IX. DISCLOSURE

A. FAILURE TO DISCLOSE

Although Lewis Matheson believed that Donald C. MacNeil had made complete disclosure to the defence in 1971 (26/4925), and Art Mollon said it was Mr. MacNeil's practice to disclose when requested to do so (29/5421, 5423), it appears that no request for disclosure was made by defence counsel (Simon Khattar - 26/4783). Certainly none was voluntarily given by the Crown. Although John F. MacIntyre couldn't be certain that he gave the entire police file to Mr. MacNeil, he did say that knowing the type of person Mr. MacNeil was, "I would say that I would [give him the entire file]" (33/6189).

This evidence, combined with Mr. Matheson's testimony that the Crown knew of the earlier statements of Mr. Chant, Mr. Pratico and Ms. Harriss (26/4933), means the only logical conclusion which can be drawn from the evidence is that there was no Crown disclosure. Accordingly, the Attorney General accepts that the Crown failed to disclose to defence counsel the prior inconsistent statements of Mr. Chant, Mr. Pratico and Ms. Harriss.

The Attorney General, however, does not concede that failure to disclose the statements at the time constituted a breach of any duty owed to the accused, defence counsel or the Court. An analysis of the law, as it was in 1971-72, will follow a review of the issue of Crown disclosure in its present context.

B. CROWN POLICY RE DISCLOSURE

The evidence discloses that from the 1960's there has been an evolution in both the Crown's and defence bar's attitude towards disclosure (Innes MacLeod - 39/7330). In 1961, Malachi Jones, then senior solicitor in the Attorney General's department, encouraged Crown prosecutors to disclose statements to the defence as part of the Crown's duty "to see that justice is done" (Ex. 81). This was a letter similar in content to one received by Mr. Matheson while a prosecutor in the mid-1960's. Mr. Jones referred to authority supporting this by noting how the Privy Council had ordered a new trial where the Crown failed to give the defence statements of witnesses which varied from evidence at trial. The Crown's duty to disclose evidence was part of its duty to call all relevant evidence, even if that evidence tended to the accused's innocence. Mr. Jones concluded:

> "It is clearly a matter for the Crown to decide, guided by these principles, as to what action should be taken in each particular case. No general proposition prohibiting the production of statements can therefore be safely relied upon in all cases..." (Ex. 81/3)

Present and former senior practitioners, such as Messrs. Khattar, Pace, Mollon and How recognize that there have been significant changes in the Crown's general attitude to disclosure with the tendency being towards more disclosure of the Crown's case. This has evolved to the present policy of full and fair disclosure (Ex. 132/16) which has been revised by the

Attorney General's updated Disclosure Guidelines of July 18, 1988 (Appendix C).

Nova Scotia probably has the most liberal disclosure policy of any province in Canada. The commitment to full and timely disclosure is indicative of the Crown's desire to ensure that the defence has an ample opportunity to know of the Crown's case and to make its choices and decisions accordingly.

As with any policy it is the application of it which causes the most difficulty. Thus, even a policy of full and fair disclosure leaves open some very difficult areas for examination.

C. INITIATION OF DISCLOSURE

It is practically impossible for the Crown to initiate disclosure in all cases. Often the Crown will not know who defence counsel is or whether counsel is retained. Without that information, the Crown cannot make disclosure. If the accused is to represent himself, the Crown must make disclosure to the court (Code of Professional Conduct, Ch. VIII) or to him directly, but that should only occur if the Crown is certain counsel will not be retained. If the accused appears initially without counsel but indicates he will return to court with a lawyer, the Crown cannot make disclosure until advised who will represent the accused. If the accused changes lawyers, it would be inappropriate for the Crown to make disclosure to one who is no longer retained to represent the accused.

There are a multitude of other practical problems which would arise if, as part of a positive disclosure duty, that

disclosure must be initiated by the Crown. Because the defence has the obligation to defend its client completely, the Attorney General recognizes and endorses the principles espoused by the Code of Professional Conduct which states:

> "When defending an accused person, the lawyer's duty is to protect his client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which he is charged (Chapter VIII, Commentary 8)."

Further the code contemplates that a defence lawyer can only advise a client with regard to a guilty plea "following investigation". Surely it is an ethical duty for the defence to request disclosure of the Crown's case in order to "protect his client as far as possible from being convicted".

The Attorney General recognizes there will be times when disclosure will be initiated by the Crown as part of its overriding obligation to see that justice is done. Normally, Disclosure will be initiated by a Defence request. **If an accused is not represented and does not intend to avail himself of counsel, then it is the Crown's duty to make full disclosure to the Court or to the accused personally.**

D. CROWN RESTRICTIONS ON DISCLOSURE

As part of its duty to ensure that justice is done, the Crown owes a duty, not only to the accused, but as well to witnesses required to testify by the Crown - be they victims, observers or others with relevant evidence. The Crown must balance disclosure with the need to prevent endangering the life

or safety of witnesses or interference with the administration of justice. **The Crown must fairly and dispassionately exercise its discretion to deny information for the protection of witnesses while at the same time providing the accused with sufficient information to allow for a full answer and defence. In exercising that discretion, the Crown must be mindful of any reasonable grounds for believing there will be destruction of evidence, intimidation or threats to the well-being of witnesses or excessive stress of victims of certain offenses, which will likely result from disclosure of that witness' statement or particular information in the Crown's file. In that instance, the Crown should provide to the defence sufficient information to allow the defence to know what the evidence will be, while ensuring the protection of witnesses.**

In retaining a residual discretion to deny disclosure of specific information on the basis it would be contrary to the interests of justice, the Crown prosecutor has a heavy onus placed upon him. The Attorney General believes full and fair disclosure must be the rule with minimal limitation to protect those interests which the Crown must bear in mind to ensure that justice is done.

