 686(1)(b)(iii)] provides that an appeal may be dismissed even where there has been a wrong decision on a matter of law when the appeal court "is of the opinion that no substantial wrong or miscarriage of justice has occurred". Thus, the strict application of the rules of evidence is tempered by a practical appreciation of the particular circumstances of each trial and the interplay among counsel and presiding judge in relation to them. Given the complexity of the law of evidence, such a flexible approach is essential; otherwise almost every criminal verdict might be overturned for trivial reasons.

II An overview of problematic evidentiary issues at the trial of Donald Marshall, Jr.

In conducting an overview of the problematic evidentiary issues at the trial two general areas are revealed as worthy of analysis: (i) a series of witness statements which were of tangential relevance, questionable weight and potential prejudice; and (ii) the approach to the hearsay rule taken by the presiding judge and counsel for Crown and defence in relation to testimony from several witnesses.

1. Problems with relevance, weight and prejudice

As mentioned above, the determination of whether any particular statement or evidence tendered is "relevant" is a matter of judgment which must be exercised in the light of logic and practical experience. However, the test of relevance is whether the evidence offered tends to prove a *fact in issue* - that is, an element of the offence charged or an aspect of a pertinent defence. Evidence may be classified as *direct*, that is where a witness testifies to have perceived a matter which must be proved, or *circumstantial* where the witness testified to having observed something from which it may be *inferred* that a fact in issue existed. Many criminal cases are properly proved by the use of circumstantial evidence only. However, judgments as to what evidence is relevant and what evidence is irrelevant in such cases can be difficult, since the relevance of any particular item or observation may not be clear except when viewed in relation to all the rest of the evidence which "gives the total picture" or ties the individual elements of proof together. Evidence may be clearly irrelevant in which case it is inadmissible. On the other hand, it may be of some relevance, and a presiding judge may admit it on the assumption that counsel will "tie it in" before the conclusion of the case. Thus, evidence in a criminal trial may consist of both highly relevant and tangentially relevant bits of information. This highlights the importance of the role of the trial judge's charge to the jury in which he or she has the duty to help the jury separate the evidentiary wheat from the chaff.

It may be thought that problems of relevance and attendant potential prejudice flow from aspects of the testimony given at the Marshall trial by witnesses Merle Faye Davis, Oscar and Leotha Seale, Patricia Harriss and Terrance Gushue. Each of these will be dealt with in turn.

A. The evidence of Mrs. Davis

Mrs. Merle Faye Davis was called by the Crown and examined in chief by Mr. MacNeil. Her evidence was to the effect that she had, in her duties as a nurse at the City of Sydney Hospital, treated the accused for a laceration on his left forearm on the night of the death of Sandy Seale, and she testified that the accused had been wearing a yellow jacket. It is apparent from a reading of the transcript that the Crown believed that evidence concerning the laceration would be relevant to an anticipated defence of self-defence (which was not ultimately put forward by the accused in the manner anticipated by the Crown), and that the evidence of the accused wearing a yellow jacket was relevant when taken together with that of purported eyewitnesses to the stabbing who "saw" Seale's assailant wearing a yellow jacket. This was the core of Mrs. Davis' testimony and presented no problems of relevance.

In passing, however, there occurred the following interchange during the examination-in-chief of Mrs. Davis:

Q. *Did you notice anything else about his arm?*
A. *I noticed a tattoo on his arm.*

Q. *Can you tell us what that tattoo is?*
A. *"I hate cops."*

This evidence is not directly relevant to the proof of any element of the offence, or to the proof of any defence. It is relevant to prove the character of the accused and his disposition toward the police, and only indirectly, if at all, to show that he is the kind of person capable of committing crimes. Since the accused had not put his character in issue at this point in the trial, the admission of such evidence was improper. (*R.* v. *Rowton* (1985), 10 Cox C.C. 25 at p. 38 (per Willes, J.)) Crown counsel should not have asked a question designed to elicit this testimony, defence counsel could have objected to it, and the trial judge might have prevented a reply or directed the jury to disregard it. (See *Stirland* v. *DPP,* [1944] A.C. 315 (H.L.)) However, the incident may not be serious enough to warrant the declaration of a mistrial. (See *R.* v. *Ambrose* (1976), 25 C.C.C.(2d) 90 (N.B.C.A.)) On appeal, the giving of this evidence might be thought insufficient, in and of itself, to overturn a verdict of guilty as not being a "substantial wrong or miscarriage of justice" in the language of Section 613 [now 686] of the *Criminal Code* in 1971. As such, one can understand what appears to have been the response of the court and defence counsel, if indeed they turned their minds to the issue: that is, to ignore the "tattoo" matter on the assumption that to draw attention to it would heighten its prejudicial impact on the jury. However, it is impossible to assess, in retrospect, what the effect of the wrongful admission of this evidence might have had in a trial where the outcome depended upon assessing the credibility of witnesses for the Crown and of the accused, where two totally conflicted versions of the events in question were being advanced by each side.

B. The evidence of Mr. and Mrs. Seale

The Crown called Mr. and Mrs. Seale, the parents of the victim, in order "to prove the continuity of the exhibits" in the form of a brown jacket and overalls which had been worn by the victim on the evening in question. While it was the practice in criminal trials in 1971 to present formal proof of the continuity of possession of all exhibits in order to demonstrate the absence of falsification or

error in relation to them, the exhibits must be shown to be relevant in the first place to be admissible at all. The rationale for the relevance of these items to the Crown's case was not demonstrated at the time they were admitted in evidence, and the fact that they were virtually ignored in the subsequent parts of the proceeding confirms the difficulty concerning their lack of relevance. Comments from Crown counsel, Mr. MacNeil, during his summation (Trial Transcript, Page 233) to the effect that continuity must be demonstrated and that requirements of proof may differ where the accused testifies, side-step the issue of the relevance of these exhibits.

While the argument in favour of the admissibility of these items was never made, their admissibility was not challenged by defence counsel or adversely commented upon by the presiding judge. All participants seemed to assume that their relevance would or could be demonstrated, though this did not turn out to be the case in the final analysis.

Though the relevance of the exhibits referred to by Mr. and Mrs. Seale was never demonstrated, they both appeared on the witness stand and may have become the objects of considerable sympathy on the part of jurors. Their son had been the victim of a gruesome murder, and the transcript seems to indicate that they were being treated with solicitude by both Crown and defence counsel. However, the ultimate irrelevance of their testimony and the impropriety of allowing sympathy for their plight to influence the decision in the case were not made the subject of comment by the trial judge in his charge to the jury. It is doubtful, however, that there is an appealable error of law in this matter, and even more doubtful that there is one which alone would pass the "no substantial wrong or miscarriage of justice" test. While this issue might have been better handled in a charge to the jury, it is a matter of speculation as to whether by itself or in combination with other evidence adverse to the accused, it contributed to Mr. Marshall's wrongful conviction.

C. The evidence of Miss Harriss and Mr. Gushue

It was the evidence of Patricia Harriss and Terry Gushue that they had encountered the accused, Mr. Marshall, in the company of one other person (although there was doubt about whether others might have been present) in the vicinity of the stabbing some little time prior to the event. Their evidence was clearly relevant to proof of the material elements of the offence in that they identified the accused and put him at the scene of the crime. Their testimony was also relevant to the extent that their inability to specifically recall others at the scene tended to rebut any defence of denial which would put the blame on others. While this was not direct testimony of the "eyewitness" variety, and while it was far from conclusive circumstantial evidence, it was certainly relevant and therefore admissible evidence.

With present knowledge of Mr. Marshall's wrongful conviction, it might be tempting to characterize this evidence as having been improperly admitted. In the language of *The Queen* v. *Wray*, was this evidence "gravely prejudicial to the accused", was its admissibility "tenuous", was its "probative force" in relation to the main issue before the Court "trifling"? The answer to these questions must be "no". The evidence of Harriss and Gushue was not gravely prejudicial; it was rather one more brick in a wall which the Crown was trying to construct. Its relevance and therefore admissibility in the absence of an exclusionary rule was evident and direct. Its probative force or weight, while not conclusive, was certainly more than trifling. This later judgment would have appeared, at the time

of the trial, to have been confirmed by Mr. Marshall's inability in cross-examination to explain how his version of the events could have co-existed with the circumstances described by Miss Harriss and Mr. Gushue. While in retrospect it may be clear that the inferences which the Crown wished the jury to draw from the evidence of Miss Harriss and Mr. Gushue were incorrect, it is equally clear that there were no "evidentiary errors" in the manner in which their testimony was elicited.

2. The general approach to hearsay at the trial

In its attempt to restate the law of evidence in a statutory framework, the Federal/Provincial Task Force on Uniform Rules of Evidence (*Report*, Carswell, Toronto, 1982, p. 124) defines hearsay in the following manner:

'Hearsay' means a statement by a person other than one made while testifying as a witness at the proceeding, that is offered in evidence to prove the truth of the matter asserted. (emphasis added)

The Task Force also recommended unanimously that in the foregoing definition, "statement" should mean "an oral or written assertion" and that it should include "non-verbal conduct intended as an assertion". The Task Force recognized that defining hearsay has been a matter of some controversy, but for the purpose of this opinion subtle differences among competing definitions are not determinative of issues raised in the Marshall trial. The above definition contains the commonly accepted core of the notion of hearsay, and corresponds to a definition referred to by the judge in the Marshall trial from the Eleventh Edition of *Phipson on Evidence* at p. 268:

Former oral or written statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them.

The policy behind the rule which normally excludes hearsay evidence from criminal trials was referred to in Part I of this opinion. However, as all practitioners of law are aware, the general rule excluding hearsay testimony is subject to numerous exceptions which operate to allow in evidence what would otherwise be excluded by a blanket application of the rule. Many exceptions have developed in accordance with a "necessity" principle, while others have emerged as courts have become convinced that in the particular fact patterns there are circumstances which guarantee the trustworthiness of these statements notwithstanding the so-called "hearsay dangers" discussed earlier. (See R. J. Delisle, *Evidence: Principles and Problems*, Carswell, Toronto, 1984, pp. 219-221) The result of this accretion of common law precedent has been the development of a highly complex, even arcane body of evidentiary law. As one famous judge put it: "It is difficult to make any general statement about the law of hearsay which is entirely accurate." (Per Lord Reid, *Myers* v. *D.P.P.*, [1965] A.C. 1001 (H.L.) at p. 1070) Counsel and the presiding judge at the Marshall trial encountered difficulty with the hearsay rule and its exceptions during the testimony of Sgt. Michael MacDonald, Maynard Chant, M. D. Mattson and John Pratico. The first three witnesses and hearsay issues will be dealt with in this Section as a group. The problems with "hearsay" in Mr. Pratico's testimony are sufficiently important to be addressed separately in Part III of this opinion.

