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PREFACE

When someone is murdered, the comfort of a community is forever changed. While a chorus of outrage, grief, fear and retribution is heard, the citizens expect that their system of justice will find the assailant, guarantee a fair trial, convict dispassionately and sentence wisely.

We who live in this country have enjoyed the legacy of believing the system will not fail. It will do the right thing. It will be applied equally, without fear or favour, to whomever should be subject to its gaze or in need of its protection.

We are content in the knowledge that the system we demand be imposed on others, would be all we could expect for ourselves.

In the case of Donald Marshall, Jr. we have learned that the system failed. Not just for him, but for our society. Each deserved more.

On May 28, 1971, at Wentworth Park in Sydney one young man's life was tragically taken while another youth's life was irrevocably altered. As we all know now, this tragedy unfolded by the actions of a crazed and habitually drunk eccentric, Roy Newman Ebsary.

In the quiet of reflection, one ponders what would have happened in the lives of Sandy Seale and Donald Marshall, Jr.? Would they have gone on to succeed in business or sport, or had the chance to marry and rear a family? Would they have settled in the community or gone elsewhere? How would they compare to

the parade of friends and relatives who we all watched so closely as they walked to the witness stand to testify at these proceedings?

Sandy and Junior deserved better. Society, at least, owed them the chance to succeed or fail.

How much happier would the lives of their parents and brothers and sisters have been without the relentless burden of such a loss?

Perhaps it is not presumptuous to think how many times the Seale and Marshall families must have been reminded of the similarities in the loss they shared? A son, taken away, expectations dashed, private memories probed or held to ridicule by those ignorant or motivated by sensationalism.

The administration of justice has many components: some human, others inanimate; some trained in the law, others not. Whether policeman or juryman, teenager or adult, judge or barrister, tradesman or professional, politician or prosecutor, it matters not. The law is to be adept and vibrant enough to account for all of the vagaries of life's experience.

Yet, we know the system is and can never be perfect. The search for truth is not a science capable of mathematical prediction and affirmation.

What we demand is best effort, conscientiousness, evenhanded unbiased dedication, by those who are committed to their roles in the justice system - to see that the system is

fair for all without regard to their age, race, colour social position or political persuasion. Be they police, prosecutors, defence lawyers, probation officers, court clerks or correction officials, we demand they treat everyone the same. That is our goal.

As counsel for the Attorney General and his department we have become aware of the fine tuned system that we call justice. With its checks and balances, strengths and weaknesses, myths and realities, it is the best we have. We strive for its perfection, but short of that will settle for improvement. We recognize human frailties. We understand personal realities. We recognize strengths and weaknesses in a system where we as participants know we can do better.

This Royal Commission has had the luxury of 89 days of hearings where the slightest detail of action, re-action and in-action was scrutinized. Where hard fact, simple recollection, mere conjecture and distant hearsay, in all their various shades, were received and probed.

Perhaps never before in this country's history has there been such an exhaustive and penetrating analysis of the criminal justice system. With the time and resources available and the skill of counsel engaged for all parties who appeared, each issue was relentlessly and purposely considered.

Nova Scotia need feel no discomfort with either the attention or the result. By convening this Commission, and

providing it with the resources to complete its work, this should serve as an example and lesson from which all jurisdictions can benefit.

Our approach in this submission has been to illustrate those parts of the system which didn't work. Our critical assessment will include Donald Marshall, Jr. While perhaps not fashionable, we would be remiss if we failed to address what we consider his personal responsibility to have been.

Various appendices have been prepared to assist the Commissioners and other readers of this submission.

Our recommendations for change are highlighted throughout the text of this brief, and for ease of reference, are compiled as a list at the end.

II. CROWN CONDUCT IN COURT

Throughout the hearings of this Commission, various aspersions have been cast upon the character and conduct of Donald C. MacNeil. As counsel for the Attorney General, we shall only deal with these allegations as they expressly relate to his actions as an agent of the Attorney General in the prosecution of Donald Marshall, Jr.

A. LAYING OF THE CHARGE

The evidence suggests that Mr. MacNeil was kept appraised of the police investigation. After the interviews with Maynard Chant and John Pratico on June 4, 1971, the statements were taken to the prosecutor for his review. Subsequently, a charge was laid by Detective John F. MacIntyre-(33/6185).

It could be said that Mr. MacIntyre was taking instructions from the Crown on the laying of the charge (33/6185). If so, this would reflect a lack of appreciation of the various roles of the police and the Crown in the charging process. However, too much should not be read into Mr. MacIntyre's evidence on this point and no impropriety can be suggested. In Section XI of this brief, we deal in detail with the role of both the Crown and the police in the decision-making process related to the laying of charges.

B. THE PRELIMINARY INQUIRY

No serious objection has been made regarding the Crown's conduct at the preliminary inquiry. Twenty witnesses were called at the preliminary, more than required to meet the Crown's burden at that stage. There has been some criticism that the Crown should have dealt at the preliminary with the amount Mr. Pratico had to drink. On the other hand, the defence did not follow-up with the witness to elaborate upon the drinking which was raised in direct evidence (Ex. 1/44).

C. THE TRIAL

Many quotes could be offered to describe the respective roles of the parties at a criminal trial. Professor Bruce Archibald quoted from Mr. Justice Evans in Phillips v. Ford Motor Company (1971), 18 D.L.R. (3d) 641, 661 (Ont. C.A.).

> "Our mode of trial procedure is based upon 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 basis 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." (Ex. 83/2)

That description acknowledges that it is up to the litigants to present all the material facts for the judge to assess. It goes without saying that as part of that process the parties (and the Crown is a party) will challenge the evidence and assertions by objection, argument and evidence to rebut the assertions made. In a criminal trial, the Crown has a higher duty than counsel in a civil case to bring forward all the evidence and not to seek victory for victory's sake. But, the Crown prosecutor is an advocate in an adversarial proceeding. That cannot be forgotten. It is an underpinning of our system that the trier of fact will be able to select what is the truth through adversarial confrontation and render a verdict accordingly.

The Attorney General acknowledges the prosecuting officer may have dealt with some evidence inappropriately or made some comments that were not necessary for prosecution of the case. However, to take several examples out of the entire trial and suggest that the Crown was not fair in its prosecution or that the Crown transgressed the boundaries of propriety is not a correct conclusion. A reading of the entire transcript shows

the Crown diligently presented the evidence and cross-examined the one witness called by the defence. It cannot be forgotten that the prosecutor is not the only player. If he oversteps any bounds, then the defence can and should object and the Trial Judge has the ultimate responsibility to rule where there is a dispute.

A review of the evidence points to a number of suggested improprieties:

A. Questions to nurse Merle Davis about the quote "I hate cops" tattoo on Donald Marshall, Jr.'s arm (Ex. 1/134);

B. Calling Mr. and Mrs. Oscar Seale as witnesses;

C. Failure to raise in direct evidence the amount of alcohol Mr. Pratico had consumed on the night of the murder (Preliminary Inquiry-Ex. 1/44, Trial-1/158,174);

D. Reference to Tom Christmas, Mary Theresa Paul and Artie Paul before the jury to explain why Mr. Pratico was "scared of my life" (Jury address - Ex. 2/56);

E. Failure to fully explain the disposition of proceedings involving Mr. Christmas and the alleged threats against Mr. Pratico (Trial evidence, voir dire - Ex. 1/197);

F. Reference to Donald Marshall, Sr., in a way that may have suggested Mr. Pratico was "scared" as a result of a conversation with him (Jury address - Ex. 2/64);

G. Placing information before the Jury which was not in evidence when addressing Mr. Pratico's change of story (Jury address - Ex. 2/64).

The Attorney General's position regarding these suggested improprieties is as follows:

(a) It was the defence who first put the issue of Mr. Marshall's arm into evidence when Dr. Mohan Virick was testifying (Ex. 1/117). However, it was not appropriate for the Crown to specifically draw the jury's attention to the tattoo when Mrs. Davis was on the stand.

(b) The calling of Mrs. Seale was for the purpose of proving continuity of evidence, which, as it turned out, wasn't necessary. As Judge Lewis Matheson pointed out, Mr. and Mrs. Seale were well-known in the Sydney area and were present in the court room (27/5068-9). It was not necessary to put them on the stand to obtain sympathy from the jury. It is speculation to impute any improper motives here to Mr. MacNeil.

(c) At the Preliminary Inquiry, Mr. Pratico said that he "went into the bush and started to drink a pint of beer" (Ex. 1/44). At trial, on direct examination, the amount Mr. Pratico had to drink was not raised, although the fact he was "drinking" was established (Ex. 1/158). Judge Matheson said that it was not

raised in direct testimony because the Crown did not know how much Mr. Pratico had consumed (27/5088) although they knew he was very intoxicated (26/4943), a fact which gave the Crown some concern. The amount was brought out effectively by the defence (Ex. 1/174);

(d) Although conversations with Mr. Christmas had been referred to in Mr. Pratico's earlier cross-examination by Simon Khattar (Ex. 1/172A), the first mention of Mr. Pratico "being scared" was made during the voir dire conducted to hear his evidence about the conversation in the court house on the day before he testified (Ex. 1/197). Mr. Pratico said he was scared. The ruling by Dubinsky, J., limiting the probing of that, followed. However, in response to the question asked about why he made the statement he did in the court house the day before, Mr. Pratico answered that Mr. Christmas had come to see him, as did Miss Paul and Mr. Paul (Ex. 1/205). This evidence was given before the jury (Ex. 1/265). Mr. Pratico said he was scared, but not because of anything Donald Marshall, Jr. said to him (Ex. 1/207). After discussions between counsel and the Court, Mr. MacNeil asked Mr. Pratico what the basis of his fear was. No answer was given. It was then the Court who asked if it was Mr. Christmas; Mr. Pratico said "yes"; Mr.

Rosenblum adds the name "Mary Theresa Paul" and Mr. Pratico adds "Artie Paul" to conclude his testimony (Ex. 1/208).

To say both counsel and the judge were confused about the rulings as they pertained to this evidence is an understatement. However, the defence obviously did not feel the matter to be of significant importance to make it the basis of an appeal. Throughout this exchange the judge played an active role and perhaps contributed to the ambiguity which resulted. However, no blame can be placed on Mr. MacNeil for bringing out the evidence as it eventually got before the jury.

Further, we agree with Professor Archibald that Mr. MacNeil probably drew an inference which was not supported by the evidence during his jury address (Ex. 2/56 and 30/5579). Notwithstanding that view, neither the defence counsel nor the trial judge raised this and it can be assumed they did not feel it had a negative impact on the jury.

(e) During that same voir dire the issue of the charge against Mr. Christmas for tampering with witnesses was raised. The Crown was too circumspect in not directly advising the court of the fact that charges against Mr. Christmas had been dropped. Though the information was not directly relevant to matters before the Court, the

Crown should have been more forthright in providing this information.