E. <u>DISCLOSURE OF POLICE REPORTS</u>

Full and fair disclosure by the Crown is dependent upon full disclosure by the police of information in its possession. A system which permits the police to hold back information from the prosecutor undermines the very purpose of

disclosure. Some may suggest that full disclosure by the Crown will limit police disclosure. The Attorney General rejects this assertion. **A system which aspires to the highest level of competence from police and Crown prosecutors cannot condone an attitude which maintains the myth that the police "have something to hide". Both the Attorney General and the Solicitor General must ensure that police reports are thorough and complete without extraneous information and opinions. Consideration should be given to imposition of sanctions if it is determined that police are not completely disclosing to the Crown.** However, it is a fair recognition of human nature to allow that reports will, from time to time, contain information which is not necessary to meet the aims of disclosure. As a rule, police reports themselves will not be essential to provide to the accused a complete outline of the circumstances of the offence. **If police reports contain extraneous information, the Crown should be at liberty to provide to the defence a detailed review of the contents of the report without disclosing the information which is not properly the subject matter of factual police reports.**

There will be other confidential communications between the police and the Crown where theories, ideas, requests and comments are made that would not be part of Crown disclosure in any event. It is to these documents that police should be directed to confine their comments.

F. DENIAL OF DISCLOSURE TO CERTAIN LAWYERS

Since disclosure is to satisfy the Crown's duty to the accused, the accused's choice of lawyer should not undermine the extent of disclosure provided. Many witnesses recognized there are personality conflicts which might impede full disclosure. **We assert that an accused should not suffer for the previous sins of his lawyer. Maximum disclosure is the right of every accused.**

As a general rule, there should not be "qualified disclosure" such that material is released "so long as it is not used for (a particular purpose) ...". If a document is properly admissible to challenge the credibility of a witness, then the Crown should not dictate that it cannot be used for that purpose; neither should the defence accept any document with these restrictions in place. Only if there are bona fide and reasonable concerns about the use to which disclosed material might be put should the Crown deny disclosure. In these circumstances, the Director (Prosecutions) ought to make the decision, devoid of the personality conflict which might exist on the local level.

G. TIMING OF DISCLOSURE

Disclosure should be "as soon as reasonably practical, but in any event prior to the preliminary hearing or trial (in summary matters)". Nonetheless, the obligation to disclose is continuous. Therefore, if new material evidence comes to the

Crown's attention, disclosure to the defence should occur as if the information had been in the Crown's file at the outset of the proceeding.

This obligation should not be construed to limit the Crown's adversarial role in a criminal trial. This role necessitates a response to positions taken by the accused and at times the need for additional evidence or information to reply to the accused's case. In this context, the Crown should be free to place newly acquired information, for rebuttal or reply, before the court without advising the defence of this information in advance. The guiding principle must continue to be the Crown's obligation "to see that justice is done to a fair trial on the merits" (Code of Professional Conduct).

If the prosecuting officer refuses to disclose, there should be a meaningful ability to appeal to the Director (Prosecutions) to ensure the original decision is reviewed in a timely manner.

H. <u>DUTY TO DISCLOSE BY THE CROWN IN 1971</u>

Having addressed the present situation, it is necessary to examine the 1971-72 situation to determine if the Crown's lack of disclosure constituted a breach of any legal duty imposed on the Crown. It has been suggested the Crown owed a duty to disclose to the defence information of three different types:

(i) Previous statements of Mr. Chant, Mr. Pratico and Ms. Harriss;

(ii) Jimmy MacNeil's statement made on November 15, 1971, and other related information; and

(iii) The psychiatric history of Mr. Pratico.

Each of these examples will be discussed later in this section.

In a detailed opinion attached as Appendix D to this brief, we outline the law as it existed in 1971 with regard to disclosure by the Crown. We have canvassed the various sources that have been put forward as authority for the proposition that a legal duty was owed by the Crown to disclose to the defence in each of the instances noted above. With respect to those who hold a contrary opinion, the Attorney General rejects any conclusion that Mr. MacNeil breached a legal duty owed by him as prosecuting officer when he failed to disclose this particular information to the defence.

Mr. Matheson suggested that there may not have been disclosure because of "concern for the safety of witnesses" (26/4933). That may have been the situation, but even without that concern, in 1971-72, there was no general obligation on the Crown to disclose information to the defence. Whatever moral duty to act fairly may have existed in 1971, the case law or statutes do not support the existence of a legal duty to disclose such information, nor do the cases referred to by Mr. Jones in Ex. 81, create a mandatory duty. Rather, disclosure remained in the realm of prosecutorial discretion. It was clear that the Crown "must not hold back evidence because it would assist the

accused" (Lemay v. The King (1951), 14 C.R. 89, 95 (S.C.C.). A prosecutor who called a witness, who may have given contradictory statements to the police, and made that witness available to the defence for cross-examination cannot be said to have withheld evidence. Though the Defence may not have known of the earlier statement, a standard inquiry of a witness should be directed towards previous statements to the police. This is especially so where the witness had to be reminded of his earlier statement by the Crown.