A. Sergeant MacDonald's hospital conversations with Maynard Chant

Sgt. Michael MacDonald was called by the Crown and questioned briefly by Mr. MacNeil concerning the proof of "continuity of exhibits" as discussed earlier. Controversy concerning the applicability of the hearsay rule arose during Mr. Rosenblum's cross-examination of Sgt. MacDonald. The process of cross-examination had elicited the facts that Sgt. MacDonald had encountered Maynard Chant for a few minutes at the City of Sydney Hospital in the early morning hours following the stabbing. The exchange which sparked the controversy began as follows:

Q. *...when you say Mr. Chant and you had a brief conversation, was Donald Marshall present?*
A. *No sir. He was in the building.*
Q. *Did Chant tell you anything -*

At this point Mr. MacNeil objected on the grounds that conversation which took place "between the officer and Mr. Chant is inadmissible unless the accused is present". Somewhat later in argument in the absence of the jury Mr. MacNeil rephrased his objection in the following manner: "...I know of no rule that would allow a conversation to go in that may work to the detriment of the accused when he wasn't present." Mr. Rosenblum for the defence, apparently inhibited by the potential application of the hearsay rule, attempted to avoid its invocation with the following argument:

...I'm not asking for the words that were used, my Lord. I'm asking the question as to whether or not Chant made any accusation to this witness concerning Donald Marshall, at any time -

Later in argument the trial judge correctly says: "You're asking him about conversation which he had with Mr. Chant, and however you may phrase it, it gets to what Chant said to him." But in immediate reply to this statement from the judge, Mr. Rosenblum indicates indirectly the rationale behind his cross-examination when he stated: "Or didn't say - or didn't say! This is the point. Silence!"

One way to analyze the defence line of question is to say that Mr. Rosenblum was seeking to put in evidence statements, or at least implied assertions, from Mr. Chant as heard by Sgt. MacDonald, that Mr. Marshall did or did not stab Sandy Seale *for the purpose of their being taken into account by the jury as evidence of Mr. Marshall's guilt or innocence*. This interpretation may have been reinforced in the mind of the Court and counsel for the Crown by the nature of the form of restatement of the question made by Mr. Rosenblum in seeking an evidentiary ruling:

Q. *Did Maynard Chant on that occasion say anything to you to implicate Donald Marshall, Jr., the accused in this case, in connection with the injuries which had been sustained by the late Sandy Seale?*

This might be interpreted as seeking the admission of the statement for reasons contrary to the policy behind the hearsay rule as described above. But the other purpose for asking this question, which is alluded to by Mr. Rosenblum in his argument although not made entirely clear, is to determine *not the contents* of any accusation or lack thereof, but the mere fact that an accusation was or was not

made. This purpose is not to elicit evidence which would go directly to the main issue of Mr. Marshall's guilt or innocence but rather to Maynard Chant's credibility as a witness. Chant did not implicate Mr. Marshall when he had an opportunity to do so, and as he ought to have done as an upstanding credible person. This would surely be the main point of the "silence" which Mr. Rosenblum apparently expected Sgt. MacDonald to describe. Moreover, it would be to use the out of court statement for a proper non-hearsay purpose, but one which would invite a limiting instruction in the judge's charge to the jury.

The trial judge refused to allow the question to be put to the witness. However, it is not entirely clear from the transcript whether he based his ruling on the principle that an answer would be inadmissible hearsay or because to allow cross-examination of one witness about statements made by another in order to impugn the latter's credibility would be improper. His ruling is perhaps based upon an amalgam of both sets of reasons. Given the revelations subsequent to the trial, it becomes important to know why Maynard Chant's credibility was not challenged. Mr. Rosenblum may not have understood at the time he made them the full significance of his repeated statements during the course of argument on this evidentiary issue that it was of "great importance to the case", the "nub of the case" and the "heart of the case".

In assessing Mr. MacNeil's objection to Mr. Rosenblum's question to Sgt. MacDonald from the viewpoint of hearsay analysis, a number of points must be made. Firstly, there is Mr. MacNeil's assertion that "conversation took place [sic] between the officer and Mr. Chant is inadmissible unless the accused is present". If this involves an assertion that testimony on all conversation outside the courtroom implicating an accused in the absence of the accused is inadmissible hearsay, then it is incorrect because it fails to take into account the purpose for which the statement may be adduced (i.e., challenge to credibility rather than for truth of contents). To the extent Mr. MacNeil viewed the presence of the accused as determinative, it appears to be an incorrect statement of law with two possible sources of origin. Prior to the 1955 revision of the *Criminal Code* the provision which established procedures at a preliminary inquiry was worded in part:

The evidence of the said witnesses shall be given upon oath and in the presence of the accused and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

Perhaps Mr. MacNeil believed this rule, found in Code Section 468 [now 540] in 1971, extended to statements made during police investigation. On the other hand, it may be that Mr. MacNeil was misconstruing an established exception to the hearsay rule which provides that where an accusation is made in the presence of an accused and is not denied, it can be treated as an admission against interest and admitted in evidence. Regardless of the mistaken origins of Mr. MacNeil's asserted rule, and even though the trial judge did not immediately accept it in the form in which it was asserted, Mr. MacNeil's insistence upon it may have had the effect of inhibiting enquiry into the manner in which the trial dealt with police investigation. Mr. Rosenblum seemed to be sensitive to this purported interpretation of the hearsay rule which proved so adverse to his client's interests. Furthermore, it may have influenced the decision made by the trial judge in ruling on this particular issue.

The trial judge was ambiguous about the basis on which he made the ruling that Mr. Rosenblum could not ask Sgt. MacDonald about his conversations with Maynard Chant. On the one hand, he quoted at length from *Phipson on Evidence*,

Eleventh Edition (at p. 63 of the Trial Transcript) at the point in the text that deals with the hearsay rule. Significantly, he omitted to cite the passage which points out that one of the most frequent sources of error in hearsay analysis is to exclude out of court statements without reference to the *purpose* for which they are adduced. However, after citing Phipson on hearsay, he shifts discussion to a case, apparently cited by Mr. Rosenblum, called *Rex* v. *Rewniak*, [1949] 7 C.R. 127 (Man. Q.B.) which considered the issue of cross-examination of witnesses as to credibility of other witnesses and held that unnecessary restriction of cross-examination might, in a proper case, be grounds for appeal. Without further analysis the trial judge concluded:

While I repeat again that I appreciate very much the reasons for the submission, both the legal reasons and the practical reasons from the point of view of the defence, I have come to the conclusion that in this particular case, in the circumstances of this case, my ruling is that the witness cannot be questioned about the conversation which he had with Mr. Chant.

A reading of *Rex* v. *Rewniak* and the annotation by A. E. Popple which follows it at [1949] 7 C.R. 136 should lead to the opposite conclusion. However, the judge then assured Mr. Rosenblum that the latter would be able to ask Maynard Chant directly about his conversations with Sgt. MacDonald (even though the accused was not present!). The ruling thus appears to have been mainly based on an application of the hearsay rule. However, it is clear that its main effect was to inhibit the defence in any effort to examine the manner of police questioning as a basis for challenging the credibility of one of the two key "eyewitnesses".

To assess the potential effect of this confused evidentiary ruling on the trial, it is important to examine what might have occurred if proper analysis had flowed along the lines of credibility and not hearsay. It is to be remembered that what was at stake here was the credibility of Maynard Chant as a Crown witness. Maynard Chant *had not yet testified* and Mr. Rosenblum, in his cross-examination of Sgt. MacDonald, was anticipating difficulties which he might have with Chant's testimony based, presumably, on what the latter had said at the preliminary inquiry. The propriety of Mr. Rosenblum's question must be assessed in the light of the recognized purposes of cross-examination. These purposes are described by Professor Stanley A. Schiff in his *Evidence in the Litigation Process* (2nd Ed.), Carswell, Toronto, 1983, Vol. I, p. 201 as follows:

First of all, counsel may seek to elicit testimony relating to the substantive issues helpful to his case or harmful to the opponents case. Secondly, he may seek to impugn the witness's credibility so that the trier of fact will discount the probative value of the testimony given during the examination-in-chief - sometimes called 'impeaching the witness' or 'impeaching his [sic] *testimony'*. In addition, counsel may seek to elicit testimony relevant to the credibility of other witnesses. (emphasis added)

Professor Schiff then continues at p. 204:

The purposes of cross-examination define generally what counsel may do in the questioning of the witness, and also define what he [sic] *must not do. Thus, counsel should not ask the witness any question seeking an answer irrelevant to a substantive issue or to the trier's assessment of that* (or some other) *witness's testimonial factors.* Moreover, counsel should not ask questions inviting testimony barred by exclusionary doctrine unrelated to relevancy, for example, the hearsay rule. (emphasis added)

This broad approach to cross-examination is also described by P. K. McWilliams, Q.C. in his *Canadian Criminal Evidence* ((2nd Ed.), Canada Law Book, Aurora, 1984 at p. 774 where he says: "Cross-examination as to credit may extend to collateral matters which, of course, cannot be led in chief, let alone be anticipated. The defence is not limited to matters which happen in the presence of the accused: *R.* v. *Rewniak* (1949), 93 C.C.C. 142 (Man. C.A.)." In other words, Mr. Rosenblum, in this interpretation, would have been fully entitled to question Maynard Chant about what he said to the police, when he said it, *and* why he said it - and why he changed his story.

But as the second passage from Schiff quoted above indicates, the scope of cross-examination as to credit is not unlimited, particularly where the testimony sought to be elicited would also contravene another exclusionary rule, such as the hearsay rule if advanced for another purpose. The trial judge has a duty to exercise a discretion to see that the right of cross-examination is not abused. The standard by which to assess the exercise of discretion was set out by the Manitoba Court of Appeal in the widely cited case of *Rex* v. *Anderson*, [1938] 3 D.L.R. 317 at p. 321 as follows:

That full cross-examination of an opposite witness should be permitted by the trial judge is well settled. The judge may check cross-examination if it becomes irrelevant, or prolix, or insulting but so long as it may fairly be applied to the issue, or touches the credibility of the witness [or another witness?] *it should not be excluded.* (question in square brackets added)

This problem was long ago described by the Supreme Court of Canada in *Brownell* v. *Brownell* (1909), 42 S.C.R. 368 at p. 373 in the following terms:

The character of this discretion, however, is such that its precise limits are not easily defined and in practice its exercise, though undoubtedly reviewable, must be left largely to the sound judgment and wisdom of the presiding judge who, from his observation of the demeanor of the witness and also the manner of and the conduct of the case by counsel, has means and opportunities of forming a correct opinion as to the importance and real purpose of questions propounded which are not open to an appellate court.

In the trial of Mr. Marshall, the presiding judge was faced with the relatively rare circumstance of ruling on the admissibility of a question which would elicit an answer barred by the hearsay rule if offered for the truth of its contents, but justifiable if accepted as a challenge to an important Crown witness *who had yet to testify*. In accordance with the authorities represented by *Rex* v. *Anderson* and *Brownell* v. *Brownell* cited above, a court of appeal would in all likelihood have found the trial judge's decision to be incorrect. In retrospect, it is clear that the ruling closed, at least in part, what might have been an important avenue for the demonstration of Mr. Marshall's innocence. At the time, however, Mr. Rosenblum did not press his argument with such allegations as collusion between Mr. Chant and Mr. Pratico, or police misconduct during the questioning of witnesses. Indeed, in the absence of knowledge by Mr. Rosenblum of evidence for challenging Maynard Chant's credibility on such bases, to suggest them would have been highly improper. But a court of appeal might find it very difficult to say that foreclosing cross-examination on this issue involved "no substantial wrong or miscarriage of justice" *if* presented with facts to show how this could have been the case.