(f) Mr. MacNeil states in his jury address:

> "And what would give Mr. Pratico the impression as he told you, the explanation for that remark yesterday, after consultation with Donald Marshall, Sr., that he was <u>scared</u> for his life. That was his explanation." (emphasis in original) (Ex. 2/64)

Mr. MacNeil appears to be suggesting that Mr. Pratico was scared because of his conversation with Mr. Donald Marshall, Sr. This passage is equally open to the interpretation that the reference to Mr. Donald Marshall, Sr. is merely to place it in its context of time and nothing more should be taken from it. The trial judge did not feel the comment to have been inappropriate and felt no need to specifically draw it to the jury's attention.

(g) In the passage which immediately follows, the prosecutor probably went too far in putting evidence before the jury which was not in fact before the court (Ex. 2/64). The evidence was of no consequence to the charge against Mr. Marshall for it related to the incident in the hallway with Mr. Pratico. It should not have been said.

The Crown's conduct at trial was not a major part of the Defence's appeal. The Crown's conduct was not the subject of admonition or comment by the trial judge. To forget that a trial is an adversarial exercise where it is the judge who keeps the parties in line, is to forget the underpinnings of our system. The noted instances of overstatement or trespass by the Crown should not be taken out of their context and given an importance or weight which is too great. Overall, it is our view, that in spite of these minor matters, the Crown's role was unassailable. In the absence of objection or caution, one must assume that the defence and the Court felt the same way.

III. THE CONDUCT OF DONALD MARSHALL, JR.'S DEFENCE BY HIS LAWYERS

Much has been said at these hearings about the Crown's duty to disclose information. Not enough has been said about the obligation upon Defence Counsel to demand information and use every device available to them to conduct a thorough and competent defence.

There were two critical areas where Donald Marshall Jr.'s defence was at a distinct disadvantage due to his lawyers' ignorance of the true circumstances:

1. The fact that Maynard Chant, John Pratico and Patricia Harris had given earlier, inconsistent statements to the Sydney Police department; and

2. That the investigation conducted by the R.C.M.P. (including the polygraph examination) in November, 1971, was apparently not known to (and therefor not capitalized by Moe Rosenblum in appealing Mr. Donald Marshall, Jr.'s conviction.

It will be the function of this Commission to decide who's fault it was that these matters were neither detected nor employed by Mr. Marshall's defence counsel, and what difference that made to his conviction.

A. CROWN DISCLOSURE

Former Attorney General, Harry How, testified that if, even after the Crown has disclosed its case to the defence, some new piece of evidence comes forward, then it is the Crown's duty

to draw that to the attention of defence counsel. Mr. How saw it not only as a moral duty but also as a legal duty (61/10922 and 10924). It doesn't matter if the defence was remiss in not asking for anything from the Crown.

In the section of our brief dealing with Crown disclosure (as well as the opinion attached as Appendix A to our submission) we have canvassed the authorities on the state of the law in Canada at the time of Mr. Marshall's trial. It is our view that there was no legal obligation upon the Crown prosecutor to provide to the defence the statements given by Mr. Chant, Mr. Pratico and Miss Harriss to the Sydney Police department.

During his days on the stand, Mr. Frank Edwards said that he was "shocked" to hear Mr. Khattar say that he had not even asked for a production of statements by the Crown (65/11740). Mr. Edwards said that the Crown's duty to disclose and the defence's obligation to demand was a two-way process (65/11742).

We accept that if asked for statements by the defence in 1971, Mr. MacNeil would probably have provided all of the statements given to the police. But, if the defence were remiss in soliciting such information (and the evidence clearly suggests they were), we do not concede that it was the law in Canada in 1971 for the Crown to have provided such statements (see our submission on Disclosure, Section IX of this brief) and the

admission of Mr. Khotter regarding Patterson v. The Queen (1970), 2 C.C.C. (2d) 227 (SCC) 26/4855.

B. DEFENCE DUTY TO DEMAND DISCLOSURE

Having said that, we maintain there was a very real obligation upon the lawyers hired to defend Mr. Donald Marshall, to demand production of statements and all other documentary evidence in order to adequately prepare for Mr. Marshall's defence.

The charge was murder. There was no lack of money to prevent adequate investigation of both the circumstances of the crime and the background of all witnesses. There were five months available between Mr. Marshall's arrest and his trial to properly prepare his defence.

There was an obligation upon Mr. Marshall's lawyers to conduct investigations during the course of preparing for trial. ONe of the most basic requirements would be to go to the Crown and simply ask "What have you got?" (see for example the remarks of Commissioner Evans at 61/10928).

His Honour Judge Lewis Matheson said it was his experience that the prosecuting officers never attempted to play games with defence counsel. He and Donald C. MacNeil, had the practice of giving statements to defence counsel upon request (26/4925). If there were reasons why the Crown declined to provide such information (for example safety of a witness) then defence lawyers were informed.

It was the practice in Sydney in 1971, according to Judge Matheson, that defence counsel usually approached the Crown and asked for information. This would include any statement given by the accused to the police. This would be in the hands of the defence "certainly at the preliminary" (26/4925). If a certain fact came to the attention of the Crown which the prosecutor surmised the defence could not have discovered on its own initiative, then Mr. Matheson would have disclosed it (26/4927). Clearly, he expected the defence to do its own work and not simply sit back and wait for something miraculous to happen, either at the preliminary or at trial.

Judge Matheson disagrees with the testimony of Simon Khattar when Mr. Khattar testified that he and Mr. Rosenblum didn't ask for statements from the Crown because they knew they wouldn't get them anyway. That was not Mr. Matheson's experience or style (26/4926).

Judge Matheson testified that it would have been his custom to have advised the defence if he knew a witness had given two inconsistent statements. He believes that Mr. MacNeil followed the same practice (26/4932). He had never heard any complaints about non-disclosure of information by Mr. MacNeil. He vehemently disagreed with the suggestion of Mr. Francis that Mr. MacNeil would do anything to win a case (26/4938).

Judge Matheson recalled incidents where Mr. Rosenblum would come to him requesting information in the Crown's case and

it being disclosed to him. Mr. Rosenblum had been a Crown prosecutor himself and knew he could ask the Crown for statements given by witnesses. He had, in other cases, asked for such production (26/4948-9).

Judge Matheson confirmed that no request was ever made of him by the defence for disclosure of anything and to his knowledge, no such request was made by Mr. Donald MacNeil (26/4957). He would have expected Mr. Rosenblum and Mr. Khattar to have asked for whatever information/statements they thought they required (26/4958) and he was surprised, in a very serious case like this, that Mr. Khattar failed to ask (27/5104).

Mr. Khattar testified that on the occasions that he acted as a prosecutor, it was not his practice to give out statements, nor to divulge the fact that he had statements (25/4698). Put another way, he testified that it was the practice that defence not be given statements. Defence lawyers were not advised by the Crown that statements existed (25/4699). We say that if this situation existed in Sydney (and we do not agree it was the general practice at the time) that this would place an even greater obligation on the shoulders of defence lawyers to at least demand production. Then, if refused, it could form the basis of an application to the trial judge to compel disclosure.

Mr. Khattar knew Detective John MacIntyre and should have known that, undoubtedly, he would have obtained statements

from key witnesses like Messrs. Chant and Pratico (25/4715). Yet, disturbingly, he and Mr. Rosenblum never demanded production.

Should any defence counsel in Nova Scotia feel that the prosecuting officer has not complied with the requirements of disclosure, then we recommend there is a responsibility upon the defence lawyer to state his objection by making a complaint to the Director (Prosecutions), Attorney General's Department.

C. RELIANCE UPON MR. MARSHALL FOR INFORMATION

Mr. Bernie Francis testified that he was present during the first meeting between Messrs. Rosenblum and Khattar and their client Mr. Marshall. This session at the jail lasted 15-30 minutes. Mr. Francis was confident that Mr. Marshall understood the questions. Mr. Marshall said nothing about any attempt to get money from people in the park (22/3964-5). Mr. Francis sensed that there was "more to it" and he went back to talk to Mr. Marshall a second time, privately (22/3966). One wonders whether Mr. Francis was suspicious about the veracity of Mr. Marshall. It's not an unfair inference to suppose that Messrs. Rosenblum and Khattar were less than convinced by either the sincerity of their client or the truthfulness of the explanation he'd given them.

We consider it shocking that, by Mr. Marshall's own account, he was visited on only two occasions by his lawyers (82/14380). Mr. Marshall said it came as a complete surprise to

him to hear the testimony of Mr. Chant and Mr. Pratico at his preliminary inquiry (82/14382). If Mr. Marshall is being truthful, it means that his lawyers did not advise him that two eye witnesses were going to "independently" describe him as being the murderer.

In testimony, Mr. Marshall said he could not remember if his lawyers gave him a copy of the preliminary evidence to study (82/14430). Nor did he remember being prepared in any way by his lawyers to give evidence at his trial.

Mr. Marshall testified that he couldn't remember whether he gave his lawyers the names of the people he saw in the park that night (82/14445). One would think it elementary that a client/accused by quizzed almost mercilessly by his lawyers to find out absolutely everything that occurred in the hours leading up to and during the crime and, of course, obtaining names or descriptions of literally anyone in the vicinity. Only then could an adequate investigation be conducted to see if any of these potential witnesses might have information useful to Marshall's defence or, put another way, useful to attacking the Crown's case against him.

To the extent that Mr. Marshall is/was telling the truth about being in Wentworth Park to deprive people of their money, it is obvious from Mr. Khattar's testimony that the defence would have been different had Mr. Marshall been prepared to give the whole truth. Mr. Khattar, who cross-examined Mr.

Pratico, would have handled the examination differently had his client revealed what he and Mr. Seale were doing in the park. As well, Mr. Khattar would have conducted a different investigation which would have included a search into the backgrounds of the two people that Mr. Marshall and Mr. Seale were attempting to rob (26/4790).

Messrs. Khattar and Rosenblum relied completely upon Mr. Marshall and his friends. Mr. Khattar's evidence states:

> "Q. It is a correct summary to say that you were relying completely upon Mr. Marshall or his friends to supply you with information with which you could conduct his defence?
>
> A. That is correct.
>
> Q. And you embarked on no independent investigation yourself?
>
> A. That's correct. There was no independent investigation." (26/4859)

Mr. Marshall's lawyers did not have copies of the statements Mr. Chant had given to the police in their file even though they knew he had given the statement (25/4689). One is forced to ask why so little attention was paid to these details.