In its examination of a prosecutor's role in Boucher v. The Queen (1954), 20 C.R. 1, the Supreme Court of Canada did not identify any duty that would have forced the prosecutor in the Marshall case to reveal the existence of the contradictory statements. There was the duty "to bring before the Court the material witnesses" (Boucher v. The Queen, supra p. 3), the duty "to see that all available legal proof of the facts is present" (Boucher v. the Queen, supra p. 8), and the duty "to state to the jury the whole of what appeared on the depositions to be the facts of the case, as well as those which were made in favour of the prisoner as those which were made against her" (R. v. Thursfield (1838), 173 E.R. 490 as quoted in Boucher v. The Queen, pp. 9-10). No mention was made of a duty that would have led Mr. MacNeil to believe he had to disclose the fact that contradictory statements had been given by Crown witnesses to the police.

In a case decided after Boucher, the British Columbia Supreme Court stated flatly that there existed no duty on the part of the Crown to open police files to the defence: R. v. Silvester and Trapp (1959), 31 C.R. 190, 192. If, as the Court found the law to be, the Crown was only required "to advise the defence of the substance of the evidence they proposed to adduce at trial" the assertion that an accused "has a right to have produced to him before the trial all statements taken from witnesses during the course of the investigation" seems untenable (Ibid.).

In R. v. Lalonde, [1972] 1 O.R. 376 (High Ct.), Haines, J., was faced with a request from the defence for access to witness statements and police memoranda. The accused was charged with stabbing another man to death. The attack occurred on the front lawn of a rooming house, following an altercation in a tavern. There was no shortage of witnesses. The defence sought production of the statements given to the police in order to aid their cross-examination.

Haines, J., refused the request and in so doing reviewed the state of the law as it related to a prosecutor's discretion to release or withhold material gathered by the police. The Judge first cautioned proponents of disclosure about the poor quality of information contained in police files:

> "The facts discoverable on investigation may be horribly confusing, the witnesses frequently untruthful, deliberately forgetful, or worse still, misleading. Some will be shielding others. Different stories

> may be told to different officers, especially when one considers that in a large metropolitan area, the police teams work in shifts, and often on the same case for days. Since they may be required to work on several cases at the same time, they are unable to follow one case through to its conclusion without interruption. Their records, if kept fully and accurately must be replete with misinformation gleaned from uncooperative citizens. Finally from the spurious is sorted out the apparently trustworthy and a prosecution is launched. " R. v. Lalonde, supra p. 380.

The production of witness statements before a trial is at the discretion of the Crown, according to Haines, J. Once the trial is underway, that discretion rests with the Court. At no time did the defence have a right to disclosure (pp. 382-383). A prime consideration in the exercise of the Crown's discretion is the need to be fair to the accused and not to attempt to surprise the defence at trial (p. 382). However, there are also powerful investigatory interests, also important in the attainment of justice, which militated against automatic disclosure:

> "In ordering production of the statements of Crown witnesses, it must be kept in mind that many people would be unwilling to talk to the police if they felt that their statements would be given to defence counsel before trial so that they may be picked apart at leisure in preparation for their embarrassment in the witness stand or accosted by private investigators to recant.
>
> However, each individual clash between the interests of pre-trial discovery and the needs of effective crime detection must be handled on its own merits." R. v. Lalonde, pp. 383-384.

Because each request must be judged on its own facts, the question of disclosure must necessarily remain discretionary. The maintenance of that Crown discretion has consistently been protected by the Courts:

> "From the foregoing it will be seen that our Courts place great reliance on the discretion of the Crown prosecutor and are loath to interfere with that discretion unless the circumstances are unusual. In my opinion there is a heavy onus upon defence counsel to establish in the interests of justice, as distinct from the interests of the accused, the production of statements of witnesses and police memoranda concerning their evidence." R. v. Lalonde, p. 386.

While the state of the case law in Canada seemed clearly to support Crown discretion over the disclosure of witness statements, there was one English case which attempted to place limits on that discretion: Baksh v. The Queen, [1958] A.C. 167 (J.C.P.C.). Here, the failure of the Crown to disclose information that cast doubt on the truthfulness of its witnesses was held by the House of Lords to be reason enough to overturn a conviction of murder. Information that the Crown witnesses had given statements to the police which conflicted with their testamentary evidence was not given to the defence until after the trial. Although the prosecutor passed on the information about the earlier statements as soon as he learned of them, the Lords ruled that the conviction could not stand:

> "If these statements afforded material for serious challenge to the credibility or reliability of these witnesses on matters vital to the case for the prosecution it follows that by cross-examination--or by

> proof of the statements if the witnesses denied making them--the defence might have destroyed the whole case against both the accused or at any rate shown that the evidence of these witnesses could not be relied upon as sufficient to displace the evidence in support of the alibis." Baksh v. The Queen, supra p. 172.