B. Cross-examination of Maynard Chant

Maynard Chant was called as a witness by the Crown and testified to have been an eyewitness to the stabbing of Sandy Seale. There was conflict between what he said on preliminary inquiry in identifying Mr. Marshall as the perpetrator of the crime, and his testimony at trial which was uncertain in this regard. The controversy about his being declared an adverse witness and being cross-examined by the Crown was dealt with on appeal before the Appellate Division of the Supreme Court of Nova Scotia in the decision cited earlier. It will not be canvassed in this opinion. However, in cross-examination by Mr. Rosenblum, the issue of the nature of police questioning and Maynard Chant's statements to police was the subject of testimony and will be examined here.

In the trial transcript there is an exchange between Mr. Rosenblum and Maynard Chant concerning the latter's conversation with police officers at the hospital and at the police station in the early morning hours after the stabbing. Also the subject of cross-examination were subsequent periods of questioning of Maynard Chant in Louisbourg and at the Sydney police station during which time he changed his version of the events, and identified Mr. Marshall as the perpetrator of the crime.

During these exchanges, and in accordance with the presiding judge's prior ruling, Mr. Rosenblum was at pains to elicit testimony that Maynard Chant had not implicated Mr. Marshall in the period immediately following the stabbing but only after prolonged police questioning. Mr. MacNeil raised his earlier unfounded objection about statements made "in the presence or absence of the accused". The court rejected this contention with the statement at p. 112 of the transcript:

He [Mr. Rosenblum] *is now perfectly within his rights to cross-examine* this witness *on the subject matter that he was proceeding with.* (emphasis added)

However, Mr. Rosenblum asked no questions about what the police said to Maynard Chant in their interrogation. This may be because of a fear that the hearsay rule would apply. But it might also be based on an interpretation of this intervention by the trial judge to the effect that the earlier evidentiary ruling was confirmed which seemed to exclude cross-examination, and perhaps direct examination (although this issue was never canvassed in argument) of any police officers who had questioned Maynard Chant, including Det. Sgt. John MacIntyre to whom Chant said he had told "the untrue story" - the one which presumably might have exculpated Mr. Marshall.

The result was that Mr. MacNeil for the Crown obtained from the court a ruling which limited the damage to Maynard Chant's credibility and had the effect, intended or unintended, of shielding the police from inquiry about their methods of investigation. However, this was a result in which Mr. Rosenblum, for reasons which do not appear in the transcript, seemed to have concurred. At page 116 of the Trial Transcript, there appears this enigmatic but perhaps revealing exchange:

By Mr. MacNeil: (Re-direct Exam)

Q. *You told my learned friend in your evidence that you told the police an untrue story. Why did you tell them an untrue story?*

A. *Because I was scared.*

Mr. Rcsenblum:

Excuse me, just a moment. Now, My Lord, we're going into the recesses of a

man's mind. There's an old saying that even the devil doesn't know what's going on in a man's mind, it's not triable and for him now to give explanation as to why he did something or why he lied or why he lied to or why he lied yesterday or why he lied in the police station -

The Court

I know. Any further questions?

Mr. MacNeil

No, no further questions but do I understand that Your Lordship won't allow that question.

Maynard Chant might have been afraid of reprisals from Mr. Marshall's friends, or from the police or for some other reason. Defence counsel seemed unwilling to pursue the matter, perhaps because he believed, with apparent good reason, that the court would not allow him to substantiate any response by questioning other witnesses on the issue. The impact on the trial is incalculable.

C. Examination and cross-examination of Marvel D. Mattson

Mr. Marvel D. Mattson was called as a witness by the Crown. He testified that as a result of a conversation he overheard in the street he called the police. Both Mr. MacNeil in direct examination and Mr. Rosenblum in cross-examination were very careful not to allow this witness to recount the contents of any conversation which he overheard. It may be that both counsel were fully apprised of what this witness had heard and were rightly of the view that to elicit it as evidence would only be to seek inadmissible hearsay. On the other hand, the arguments over the scope and applicability of the hearsay rule in relation to other witnesses do not encourage confidence in such a view. Both counsel and the presiding judge demonstrated an apparent confusion over the principle of multiple bases for the admission of evidence and the distinction between using out of court statements for hearsay and non-hearsay purposes. Mr. Mattson may have overheard remarks, the importance of which was not the truth of their contents, but the fact that such statements were made at the time they were made. In particular, such matters might have been explored in cross-examination, perhaps with the aid of a *voir dire*. But even if Mr. Rosenblum had been convinced that Mr. Mattson had important "non-hearsay" evidence to give, Mr. MacNeil's interpretation of the hearsay rule, which was apparently accepted in part by the presiding judge, would have precluded consideration of the matter.

III Hearsay, out of court statements and impeaching witnesses: the evidence of John Pratico

John Pratico testified in direct examination that he observed Donald Marshall, Jr. stab Sandy Seale in the stomach with a "shiny object". As one of two purported eyewitnesses to the homicide, one must conclude that his testimony was an important element in the jury's verdict of guilty. Where the accused's claim was that he did not commit the offence and that he saw someone else do it, John Pratico's credibility as a witness was crucial.

The two standard techniques for challenging a witness's credibility are (1) to cross-examine that witness to bring out inconsistencies which tend to show the witness to be lying, to have a poor memory, to have had no opportunity to really observe the events or to be incapable of accurately describing events observed, or (2) to obtain statements or evidence from *other* witnesses which contradict or "impeach" the principal witness's story. In relation to the first of these techniques, the law has traditionally allowed great scope in cross-examination. To cite the

Eleventh Edition of Phipson (which, as the transcript indicates, was available to the trial judge in the Marshall trial): "So, all questions may be asked in cross-examination which tend to expose the errors, omissions, inconsistencies, exaggerations or improbabilities of the witness's testimony." (p. 654) However, there are restrictive rules about the second technique of bringing in *other* witnesses to impeach the credibility of the principal witness, and these rules are particularly strict where one wishes to cross-examine or impeach one's own witness by having him declared hostile or adverse. The principal concern here is that it is the accused, not the witness who is on trial. Disputing the testimony of every witness with other witnesses raises potentially limitless collateral issues.

One evidentiary problem with the hearing of John Pratico's testimony was that the trial judge limited the scope of *cross-examination* by Mr. Khattar on prior inconsistent statements (technique 1) through the improper application of rules designed to limit *impeachment* of witnesses by other testimony (technique 2).

The afternoon before John Pratico was cross-examined he told a number of people outside the court room, including Mr. Khattar, Mr. MacNeil, the Sheriff, Det. Sgt. MacIntyre and Mr. Donald Marshall, Sr. that Donald Marshall, Jr. did *not* stab Sandy Seale (Trial Transcript, Page 148). This is a "prior inconsistent statement" which can be used to challenge the witness testimony to the contrary by probing in *cross-examination* whether he or she made the statement, why he or she made the statement, the circumstances surrounding the statement, etc. (technique I). In accordance with the general rule as stated above by Phipson, cross-examination about such a statement may be extremely wide ranging. However, the precondition for obtaining evidence about such statements from other witnesses for the purpose of impeaching the principal witness's (i.e., Pratico's) credibility (technique 2) is governed by the *Canada Evidence Act*. Section 11 of the Act reads (and read in 1971):

Cross-examination as to previous oral statements

R.S.C. 1970, c.307

11. Where a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

This section would only have been applicable if Pratico had denied making the statement outside the courtroom. But this section of the *Canada Evidence Act* was used by the trial judge *not* to permit testimony from other witnesses about what John Pratico had said outside the courtroom following a denial, but rather to limit cross-examination of Pratico himself. The section was cited by the trial judge, and followed by the comment:

Trial Transcript, Page 154

So you have the right to ask him about any statement which he made to anyone inconsistently - but Mr. Khattar, let us limit ourselves to anything that he said that was inconsistent.

Mr. Khattar limited his questions to John Pratico to eliciting the names of those present when the statement was made, and the time at which they were made. That is, Mr. Khattar limited his cross-examination in accordance with the judge's application of Section 11 of the *Canada Evidence Act*. Whether Mr. Khattar might

have wished to pursue in cross-examination the *reasons* for this prior inconsistent statement is a matter of strategy and is not clear from the transcript. It does seem clear, however, that the trial judge would have stopped him if he had attempted to do so.

When the trial judge limited defence counsel's cross-examination of John Pratico, he accorded the Crown a right of re-examination on the issue of prior inconsistent statements. However, he incorrectly limited re-examination by Mr. MacNeil as well. As the Phipson text available to the court correctly states (at p. 664): "The right to re-examination exists only when there has been cross-examination, and must be confined to the matters arising thereon." There was a *voir dire* on the extent to which questions might be put to the witness Pratico as to *why* he had made prior inconsistent statements, and the Crown wished to elicit evidence concerning alleged threats made by a number of persons (including the accused) to Pratico. The trial judge summarized his reasoning and his ruling on this point in the following passage

Trial Transcript, Page 169

Mr. Khattar, the witness was examined yesterday and today was subjected to a very searching and careful cross-examination and I found your cross-examination to be in order. But you have brought up the matter of inconsistent statements and now the law is, that in re-examination a witness may explain - may explain - the reasons why he gave this inconsistent statement. That is the law Mr. Khattar. Now then, he cannot tell in court what somebody said to him because it was not in the presence of the accused. He cannot say what Donald Marshall, Sr. said to him or Theresa Paul or Tom Christmas. But there is no such prohibition relative to the reason why he gave this inconsistent statement affecting the accused himself. You see, Mr. Khattar, as was your right to bring out the inconsistent statement, now surely the law is that in re-examination the witness can explain why he gave an inconsistent statement.

This reasoning is seriously flawed. It begins from the premise that Mr. Khattar had exercised a "right to bring out the inconsistent statement" but, for reasons explained above, ignores the fact that cross-examination concerning the statement had been improperly limited. It continues to declare inadmissible out of court conversation which might explain the motive for making the prior inconsistent statement, on what appears to be the incorrect interpretation of the hearsay rule discussed earlier. Moreover, the reasoning seems to adopt Mr. MacNeil's erroneous contention (discussed above and earlier both allowed and disavowed by the court) that only out of court statements made in the presence of the accused are admissible. The reasoning is correct only in so far as it states the proposition that a witness may explain in re-examination the reasons for having given a prior inconsistent statement.

The upshot of this approach was that in the re-examination, John Pratico stated that he had made prior inconsistent statements because he was "scared of his life". (Trial Transcript, Page 173) Furthermore, conversation between the court and counsel (Trial Transcript, Page 175), and questions from Mr. MacNeil identified a number of acquaintances of the accused who had been in contact with the witness Pratico after the murder and prior to the trial. However, because of the judge's ruling, there could be no exploration of the nature of any conversation which had occurred on these occasions. It is in this way that the trial judge incorrectly limited the Crown's right of re-examination. The trial judge then even appeared to limit exploration of any actual conversation between the witness and the accused, and concluded the matter with his own question:

Trial Transcript, Page 174

Q. *Now, your being scared of your life, is that because of anything the accused said to you at any time?*

A. *No.*

In the result, the jury might draw the conclusion that the witness had been threatened, and in all likelihood by acquaintances of the accused, but any attempt to find out what might have been said of a threatening nature was foreclosed to both Crown and defence. Furthermore, the limitation on cross-examination on the broader issue of why Pratico made conflicting statements was not allowed, while it might have clarified the question of whether threats were relevant to the problem at all. Given that the trial rested on the credibility of witnesses, it cannot be said that this curtailment of the cross-examination and re-examination of John Pratico might not have contributed significantly to "a substantial wrong or miscarriage of justice".