D. <u>DEFENCE PREPARATION FOR TRIAL</u>

Mr. Khattar said that it was his practice to ask very few questions at the preliminary hearing because they didn't want to "give away the defence" (25/4700-1). Even if such a strategy were ever appropriate, one is hard pressed to grasp a reason why it would matter in Mr. Marshall's case. The simple defence

should have been that Mr. Marshall was innocent of the crime. It is unreasonable to suppose that vigorous questioning of Messrs. Chant and Pratico at the preliminary hearing would have somehow given the Crown some advantage.

Mr. Khattar said it was not his practice to speak with Crown witnesses, except with another witness present (25/4732). Messrs. Rosenblum and Khattar easily could have been a witness for the other during such interviews or alternatively, someone not connected with the defence might have been solicited.

Mr. Chant was not questioned by the defence at the preliminary hearing (6/1066). Neither was he interviewed by defence lawyers between the preliminary hearing and the trial.

At no time was the other key eye witness, Mr. Pratico, questioned by the defence.

> "Q. And at no time were you asked by counsel representing Mr. Marshall who you had met with to discuss what you had seen in the Park?
>
> A. No, sir.
>
> Q. At no time were you asked by defence counsel how many times you had been contacted by the Police Department?
>
> A. No sir.
>
> Q. At no time were you asked by defence counsel how many statements you had given to the Police Department?
>
> A. No sir.

> Q. In fact the record shows that at the Preliminary hearing you were not asked any questions by defence counsel at all?
>
> A. That's right, sir." (12/2227)

E. DEFENCE CONDUCT AT TRIAL

Mr. Khattar did not meet with Mr. Marshall to prepare him to testify at his trial, but he thought that Mr. Rosenblum had. He didn't know the details of what was discussed, except he did know Mr. Rosenblum had cautioned Mr. Marshall about his mannerisms:

> "... take your hand away from your mouth and be truthful all the way, and to have no hesitation in answering, just general advice on - on giving evidence." (26/4798)

Despite these efforts the record discloses at least 15 occasions where Mr. Marshall was admonished by either Justice Dubinsky, his own lawyer or the prosecutor to take his hand away from his mouth and speak clearly. Mr. Khattar agreed that Mr. Marshall's poor demeanour might well have been a major factor in a determination made by the jury (26/4852).

Messrs. Rosenblum and Khattar made no effort, between the commencement of the preliminary and the conclusion of Mr. Marshall's trial to request production of witness statements from the Crown:

> "Q. Was it also your understanding of the law, sir, at the time of the Marshall trial, that at the time of the trial, it was no longer a discretion of Crown

counsel but rather discretion of the Trial Judge whether he would order production of witness statements to defence counsel?

A. I wasn't aware of that.

Q. You were not aware of that? There was a decision of the Supreme Court of Canada called, "Patterson vs. The Queen," decided in 1970 on point, and I ask whether you were aware of that decision during the Junior Marshall trial?

A. I was not aware of it, sir.

Q. Thank you. I suppose, Mr. Khattar, that there would be three ways to seek production of information from Crown counsel. One way would be to merely ask the Crown by phone or in person, "What can you tell me about the Crown's case?" That would be one way, sir?

A. Certainly.

Q. All right. A second way would be to solicit production of the files so that you could at least read it to see what was in it. That would be a second alternative?

A. Correct.

Q. And the third and perhaps the most productive would be to ask the Crown Prosecutor to actually deliver to you copies of whatever statements were in the file. Correct?

A. That's correct.

Q. And as I understand your evidence, neither you nor Mr. Rosenblum made any of those three alternative approaches to the Crown.

A. That's correct." (26/4855-6)

When advised of the likelihood that Mr. Chant had given more than one statement to the police Mr. Rosenblum still did not seek production (26/4868). When asked why he didn't, Mr. Khattar said it was his (Mr. Rosenblum's) problem. Mr. Rosenblum did not himself, nor did he ask any of Mr. Marshall's friends or relatives to, thoroughly investigate the background of the potential witnesses (26/48969). Mr. Marshall didn't give his lawyers much by way of information (26/4876). We submit that there was a greater obligation upon them to peruse the evidence personally.

> "Q. All right. Now, why didn't you, at the trial of Junior Marshall, ask Mr. Justice Dubinsky leave to have produced the different statements of Maynard Chant?
>
> A. Number one, I was not questioning Maynard Chant; so that question should properly be directed to Mr. Rosenblum, but you're asking me as associate counsellor or co-defence counsel why I didn't. I left Chant entirely in the hands of Mr. Rosenblum, and I must have had the opinion that we couldn't go any further than Rosenblum had gone. That he would not be able to get anything further than he had already. You're asking why he didn't ask him for a statement -- a copy of the statement?
>
> Q. Yes.
>
> A. First of all, I wasn't aware of that case to which you referred --
>
> Q. You were not?
>
> A. -- for one.

Q. All right.

A. Number two, it was not my problem at that time. Mr. Rosenblum was handling Mr. Chant.

Q. All right. Do you recall any discussions with Mr. Rosenblum during the course of the trial as to whether you would make application to the Court for production of these Crown witness statements?

A. No, I don't recall any such thing.

Q. Did you make any efforts, sir, to ascertain the whereabouts of John Pratico from June, 1971, until November?

A. I can only repeat what I told you before. The information we got on the witnesses came to us from the Indian community and anyone to which -- to whom Mr. Marshall had referred. Actually, Marshall gave us very little information. He had the others give it to us.

Q. Yes. Did you though give any instructions to Junior Marshall's friends to find for you everything they could about John Pratico and his whereabouts?

A. No, we were merely concerned about the events of that evening.

Q. Did you give --

A. Only.

Q. And so you gave no instruction to other individuals to find out what they could?

A. To find out what did this fellow do for a living and where does work and so-- none of those questions.

Q. Or the fact that he had been in a psychiatric institute --

A. No knowledge.

Q. -- for some months?

A. No knowledge of that.

Q. You had no knowledge of that?

A. None whatsoever.

Q. And made no inquiries or directed inquiries about that?

A. On that basis at all.

Q. And did you give any --

A. Nothing to lead us to indicate-- nothing that we had received in the information given to us which would warrant further investigation as to what this fellow was doing.

Q. Yes.

A. Whether he had been a patient or whether he had been receiving psychiatric help. Nothing of that nature was given to us. We were concerned in directing our attention to the events of May, 28th of 1971, when this fatality took place.

Q. Yes. And no one came forward that summer or fall --

A. No one came.

Q. -- to say to you, "Look, do you know where John Pratico's been these last few months?"

A. No one came forward prior to the Inquiry, subsequent to the Preliminary Inquiry, not at the trial or after the trial.

Q. Yes. And similarly, did you give any instructions to any of Junior Marshall's friends to determine anything about Maynard Chant from June, '71 to November?

A. No.

Q. All right. Would you agree with me, Mr. Khattar, that once you and Mr. Rosenblum were appraised of the fact that John Pratico was telling two different stories, you tried to make the most of it you could?

A. Right." (26/4868-71)

After being confronted with Mr. Pratico's "recanting" in the court house hallway, Mr. MacNeil - to his credit - sought to reveal this incident to the judge and jury when Mr. Pratico's testimony commenced. Mr. Justice Dubinsky prohibited Mr. MacNeil from pursuing that course (25/4734). When Mr. Khattar was asked why he then didn't object to the judge's sentiments and urge that the prosecutor be permitted to strongly question Mr. Pratico about his recanting, Mr. Khattar replied that he had his own plan and strategy in mind (25/4735).

This incident with Mr. Pratico illustrates that witnesses will continue to lie, to perjure themselves before the court. Some will do it with cunning deliberation; others with complacency or recklessness. Mr. Pratico resumed the stand and decided to continue his perjured testimony despite strong urging by senior defence lawyers and senior Crown prosecutors to tell the truth and not worry about what he might have said before.

F. CONCLUSION

A question for this Commission is how can one improve the systems' chances for detecting false testimony?

We will urge strongly before this Commission that the outcome of Mr. Marshall's prosecution may have been different had he been willing to tell the whole truth to his lawyers. We have been told it would have made a difference to Mr. Khattar. It is not idle speculation to suppose that it would have made a difference to Mr. Rosenblum as well. It might have changed his attitude. It was understood by Mr. Milton Veniot that Mr. Rosenblum felt that Mr. Marshall was guilty (38/7043 and 7047). It might have caused him to investigate the circumstances of the incident thoroughly and not rely upon Mr. Marshall or his friends to uncover the facts. It may well have caused him to challenge Mr. Chant and there by discover Mr. Chant had given two statements to the police. Furthermore, it may have changed the way in which he conducted the argument before the Nova Scotia Court of Appeal.

Mr. Khattar defended a case that Mr. Rosenblum and Mr. MacNeil prosecuted together in June, 1971 (within days of Mr. Marshall being charge). Surely the opportunity presented itself for Mr. Rosenblum to question Mr. MacNeil about the Crown's case. It's almost as if a wall of silence was built by the defence counsel, who seemed content to leave it that way.

For all the reasons stated in this section, we say there were very serious weaknesses in the defence provided to

Mr. Marshall and these would have been prevented had his counsel aggressively fulfilled their ethical, legal and contractual obligations to their client. This included a demand for production from the Crown of information which they knew or ought to have known existed.

IV. JOHN PRATICO AS A WITNESS

It has already been noted the Crown's obligation is to lay before the jury "what it considers to be credible evidence relevant to what is alleged to be a crime" whether the evidence tends towards the guilt or innocence of the accused (Boucher v. The Queen, (1954), 20 C.R. 8.

There have been suggestions that the Crown acted inappropriately in calling Mr. Pratico as a material witness because of his previous psychiatric condition. The mere fact that Mr. Pratico had been in the Nova Scotia Hospital would not be determinative of a condition disqualifying him from testifying. His Honour Judge Lewis stated that while he knew Mr. Pratico had been in the Nova Scotia Hospital, he did not know the nature of his illness, nor that it might affect his credibility (27/5083). Neither did the police know of the nature of his illness. Although Dr. Maqbul Mian did not treat Mr. Pratico in 1971 he was familiar with his case. He knows of no communication with the police or Crown about Mr. Pratico prior to Mr. Marshall's trial in November, 1971. It is our view that no one knew enough about Mr. Pratico's condition to cause concern about his ability or competence to testify.

More importantly, the Trial Judge questioned Mr. Pratico before he testified (the details of which unfortunately do not appear in the transcript) and concluded:

"THE COURT:

> This young man is of age and has an appreciation of the significance and nature of an oath. I am satisfied that he should be sworn." (Ex. 1/155)

Though the Trial Judge may only have turned his mind to the age of the witness, Section 14(1) of the Canada Evidence Act, envisages a similar type of examination where a "person...is objected to as incompetent to take an oath" in which case, an affirmation is made. Moreover, the Judge, the Crown and Defence Counsel heard Mr. Pratico's testimony and were not driven to challenge his competence or ability to testify. A reading of the transcript reveals that Mr. Pratico may not have been the most intelligent witness, but he appears to have understood the questions posed to him and though he clearly lied, his evidence is fairly coherent.