This case has had little impact on the deliberations of Canadian courts. One possible explanation for this is that by the time the case was decided, the practice of Crown disclosure in the English courts had progressed well beyond that found in Canada (See, for example, Christmas Humphreys, "The Duties and Responsibilities of Prosecuting Counsel", [1955] Criminal Law Review 739). The wide access to Crown files enjoyed by defence counsel in English courts is at least partially explained by the English prosecutorial system which relied on the private bar and not on state authority to prosecute cases. The practice of full disclosure was more likely to develop in a system where an attorney acted as a prosecutor one day and defence counsel the next.

It is also important to note what Baksh does not say. It does not stand for any automatic right to disclosure on the part of the defence. The Lords say that the defence should have had access to the witness statements before trial and the actions of the prosecutor left little doubt that if he had known of their existence, they would have been made available. However, the judgment leaves the principle of Crown discretion intact.

The authorities referred to here and in the Appendix D support the view that in 1971 disclosure remained within Crown discretion without a right of the defence to have access to materials in the Crown's file and a concomitant obligation on the Crown to disclose. Accordingly, although one might attribute a cause of Mr. Marshall's conviction to the failure to disclose, the Crown did not violate any duty owed. The three crucial witnesses were called to the stand at both the preliminary and the trial. Defence counsel had the opportunity to ask the witnesses if they had made statements and did not avail themselves of it. The practices of the police were well known to both defence counsel who had acted as prosecutors and worked closely with Mr. MacIntyre. The Crown fulfilled its obligations by calling all "credible evidence relevant to what is alleged to be the crime" (Boucher, supra p. 8).

I. INCIDENTS OF NON-DISCLOSURE

As noted earlier, it has been suggested that the Crown owed a duty to disclose the following information:

(i) Previous Statements of Mr. Chant, Mr. Pratico and Ms. Harriss

The Attorney General has already admitted that Mr. MacNeil failed to disclose these prior statements to defence counsel. However, the Attorney General also maintains there was no breach of a legal duty to disclose at that time.

(ii) The Jimmy MacNeil Statement

The authorities do not clearly elucidate the principles applicable to disclosure of the November 15, 1971, statement of Jimmy MacNeil and other evidence gathered at that time. One might argue that the local prosecutor's obligation had ended with the conviction and subsequent information should have been dealt with by the Attorney General's office. In Section VI of this brief we canvassed in detail the facts surrounding the Jimmy MacNeil incident.

At this point, however, it is sufficient to note that if Boucher sets the standard for prosecutors' performance, the obligation with regard to evidence is qualified by the notion that only "credible" evidence must be produced by the Crown. Accordingly, the Crown in exercising its obligation "with a sense of dignity, the seriousness and the justice of the proceedings" (Boucher, p. 8), must determine if evidence is believable before putting that witness on the stand. That is not to suggest that the Crown must believe the witness, but that the witness is capable of belief.

When Jimmy MacNeil came forward and the R.C.M.P. were called to investigate, the conclusion was that Mr. Ebsary was telling the truth when he denied stabbing Seale. Due to his mental and physical condition, because he was recovering from a drinking bout when he was given the polygraph test, no opinion could be rendered with regard to Jimmy MacNeil. Accordingly, he was not believable when he said he saw Mr. Ebsary stab Mr. Seale.

Mr. Gale offered the opinion that in spite of this conclusion there was an obligation on the Crown to advise defence counsel of the statement (75/13344). Failure to do so was a breach of a fundamental obligation owed by the Attorney General's office. We accept this view. It might be argued that in these circumstances, the Crown was justified in not advising the defence of the incident. However, the Crown's primary commitment to fairness does not allow for this conclusion.

Of course, had the prosecutor or the department advised the Defence, there is no assurance that they would have acted upon the new information. Mr. Khattar stated that they would not have allowed Mr. Marshall to take a polygraph (25/4760). Neither may the Appeal Court have allowed the evidence to be heard or even if they had heard both Mr. Ebsary and Jimmy MacNeil, there is no guarantee that Jimmy MacNeil would have been believed. One could speculate that had the defence been aware of Jimmy MacNeil and Mr. Ebsary, a thorough re-investigation of all the facts would have been the result.

However, it may be an exercise in futility to allow logic to dictate where we know logic did not prevail. Accordingly, although we assert that where the Crown exercised due diligence to test the story given by Jimmy MacNeil, and concluded after personal interviews and an R.C.M.P. investigation, that his story was not worthy of belief, the Crown still should have advised Messrs. Rosenblum and Khattar of this new information.

(iii) John Pratico's Psychiatric Condition

This issue has been fully canvassed in Section IV above. The evidence discloses that the Crown did not know of Mr. Pratico's previous psychiatric condition or of any treatment he had received. Mr. Pratico himself believed that Mr. MacNeil did not know of his previous hospitalizations (12/2134). Mr. Matheson knew Mr. Pratico had been hospitalized but believed it was "because of his anxiety over the threats he had received" (26/4972). He did not know either the current status of his illness, his history of mental illness (22/5083), or that reports from the Nova Scotia Hospital might disqualify Mr. Pratico as a witness (22/5087).