IV General Conclusions

In light of the foregoing analysis, general conclusions may be drawn concerning three broad sets of issues related to the evidentiary controversies in the Marshall trial discussed above, and a recommendation for improvement in the handling of evidentiary matters in criminal trials, like that of Mr. Marshall, may be made.

The first general conclusion relates to the manner in which a trial judge exercised his discretion in directing jurors as to how to appropriately evaluate the testimony which they heard. The analysis of the testimony of Mrs. Davis, Mr. and Mrs. Seale, Miss Harriss and Mr. Gushue indicates that the jury heard some evidence which was both irrelevant and potentially prejudicial, as well as other evidence which, while relevant, was of controverted weight. The trial judge's charge to the jury did not carefully identify for the jurors the evidence from these witnesses which they could not consider in reaching their verdict, and that which they should regard with caution because of its limited weight. While it cannot be said that any one of these matters, if taken alone, would inevitably have led to Mr. Marshall's wrongful conviction, taken as a whole they may have contributed to the jury's process of reaching the false conclusion that Mr. Marshall's version of the events could not be believed and that he was guilty.

The second general conclusion relates to the manner in which the concept of hearsay was used by the trial judge to support evidentiary rulings. In either direct examination, cross-examination or re-examination of Mr. Mattson, Sgt. MacDonald, Maynard Chant and John Pratico, out of court conversations were not related to the jury on the erroneous theory that their admission would contravene the rule excluding hearsay evidence. Some of these conversations, if admitted, might have had the effect of enhancing Mr. Marshall's credibility and challenging or destroying the credibility of the purported eyewitnesses. Whether defence counsel would have availed themselves of the opportunity to present evidence of such conversations to the court would depend on what they knew of such conversations through their own investigations, from disclosure, if any, by the Crown or from the preliminary inquiry. What can be said, however, is that the trial judge's approach to hearsay (often acquiesced in by Crown and defence counsel) precluded the jury from hearing admissible evidence relevant to the credibility of important witnesses in the case.

The third general conclusion concerns the way in which the trial judge limited cross-examination of Maynard Chant and John Pratico, the two purported eyewitnesses to the murder. As a result of the misapplication of the hearsay concept and the trial judge's confusion over the use and challenging of prior

inconsistent statements, cross-examination of the Crown's two most important witnesses was incorrectly limited so as to prevent their credibility from being challenged. Once again, the extent of any challenge would have depended on how defence counsel used information available to them through their own investigation, from Crown disclosure, or from evidence taken on preliminary inquiry.

The recommendations relate to the present state of the law of evidence in Canada, and its use and application in criminal trials, such as that of Donald Marshall, Jr. The law of evidence in Canada is needlessly complex and difficult to master. As the matters canvassed in this opinion indicate, the trial judge and three experienced counsel appear to have been unclear about a number of important aspects of the law of evidence. The trial of Donald Marshall, Jr. represents a dramatic illustration of the need for reform in the evidence law in Canada. As the Law Reform Commission of Canada said in 1975 in its *Report on Evidence* to the Parliament of Canada, at p. 5, "While we are satisfied that rules of evidence are necessary to maintain a reasonable degree of consistency in court procedure, the time has surely come for a reformulation on broader lines. What is needed are easily available, clear and flexible rules."

Since the release of the Law Reform Commission's *Report on Evidence*, the Government of Nova Scotia, along with the governments of five other Canadian jurisdictions (Canada, Ontario, Quebec, British Columbia and Alberta) established a Federal/Provincial Task Force on Uniform Rules of Evidence. The report of this Task Force was released in 1982 and was the subject of broad consultation with the legal profession and the general public. The Department of Justice of Canada has drafted a new *Canada Evidence Act* as a result of this process which would restate the law of evidence in a more comprehensible form which might assist trial judges and litigation counsel in more easily resolving evidentiary issues to ensure fairness and uniformity in the administration of criminal justice. The Provincial Government, in light of the trial of Donald Marshall, Jr. should be urged to press the Federal Government to enact immediately its proposed legislation to reform the law of evidence. Furthermore, the Government of Nova Scotia should introduce a parallel reform to the Nova Scotia *Evidence Act* to ensure uniformity where possible in the rules of evidence to be applied in federal and provincial proceedings in the province.

Without limiting the generality of this recommendation concerning the benefits to the administration of justice of a general restatement or reform of the *whole* of the law of evidence, the following example may be apposite. The latest draft of the proposed *Canada Evidence Act* contains the following provision:

92. A party may cross-examine any witness not called by the party on all facts in issue and on all matters relevant to the credibility of the witness, and on cross-examination may ask the witness leading questions.

Had such a provision been found in the *Canada Evidence Act* at the time of Mr. Marshall's trial, the confusion which lead to the curtailment of the cross-examination of John Pratico by Mr. Khattar might easily have been avoided.

14 Federal/Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons

The following guidelines include a rationale for compensation and criteria for both eligibility and quantum of compensation. Such guidelines form the basis of a national standard to be applied in instances in which the question of compensation arises.

A. Rationale

Despite the many safeguards in Canada's criminal justice system, innocent persons are occasionally convicted and imprisoned. Recently three cases (Marshall, Truscott, and Fox) have focussed public attention on the issue of compensation for those persons that have been wrongfully convicted and imprisoned. In appropriate cases, compensation should be awarded in an effort to relieve the consequences of wrongful conviction and imprisonment.

B. Guidelines for eligibility to apply for compensation

The following are prerequisites for eligibility for compensation:

1. The wrongful conviction must have resulted in imprisonment, all or part of which has been served.

2. Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.

3. Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a *Criminal Code* or other federal penal offence.

4. As a condition precedent to compensation, there must be a free pardon granted under Section 683(2) [now 749(2)] of the *Criminal Code* or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b) [now 690(b)].

5. Eligibility for compensation would only arise when Sections 617 and 683 [now 690 and 749] were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

As compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty), a further criteria would require:

(a) If a pardon is granted under Section 683 [now 749], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or

(b) If a reference is made by the Minister of Justice under Section 617(b) [now 690(b)], a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c) [now 690(c)], to the effect that the person did not commit the offence.

It should be noted that Sections 617 and 683 [now 690 and 749] may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an

extension of time to appeal and a verdict of acquittal has been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence.

C. Procedure

When an individual meets the eligibility criteria, the Provincial or Federal Minister responsible for criminal justice will undertake to have appointed, either a judicial or administrative inquiry to examine the matter of compensation in accordance with the considerations set out below. The Provincial or Federal Governments would undertake to act on the report submitted by the Commission of Inquiry.

D. Considerations for determining quantum

The quantum of compensation shall be determined having regard to the following considerations:

1. Non-pecuniary Losses

(a) Loss of liberty and the physical and mental harshness and indignities of incarceration;

(b) Loss of reputation which would take into account a consideration of any previous criminal record;

(c) Loss or interruption of family or other personal relationships.

Compensation for non-pecuniary losses should not exceed $100,000.

2. Pecuniary Losses

(a) Loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;

(b) Loss of future earning abilities;

(c) Loss of property or other consequential financial losses resulting from incarceration.

In assessing the above mentioned amounts, the inquiring body must take into account the following factors:

(a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;

(b) Due diligence on the part of the claimant in pursuing his remedies.

3. Costs to the Applicant

Reasonable costs incurred by the applicant in obtaining a pardon or verdict of acquittal should be included in the award for compensation.

15 Canadian Bar Association, Nova Scotia Branch, Submission to the Royal Commission on the Donald Marshall, Jr., Prosecution

(excluding appendices)

Foreword

When the Government of Nova Scotia established the Royal Commission on the Prosecution of Donald Marshall, Jr., on the 20th day of October 1986, it was natural for the Canadian Bar Association to become involved. The findings of this Royal Commission will, without doubt, become a "watershed" for reform of certain neglected and tired aspects of the criminal justice system, especially some of its procedural safeguards which failed at almost every turn in this case.

Aside from the important matters of police and prosecutorial conduct and the findings of fact which evolve therefrom, the key to uncovering the injustice to Donald Marshall, in the opinion of this submission, turns on the Crown's failure to disclose exculpatory (favourable to the accused) evidence to Donald Marshall or his counsel before, during or after his trial and appeal. It is this obligation to disclose evidence favourable to the accused which will be carefully examined in this submission. This report further endeavours to recommend some solutions and methods to improve the disclosure practice by the Crown to the accused and its counsel.

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Gordon F. Proudfoot
Halifax, Nova Scotia
October 28, 1988

Introduction

What information to disclose to an accused in a criminal matters is a question that has long vexed the legal profession. The answer to this question requires a balancing between the interests of the State in the administration of criminal justice and the right of the accused to a fair trial. On one hand, Crown prosecutors are understandably reticent to release information that, if misused, could result in justice not being done. Witness tampering, fabrication of evidence and alibis to meet the Crown's stated case, and the elimination of surprise are just three of the concerns Crown prosecutors raise when asked to broaden the scope of information to be disclosed to lawyers for an accused. On the other hand, lawyers for the defence need sufficient information for the preparation of their case and it is the State that generally controls access to that information. Defence counsel need to know not just the evidence against the accused but the evidence in his or her favour along with evidence that is apparently neutral, suggesting neither guilt nor innocence. Only with full and timely access to the information gathered by agents of the State can defence lawyers properly discharge their burden of holding the State to the criminal burden of proof.

It has long been accepted as indispensable for the fair administration of criminal justice in our society that some access by the accused to the State's case against him/her is required. But, what type of access? To statements? To witnesses? To an

accused's entire file? And when should access take place? Before the trial? During the trial? Or after the trial if relevant evidence subsequently comes to the attention of the Crown? What this report seeks to do is, first, to historically review the duty of Crown counsel to disclose exculpatory evidence to the accused; second, to examine in a limited manner the general disclosure practice of prosecuting attorneys in a number of Canadian provinces and territories, the United States and in some foreign jurisdictions; third, to review canons of professional ethics relating to disclosure of State evidence to an accused; and finally, to draw from this review some solutions to improve Crown disclosure practice so that another Donald Marshall, Jr. case shall never occur again.

Chapter 1
Historical Review and the Law

There have never been nor are there today, any legislative requirements in Canada compelling Canadian prosecutors to make complete disclosure of their case to the defence prior to trial. Notwithstanding this legislative lacuna, there is one area to which Canadian judges have, from time to time, turned their attention and formulated general principles which establish a Crown duty of disclosure of exculpatory evidence.