To suggest at this point some impropriety in the use of Mr. Pratico because of his medical condition places greater reliance on the labelling of his condition than its true manifestation. When assessed at the Nova Scotia Hospital in May, 1971, Dr. P.K. John concluded that Mr. Pratico had "some kind of acute situational reaction" and other symptoms which pointed to "a diagnosis of adolescent schizophrenia" (Ex. 47 - Psychiatric Survey - August 31, 1971). Dr. Mian noted, as do the hospital records, that Mr. Pratico's symptoms could be controlled by medication (14/2444, 2461 and Ex. 47 - Progress note- September, 1971). When he returned to the hospital after the

trial in November, 1971, Dr. John noted that in spite of his anxiety "he seems to be in good contact with reality" (Ex. 47-Psychiatric Survey - November 29, 1971).

Based on the medical reports and the evidence of Dr. Mian, there is little to suggest that Mr. Pratico was not competent to testify. The matter of his credibility, as with all witnesses, was a matter for the jury to assess, based on his demeanour, testimony and whatever factors they chose to consider.

We will deal in the next section of this brief with the issue of child witnesses, but at this point, in light of the suggestion that Mr. Pratico should not have been allowed to testify, a brief review of some authorities which deal with the mental competence of witnesses is merited. That discussion raises two topics of relevance to this inquiry.

A. TESTIMONY OF THE MENTALLY ILL

In a recent work, Mental Disability in Canada by Gerald B. Robertson (Carswell, 1987) the author introduces the issue of competence of a mentally ill witness at p. 282:

> "Early common law regarded insanity as an absolute bar to a person testifying as a witness in legal proceedings. By the 19th century, however, this rule had been relaxed, and it was accepted that mental disorder did not necessarily render a person incompetent to testify as a witness. If the individual was capable of being sworn and of giving rational testimony, he was competent as a witness. To a large extent, this remains the tradition today. A persons competence as a witness depends on his capacity to understand the nature of an oath and to communicate, observe and recollect." (Authorities omitted)

Two cases have recently dealt with the procedures to be followed when a mentally ill witness is to testify: R. v. Hawke (1975), 7 O.R. (2d) 145 (C.A.) and R. v. Horbuz, [1979] 2 W.W.R. 105 (Sask. Q.B.). In Hawke, the court sets out what should have been done prior to swearing or affirming a mentally ill witness, whose competence to testify is raised prior to taking the stand. The proper procedure is for the judge, in the absence of the jury but in open court, to assess the witness' competence. Expert evidence of psychiatrists may be required for that evaluation. Once the witness' competence has been assessed by a court, then it is for the jury to deal with the issues of credibility (assuming competence is established). As a guideline the Court adopted the following passage from Wigmore on Evidence, 3rd ed. (1940). Vol. 2, s. 497, at p. 588-9:

> "S. 497, Capacity Presumed: Methods of Ascertainment; Judge and Jury.
>
> (a) The general rule here applies that the capacity of the person offered as a witness is presumed; i.e. to exclude a witness on the ground of mental or moral incapacity the existence of the incapacity must be made to appear.
>
> What is sufficient in order that the offering party may be put to the necessity of adducing evidence of capacity, and the judge to the necessity of determining the existence of capacity, has not been made entirely clear by decisions. It may be supposed that a mere objection raised and a claim to have a 'voir dire' examination would suffice. Moreover, the offering of any extrinsic evidence whatever would suffice to make it necessary for the judge to record a similar finding; though an upper Court should pay no attention

> to the lack of such a finding unless the nature of the evidence appeared.
>
> But it is generally accepted that the fact that the witness is, at the time of testifying, or was shortly beforehand, a lawful inmate of an asylum for mental disease or defect, or an adjudged lunatic or defective, makes it necessary that his capacity should be examined into and an express finding appear." (emphasis in original)

The judge's responsibility to deal with competence prior to a witness testifying had been confirmed by the Supreme Court of Canada in R. v. Steinberg, [1931] O.R. 222, 4 D.L.R. 8, where the Ontario Court of Appeal's decision to that effect is affirmed without reasons.

In Horbuz the mentally ill witness took the stand and was sworn. What next occurred is described by MacPherson, J., at p. 106:

> "Near the end of the second day of the trial the son, Carmen, was called by the Crown and sworn to testify against his father. After about a half hour, maybe longer, of confused and repetitious and incoherent testimony, Mr. Hillson, the Crown prosecutor, asked for an adjournment. By that time it was apparent to me, as I am sure it was to everyone else in the courtroom, that Carmen was incompetent as a witness by reason of some mental disease or retardation which, as a judge, I am unable to diagnose or to define."

In light of that conclusion, the judge considered his two options: to stand-down the witness and direct the jury to disregard the evidence or declare a mistrial. He found that the witness' testimony was so prejudicial that he could only follow the latter course and a mistrial resulted.

B. A PSYCHIATRIST'S OBLIGATIONS

Though psychiatrist-patient privilege is not universally recognized, there is a relationship of strict confidence between psychiatrists and patients. Though a psychiatrist is compellable and will probably be required to disclose the nature of a diagnosis and prognosis, what is not clear is whether a psychiatrist has a duty to voluntarily warn people about the propensities of the patient. As Professor Robertson notes at p. 381 of Mental Disability and the Law in Canada:

> "As with all physicians, psychiatrists are under an ethical and legal duty to preserve the confidentiality of information relating to their patients. Breach of this duty probably gives rise to an action for damages at common law, and may also result in professional disciplinary proceedings. In the context of a psychiatric hospital, the duty of confidentiality extends to all members of the hospital staff. In many provinces, (including Nova Scotia) the duty to respect and maintain the confidentiality of patient records is set out in the mental health legislation." (Authorities omitted)

In the United States, authorities have required psychiatrists to warn where they believe a patient poses danger to a particular person or to the public in general. This position has not yet been adopted in Canada, although there have been some suggestions that civil liability might result from a failure to warn. Professor Robertson's detailed review of this is attached as Appendix B.

In conclusion, two matters can be affirmed from this discussion:

(a) In the absence of actual knowledge of a witness' possible incompetence to testify, the Crown has no obligation to raise the possibility of incompetence with the defence or the court. If the Crown knows facts which place the witness' competence in issue, he is obliged to advise the defence and to avail the court of the evidence so the judge can rule on the witness' competence.

(b) The psychiatrists treating Mr. Pratico were constrained by ethical obligations not to voluntarily advise anyone of the details of Mr. Pratico's condition in 1971. Had they been called to testify, they would have been compellable, but in the absence of a subpoena, they were not in a position on their own volition to advise the Crown, defence or court of Mr. Pratico's condition at that time. In other words, even if he had been incompetent to testify (which does not appear to be the case) the psychiatrists could not have voluntarily come forward to offer that information.

In conclusion, it is important to remember what Mr. Pratico's actual mental status was prior to his testifying at trial. In the August 31, 1971, Psychiatric Survey (Ex. 47) Dr. John states:

> "This shows a very anxious, jumpy, jittery 16 year old boy. He seems to be quite frightened and scared and quite happy to be in the hospital. He stated that on top of all his problems he has got himself into a

> tight spot by witnessing a murder in the park not too long ago. He is one of the only two witnesses in this murder trial and there have been some threats on his life. This has not made matters easy for him. He has also stated that there are some racial overtones in this murder trial because the boy who was murdered was a negro lad and the murderer (alleged) was an Indian boy. It seems that the whole Indian tribe in the local area considers him as an enemy and would like to liquidate him..."

In the social service note of September 23, 1971, (Ex. 47), it states:

> "Moreover, the impending pressure of the Court Hearing (scheduled for some time in October) seemed to be causing John some increasing anxiety."

We believe policies should be developed to define the responsibilities of the Crown when dealing with the mentally disabled, so as to ensure their fair treatment without undermining rights of an accused for a fair trial.

Further we urge that information be promulgated to psychiatrists regarding their rights and obligations when their patients came in contact with the criminal justice system.

V. CHILD WITNESSES

Donald Marshall, Jr. was convicted on the perjured testimony of three juvenile witnesses: John Pratico, Maynard Chant and Patricia Harriss.

Their perjured testimony, which went unchallenged for many years while they kept their silence, was perhaps the single most important factor which lead to Mr. Marshall's wrongful conviction and lengthy period of incarceration.

Our system of justice is based on truth. Without it innocent people are wrongfully convicted and languish in jail as a consequence. Yet, the system is supposed to be built around a series of checks and balances to protect - as best we can- against the possibility that an innocent man will be unlawfully convicted. Clearly it did not work in the case of Mr. Marshall There are countless reasons why. This submission will deal with some of them.

A. JOHN PRATICO

The first time Mr. Pratico testified under oath was at the Preliminary Hearing (12/2224). The second time was at Mr. Marshall's trial. On both occasions he was questioned by the presiding judge and asked sufficient questions to satisfy the Court that he understood the difference between truth and falsity and the consequences of lying while under oath. Yet, despite these admonitions, he continued to perpetuate a false story.

Mr. Pratico said that he would have been more comfortable had he been taken aside by the trial judge and questioned out of the court atmosphere. He may have spoken more freely. Can that kind of request be accommodated within our present system? Naturally counsel for the accused ought to be present at such an interview. Can the number of other people be restricted so as to diminish any fear or discomfort a juvenile witness might have? This is something which the Commission must consider.

Mr. Pratico's conscience was bothering him when he testified in the Supreme Court in November, 1971. He sought out Mr. Marshall's lawyer, Simon Khattar and confessed to him that his first story was not true. He must have realised the effect would have long lasting repercussions on Mr. Marshall's freedom and that he had best confront the man hired to defend him.

Mr. Pratico said he wanted to tell the Court the truth, but that when he took the witness stand, Mr. Marshall's lawyer did not ask the proper questions (12/2101). It may be argued that both the Crown and the Defence were prohibited from pursuing this significant feature by the ruling made by Mr. Justice Dubinsky. It may be that Mr. Marshall's lawyer did not pursue vigorously and in a timely fashion this recanting by Mr. Pratico as soon as he took the witness stand. But, several things are clear:

- Mr. Pratico was given no comfort "to tell the truth" by the manner in which he was questioned by the Trial Judge, either at the preliminary or at the trial;
- Mr. Pratico declined to tell the truth, while having several opportunities to do so under oath;
- The pleas made by Mr. Marshall's lawyer (and other counsel and officials present) Mr. Pratico not to worry about what he had said before, and to tell the truth at trial were ignored.