There are no authorities to suggest that the mere presence of a psychiatric condition disqualifies a witness, even an eye witness. If the Crown knew of Mr. Pratico's condition and believed it would impact on his credibility, then the prosecutor, as part of his overall duty to be fair, should have advised the defence of this fact. This is similar to the Crown's duty to advice defence of a witness' previous convictions for perjury. In the absence of proof that the Crown was aware of Mr. Pratico's condition, there can be no duty on the Crown to disclose what they did not know. Even if the Crown knew of his condition, there is no evidence that it would impact on his competence to testify or his credibility and therefore no duty was owed by the Crown to disclose this information to the defence.

X. CROWN DUTY ON APPEAL

The issue to be examined in this portion of our submission is whether or not the Crown is under an obligation, when responding to a Criminal Appeal, to raise with the Appeal Court errors on the record which are not part of the Appellant's case.

The 1971 trial transcript has been extensively reviewed before this Commission, with certain objections and rulings of the trial judge being commented upon critically by Professor Bruce Archibald. Because of the conclusion shared by most counsel, that Dubinsky, J., erred when he limited the cross-examination of John Pratico on his inconsistent statements, the role of counsel on the appeal has become an issue.

Only Milton Veniot was able to actually testify regarding the appeal itself. The Crown's factum raises the problem with the evidence of Mr. Pratico (Ex. 2/155) . The factum states:

> "With respect to the evidence of the witness Pratico, it is submitted that the trial judge charge (sic) was unexceptional in law. As in the case of Chant, His Lordship read back portions of the direct examination of Pratico to the jury (See pp. 275-277). There followed immediately an accurate summary of the evidence on cross-examination, bringing to the attention of the jury the condition of the witness at the material times, his statement subsequent to the event, some of which were inconsistent with his testimony for the Court, and the necessity for jury (sic) to come to their own decision with respect to the credibility of the witness."

In the summary referred to in the factum, the trial judge stated that Mr. Pratico had said a number of times that Donald Marshall, Jr. did not stab Sandy Seale (Ex. 1/98). In his testimony, Mr. Veniot recalled that the court did raise the issue of the evidence of John Pratico, and that it, along with the evidence of Maynard Chant and Donald Marshall, Jr., consumed the entire time before the Appeal Court.

Whether the argument about the erroneous ruling was clearly made at the appeal court will never be known. It does not form part of the court's decision. However, because of the importance of the Crown's role, it's obligation at that point in a proceeding should be clearly stated.

In his direct examination at the Marshall portion of these hearings, Gordon Gale stated at:

> "Mr. Chairman
>
> Supposing in an appeal by an accused person, counsel for the accused does not raise a ground of appeal which would appear to be readily ascertainable from reading the transcript of the trial. Would counsel for the Crown, in your view, be under any obligation, or not so much obligation, would it be more...would it be part of his practice to draw to the attention of the Court of Appeal a ground that had not been raised by counsel for the accused, and suggest that it should be considered?
>
> Mr. Gale
>
> There are some cases where our counsel draw the omission to the attention of counsel for the accused. There are...he may indicate for various reasons that he does not want to advance that. Notwithstanding that, if we think that it's a matter that should be

> advanced, then we draw it to the attention of the Court and we are prepared to argue that issue and we have on numerous occasions.
>
> Mr. Chairman
>
> I take in the first instance it's the responsibility of counsel for the appellant.
>
> Mr. Gale
>
> Yes, it is.
>
> Mr. Chairman
>
> And I understand you bring it to his attention and if he deems...
>
> Mr. Gale
>
> In most of those cases that I am aware of the counsel for the appellant normally says, 'Thank-you,' and he does something about it, and I think there have been some where he has indicated that for one reason or another he does not wish to have that matter brought before the Court. I think in some of those ...I know in some of those the ...our counsel have, in fact, drawn that to the attention of the Court." (75/13311)

That view was supported by Leonard Pace (72/12836), Reinhold Endres (74/13229), and Professor Bruce Archibald (30/5523). Robert Anderson, on the other hand, took a somewhat narrower view. He felt that because the Court had the transcript and on its own could ascertain the errors, the Crown's role was only to respond to the appellant's case (50/9187). These two views state the options.

In responding to an appeal, the Attorney General accepts that the Crown's obligation continues to be governed by the principle that justice must be done. As Leonard Pace said "I

don't think the Crown ever looses a case" (72/836). Accepting that as the Crown's role, it must be qualified by two factors: (1) The appellant should be able to bring before the court the errors and arguments that it chooses; and (2) On an appeal, the Crown has no more knowledge of the facts, rulings or law than does the Appellant or the Court. Accepting these factors, two questions then emerge.

1. What type of error, omitted from the appellant's factum, should the Crown raise?

Not every trivial erroneous ruling or mistake in a trial need necessarily be dealt with by the Court of Appeal. Thus the Crown's obligation is to raise those errors, omitted by the appellant, which in the opinion of the Crown might reasonably result in the appeal being allowed, whether the errors are considered alone or in conjunction with others. This would deal with the Section 613 threshold. That is not to say that the Crown must believe the error will be determinative of the appeal or that the Crown cannot argue that no error was committed. **If the Crown objectively feels a ruling or direction by the Trial Judge might be erroneous, and that error might reasonably result in the appeal being allowed, then the Crown should raise it.**

2. With whom should the Crown raise the issue?

Because the appellant should decide how it chooses to appeal the case, the Crown's obligation is to raise the matter first with the appellant's counsel. They will decide how or if they will incorporate it into their case.