In *Lemay* v. *The King*[1] the late Mr. Justice Locke declared that counsel for the prosecution must "...not hold back evidence because it would assist an accused ..."[2] This is not to say that as a result of this decision Crown counsel had an obligation to disclose all information in their possession tending to suggest innocence to counsel for an accused. Lawyers prosecuting criminal trials were, instead, to exercise discretion as to which witnesses were material and which were not. One commentator described the obligation as follows: "The word 'material' must be taken to refer to facts which are material either to guilt or to innocence, but in making a judgment in this situation, the Crown counsel must have regard to the reliability of the evidence in question. To attempt to go beyond that which has been indicated, and to formulate rules that must govern the exercise of the discretion, would, in effect, be putting an end to the discretion. The consequence of this conduct would be to hinder, rather than promote, the fair and impartial administration of criminal justice. It cannot be the rule that counsel for the prosecution must call each and every person who may be in a position to testify."[3] So, as formulated in the *Lemay* case, Crown counsel was not obliged, as a matter of principle, to call a witness where the effect of eliciting that testimony would be to allow a guilty person through, for example, perjury, to escape justice. Where, however, the effect of evidence disclosure would be to reveal facts material to the innocence of an accused, this consideration cannot apply and disclosure must be made.

Three years later, in 1955, the late Mr. Justice Ivan Rand further defined the disclosure duty of Crown prosecutors. In *Boucher* v. *The Queen*,[4] Rand J. wrote: "It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be reliable evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings."[5] The principles embodied in this judgment would subsequently be mirrored in the *Canadian Bar Association Code of Professional Conduct* and in the various provincial law society codes.

1. [1952] 1 S.C.R. 232

2. *Ibid.* at p. 241

3. Keith Turner, "The Role of Crown Counsel in Canadian Prosecutions," (1962) 40 *Canadian Bar Review* 439 at p. 453

4. [1955] S.C.R. 16

5. *Ibid.* at pp. 23-24. See also *Richard* v. *The Queen* (1960), 126 C.C.C. 255 per Bridges J. A. at p. 280; *Regina* v. *Lalonde* (1972), 5 C.C.C.(2d) 168; and Martin, "Preparation for Trial," Law Society of Upper Canada, *Special Lectures*, 1969, p. 221 at p. 235 et seq; Mark M. Orkin, *Legal Ethics: A Study of Professional Conduct*, (Toronto: Cartwright & Sons, 1957, p. 116ff.)

What commentary the disclosure principles of these judgments elicited was agreed: "The ethical obligations of a prosecutor as interpreted by the Supreme Court of Canada, require him, at a minimum, to disclose evidence favourable to the accused at some stage prior to the verdict."[6] This duty implicitly imposed an obligation on the police to disclose such evidence to the prosecutor.[7] The disclosure duty of the prosecutors was at best a minimum standard: "If the primary task of the prosecutor is to see that 'justice' is done, should he not disclose the evidence before the trial and should he not also allow the defence access to unfavourable evidence so that there is an opportunity to make any necessary investigations? Surely surprise does not always result in 'justice' being done? Surely 'justice' also requires that the accused have access to what appears to the prosecution to be neutral evidence. If discovery is denied, are we not merely paying 'lip service to grandiose concepts' and preventing them from having any practical effect by procedural rules which deny counsel access to the facts which he must know in order to make them effective?"[8] Notwithstanding this trenchant observation and seemingly clear statement of principle by the Supreme Court of Canada, the disclosure requirements of Crown prosecutors remained, as a matter of practice, largely unaffected by these judicial developments.

6. Anthony Hopper, "Discovery in Criminal Cases," (1972) 50 *Canadian Bar Review* 445 at p. 469

7. *Ibid.* Indeed, according to Lord Devlin this obligation was, in fact, a legal duty. It was "strongly arguable that police or prosecutors who suppress evidence favourable to the accused are guilty of obstructing justice".

8. *Ibid.*

As late as 1968, Professor Brian A. Grosman of the Faculty of Law of McGill University observed that it was only those defence lawyers who were part of a "reciprocating environment" who received disclosure from the Crown. Those who were not, did not. What was this reciprocating environment? Those who are "trusted", Professor Grosman wrote, along with those who are "safe", will "obtain full disclosure of the prosecution's case prior to trial." How were these assessments made? "The defence lawyers is 'safe' if he enters a proportionate number of guilty pleas, does not utilize the evidence obtained in pre-trial disclosure for cross-examination of prosecution witnesses and is likely to enter a guilty plea after an assessment of the prosecution's evidentiary strength."[9] Dissatisfaction over this situation led to numerous calls by the defence bar and a recommendation to this effect from the Law Reform Commission of Canada for the institutionalization of a process of discovery, analogous to discovery in civil law, in criminal cases. "If defence counsel has an opportunity to discover the prosecution's case in advance, the weaknesses of the case can then be discussed with the prosecutor and the apparent strengths can be made the subject of further investigation ..."[10] The calls were unheeded. In fact, the only further developments to take place in this area were initiatives by the Canadian Bar Association and by some provincial law societies in the drafting and publication of guidelines for the ethical and professionally responsible practice of law, as well as issue of guidelines by the Ontario Ministry of the Attorney General and by a recommendation of the Uniform Law Conference. The canons of professional conduct will be reviewed in Chapter 5 of this brief. The recommendations of the Uniform Law Conference will be considered in the next section of this brief.

9. Brian A. Grosman, "The Role of the Prosecutor," (1968) 11 *Canadian Bar Review* 580 at p. 586

10. Anthony Hopper, "Discovery in Criminal Cases," (1972) 50 *Canadian Bar Review* 445 at p. 465. See also *Criminal Procedure - Discovery*, Working Paper No. 4, Law Reform Commission of Canada; John Sopinka, "Criminal Procedure: Discovery," (1975) 7 *Ottawa Law Review*, 288ff.

While these developments brought about some positive change, disclosure of exculpatory evidence does not, even today, occur in every case. Indeed, inadequate and incomplete disclosure continues to potentially affect some criminally accused. *Re Cunliffe*[11] is a recent case in point. The Crown prosecutor in that case knew of the existence of witnesses favourable to the accused who had been charged with murder but did not disclose their existence to the lawyer for the defence. The Law Society of British Columbia ruled that failure to disclose this material evidence constituted professional misconduct.

11. *Re Cunliffe and Law Society of British Columbia* (1984), 13 C.C.C.(3d) 560

The Law Reform Commission of Canada has examined the issue of Crown disclosure to the defence on two occasions. In 1974, they produced the Report,

Discovering Criminal Cases (1974). The recommendations included the requirement for the prosecution to disclose to the defence not only statements of witnesses it proposed to call, but also the identity of persons who had provided information to police or prosecutors. The Commission recommended that legislation be implemented to set out the rules for disclosure.

The Law Reform Commission again dealt with this issue in its 1984 Report entitled, *Disclosure by the Prosecution*, and made recommendations which included the incorporation of a Crown disclosure procedure in an amendment to the *Criminal Code*.

Chapter 2
The Practice and The Canadian Scene

Until recently Crown disclosure usually took place in an *ad hoc* fashion, often the result of personal relationships between Crown attorneys and the defence bar. The disclosure was often supplemented by defence counsel using the preliminary inquiry as a means of learning about the Crown case against an accused.

The preliminary inquiry as presently constituted, however, offers little in the way of an opportunity for discovery by defence counsel as the purpose of it, as stated in the *Criminal Code* and by the Supreme Court of Canada, is to determine whether there is sufficient evidence to put the accused on trial.[12] In some jurisdictions local Crown attorneys call only enough evidence to satisfy the preliminary burden of proof to see the case put over for trial. In other jurisdictions more complete disclosure is made. The result of differing practices is a morass of case law concerning adduction of new evidence by the Crown during the actual trial of an accused and, more importantly, unfairness to the accused. Moreover, preliminary inquiries are a slow, expensive and inefficient means for providing an accused with information about the case the State will try to make in court. Nevertheless, in some jurisdictions preliminary inquiries remain the only means, pursuant to the relevant provisions of the *Criminal Code*, through which the accused can obtain access to information about the Crown's case.

12. *Patterson* v. *The Queen*, [1970] S.C.R. 409 at p. 412

Concern over inadequate and varying disclosure processes led Ontario Attorney General Roy McMurtry, in 1981, to table in the Ontario Legislature guidelines subsequently issued to Crown prosecutors respecting disclosure in criminal cases. These guidelines are reproduced completely in Appendix E to this report.

The guidelines recognize the general duty of Crown counsel to disclose both the Crown's case and make the defence aware of any relevant evidence that may be helpful to the defence and that is worthy of consideration by the court, but which the Crown may not intend to call as part of the case for prosecution. The guidelines do not set out specific procedures for providing disclosure nor do they establish any mechanism for ensuring uniformity in disclosure. Rather they create a discretionary regimen under which disclosure will be determined by the local Crown attorney in accordance with local Crown and police resources and with the needs of the local defence bar. As a result, disclosure practices vary throughout the province of Ontario. The decision to provide guidelines on disclosure rather than rules was, apparently, a deliberate one. It was made in order to ensure flexibility and to give Crown counsel discretion in their application depending on local conditions. The notion behind the retention of discretion was to provide a means of ensuring that certain information that could lead either to injustice through perjury or injury to witnesses and victims remain confidential. However, the defence bar charges that the decision to retain discretion over disclosure has proved both unworkable and, in some cases, unfair. In some localities Crown counsel provide defence lawyers with near-to-complete access to an accused's file, but in other

localities only limited disclosure is made. The defence bar in Ontario has asked, on at least one occasion, that the guidelines be replaced with legislation stipulating mandatory practice and procedure for defence access to Crown information.[13]

13. See "Has Crown's disclosure duty changed with Charter?", *The Lawyers' Weekly*, October 10, 1986, pp. 10-11

Disclosure requirements of Ontario Crown counsel was one of the matters considered by the Hon. Mr. Justice T. G. Zuber. In his recently issued, *Report of the Ontario Courts Inquiry*, Mr. Justice Zuber reviewed the practice and problems of Crown disclosure in Ontario. Justice Zuber noted that while the guidelines improved the overall practice of Crown disclosure, serious difficulties remain. One of the first problems that Justice Zuber identified was unavailability of Crown prosecutors with sufficient time to devote to making adequate disclosure. Justice Zuber recommended that additional Crown prosecutors be hired.

Another problem that was brought to Justice Zuber's attention, in the form of submissions from the defence bar, was the degree of Crown disclosure. These submissions urged Justice Zuber to recommend that more detail respecting the Crown's case be disclosed and that copies of witness statements be provided rather than simple summaries or outlines of the testimony witnesses are expect to give. Mr. Justice Zuber, however, was satisfied that adequate disclosure was being made and that no changes were necessary in this area.

Where Mr. Justice Zuber did recommend change was in respect of the guidelines themselves. Justice Zuber adopted the submission of the defence bar that because the guidelines were only guidelines they were not being uniformly followed. "In some areas of the province, full disclosure is made but, in others, it is inadequately made."[14] The explanation for inadequate disclosure was concern over fabrication of testimony to meet expected evidence. Mr. Justice Zuber, while cognizant of this potential problem, stated that he was "not convinced that this possibility is so great that it should lead to a shutdown of the disclosure process in some areas of the province."[15] Furthermore, Mr. Justice Zuber added, it did not "appear reasonable that the likelihood of fabricated defenses is the subject of such variation from region to region to justify a similar variation in the disclosure process. If disclosure in a particular region is perceived to lead to reasonable grounds for believing that defenses are being fabricated, then the appropriate remedy is to initiate an investigation with a view to laying criminal charges for obstructing justice, or some like criminal offence."[16] Having concluded that the guidelines were not being uniformly applied, and that no compelling reason existed for variations in their application, Mr. Justice Zuber recommended that the Attorney General upgrade the existing guidelines respecting Crown disclosure to the status of a directive to be observed unless the Crown prosecutor could demonstrate to the Attorney General why, in a particular case, disclosure should not be made.