The challenge to this Commission will be to comment on the quandry faced by our system of justice as illustrated by this and other incidents, and to speak of guidelines which may be useful to the Court and practitioners in striving to ascertain the truth.

We recommend improvement of the swearing-in process by a judge to expand the types of questions asked of children, and that in the exercise of its discretion the court make the child at ease by possibly covering that segment of the trial i.e. swearing-in of a child, in a semi-private surrounding with only the judge, accused, and counsel present.

His Honour Judge Lewis Matheson testified that in his experience he would interview juvenile accused persons in the presence of a guardian or parent, but this safeguard would not necessarily apply to juvenile witnesses.

Neither Mr. Pratico's mother nor father accompanied him to the police station nor did they attend the preliminary hearing

or the lengthy jury trial while he testified. Surely, as we examine fault, it can be said that it is incumbent upon a parent to provide such comfort and guidance to his/her child who is faced with such an onerous responsibility as testifying as an alleged eye witness to a murder.

B. MAYNARD CHANT

Mr. Chant tried to justify his lies by saying he felt "pier pressure". He explained that his mother was continually telling him to tell the truth (6/1033-4), he was on probation (which might be affected as a consequence), and he was intimidated by the "big" policemen (5/879). Mr. Chant said he knew that what he was doing was wrong but "not terribly wrong" because he had concluded that Mr. Marshall was guilty anyway. Mrs. Chant may also have rationalized her actions for this same reason.

He said he was also aware of the notion of perjury following his encounter with Detective, John MacIntyre at the Town Hall in Louisburg (6/1035).

This Commission must ask itself whether it's wrong for a police officer, or a prosecutor, or a private practitioner to remind a juvenile of the consequences of not telling the truth i.e. perjury? Does that conjure up something sinister or wrong? Or is it simply restating the obvious? Mr. Chant was questioned by the Provincial Court judge at the preliminary hearing on the difference between truth and falsity and the consequences thereof

(6/1035). Despite these efforts, Mr. Chant was not persuaded to be truthful.

At the Reference in 1982 prosecutor Frank Edwards questioned Mr. Chant about the motives of the investigating Sydney Police department. Mr. Chant replied that the police were after the truth (6/1051).

Several R.C.M.P. officers were questioned about the practice they adopted. Staff Sgt. Murray Wood said that in 1971 his practice would be to always take a statement from a juvenile while a parent or teacher was present (10/1816). The same response was elicited from former Deputy Commissioner Douglas Wright (28/5255).

To a question posed by Commissioner Evans, Judge Matheson agreed that it would be a concern of his whether a juvenile's statement was voluntary if no parent/guardian were present (27/5045-6).

We have been critical of Mr. Pratico's parent(s). We make the same submission with respect to Mr. Chant's mother and father. Mrs. Chant apparently just assumed that her son was lying because the police thought he was (20/3528). Astonishingly, she never asked him what the truth was. She said her reason was that she probably did not want to have to deal with the truth. She "didn't want to fact it" (20/3545). She said they were comforted by the fact their friend (and then Louisburg Chief of Police) Wayne Magee was present during the interview (20/3536). She said the police felt her son would talk

more freely if she were not there and so she voluntarily left the room (20/3538); not unlike the decision taken by Mrs. Harriss. Mrs. Chant accompanied her son to court but did not stay for its duration because "it wasn't necessary" (20/3549).

Even though Mrs. Chant read the paper during Mr. Marshall's trial and concluded that her son was testifying to something opposite to that which he had told her, she couldn't remember if she had ever confronted him about it. Later she said she "probably asked him why he lied" but couldn't remember what her son said (20/3560).

And even though she was advised by Mr. Chant in or about 1979 that he had lied, Mrs. Chant and her husband kept their silence. She excuses that conduct by saying she felt Mr. Marshall was guilty anyway (20/3557).

C. PATRICIA HARRISS

Patricia Harriss said she was worried about perjury if she were to change her story (15/2806). She confided in her mother. Her mother was "confused" about it all and arranged a meeting for her with lawyer, Mr. A. O. Gunn. They met at 4:30 p.m. on June 28, 1971, but when they got there Ms. Harriss failed to disclose the truth, because she was "frightened" of Mr. Gunn (15/2808).

Did Mrs. Harriss do what one should expect from a reasonable and conscientious parent? Here, Ms. Harriss, in the privacy of a lawyer's office and with the comfort and guidance provided by her mother declined to tell the truth. She missed an

opportunity and maintained her silence until 1982 when Staff Sgt. Wheaten visited her. She felt relieved and happy, presumably in the unburdening of her secret.

If only Sub-inspector E.A. Marshall had seen fit to interview these juvenile witnesses, alone, in 1971. Through his considerable experience with the R.C.M.P. he may have quickly come to the same conclusion by Staff Sgt. Harry Wheaton, that these three juveniles had lied. Had he done so, Mr. Marshall's wrongful incarceration would have only been for a matter of weeks.

Others might suggest that it was only maturity or passage of time which enabled Ms. Harriss to finally disclose the truth to Staff Wheaton in 1982. No one will ever know.

Mrs. Harriss placed her confidence in the two police officers interviewing her daughter. In her eyes these were "family men" (16/2964) and she was content to leave her daughter in their company.

We submit that properly trained police investigators ought to be able to uncover the facts, consider demeanour and judge the candour of a juvenile while still in the company of an adult/guardian. In this day and age the public ought to demand such conduct from the police. Such are the safeguards we expect against improper questioning and potential abuse.

We recommend this Commission should comment upon techniques that ought to be used by police when interviewing children - be they witnesses or suspects. From minimal

protection, such as the presence of a friendly adult, to video recording all interviews with children, the goal must be to insure the natural threat that an adult can be to a child is not allowed to become overbearing, while at the same time being cognizant of the risks of children not telling the truth, for motives unrelated to the presence of an adult.

VI. JIMMY MacNEIL'S STATEMENT: THE CROWN'S RESPONSE

When Jimmy MacNeil went to the police department in November, 1971, he said that Roy Ebsary stabbed Sandy Seale. The assistant prosecuting officer, Mr. Lewis Matheson, was immediately notified. All events subsequent to that pertaining to the statements of Mr. MacNeil and Mr. Ebsary and the R.C.M.P. investigation were made known to the Crown, at least at the level of the local prosecuting officer.

The sequence of events merits brief recitation:

Monday, November 15, 1971

- In the early evening, Jimmy MacNeil comes forward and gives a statement along with his brothers David and John MacNeil (Ex. 16/171-181).

- Mr. Matheson attends the Sydney Police Department; he reviews the statements; he speaks with Jimmy MacNeil and suggests that a statement be taken from Roy Ebsary (27/5009-5016). At this point, Mr. Matheson thought Jimmy MacNeil was lying (27/5013).

- Statements are taken from Roy, Mary and Greg Ebsary (Exhibit 16, pages 181-194).

- Mr. Matheson calls Mr. Anderson at home and informs him of the situation, suggesting that an investigation should be done by another police force and that a polygraph test might be administered (27/5020).

Tuesday, November 16, 1971

- Mr. Anderson contacts the R.C.M.P.

- He "wanted to find out whether this person who was making this admission was telling the truth... and the R.C.M.P. were requested to do a polygraph" (50/7040-41). Although the usual procedure was to advise the Deputy Attorney General or the Attorney General of an unusual matter such as this, Mr. Anderson has no recall of doing so (50/7142).

- Counsel for Donald Marshall, Jr. files their notice of Appeal.

- Sub-Inspector E.A. Marshall is assigned to the file (30/5056).

Wednesday, November 17, 1971

- Insp. Marshall proceeds to Sydney where he interviews Jimmy MacNeil, meets with Detective John F. MacIntyre and reviews the file (30/5621-24). He calls Sgt. Burgess in Halifax to arrange for a polygraph test (30/5624).

- Insp. Marshall returns to Halifax (30/5633). He believes Jimmy MacNeil's account was "a figment of his imagination" (30/5645).

Tuesday, November 23, 1971

- Cpl. E.C. Smith and Insp. Marshall return to Sydney where Smith conducts polygraph examinations of Roy Ebsary and Jimmy MacNeil (Exhibit 16/202 and 30/5637).

- The conclusion of the polygraph operator was:

> "It is my opinion, based on Ebsary's polygraph examination, that he was telling the truth to his questions.
>
> It will be noted that I gave an indefinite opinion as to MacNeil's polygraph examination; however, the following should be added. This subject was interviewed after the examination and on a number of occasions was quite ready to admit that he was lying and that he was only 'joking' when he said that (EBSARY had stabbed SEAL (sic). He would then revert to his original story. I believe that his mind was open to anything that might be suggested to him. Under the circumstances I do not feel that he is mentally capable of responding to a polygraph examination and for that reason no other tests were administered. I do feel, however, that EBSARY was truthful with reference to his polygraph examination."

- After the test, the results were explained to Donald C. MacNeil, Q.C. (30/5648ff) and Mr. Matheson (27/5023).

- Insp. Marshall testified that at the meeting, Donald C. MacNeil said 'Gee I better call Leonard Pace' (31/5762). He had no recollection of the conversation or what was said after the conversation (31/5767) and was not 100% sure that it was Mr. Pace to whom MacNeil spoke (30/5652), but 'I'm 99% certain, and don't ask me why but that sticks in my mind. I can remember him using the telephone...' (30/5653). Pace categorically denies that he was advised of the results of the polygraph (72/12805) and said he had no knowledge of the case in 1971 (72/12800).

Tuesday, November 30, 1971

- Cpl. Smith prepares and forwards his report to the C.I.B. officer (Supt. Donald Wardrop) in Halifax (Ex. 16/202). On December 16, 1971, Mr. Anderson is appointed a judge of the County Court and after cleaning out his desk, leaves the department (50/9149ff).

December 21, 1971

- Insp. Marshall completes his report and forwards it to the C.I.B. officer (Ex. 16/204 and 30/5660). Supt. Wardrop had previously been appraised of the results of the polygraph and there was no rush to complete the report (30/5658ff).

After December 21, 1971

- Supt. Wardrop received the report and believes he took it to the Attorney General's department and handed it to Mr. Anderson or Mr. Gale (37/6761). The report should have been sent to the Attorney General's department by the readers (37/6762). There is no written record of the report being sent by the R.C.M.P. to the Attorney General's department (37/6783-84). No request from the Attorney General's department for a report is noted in the documentation.

It is the position of the Attorney General that the Crown is indivisible. Therefore, the Crown through the Attorney

General's agents, Donald C. MacNeil and Mr. Matheson, knew of the results of the R.C.M.P. investigation. However, the bulk of the evidence would indicate that the report itself was not received by the Attorney General's department. Supt. Wardrop's recollection, though he attempts to be specific, is not clear. He spoke of Mr. Anderson and Mr. Gale in the same breath. This failure to distinguish between them undermines his credibility on this point, for he could not have delivered the report to Mr. Anderson after December 21, 1971 because Mr. Anderson had been elevated to the Bench. Further, Mr. Gale categorically denies receiving it (75/13335) as does Innes MacLeod, the then Deputy Attorney General (39/7314), and Milton Veniot (38/7030).