Should the appellant decide that it does not wish to pursue the matter, then in most cases the Crown's obligation will come to an end. **There may be situations where the Crown believes that the error will be determinative of the case:** for example, if the trial court did not have jurisdiction. **Then, the Crown has an obligation to bring this error to the appeal court's attention and if need be, in light of the applicable law, to argue that the appeal be allowed.** That will be a rare case, but if the Crown feels there is unquestionably an error, then it must advance it before the Court of Appeal.

XI. REINVESTIGATION OF THE DONALD MARSHALL, JR. CONVICTION BY THE R.C.M.P. IN 1982

It is our position that there was nothing to prevent the R.C.M.P. from investigating the Sydney police force. No permission was needed from the Attorney General and no suggestions or recommendations for further investigation were presented to the Attorney General by the R.C.M.P. Furthermore, the Attorney General did not deliberately halt any investigation of the Sydney police force.

A. THE AUTHORITY/RESPONSIBILITY OF THE R.C.M.P. TO INVESTIGATE, AND TO CHARGE

This commission has heard countless hours of testimony from police officers, prosecuting officers, judges and former attorneys general regarding the authority of a police officer to commence and continue an investigation, and to proceed with a criminal prosecution by swearing an Information. The evidence has been varied and at times contradictory, and has demonstrated that sometimes conflicting philosophies exist as to the proper role of the police and the Crown. This Commission has the benefit of several important research papers dealing with these issues prepared by experts in the field. Further references to observations made by the researchers will be made subsequently in our argument.

One of the first senior R.C.M.P. officers to testify was Insp. J. Terrance Ryan. He said that if a serious crime occurred in another jurisdiction and the local police department

asked the R.C.M.P. to intercede and handle the investigation, that the responsibility for that investigation, and the scope of it, would be for the R.C.M.P. to decide. The local police department could not restrict the investigation; neither could the Crown. It would be up to Insp. Ryan and his superior officers to use their best judgement in deciding how best to proceed towards completion of a thorough investigation (11/1899).

R.C.M.P. Staff Wheaton, on the other hand, felt that when his investigation turned to the tactics used by former Chief of Police, John F. MacIntyre, and Insp. William Urquhart, that he (Wheaton) required some kind of special direction from the Attorney General's Department before he could proceed (42/7764 and 7802). Clearly Staff Wheaton drew a distinction between an investigation or a continuing investigation of ordinary cases and an investigation into another police department, or senior police officers, or "a public officer" of that department (42/7695). He made this distinction in spite of his ready admission that he had reasonable and probable grounds to believe that the Sydney Police Department had information which was material to the R.C.M.P. review (46/8393).

These assertions by Staff Wheaton are simply not correct, according to the Director (Criminal), Mr. Gale. It is his view that the R.C.M.P. could question, interview, investigate whomever or whatever they wished. They had already been assigned the file, were given conduct of the case, and Mr.
Gale refuses to accept that the R.C.M.P. needed to get back to

him for any direction or special permission. Mr. Gale asserted consistently throughout his lengthy testimony that the R.C.M.P. would not require any consent of the Attorney General's Department (for example, 75/13388).

Staff Wheaton's immediate superior officer was then Insp. Donald Scott. In an exchange with Commission Counsel, his answers to various scenarios illustrated the confusion in the mind of a senior police officer and how that could well have lead to a reluctance to pursue a particular line of investigation. If a police officer was observed committing an illegal act, then Insp. Scott said he would have no difficulty charging that official "without any permission" (50/9291). But Insp. Scott drew a distinction between that example and launching an investigation. Before doing that, he thought he would require "the permission of the Attorney General's Department to do so" (50/9293).

This leads to an essential feature of this case. In the minds of most of the R.C.M.P. officers involved, their role in 1982 was divided into three separate operations: (1) obtaining the release of Marshall from the penitentiary so that his case could be determined in the courts; (2) the pursuit of Roy Ebsary as the true assailant; and (3) an inquiry into the activities of Messrs. MacIntyre and Urquhart to determine whether or not their actions were criminal. Coincidentally, officials within the Attorney General's Department saw it as one matter, one case with

various features, but all under the jurisdiction, judgement and control of the R.C.M.P.

Regrettably, none of the senior R.C.M.P. officers ever told Mr. Gale that in their view they could not get on with launching an investigation into the actions of MacIntyre and Urquhart because they were waiting for his permission. More will be said about that failing later in this brief.

A corollary question was whether the Attorney General's Office could intervene and "stop" a police officer's investigation. This notion will be explored in more detail under the next heading "hold in abeyance". For the moment, one can point to some curious differences of opinion between senior police and law officers. For example, former Director (Criminal) Judge Robert Anderson wasn't sure if the Department of the Attorney General could prevent, or stop, a police investigation (50/9132). Chief Judge and former Attorney General, Mr. Harry How, thought that such interference would be clearly wrong (61/11014). Former Attorney General, Mr. Ronald Giffin, felt that in certain circumstances it might be appropriate for his department to stop a police investigation, but agreed that such circumstances would be rare. He could not articulate an example (58/10601).