14. The Hon. Mr. Justice Thomas Zuber, "Report of the Ontario Courts Inquiry," Toronto: Ministry of the Attorney General, 1987 at p. 233

15. *Ibid.* at p. 234

16. *Ibid.*

In preparation for this submission, a questionnaire was sent to all provincial Attorneys General with regard to Crown disclosure. Many of the provinces have adopted the *Uniform Law Conference Disclosure Guidelines* which are reproduced in their entirety in Appendix D of this report. At the present time, these guidelines have been adopted by the Provinces of Manitoba, Alberta, New Brunswick and Nova Scotia (as of July 22, 1988). These rules acknowledge the general duty on the part of the Crown to disclose the case-in-chief for the prosecution to counsel for the accused. Furthermore, the guidelines provide for the continuing disclosure of any new and relevant evidence that becomes known to the Crown.

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without

17. *Uniform Law Conference Disclosure Guidelines*, Uniform Law Conference, Halifax, 1985

the need for further requirement for disclosure.[17]

While the *Uniform Law Conference Disclosure Guidelines* appear to be progressive, there are many shortcomings, some of which include:

1. The continuing obligation to disclose is on the "prosecution" not the police, yet the police are often the gatherers and recipients of new evidence.

2. The evidence must be "new" to be provided to the defence under the continuing obligation to disclose rule. Numerous appeals in the U.S. and in Australia by the defence on inadequate disclosure have been lost because the Court held that the evidence was not "new". (See Appendices B and C)

3. The new evidence referred to must also be "relevant". It is left to the discretion of the Crown to decide if the new evidence is relevant. Obviously, if new evidence is developed in a case, it should be provided to the defence. What is considered relevant evidence to the defence may not be relevant to the prosecution.

4. Under the Guidelines the Crown may still refuse to disclose names and addresses of "potential witnesses" because of the perceived need to protect these witnesses from intimidation and harassment. This rule is contrary to the spirit of full disclosure. One cannot assume defence counsel would approach a witness in other than a professional manner. There are serious consequences in the *Criminal Code* for anyone who intimidates, threatens or harasses witnesses. However, there may be a rare occasion where a potential witness cannot be identified and their identity should be protected by an application to the Court. However, their evidence should still be disclosed.

5. Disclosure to an unrepresented accused by the Crown is left to the discretion of the Attorney General. This is unfair to an accused who has the right to represent himself and make full answer and defence. It is difficult to see how a guideline such as this does not violate the *Canadian Charter of Rights and Freedoms.*

6. The final clause of the Uniform Guidelines provides that, "...full and fair disclosure should be given *unless there is* a demonstrable need that such full and fair disclosure should not be given." The vagaries of what a "demonstrable need" may be in the eyes of a prosecutor invites problems.

7. The Guidelines do not provide for aggrieved parties seeking Crown disclosure to appeal a decision not to disclose.

8. There is no mention in the Guidelines of the obligation on the Crown to advise the defence what the nature of the information is the Crown has not disclosed and the reasons for the denial.

9. Finally, the Guidelines provide no sanctions which the defence can seek to enforce against the Crown to ensure compliance to the Guidelines.

Some provinces, however, have made some marked improvements over the *Uniform Law Conference Disclosure Guidelines*. Manitoba's Guidelines have restrictions on disclosing police information that is collected during investigation. Police investigatory records are not released to defence counsel without the consent of the police. The Manitoba Guidelines require the disclosure of witnesses' names favourable to the accused but there is no obligation to provide information

on what these witnesses would say. The Guidelines further stipulate that all disclosure information is to be revealed on a "timely basis", but it is unclear what this means.

Nova Scotia has recently invoked new Disclosure Guidelines which provide for fuller disclosure. Prior to the recent amendments, defence counsel were only entitled to read and not photocopy a "will say" statement of a witness. The new Guidelines entitle defence counsel to photocopies of all written signed statements. It would appear this only applies to witnesses to be called in the Crown's case-in-chief.

It may be argued, however, that Nova Scotia has actually taken a step backward with its new Disclosure Guidelines. Under the Uniform Guidelines, an accused is entitled to a "summary of witnesses' statements or the contents of witnesses' statements". Now in Nova Scotia an accused is only entitled to a "summary prepared by the investigating police agency of the case as a whole". The new Guidelines say the defence is entitled to "all written statements made by witnesses" to be called by the Crown. This does not include someone who did not give a written statement but who the Crown intends to call. Second, the Uniform Guidelines permit Crown disclosure of the criminal records of certain witnesses. The new Nova Scotia guidelines make no such provision. Where the defence has no access to CPIC (Canadian Police Information Centre) or other data sources, this may prejudice the defence.

No province, however, specifically provides for the disclosure of information that comes to light after the trial process has commenced, nor after the trial process has concluded. The only mention in the Uniform Guidelines is the "continuing obligation" to disclose but it does not define the time frame. Crown non-disclosure of exculpatory evidence during and after the trial was a crucial factor in the conviction of Donald Marshall.

Similarly, Crown discretion in disclosure also invites reform. A close examination of the *B.C. Crown Manual*[18] demonstrates a myopic attitude toward discretionary Crown disclosure. The Manual states:

18. See Appendix A

To release these comments and opinions (from police) except in extraordinary circumstances would discourage the investigator from providing these to Crown counsel...These comments are not provided to defence unless counsel decides that the proper administration of justice requires it.

Crown counsel's discretion is so broad and subjective that the B.C. Guidelines are seriously flawed.

Chapter 3
The United States Situation

State disclosure of evidence to accused persons is not just a matter of rules or canons of professional ethics, it is a question of constitutional law. According to the Supreme Court of the United States, the suppression by the prosecution of evidence that is material either to guilt or innocence violates the due process clause of the Bill of Rights. In *Mooney* v. *Holohan*[19] the Supreme Court held that the State's knowing and intentional use of perjured testimony to obtain a conviction violated a defendant's right to due process and to a fair trial. In *Alcorta* v. *Texas*[20] the duty of the prosecution to disclose evidence to the accused was further broadened. That case concerned the failure of the prosecution to reveal to the accused perjured material evidence which resulted in the accused being convicted of a more serious offence than he would have been had the perjury been revealed.

19. 294 U.S. 103 (1935). See also *Pyle* v. *Kansas*, 317 U.S. 213 (1942)

20. 355 U.S. 28 (1957)

Failure to bring the perjury to the attention of the accused was a denial of the due process provisions of the Bill of Rights. This issue was also canvassed in *Napue* v. *Illinois*.[21] In *Brady* v. *Maryland*[22] the duty to disclose was further developed. The Supreme Court held that "the suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[23] The issue, according to one of numerous academic commentaries on the decision, was "not prosecutorial misconduct, but rather the defendant's constitutional right of access to favourable testimony."[24]

21. 360 U.S. 264 (1959)

22. 373 U.S. 83 (1963)

23. *Ibid.* at p. 87

24. Daniel J. Capra, "Access to Exculpatory Evidence: Avoiding the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review," (1984) 53 *Fordham Law Review* 391 at p. 393. See also *Biglio* v. *United States*, 405 U.S. 150 (1972)

What the *Brady* case stands for is not the proposition that American prosecutors must open their files to criminally accused, but that they must disclose material evidence favourable to the accused. The distinction is, of course, that access to exculpatory evidence cannot impede the vindication of justice while access to inculpatory evidence can.

While the *Brady* case makes clear that material exculpatory evidence must be disclosed to the accused, not evident from the decision were the means for doing so. The result was to reserve to prosecuting attorneys the discretion of deciding what evidence was favourable to an accused and what evidence was not. Criminally accused cannot help but believe that important decisions concerning evidence disclosure are, in these circumstances, being made by a biased party. At the very least, the prosecutor is faced with the almost impossible task of sifting through the evidence brought to his or her attention and attempting to determine which evidence is material and favourable to the accused and therefore subject to disclosure. This aspect of the *Brady* decision has received considerable academic commentary and criticism.[25]

25. See Capra, "Access to Exculpatory Evidence," at p. 392ff. Most of the other comments on the decision have been gathered together and are cited in Paul L. Caron, "The Capital Defendant's Right to Obtain Exculpatory Evidence from the Prosecution to Present in Mitigation Before Sentencing," [1985] 23 *American Criminal Law Review* 207

Following the *Brady* decision, American courts struggled to accommodate the Supreme Court requirement that the prosecutor disclose material evidence within the traditional adversarial system of criminal prosecution amid prosecutorial fears of an "open file" rule that members of the criminal bar claimed *Brady* had brought about. A trilogy of cases that reached the Supreme Court in the decade following *Brady* failed to provide lower courts with much guidance as to what constituted materiality insofar as the prosecutor's duty to disclose evidence was concerned. However, the Supreme Court of the United States again considered the disclosure obligation of prosecuting attorneys in *United States* v. *Agurs*.[26]

26. 427 U.S. 97 (1976)

Agurs, while not modifying the requirement of disclosure of exculpatory evidence, placed on attorneys for the defence certain obligations for the identification of such evidence without providing them with more generalized access to prosecutors' files. Put another way, it became incumbent upon defence attorneys to request exculpatory evidence from prosecutors rather than for prosecutors to automatically disclose such evidence to the defence. This decision led, in the United States, to a number of reform proposals including a recommendation calling for pre-trial *in camera* review of all information in possession of the prosecutor. The two key benefits of this reform proposal were that any such review would remove prosecutorial discretion in the identification of evidence beneficial to the accused, while avoiding the potential pitfalls of an "open file" rule. At the same time, it would relieve the defence attorney of any obligation to inquire into the existence of evidence favourable to the accused, an onerous, impractical and unfair burden considering that knowledge of any such evidence is in the hands of the prosecution. Implementation of this suggested reform was, perhaps, made unnecessary by a subsequent and, to date, the latest, Supreme Court decision on point.

27. 105 St. Ct. 3375 (1985)

28. *Ibid.* at p. 3384

In *United States* v. *Bagley*[27] the court held that a single due process test applied to a prosecutor's non-disclosure of exculpatory evidence regardless of the request, if any, for the disclosure of such evidence. Exculpatory evidence, under the new test, was material "only if there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different."[28] The test is a stringent one and has been subjected to searching criticism, for under it, challenge to the prosecutorial non-disclosure of evidence will prove more difficult, and less successful, whether or not counsel for the defence has made a request for exculpatory evidence.