In terms of ultimate responsibility, little turns on the fact that the R.C.M.P.'s report was not received at the Attorney General's department, although it is a further coincidence in this unfortunate affair which may have made a difference. Had there been a physical report, someone may have seen it and decided that because of its contents, it merited further discussion. Its absence accentuated the problem which occurred as Mr. Anderson left the department and his responsibilities were assumed by others.

The department's failure to have an organized transfer of files and a briefing of department personnel on current matters indicates poor procedures and organization. Both Innes MacLeod and Leonard Pace acknowledged their ultimate responsibility for any mishap which resulted from this.

Even if the report had been received by the department, or Mr. Anderson had briefed his successors in the department to follow up with the R.C.M.P. to get the report, the ultimate conclusion that would have been presented to the department was still that Jimmy MacNeil was not worthy of belief and Mr. Ebsary was telling the truth. In fact, that's the very conclusion that Insp. Marshall and Cpl. Smith reached after the polygraph examination of which both Donald C. MacNeil and Mr. Matheson were appraised. So assuming nothing changed from the date of the polygraph until the final report, the question remains what should the Crown have done with the information?

Because the prosecuting officer, the R.C.M.P. and presumably the Sydney Police Department did not believe Jimmy MacNeil and more importantly, when relying on the polygraph believed that "his (Jimmy MacNeil's) mind was open to anything that might be suggested to him" (Ex. 16/203) and "Ebsary was truthful" (Ibid), it is doubtful that the Crown would have reached any other conclusion. There was a <u>bona fide</u> belief that the polygraph would affirm if there was any truth to Jimmy MacNeil's story. This misplaced emphasis (primarily by the R.C.M.P.) and the Crown's reliance on that can be criticized in hindsight, but is understandable. Given these conclusions, there may have been nothing to tell the defence, other than some "crackpot" came along and "joked" about the fact they had seen someone else kill Mr. Seale. From that perspective and with that viewpoint, it is easy to imagine that the defence would have done

nothing with the information. Nonetheless, the Crown should have advised the Defence, even if they felt it might be a "wild goose" chase. The Crown's failure to disclose is regrettable and should never be allowed to happen again.

To ensure this, several observations are made:

1. **Whenever senior officials in the department leave their positions, there should be an organized procedure for transfer of responsibility to successors and/or briefing of superiors on current matters;**

2. **The R.C.M.P. should have guidelines in place for procedures to be followed in reviewing the work/investigation of another police force so that too great a reliance is not placed on the work of the original force to the detriment of the R.C.M.P.'s review;**

3. **There should be policies to determine what information coming into the Crown's possession subsequent to a conviction merits investigation and/or disclosure to the defence and the means by which this disclosure will occur.**

VII. JIMMY MACNEIL'S STATEMENT: THE R.C.M.P. INVESTIGATION CONDUCTED IN NOVEMBER, 1971

A. WHAT THE R.C.M.P. WERE ASKED TO DO

We have reviewed in Section VI, the facts of November 15, 1971, when Jimmy MacNeil came forward with a statement about the murder of Sandy Seale.

Mr. Robert Anderson's request of the R.C.M.P. was:

> "... to investigate the possibility of his telling the truth, or not telling the truth." (50/9141)

It is anticipated others will suggest that this request by Mr. Anderson constituted a direction to limit the scope of inquiry. Such a proposition is untenable and contrary to both the evidence and common sense.

Mr. Anderson knew as much of the incident as was disclosed to him by Mr. Lewis Matheson. The key feature was the appearance of Jimmy MacNeil telling a story which could only be described as startling; it had to be taken seriously.

This occurred only ten days after the conviction of Donald Marshall, Jr., when he was still incarcerated at the local jail in Sydney.

It made sense for Mr. Anderson, in his contact with the R.C.M.P., to stress the significance of establishing the veracity of Jimmy MacNeil's statement. All other factors were details. By asking the R.C.M.P. to investigate, and suggesting that they employ a polygraph expert, Mr. Anderson was concentrating on what he concluded was the task at hand; testing the veracity of a man

who might well have been the key eye witness to a murder. Mr. Anderson could not be expected to dictate the means for the R.C.M.P. to accomplish that objective; nor could/would he deliberate on the parameters of such an investigation. Put simply, what to do, how to do it and the time within which it ought to be concluded were matters left in the hands of senior police officers.

From the testimony of Sub-Inspector E.A. Marshall, one might infer he drew some distinction between a "review" and a "re-investigation". Insp. Marshall told the Commission that over the years he tried to reconstruct the assignment in his own mind. By virtue of the fact that he did not take with him two teams of investigators he concluded that he was not ordered by his superior officer, Supt. Donald Wardrop, to do a re-investigation, but rather simply told to go to Sydney and complete a review.

Even if one were to accept this reconstruction by Insp. Marshall, which we do not, it raises several disturbing questions. No one at the Attorney General's Department could possibly have known of these refined distinctions in language. Liberty is too important to have it threatened or lost on account of bureaucratic niceties.

As noted earlier, we say that Insp. Marshall's reconstruction is incorrect. Supt. Wardrop absolutely rejected any suggestion that he limited Insp. Marshall to a review. He testified that he did not receive any instructions from the

Attorney General's Department as on to do, or how to do it. These things were - as he expected - left entirely to the R.C.M.P. It was purely in the discretion of the R.C.M.P. (37/6793-4).

It was clear from Supt. Wardrop's evidence that he expected Insp. Marshall to do whatever was necessary to get to the bottom of the case. He was a senior and highly experienced detective. Supt. Wardrop felt that it was "basic routine" for Insp. Marshall to have gone;

> "...into the whole thing and talk to everyone that was involved" (37/6745)"

Supt. Wardrop fully expected Insp. Marshall to act independently of the Sydney Police Department. He was shocked to learn, only recently, that his key investigator had really only rubber-stamped the effort of the Sydney Police Department and had not done what Supt. Wardrop was assumed Insp. Marshall knew he had been ordered to do.

> "... and I'll repeat, I did not even have one inkling that he hadn't gone through the whole thing, investigated everything that I would have done on the same type of job..." (37/6819)

This is just one more chilling example of a situation seen all too often during these commission hearings, where people in authority have either done nothing, or done the wrong thing, or assumed others were responsible. As a consequence, mistakes were made and the system of checks and balances, which was assumed to have prevented such abuses, failed. Undeclared

sentiments, withheld opinions and blurred responsibilities thwarted the proper exercise of professional skill and judgement.

We recommend, inter alia, that the lines of communication between a local prosecuting officer and the Attorney General's Department, and the R.C.M.P. (and vice versa) be strictly, and accurately defined; that proper records be kept of written and oral communications transmitted between those agencies; and that the roles and responsibilities of both police and legal officers within the system be delineated, understood and tested to see if they are working properly and are remaining current.

B. WHAT INFORMATION THE R.C.M.P. HAD AT THEIR DISPOSAL

There was nothing to limit the scope of Insp. Marshall's investigation. His superior officer expected him to do everything that was necessary to get at the truth. That is what was requested by the Director (Criminal) of the Attorney General's Department.

A man had been convicted of murder, only ten days earlier. If a mistake had been made and the wrong man were convicted, one could proceed with dispatch while witnesses were still available and recollections fresh.

Essentially, Insp. Marshall had at his disposal anything he required. He sought a polygraph expert and was provided with one. No shortage of manpower prevented him from attending at the park, meeting with every witness, following up on leads which may have been generated as a consequence of

witness interviews, testing the veracity of witness' testimony as contrasted to the physical evidence, or establishing whether in fact there was any connection or communication between the "independent" eye witnesses John Pratico and Maynard Chant.

With an almost naive reliance upon the infallibility of the polygraph, Insp. Marshall proceeded with his assignment. He merely met with Detective John F. MacIntyre, and reviewed the portions of testimony which were provided to him.

Insp. Marshall neither read nor sought the Sydney police department file(s) on their investigation. Based on his experience and friendship with Mr. MacIntyre, Insp. Marshall was content to rely upon the thoroughness, objectivity and accuracy of conclusions reached by the Sydney Police.

By looking at the information available to the R.C.M.P. and by asking whether it was utilized effectively, or at all, constructive criticisms can be made and recommendations put forward to assist law enforcement officers in the future. As well, one must look at the features not addressed by the R.C.M.P. to discover if there are other useful lessons to be learned.

C. WHAT THE R.C.M.P. DID, AND THE RESULTS THAT WERE ACHIEVED

It is submitted that for many reasons Insp. Marshall erred. These errors in professional skill, judgment and analysis were either never detected or overlooked as they passed along the chain of communication and command.

Like others struck with the technology and "science" of the polygraph, especially at that time, Insp. Marshall would probably admit today that he placed far too much reliance on its infallibility. He acquiesced to the correctness of this machine and was not as conscientious or probing as he otherwise ought to have been. Equally as disturbing is a lack of reporting between Insp. Marshall and polygraph technician Cpl. Eugene Smith, either during the preparation of Insp. Marshall's report or immediately after it was completed.

We know today that Mr. Ebsary lied. Yet his untruthfulness was not disclosed by technology. Nor was it detected by experienced homicide detectives trained to be alert to those subtleties of demeanour and speech in persons capable of fraud, and to be vigilant to physical and other evidence which contradict and impugn. It is almost as though Cpl. Smith believed that Mr. Ebsary was being truthful - 'that's what the machine tells us, and machines don't lie'. Perhaps he and Insp. Marshall let their guards down. In this case it appears that they did not maintain the level of suspicion and doubt that skilled police officers must strive to maintain.

Exhibit 16/202 contains Cpl. Smith's report of November 30, 1971. He prepared this upon his return to Saskatchewan some two weeks after Jimmy MacNeil had come forward and identified himself to the Sydney police. The only other report produced by the R.C.M.P. was Insp. Marshall's report, dated December 21, 1971, at Ex. 16/204.

At page 1 of his report Insp. Marshall said he conducted a "thorough review" (Ex. 16/204). In the same report he wrote that they completed their investigation (31/5745). What do these terms mean? Insp. Terrance Ryan testified that there was a fine line between a review and a re-investigation. He supposed that a review was "considerably less than a re-investigation" (11/1910).

That distinction, if any, was lost on a senior officer like Supt. Wardrop. He spoke candidly of what he expected of Insp. Marshall and described his surprise upon learning that Insp. Marshall's effort did not measure up.