The authority of a police officer to lay an Information was the subject of considerable questioning of witnesses during the Marshall phase of this inquiry, and also during the second phase which examined the Roland Thornhill and Billy Joe MacLean

cases. Senior officials of the R.C.M.P., up to and including the Commissioner, believed that it was the fundamental right of a police officer to lay a charge (i.e.: swear an Information) if he had reasonable and probable grounds to believe that a crime had been committed. Although accurate, the simplicity of such a statement is often clouded by phrases like "commence a prosecution", "institute proceeding", and "proceed with charges". Former Supt. Feagan, retired Deputy Commissioner Quintal, and retired Commissioner Simmonds all articulated the features which distinguish a police officer's capacity to charge from a decision to charge an individual. All of these features are part of a police officer's discretion, the exercise of which is based on wisdom, judgement and experience. Some of these very same criteria must be addressed by Crown Counsel in the exercise of their discretion.

Whereas it is the ultimate responsibility of the police officer "to charge", there also exists the equally recognized authority of the Crown to proceed. If the Crown and the police do not agree on the disposition of any particular case, and if as a consequence the police decide to charge in any event, it is the right of the Crown to withdraw the charge or stay the proceedings in open court. The recognition of these important principles was confirmed by Commissioner Simmonds in his letter to Attorney General How (Ex. 165/117).

There are risks in a situation where the police officer is to lay a charge knowing that he is doing so contrary to the

advice of the prosecuting officer. Naturally, a police officer will know that his actions will be questioned by others. Can he take much comfort from the "principle" that it was his right to lay the charge? Former Supt. Feagan was aware of this risk when he discussed with Former Deputy Attorney General, Gordon Coles, his wish to proceed with charges. The cold reality of what would happen, were he to decide to charge Roland Thornhill, was explained by Mr. Coles.

Mr. Feagan admitted that he would not have proceeded with charges without the authority of his superiors (83/14579). The reliance upon a superior officer's judgement is the protection which the police officer in charge of the investigation requires. Having been given the authority, and the knowledge that one's decision has been considered and approved by one's superiors, then one ought to confidently proceed with a course of action exercised according to one's conscience. Should the Crown still decide that, for reasons of public interest, the case ought not to go forward, the prosecuting officer would still have his views (or the Minister's actions) questioned in a public forum, and that is as it should be.

Variations of opinion regarding the proper role of the Crown and the police exist between senior lawyers and senior police officers. This fact may be alarming to some people, and, as in 1971, there also exists, breakdowns in communication which now, in the face of the scrutiny during this public inquiry, appear to be the result of delay, inattention, ignorance or confusion.

What is needed is a clear statement from this commission as to the clarity of language which is required in contracts negotiated between the Province(s) and the R.C.M.P., as well as in all policy manuals used by the police and the Attorney General's Office. There should then be no doubt whose responsibility it is to direct and whose function it is to act. Nor should there be any confusion as to the scope of any investigation conducted by the R.C.M.P. into either the workings of another police department or force operating within the province, or a particular case handled or mishandled by that department or an officer thereof.

Such clarity of language and purpose would go a long way to prevent the confusion which seems to have resulted in communications between the R.C.M.P. and the Attorney General's Office in 1982 and subsequently.

B. REFERENCE TO "HOLD IN ABEYANCE"

Pages and pages of transcripts have been taken up by probing witnesses' minds as to what was meant by, or what was done on account of, the "hold in abeyance" statement. During a 1984 Provincial election, a copy of an R.C.M.P. police report was leaked to the media. The press report portrayed the suggestion by Mr. Gordon Gale that the questioning of John MacIntyre and William Urquhart be postponed as tantamount to interference by the Attorney General's Department in an ongoing police investigation.

However, if one were to accept the notion advanced by Staff Sergeant Wheaton that there was no investigation into the

actions by Detective Urquhart and Chief MacIntyre, then ipso facto there could not have been any interference by the Crown. But the more disturbing issue this brought forward is fundamental to this inquiry and ties in with the third section of our submission on this topic: the importance of speaking one's mind. This will be discussed further in the next section.

Staff Wheaton characterized his assignment as having three distinct operations. The latter involved interviewing Detective Urquhart and Chief MacIntyre, and exploring the whole question of improper pressure on juvenile witnesses which may have caused them to perjure themselves, thereby bringing about the conviction of Mr. Donald Marshall, Jr. According to Staff Wheaton's testimony, all of this involved a separate "investigation of John MacIntyre, of Sydney City Police" and Staff Wheaton thought he needed "a clear mandate whether or not we begin that investigation" (42/7784). Yet on cross examination, Wheaton admitted knowing that the Attorney General's Department was waiting for the final report of the R.C.M.P. on the Marshall matter. He knew that the Crown did not want to delay completion and delivery of that report waiting for the interviews of, or inquiry into, the Sydney Police (46/8404).

We submit that the evidence clearly shows it was never Mr. Gale's intention to interfere, intercede, retard or in any way stop such efforts on the part of the R.C.M.P.. He simply did not wish to delay receiving the R.C.M.P. report on Marshall and processing Marshall's case before the court while having to wait for these other matters to be explored. Staff Wheaton was

informed by Prosecuting Officer, Frank Edwards, that Mr. Gordon Gale had suggested such interviews should be held in abeyance for the present (42/7793). Wheaton admitted on cross examination that he took nothing sinister from Mr. Gale's suggestion (46/8403).