Notwithstanding the deficiencies of this decision, prosecutors who fail to disclose exculpatory evidence do so at their own peril. The general rule is that exculpatory evidence must be disclosed. Failure to do so, however, is not easily subject to review, for in almost all cases the accused will have no way of knowing that his or her due process rights have been breached. As a practical matter, the fact remains that notwithstanding this broad requirement to disclose, the discretion as to what to disclose remains with the prosecutor and absent any effective means of subjecting that discretion to review, it may be exercised so as to deny defendants their constitutional rights. And even when a failure to disclose is revealed, the Supreme Court test of a "reasonable probability" standard will be extremely difficult to meet. American common law suggests that constitutional guarantees alone are not enough to ensure disclosure of exculpatory evidence. What is required is a practical means of making exculpatory evidence available in every case and making that means subject to some kind of review.

In a review of legal and ethical requirements for State disclosure to the accused in the United States, 37 states responded (see Appendix B) to a request for information. The vast majority of American states have transcended the constitutional verbiage of such decisions as *Brady* v. *Maryland*, *United States* v. *Agurs*, and *United States* v. *Bagley* (supra), to arrive at practical, criminal procedural requirements regarding state disclosure. Of particular note, are the States of Arizona, Florida, Hawaii, Maine, Massachusetts and Maryland. These States have enacted rules of criminal procedure that attempt to codify the constitutional requirement of State disclosure of exculpatory evidence. The phraseology generally employed therein is:

...any material or information within the State's possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor". Rule 15.1(a)(7), *Arizona Rules of Criminal Procedure.*

Many States, however, do not provide for automatic disclosure as of right; but rather, require a written request or motion by the defence to trigger the disclosure procedure. Moreover, as earlier indicated, much discretion still rests with the prosecution in deciding what evidence is and is not favourable to the accused. Many States, however, have also specifically stated what evidence shall be furnished to the accused, e.g., written or recorded statements made by the defendant, the result of a search and seizure or wiretap, names and addresses of all witnesses which the prosecutor intends to call, and all written or recorded statements.

The majority of States also provide for a "continuing duty of disclosure". In most instances this is limited to additional material or information that is discovered *before* or *during* trial and was previously requested by the accused.

Only a very small percentage of those States who responded have enacted criminal procedure rules which call for the mandatory disclosure of police-held exculpatory evidence and/or names of State witnesses to the accused. Arizona, Hawaii, Nebraska and Vermont extend the duty of disclosure to material and information within the custody or control of those who have participated in the investigation or evaluation of the case.

In a great number of States there is an added element to the process of disclosure in criminal prosecutions - the requirement of "reciprocal discovery". Arizona, Florida, Hawaii, Maine and Massachusetts are but a few examples of U.S. States that require disclosure by the accused. Generally, this is limited to submission to tests, examinations and inspection of the accused. However, in some instances if the accused demands disclosure, the following information and material which corresponds to that which the accused sought, must be disclosed to the prosecutor, e.g., the name, address and statement(s) of any person whom the accused expects to call as a trial witness, reports or statements of experts made in connection with the particular case, and tangible papers or objects which the defence counsel intends to use at trial (e.g., Rule 3.220(b)(4), *Florida Rules of Criminal Procedure*).

The majority of States who responded to the question of whether ethical requirements for State disclosure exists answered in the affirmative. Most of these States have adopted the *ABA Model Code of Professional Responsibility* which requires a prosecutor to make "timely disclosure" to the defence counsel, or to the defendant who has no counsel, of the existence of evidence or information "known to the prosecutor...that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." (*Disciplinary Rule* (DR) 7-103(B)) Exculpatory evidence falls within this standard. The ABA has also developed *Standards of Criminal Justice Relating to the Prosecution Function*, which expand on the Model Code and have been adopted in some American jurisdictions. Standard 3-3.11(1) states that it is "unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defence, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused." It is also unethical for a prosecutor to intentionally "avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." (Standard 3-3.11(c))

In conclusion, most U.S. States have either enacted or are in the process of enacting legislation respecting the ethical and legal requirements for State disclosure. State statutes require prosecutors to respond to requests from the defence for exculpatory material and information. Generally, the prosecutor's duty to disclose begins before the trial and continues throughout the proceeding if additional material or evidence is discovered.

Chapter 4
International Approach

A 1946 case, *R.* v. *Bryant and Dickson*[29] stands for the proposition that "where the prosecution has taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence and should supply the defence with the witness' name and address."[30] This case is not authority for the proposition that the Crown is required, in these circumstances, to provide the defence with copies of any statement a witness might make, as only the name and address are required. Arguably, this limitation is not reconcilable with further judicial consideration of the subject, including the observations of Lord Denning, M.R.

29. (1946) Cr. App. R. 146

30. See Archbold, *Criminal Pleadings, Evidence and Practice*, London: Sweet and Maxwell, 1985 p. 331ff.

Lord Denning has described the duty of the Crown prosecutor to disclose evidence beneficial to the accused as follows: "The duty of a [prosecutor]...is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If [he/she]...knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish."[31]

Lord Denning's views on the disclosure duty of Crown counsel was considered in *R.* v. *Leyland Magistrates, ex parte Hawthorn*.[32] In that case, the applicant was convicted for driving without due care and attention. It was subsequently learnt that two witnesses known to the police were not called at trial. The applicant sought judicial review to quash his conviction on the ground of the failure of the police to notify him of the existence of witnesses before the trial. The court held that the failure of the prosecution to notify the applicant of the existence of the evidence prevented the applicant from receiving a fair trial. The conviction was, accordingly, quashed.

Concern over inadequate and incomplete disclosure led to the introduction of Disclosure Guidelines in England and Wales in 1982. These guidelines are reproduced in their entirety in Appendix H to this report.[33] The English Guidelines are extremely detailed and complex. However, in respect of one matter, the duty to disclose exculpatory evidence to lawyers for the accused, these guidelines are crystal clear. Any information that is or might be true, and which would go toward establishing the innocence of the accused or casting some doubt upon his guilt or upon some material part of the evidence relied on by the Crown, must be disclosed. Also, in 1985, special rules for disclosure were approved entitled, *Magistrates' Courts (Advance Information Rules 1985(a)* (See Appendix I).

31. *Dallison* v. *Caffrey*, [1965] 1 Q.B. 348 at p. 369. However, see Diplock L.J. at p. 376 and *R.* v. *Fenn*. For ruminations on this matter see, Lord Denning, *The Road to Justice*, (London: Sweet & Maxwell, 1955) pp. 36-37. For suggestions for future reform see, [1966] *Criminal Law Review*, 602 and undated report, "Availability of Prosecution Evidence for the Defence," cited in Anthony Hopper, "Discovery in Criminal Cases," 50 *Canadian Bar Review*, 445 at p. 477, footnote 160

32. [1979] 1 All E.R. 207

33. See Practice Note, [1982] 1 All E.R. 734 and see also Archbold, *Criminal Pleadings, Evidence and Practice*, p. 328ff.

Where the information that must be disclosed is of a highly sensitive nature the Guidelines provide for means to protect the interest that disclosure might affect, such as by blanking out the sensitive section of a statement. The exceptions to the general duty to disclose exculpatory evidence are set out in Section 13 of the Guidelines and they do not appear to significantly limit the general duty to disclose. But it must be observed that these Guidelines appear to be just that: guidelines. And it also appears that considerable discretion is left to Crown prosecutors and their instructing solicitors as to what should be disclosed and what should not. Moreover, it should be noted that the defence is not provided with the same opportunity for discovery in Great Britain, as in Canada, as the English preliminary hearing is shorter and less reliant on the adduction of *viva voce* testimony.

Chapter 5
Ethical Considerations

The essence of professional responsibility is that the lawyer must act at all times uberrimae fidei, *with utmost good faith to the court, to the client, to other lawyers, and to members of the public.*

(Canadian Bar Association Code of Professional Conduct)

Canadian codes of professional conduct establish minimum standards for the protection of the public. In the same way that provincial law societies have been given the duty of regulating the legal profession in the public's interest, the Canadian Bar Association and a number of provincial law societies have sought, through the promulgation of codes of professional conduct, to establish standards for the ethical practice of law. Codes of professional conduct cannot, and indeed do not, set out fixed rules to be followed by members of the profession. Rather, they set out guiding principles - principles that do not profess to establish standards for every ethical dilemma encountered by members of the bar, but guidelines that lawyers can look to for determining acceptable and unacceptable professional conduct.

(a) In Canada

At its Fifth Annual Meeting in September 1920, the Canadian Bar Association adopted a canon of ethical principles to be observed by members of the legal profession in Canada. Canon 1(2) thereof provided that: "When engaged as a public prosecutor [the lawyer's] primary duty is not to convict but to see that justice is done; to that end he should withhold no facts tending to prove either the guilt or innocence of the accused." Since then, the Canadian Bar Association has remained active in reviewing and revising the ethical principles to be followed by the legal profession and has, in fact, taken a leadership role in this area. Today, the *Canadian Bar Association Code of Professional Conduct* has been adopted by a number of provincial law societies. The Nova Scotia Barristers Society adopted the CBA Code in 1974. Where the disclosure duty of the prosecutor is concerned, the ethical considerations of the 1920s remain very much alive today.

Chapter One of the current CBA Code states that integrity is the fundamental and indispensable quality of any person seeking to practice law. "The lawyer," the Code says, "must discharge with integrity all duties owed to clients, the court, other members of the profession and the public." The *Professional Conduct Handbook of the Law Society of Upper Canada* sets out exactly the same rule. Integrity, simply stated, is the standard by which a lawyer's conduct must be judged.

Chapter Eight of the CBA Code establishes guiding ethical principles for the lawyer acting as an advocate. He or she must, the rule states, "treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law." Commentary to this chapter elaborates on the principle. Lawyers should not "knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, *suppressing what ought to be disclosed* or otherwise assisting in any fraud, crime or illegal conduct" (emphasis added). The commentary to Chapter Eight further provides that a lawyer must not dissuade a material witness from giving evidence or advise such witness not to appear at a hearing. Identical guidelines can be found in the guidelines for a number of provincial jurisdictions.[34]

34. See rule 10 of the *Professional Conduct Handbook of the Law Society of Upper Canada*, Article 44 of the *Code of Professional Ethics of the Bar of the Province of Quebec* and Rule c-12 of the *Professional Conduct Handbook of the Barristers Society of New Brunswick*

In addition to the general duty to act with integrity and the more particular duty not to suppress evidence or dissuade relevant witnesses from appearing in proceedings, Crown counsel have a special duty under the CBA Code. Their duty is not to seek a conviction, but to see that justice is done through a fair trial upon the merits. According to Chapter Eight (Commentary Seven):

The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence.

Taken together these guidelines impose on all counsel both general and particular obligations. The general obligation to act with integrity is supplemented by an additional obligation of advocates to make all authorities, evidence and witnesses available to the tribunal. Moreover, Crown counsel are, under both the CBA Code and the *Law Society of Upper Canada Professional Conduct Handbook,* positively obligated to bring to the attention of an accused all evidence, whether favourable to the accused or not. There are no exceptions to this obligation. It is clear. It is complete. It imposes a duty on Crown counsel to see that justice is done, not that accused persons are convicted. Arguably, this duty is the highest calling of a prosecutor in Canadian courts. When acting in the capacity of Crown counsel, lawyers must make full disclosure of documents, statements and other evidence to defence counsel before the trial, during the trial and after the trial. Failure to do so cannot be seen as anything other than a failure to adhere to the minimum ethical standards adopted by the Barristers Society of Nova Scotia and numerous other jurisdictions in Canada.