It is alarming that the written policies and procedures of the R.C.M.P. did not, according to Insp. Marshall, stipulate this distinction nor clarify for investigating officers the standard objectives, approved methods and satisfactory lines of communication, both from within and without the force.

We recommend that the R.C.M.P. manual must clearly delineate procedures from communications within the force and with outside agencies. Senior R.C.M.P. officers should be expected to explain all such requirements to the provincial law enforcement agencies to which the force is accountable.

It was a serious omission for Insp. Marshall to pay no heed to the previous weapons offence of Mr. Ebsary. Were he to have pursued such a significant item he may have been easily led to the witness, the weapon and the true culprit.

If he had given serious consideration to this evidence, it may well have led him to question Mr. Ebsary's wife, Mary, his son and daughter, Jimmy MacNeil and others. It's not unreasonable to expect that they would soon have astounded and alarmed the R.C.M.P. officer with tales of horror, violent temper, peculiar dressing habits, a fascination/fixation about knives, Mr. Ebsary's drinking binges and the like.

These are only examples of numerous clues which should have quickly led Insp. Marshall to test the plausibility of the "robbery theory" without placing complete reliance upon the polygraph exam. The similarities in the description of the assailant(s) given by Mr. Marshall and the veracity of Mr. Ebsary and/or Jimmy MacNeil, if investigated skillfully and vigorously by trained police interrogators, would have led to a different conclusion in his report.

Insp. Marshall consulted with R.C.M.P. Sgt. McKinley upon his arrival in Sydney. They concluded prematurely that the stabbing of Mr. Seale by Mr. Ebsary was merely a "figment" of Jimmy MacNeil's imagination and so they did not immediately question him, nor take any further action. One must conclude that they confined their analysis to a paper review. That was their choice, and in the result, their mistake. No blame can lie with the local prosecuting officer, Donald C. MacNeil, Q.C., nor the Attorney General's department.

As we state repeatedly in our argument, the machinery of justice is comprised of many parts. One of these is truth.

There must be a preparedness to speak it, a willingness to accept it and a skill in testing it. Regrettably, the officers of the Sydney police department and the R.C.M.P. did little to challenge and test the accuracy of what was being said to them.

Whatever checks and balances there might have been on the work conducted by Insp. Marshall, is only speculative. Sgt. McKinley is dead, but the record shows no independent critique at least at the Sydney subdivision level.

Insp. Marshall was on to something when he inferred that Mr. Marshall was intent on rolling somebody (Ex. 16/206). Yet we are left to wonder why this was never vigorously pursued in questioning Jimmy MacNeil, Mr. Ebsary, or members of his family.

Further, Insp. Marshall too readily excused the lies told initially by Messrs. Pratico and Chant. He put it down to "feeling pressure" (Ex. 16/206). Insp. Marshall neglected to test this turnabout or even to question the witnesses to see if their observations were truly "independent".

Insp. Marshall relied too much on his inherent faith in "the system" (30/5665). He assumed it would and had worked. He and others placed great stock in the fact Mr. Marshall had been represented by two experienced counsel, had his case subjected to a lengthy preliminary inquiry and trial by judge and jury and that the Trial Judge was Mr. Justice Dubinsky (30/5632 and 37/6852). Whether called a review or a re-investigation, any reasonable person would assume that an analysis had to be

conducted separate and independent of the initial players to detect any errors or mistakes.

Yet there is no satisfactory answer available to the R.C.M.P. as to why they did not question or give a polygraph examination to Messrs. Chant, Pratico and Marshall. Why restrict the re-examination to a threshold type of test to first record the veracity of Jimmy MacNeil and Mr. Ebsary, especially when Mr. MacNeil was a poor candidate because of his drinking problem (Ex. 16/207).

Insp. Marshall failed to ask the Sydney police for the complete file (30/5705) or for the statements of other witnesses, including Mr. Marshall (30/5681). He ignored warning signals (30/5707)and he admits that he failed in conducting a good or "intensive" investigation (30/5706;31/5729). He did not conduct any independent investigation of Mr. Chant or Mr. Pratico (31/5750). He relied heavily on the advice given by Mr. MacIntyre and relied completely on information gleaned from police sources (31/5783). It would not have taken a team of R.C.M.P. officers to complete any of these steps. He and Sgt. McKinley might have interviewed practically all of these witnesses, attended at the park with Jimmy MacNeil to reconstruct the murder, "tested" the stories of Messrs. Chant and Pratico, examined the physical evidence, pursued Mr. Marshall's description of his assailant(s), inquired of Mr. Ebsary, all during the 6-7 days pending Cpl. Smith's arrival from Regina.

At the end of the 30th day of hearings, a startling exchange took place between Chief Justice Hickman, and Insp. Marshall. The polygrapher, Cpl. Smith, in his report could only give "an indefinite opinion" of Jimmy MacNeil and wrote:

> "Throughout MacNeil's examination there were irregular and erratic reactions to the test questions. These variations are the type which prevent an analysis of the charts and I can render no opinion as to whether or not MacNeil was telling the truth." (Ex. 16/202) (emphasis added)

Yet in his report, Insp. Marshall, reached his own conclusion - which he said was based on the polygraph test - that Jimmy MacNeil was not telling the truth. That conclusion by Insp. Marshall was clearly erroneous and yet a fundamental tenet of his report. That conclusion prompted this exchange with Chief Justice Hickman:

> "BY MR. CHAIRMAN:
>
> Q. Did I understand you to say that you had concluded based on the polygraph test, that Jimmy MacNeil was not telling the truth, and Roy Ebsary was?
>
> A. Yes, sir.
>
> Q. Was that the conclusion of Smith?
>
> A. I'd have a tough time answering that one, My Lord.
>
> Q. Why I ask you that is because...
>
> A. Yeah.
>
> Q. ... in his report, he says that as a result of his analysis, that he can render no opinion as to whether or not MacNeil is telling the truth.

A. Yes.

Q. Did you interpret that as meaning that MacNeil was not telling the truth?

A. I interpreted it as being a fifty-fifty possibility that he was telling the truth or lying.

Q. So the ...

A. In other words, My Lord, there is a fifty-fifty chance that he was telling the truth, and there's a fifty-fifty chance that he was lying. Does that make sense?

Q. It's not for me to respond to that. So that your conclusion was based upon your two interviews, a report that Ebsary was telling the truth, and that there's a fifty-fifty chance that MacNeil was not telling the truth.

A. Yes, sir.

Q. And that concluded the investigation?

A. Yes, sir (30/5664-5).

Insp. Marshall went on to state that in his opinion at the time, Mr. Ebsary's veracity had been <u>strongly</u> affirmed and his test results were "so positive". When pursued on this point, he thought he recalled Cpl. Smith showing him Mr. Ebsary's test chart and saying something to the effect that there was no doubt in his (Smith's) mind that Ebsary was telling the truth (31/5666-7)

However, Cpl. Smith denied telling Insp. Marshall that he was "positive" or that there was "no doubt" in his mind that Mr. Ebsary was telling the truth:

"So I can definitely say I did not say that."

(37/6906)

Further, Cpl. Smith was not able to tell whether Jimmy MacNeil was telling the truth when he said he had seen Mr. Ebsary stab Sandy Seale:

"Q. Did you ask him if he had been drinking?

A. It was certainly discussed with him, yes.

Q. And what did he respond?

A. Oh, he was quite willing and ready to admit that he did have a problem with alcohol.

Q. Yes. So whether or not he was telling the truth when he said that he saw Ebsary stab Seale, you were not able to make a determination.

A. I was not able to make a determination.

Q. Did you tell that to Insp. Marshall?

A. Yes.
Q. What did you say to him?

A. I told him I was not able to determine whether or not the man was truthful." (37/6941)

So it is Insp. Marshall's opinion, not Cpl. Smith's, that Jimmy MacNeil was not telling the truth (37/6894). Yet, the clear message from reading Insp. Marshall's report is that this was his conclusion, shared by the polygrapher and reached as a consequence of a thorough investigation and the scientific results of a polygraph examination.

It is astonishing to learn that the polygrapher never saw a copy of Insp. Marshall's report until the night before he testified at these hearings. Although they were the two single most important investigators, sent exactly 17 years earlier to critically examine the correctness of Mr. Marshall's conviction, they never did collaborate on the report being sent to their superior officers for action by and at the request of the Attorney General's department:

> "Q. He then indicates in his report as a result of that, that there was no doubt in his mind that MacNeil was not telling the truth.
>
> A. That's his opinion, not mine.
>
> Q. Did you discuss that with him at all?
>
> A. With who?
>
> Q. With Al Marshall what his conclusion was.
>
> A. I've never ...until last night saw a copy of Al Marshall's report. I've never discussed this file with Al Marshall since. No, I never did.
>
> Q. And in November of 1971, did you have any discussion with Al Marshall about his conclusion that MacNeil was not telling the truth?
>
> A. He never told me that.
>
> Q. He never told you that?
>
> A. No.
>
> Q. And the information that you relayed to Marshall was simply that you couldn't form any opinion at all?

> A. That's right. As I said at the outset this morning, I knew that he was skeptical but he never, ever told me that he felt that MacNeil was lying." (37/6894)

This revelation is as peculiar as the apparent refusal or reluctance of Sydney police detectives and patrolman to share information, descriptions, statements, etc.

To his credit, Insp. Marshall admitted that a case like this one required a fresh mind, fresh approach and fresh thinking, unfettered by any former relationships (31/5774); that the fault for failing to conduct a thorough review lay on his shoulders (31/5730); and that he had never been as "slip-shod" in any other investigation as he was in this case (31/5753).

This case and this Royal Commission stand as a striking example that acquaintanceships should never intrude and thereby prevent independent, critical analysis. If that means that any such re-investigation ought only be conducted by an officer who has no connection with the community or officers who conducted the initial investigation, then this ought to be a recommendation of this Commission.

D. HOW WERE THE RESULTS OF THE R.C.M.P. INVESTIGATION REVIEWED BY OTHERS, AND WITH WHAT RESULT?

As noted earlier, Cpl. Smith's report is dated November 30, 1981. Insp. Marshall's report is dated December 21, 1971. What the R.C.M.P. did with these reports is not persuasively established. The evidence is confusing and at times

contradictory. We know what should have happened; but we don't know what actually transpired.

We do know that although Mr. Anderson requested the R.C.M.P. to take charge of the matter, he was no longer in the department when Insp. Marshall's report was finished. Mr. Anderson had been elevated to the County Court Bench in Halifax and left his office for the last day on December 16, 1971.

There is no evidence or documentary proof to establish that either Cpl. Smith's or Insp. Marshall's report was delivered by the R.C.M.P. to the office of the Attorney General. As a matter of fact Mr. Matheson was "staggered" to learn that the 1971 R.C.M.P. report was never received in the offices of the Attorney General (20/5169).

R.C.M.P. Supt. Scott testified that in a para-military organization such as the R.C.M.P., reports are prepared and circulated "up the line" to be reviewed by senior officers and brought to the attention of the C.I.B. officer at "H" division (51/9412). This procedure was confirmed by Staff Sgt. Burgess who said that normally one would expect the routing to include the staff readers so that an investigative report prepared by somebody like Insp. Marshall "would still be reviewed by the readers" (39/7197).

On direct examination, Supt. Wardrop believed that numerous copies of such a report would be prepared and eventually circulated by the "distribution centre" of the R.C.M.P. Presumably, copies would then be sent by the readers to

headquarters in Ottawa, the Attorney General's office "and whoever else" (37/6761).

On cross-examination Supt. Wardrop reduced the circulation of Insp. Marshall's report as probably "limited to four parties" (47/6786). He speculated that a copy would be sent to the Attorney General's department, a copy to headquarters in Ottawa, a copy to the R.C.M.P. subdivision in Sydney and the fourth remaining copy would be kept at "H" division in Halifax.

Supt. Wardrop contradicted other witnesses who postulated that Insp. Marshall's report would be critically vetted by his superior officers. Insp. Wardrop allowed this might be so for "a third class constable", but not "an inspector... who is a very competent investigator" (37/6765).

We submit that the very basis for conducting a critical, in-house assessment by superior rank is defeated if exceptions are made on account of seniority or presumed expertise. In fact, a good argument can be made that such reviews ought to be even more stringent in assessing the work of an experienced detective to ensure that complacency, "tunnel vision" or familiarity have not blurred the proper exercise of skill and judgment. Otherwise the reality of tunnel vision spoken of by Insp. Ryan (11/1915) and Staff Sgt. Burgess (38/7143) could neither be detected nor avoided.

If there is no proof that Insp. Marshall's report was ever vetted by the readers specifically assigned to critically analyze; then the R.C.M.P.'s own system for independent review

failed. Staff Sgt. Burgess had no idea whether Insp. Marshall's report was seen by the readers in December, 1971. There was nothing on file to indicate that the readers even considered it (38/7167).

At a later date, Staff Wheaton spoke of the many and varied checks and balances deliberately installed in the system to provide for a proper vetting as to the accuracy and thoroughness of a field officer's investigation (41/7640-1). The clear inference is that in 1971 none of these checks and balances worked.

Our recommendation to this Commission arising out of this discussion is:

1. **The R.C.M.P. should implement stringent amendments to its record-keeping and document dissemination procedures to ensure that reports are directed to proper authorities in a timely manner.**

VII. USE OF POLYGRAPH EVIDENCE

It may be trite to say that over-reliance on the polygraph in 1971 contributed to the lengthy incarceration of Mr. Marshall. A brief review of the evidence illustrates that in spite of the fact it was known to be only an investigative aid, it along with a file review and an interview of Jimmy MacNeil, was used to conclude that Mr. Ebsary was not involved in the murder of Sandy Seale.

Both the Sydney Police Department and the Royal Canadian Mounted Police carried out flawed investigations in 1971 which significantly contributed to Mr. Marshall's misfortune. To the extent that technology was allowed to replace a thorough investigation, the R.C.M.P. must be held responsible. Perhaps no witness, more than Sub-inspector E.A. Marshall, accepted personal responsibility for his errors. It is hoped that this Commission will have some salient advice about police investigations and the pitfalls to be avoided.

On the polygraph, the evidence speaks clearly of what should have been and of what was. On what should have been, Inspector J. Terrance Ryan stated:

> "The polygraph is merely a guide or an aid to an investigator. It is not a determinative tool (11/1875).
>
> . . .
>
> Q. I take it that what you would not do would simply be rely upon a polygraph examination of two individuals, that would not be a complete reinvestigation or a thorough investigation would it?

A. I would have used the polygraph as an aid in the investigation." (11/1888)

Mr. Eugene Smith stated:

"Q. Would it be the sort of thing that you would expect to be the sole investigative tool in any investigation?

A. No, definitely not. The polygraph was then, and as far as I know, is still now considered to be an aid to an investigation and certainly not a substitute for an investigation." (37/6844)

It appears Judge Matheson was aware of this when he stated:

"I knew that a polygraph was not admissible evidence in court, but I was in a bit of a quandary and I thought, while it might be some sort of an investigative aid along with other evidence I thought it would be a good idea if he was done." (27/5019)

On what was, the evidence of Inspector E.A. Marshall is revealing:

"Well, I think really that I'd had it in my mind at that time to use the polygraph and that rather than go full-bore into a total review of the case, everything that MacIntyre had, I was content to say, Okay how do we go about this thing. Let's try the polygraph.

Q. You wouldn't have been at the - Would you have been of the view at that time, sir, that you could use the polygraph to the exclusion of getting the full story as may have been revealed by the file at the Sydney Police Department?

A. I thought that by using the polygraph it would knock the thing on the head pretty quick." (30/5616)

. . .

"A. Well, my best recall is that the combination of the polygraphist pre-test interrogation and then the use of the machine that it's reliability was quite high." (30/5640)

. . .

"Q. Because you've already told us a couple of minutes ago, sir, that the polygraph was only an aid to investigations."

A. Yes.

Q. ... and it was not the sole thing that you would use.

A. Yeh, I know. That's what I said.

Q. So why didn't you talk to him?

A. ... and that's what I mean but...

Q. But that's not what you did and I want to know why you didn't do it?

A. Well, you know, I...the only thing I can say is that because Smith was so positive or the results of Ebsary's test, I should say, as interpreted by Smith were so positive I figured it was game over.

Q. Notwithstanding the fact that you knew that a polygraph was only an aid, you were prepared to ignore that and accept the polygraph result...

A. Yes.

Q. ...as the sole determining factor...

A. Yes." (30/5647)

When questioned by Chief Justice Hickman, Inspector Marshall stated:

"A. In other words, My Lord, there is a fifty-fifty chance that he was telling

> the truth, and there's a fifty-fifty chance that he was lying. Does that make sense?
>
> Q. It's not for me to respond to that. So that your conclusion was based upon your two interviews, a report that Ebsary was telling the truth, and that there's a fifty-fifty chance that MacNeil was not telling the truth?
>
> A. Yes, sir.
>
> Q. And that concluded the investigation?
>
> A. Yes, sir." (30/5665)

On what should be, we do not feel qualified to make specific recommendations. However, the polygraph has recently been considered by the courts, including the Supreme Court of Canada in R. v. Beland and Phillips, [1987] 2 S.C.R. 398, 36 C.C.C. (3d) 481, where it's inadmissibility in evidence was confirmed.

In Nova Scotia an inculpatory statement in a video tape re-enactment of a murder following a "failed polygraph test" was ruled inadmissible by the Appeal Division in R. v. Nugent, (1988), 84 N.S.R. (2d) 191. The facts disclosed a lengthy interrogation accompanied by a violation of the accused's right to counsel. If the polygraph is frequently used to induce statements, the following comment by the Appeal Division is important:

> "I find it impossible to separate the test from the statements given to Constable Cleary. It is now clear from the decision of the Supreme Court of Canada in R. v. Béland and Phillips (1988), 79 N.R. 263; 36 C.C.C.

> (3d) 481 (S.C.C.), that evidence of polygraph tests is not admissible in evidence. In order to follow that rule then the administering of a test must be clearly separated from questioning for the purpose of obtaining statements. An accused is entitled to have all of the evidence relating to a statement placed before a jury and not the truncated version placed before the jury in this case. If the test procedure is not admissible then it should not be used for another purpose. (p. 212)"

Finally, in a commentary on Béland and Phillips, in the September, 1988, issue of the Criminal Law Quarterly (Vol. 30, p. 412), Ellis Magner comments on the problems of the polygraph as a scientific instrument. Although written in 1988, these concerns should have been even more prevalent in the early years of the technology. It is indeed unfortunate they were not. Professor Magner notes:

> "The first problem is that the polygraph measures only subjective truth. No greater claim is ever made. It follows that if the subject does not remember the incident, or suffers from delusions either pathological or drug-induced the polygraph results will not be probative.
>
> Next, there is a theoretical difficulty. There is no known psychological response or pattern of responses unique to deception. Reactions that would be deemed to indicate deception can result from a number of other factors.
>
> The substitution of numerical evaluation of the charts for global evaluation overcomes a major problem. Since, in practice, global evaluation meant accepting the impression of the polygrapher, the objection that the opinion of the expert was being substituted for that of the jury applied to it with full force. Numerical evaluation enables other

polygraphers to rate the charts and a high degree of 'interracterreliability' appears to have been achieved. The neologism means simply that different examiners reach the same result fairly frequently. This does not prevent good faith disagreements even when both experts are properly qualified. However such disagreements should not exclude the evidence.

There is also a problem with the mode of questioning... There are three other techniques: guilty knowledge, control question and positive control. The first of these depends on the existence of specialized guilty knowledge in the subject. The only objection to this technique is its practical limitations. The control question technique is the most frequently used. It pairs each relevant question with a vaguely phrased control question which focuses on other aspects of the subject's activities. The operator deliberately induces anxiety about the control questions in the pre-test interview. If the subject shows stronger reactions to the control than to the relevant questions the subject is deemed truthful. This technique overcomes the objection that the subject may be naturally unresponsive by using a measure of reaction intrinsic to the subject. However, there seems to be something inherently objectionable about it. If the subject has led a blameless life or is sophisticated enough to be concerned solely with the relevant incident the test shows the subject to be deceitful. The newest mode of questioning, positive control, may overcome any objection to question form. It involves the subject both denying and affirming the proposition. The reactions are then compared.

Other problems which concern opponents of polygraph include the possibilities of effective physical countermeasures and of results influenced by the 'friendly polygrapher'. Proponents of polygraph deny a factual basis to these concerns.

There remains, however, a problem with the rates of reliability and confidence assigned

to test results. Reliability is difficult to calculate but one survey concludes polygraph tests are reliable as an indication of truthfulness 80% of the time and as an indication of deceitfulness 89% of the time. Both false positives and false negatives will continue to appear. The false positives apparently exceed false negatives and this has been treated as an argument in favour of admitting tests showing the accused to be truthful but this approach is questionable. Statisticians tell us that the confidence rate of individual test results will vary according to the chances that the base population will be truthful. On the basis of the reliability rates given above, the rate of confidence in a truthful indication will range from 98%, assuming a base rate of guilt of 10%, to 45%, assuming a base rate of guilt of 90%. Although we are bound by the presumption of innocence to assume that an individual is not guilty, we are not obliged to assume that the majority of people arrested as suspects by the police are innocent. A base rate of guilt of somewhere above 50% should be used to assess confidence in polygraph results. Thus many technical problems still exist." (p. 414-416) [emphasis added]