(b) In the United States

The first formal code of legal ethics in the United States dates from 1887 when Judge Thomas Goode Jones drafted the Alabama Code of Legal Ethics. This code served as a model for the American Bar Association's *Canons of Professional Ethics*, which was adopted in 1908. In 1969 the Canons were superceded by the American Bar Association's *Model Code of Professional Responsibility,* which differed from the Canons in two important respects: first, in format; and second, in language. The format was changed with the new Model Code organized in three parts: (i) Canons; (ii) Ethical Considerations; and (iii) Disciplinary Rules. The language was changed to eliminate the hortatory "should" and replaced it with the mandatory "shall", insofar as the Disciplinary Rules were concerned.[35]

Promulgation by the American Bar Association of the *Model Code of Professional Responsibility* did not, of course, result in its immediate adoption in American courts. To become operative within a State, a code of professional responsibility must be adopted by the State, usually by the Supreme Court of that State, or alternatively by the local bar association, which in most American States exercises a role synonymous with Canadian provincial law societies. The Model Code was adopted in every American State except for Illinois, which prepared and adopted its own code. A number of States, as part of the adoption process, modified and have subsequently amended the ABA Code. Similarly, the ABA has, from time to time, amended the Code although these amendments have not been implemented by some States. Generally, however, the differences between States are few. Adoption by a State of the ABA Model Code does not apply to federal

35. This section of the report was derived from L. Ray Patterson, *Legal Ethics: The Law of Professional Responsibility*, (New York: Matthew Bender, 1984) pp. 5-6

courts operating within that State. Those courts are separate from State courts and must, in and of themselves, adopt the ABA Model Code. Some have and others have not, although it is fair to say that the Model Code is persuasive authority even if not adopted by a particular federal court.

In 1977, an ABA Commission was asked to review the Model Code. In 1983 the ABA adopted a new document, the *Model Rules of Professional Conduct* (see Appendix F). These rules, like the Model Code, must be adopted by each State and every federal court in order to come into effect and, in general, have not yet been so adopted. Accordingly, the Model Code remains the primary source of ethical principles for the practice of law in the United States.

The Model Code sets out the basic ethical standards of a prosecutor as follows:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the Sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defence of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused. (EC 7-13)

Not only is the duty of the prosecutor to disclose exculpatory evidence made plain in the ethical considerations of the American Bar Association Model Code, it is also elevated to the standards of a disciplinary rule: "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." (DR 7-103)[36] (see Appendix G)

Under the new *Model Rules of Professional Conduct* the role of the prosecutor is further defined and the changes that have been made reflect the judicial developments on point. The relevant provision of the Model Text Rule provides: "The prosecutor in a criminal case shall: (d) make timely disclosure to the defence of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offence, and, in connection with sentencing, disclosure to the defence and to the tribunal all unprivileged information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." (Rule 3.8)[37]

In summary, insofar as American ethical guidelines for the disclosure of exculpatory evidence are concerned, there is a duty and that duty is virtually unfettered. Considered alongside the requirements of American constitutional law, it is fair to say that where exculpatory evidence exists, it must be brought in some meaningful way to the attention of counsel for the accused or the accused if unrepresented. Failure to disclose such evidence not only raises serious constitutional issues, it also potentially gives rise to violations of the ethical

36. The *ABA Standards for Criminal Justice* (2nd ed. 1980) provide for full file disclosure, stating in part: "(a) Upon request of the defence, the prosecuting attorney shall disclose to defence counsel all the material and information within the prosecutor's possession or control...." This general mandate is restricted by the number of narrow exceptions, including where the prosecutor believes that disclosure raises a substantial risk of physical harm, intimidation or bribery, which outweighs the benefits of disclosure to counsel for the defence. These standards do not, however, carry the weight of the Model Code, nor are they, apparently, binding in any state. For relevant text of the *ABA Standards for Criminal Justice* see Appendix G.

37. The commentary to the rule notes that : "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt be decided upon the basis of sufficient evidence...."

standards adopted by the American States.

(c) In the United Kingdom

There are two separate sources of ethical standards for the practice of law in the United Kingdom. The Law Society produces a loose-leaf handbook entitled *Professional Conduct for Solicitors*. This handbook is amended and added to from time to time as new issues arise. The Senate of the Inns of Court, the professional body for British barristers, has also turned its attention to the formulation of ethical guidelines of the practice of law and makes available the *Code of Conduct for the Bar of England and Wales*. This Code was approved by the bar in a General Meeting on 15 July 1980 and it applies to all British barristers.

As a general matter the Code provides, *inter alia*, that it is the duty of every barrister: "(b) not to engage in conduct (whether in pursuit of his/her profession or otherwise) which is dishonest and which may otherwise bring the profession of barrister into disrepute, or which is prejudicial to the administration of justice."[38] Moreover, it is also part of the general obligations of British barristers to observe the ethics and etiquette of the profession. Violation of either of these obligations, or of any of the specific obligations then set out in the code, constitute professional misconduct and are the proper subject of discipline.

38. Section 6(b)

The general obligations of the British barrister are similar in substance to the general obligations of Canadian lawyers found in the *Canadian Bar Association Code of Professional Conduct* and in the various law society codes: they require the barrister to act with integrity. And just as the Canadian equivalents codify the professional obligations of Crown counsel, so too does the British Code.

This Code of Conduct provides that: "It is not the duty of Prosecuting Counsel to obtain a conviction by all means at his command but rather to lay before the jury fairly and impartially the whole of the facts which comprise the case for the prosecution and to see that the jury are properly instructed in the law applicable to those facts."[39] Insofar as the duty of the Crown to disclose exculpatory evidence is concerned, the Code requires that it be disclosed: "Where Prosecuting Counsel has in his possession statements from persons whom he does not propose to call as witnesses, he should regard it as normal practice to show such statements to the Defence. Where, however, the Defence already know of the existence, identity and whereabouts of any such person and are in a position to call him (as, for example, when a notice of alibi has been served, or when such person is married to a Defendant) and in other exceptional circumstances, the Prosecuting Counsel may, in his discretion, refrain from showing the statement to the Defence."[40]

39. Section 159

40. Section 160

In summary, therefore, the British Code requires that Crown counsel disclose exculpatory evidence to lawyers for the accused. When considered alongside the guidelines on point, there appears to be an almost absolute professional and legal obligation in Great Britain to disclose exculpatory evidence to the accused.

Chapter 6
Summary and Conclusions

A. Summary

Were the Crown disclosure problems in the Marshall case a rarity or were they symptomatic of a general reluctance of the State to provide more information to the accused? Clearly the latter is the case. The issue of State disclosure to the accused, balanced against the accused's right to make full answer and defence, goes beyond Canadian borders.

There are numerous examples of famous cases where non-disclosure has led to grave miscarriages of justice and wrongful convictions. In the United States the classic non-disclosure case is *Brady* v. *Maryland* (supra). In this case a prosecutor intentionally withheld a statement from the accused murder's counsel where a third party had admitted committing the same murder. In the Australian case, *Re Van Beelen* (1974), 9 S.A.S.R. 163, a man was convicted of murder after two appeals on disclosure arguments. The Crown had failed to disclose a third party statement confessing to a murder with four independent witnesses supporting the guilt of the confessed person. Yet, the highest Court of Appeal in Australia stated that the Crown had no obligation to disclose those statements. They took this view because the police and the Crown were of the opinion that their statements were not believable and, therefore, should not be provided to the defence. This case highlights why Crown discretion in disclosure is unacceptable.

Another infamous Australian decision, *Lawless* v. *The Queen* (1979), 53 A.L.J.R. 733, has an uncanny resemblance to the Donald Marshall case. Peter Lawless was convicted of murder and it was later determined that various pieces of critical exculpatory evidence were suppressed by the Crown, including a key eyewitness statement fully supporting Mr. Lawless' alibi. The prosecution also failed to disclose, at the first trial, the fact that the principal Crown witness had spent several weeks under institutional psychiatric care. Unfortunately, Lawless' appeals were rejected. The Court reiterated the principle that there is no requirement of Crown disclosure. Mr. Lawless, after being convicted, was finally pardoned several years later by the Australian Government.

From these various experiences there emerge at least six fundamental guiding principles that must be adopted to ensure fairness and justice in Crown disclosure.

B. Conclusions

1. The requirement to disclose information to the defence must apply to both the Crown prosecutor and the investigating police agency.

2. The Crown prosecutor and the police have a "positive duty" to make full disclosure to the accused.

3. The Crown prosecutor and the police must not limit their disclosure to that evidence or information which in their opinion is relevant and credible.

4. Disclosure to an accused must be "continuing duty" even after the appeal periods have expired.

5. Any decision not to make full disclosure to the defence must be made by a Judge upon an *inter partes* application by the Crown prosecutor, and not left to the discretion of a Crown prosecutor or the police.

6. Mandatory disclosure shall be enforced through the adoption and implementation of sanctions by:

(a) amending the *Criminal Code* to establish a Crown disclosure procedure; and

(b) amending the legal profession's codes of ethics to incorporate more specific ethical guidelines regarding Crown disclosure.

Chapter 7 Recommendations

1. The Canadian Bar Association should strike a National Committee to review the *Code of Professional Conduct* to implement specific ethical guidelines for Crown disclosure.

2. The Canadian Bar Association should strike a National Committee to establish a supplementary special code of professional conduct for those practicing criminal law to be known as the *Canadian Bar Association Standards for Criminal Justice*.

3. The Federal Government should implement amendments to the *Criminal Code* of Canada[41] as follows:

Part XVIII.2 Disclosure

534.1 A justice shall not proceed with a criminal prosecution at the time that the accused first appears unless he has satisfied himself

(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against him in that prosecution; and

(b) that the accused has been advised of his right to request disclosure under Section 534.2.

534.2 (1) Upon request to the prosecutor, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter,

(a) to receive a copy of his criminal record;

(b) to receive a copy of any statement made by him to a person in authority and recorded in writing (or to inspect such a statement if it has been recorded by electronic means);

(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;

(d) to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;

(e) to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;

(f) to receive, where his request demonstrates the relevance of such information, a copy of the criminal record of any victim or proposed witness; and

(g) to receive, where known to the investigating police agency and/or prosecutor in charge of the investigation, and not protected from disclosure by law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified, unless upon an *inter partes* application by the prosecutor supported by an affidavit demonstrating that disclosure will probably endanger life or safety or interfere with the administration of justice, a Justice having jurisdiction in the matter orders, in writing and with reasons, that disclosure be delayed until a time fixed in the order.

41. As adapted from the Law Reform Commission of Canada's Recommendations in its 1982 report, *Disclosure by Prosecutors*

(2) A request under subsection (1) imposes a continuing obligation on the prosecutor and police agency to disclose the items within the class requested, without need for a further request.

(3) A statement referred to in paragraph (b), (d) or (e) of subsection (1) does not include a communication that is governed by Part VI.1 of this Act.

534.3 Where a "justice" having jurisdiction in the matter is satisfied that there has not been compliance with the provisions of Section 534.2, he shall, at the accused's request, adjourn the proceedings until in his opinion there has been compliance, and he may make such other order as he considers appropriate in the circumstances.

All of which is respectfully submitted

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