It is our submission that none of this precluded Staff Sergeant Wheaton from continuing with his investigation.

When Superintendent Vaughan took charge he demanded to know from Mr. Wheaton why he thought he would place the Attorney General's Department in an embarrassing position and asked Staff Sergeant Wheaton for his report in writing. He also met with Staff Sergeant Wheaton and testified that he had the impression that Staff Sergeant Wheaton thought the "investigation had been stopped" (72/12882 and 87). His partner, Sergeant Carroll, testified that Staff Sergeant Wheaton was "probably frustrated" that he could not proceed further with his investigation (48/8833). If these were Staff Sergeant Wheaton's true feelings, one is forced to ask why he never spoke his mind to Prosecuting Officer Frank Edwards, his immediate superior, Inspector Don Scott, or the C.I.B. Officer, Douglas Christen. Why did he not express such views in his written reports to "H" division in Halifax?

Clearly Inspector Scott did not share Staff Sergeant Wheaton's views. He knew that the Attorney General's Department wanted to get the Marshall issue out of the way first; then proceed and conclude with the Ebsary case. He said he "had no problem with it at all" (50/9297). Staff Sergeant Wheaton's

partner, Sergeant Carroll, thought that the R.C.M.P. could conduct an investigation of another police force, up to a certain point, without necessarily having instructions. But, because of his junior rank, he could not see himself interviewing a chief of police without prior approval from one of his own superior officers (48/8855).

Supt. Scott, who was in charge of the Sydney sub-division, said it made sense to him not to pursue these other matters "with all these other things in the process. Lets clean up one or two first" (50/9288). Supt. Scott confirmed that his superior officer, Superintendent Christen, also was of precisely the same view (i.e.: not to bother with it "at this time" but rather to proceed with "one thing at a time") (51/9335).

For his part, Inspector Scott felt they hadn't really opened a file to look into the conduct of the Sydney City Police Department and that they had to wait for some direction before doing so. But this wasn't the only way of getting at the details. Another way was this very Royal Commission, or as well there could have been an investigation by the Nova Scotia Police Commission (51/9353 and 9356).

Mr. Scott understood the reasoning for postponing the questioning of Mr. Urquhart and Mr. MacIntyre pending a conclusion of the Marshall and Ebsary cases (51/9418). He took nothing sinister from the fact that they were put off for the time being (51/9420).

As noted, C.I.B.'s highest ranking R.C.M.P. officer, Superintendent Doug Christen, held the same sentiments. He and

Mr. Gale shared the same view that the Marshall and Ebsary cases would be dealt with "and the other matters would be set off to the side for the time being, till we got those concluded" (54/9914). Mr. Christen's opinion was exactly opposite to that of his junior officer, Staff Sergeant Wheaton;

> "...and (a) it wasn't as though he had told us to discontinue the investigation or stop the investigation...I don't know as he ever used the word abeyance with me...put these things on hold for the time being and we'll get to them eventually." (54/9928)

There was nothing suspicious about any of it in the mind of Superintendent Christen (54/9929).

Christen also felt that they required special direction from the Attorney General's Department to conduct such an investigation. That investigation "never started" because they didn't get the necessary direction (54/9983). It is natural to suppose that Superintendent Christen never solicited this special permission or direction from Mr. Gale because he thought they'd get around to it after the Marshall/Ebsary cases concluded; or he, like Scott, supposed that there might be other methods of inquiry, for example the N.S. Police Commission or a Royal Commission.

What is absolutely clear is that had Christen been unsettled, disgruntled, or bothered by the notion that his force had somehow been thwarted or prevented from doing what they thought was necessary, he would have put it directly to Mr. Gale (54/10002).

No one, not even Mr. Edwards and Mr. Gale ever expected that the proceedings against Ebsary were going to take close to

four years to conclude (67/11862). As noted earlier, it was never the intention of Mr. Gale to delay, hinder, or otherwise prevent the R.C.M.P. from conducting their investigation. One need only review the testimony of Mr. Gale under direct examination by Commission Counsel (for example 75/13388) for verification. His conclusions were supported by several other witnesses, including Superintendents Scott, Christen, and Vaughan, and Attorney's General How (60/10795) and Giffin (58/10604).

When Superintendent Vaughan became involved, he accurately concluded that the best way to ascertain Mr. Gale's meaning was to go ask him directly, rather than request an interpretation from Staff Sergeant Wheaton or Mr. Edwards (72/12882). Notwithstanding views expressed by Staff Sergeant Wheaton to Superintendent Vaughan during their meeting, Superintendent Vaughan communicated with Mr. Gale and then formed the opinion that Mr. Gale's statements and interpretation were correct (72/12900). Vaughan was satisfied. There was simply nothing untoward or improper.

Mr. Gale's primary interest, which is to be commended, was to see to the proper disposition of the Marshall case. He couldn't see much sense in interviewing Sydney police officers until the R.C.M.P. had the whole file, the whole picture. At Mr. Gale's suggestion, the then Attorney General, Mr. How, issued an order to Chief MacIntyre pursuant to the Police Act. As a consequence of Mr. Gale's action, the R.C.M.P. were then appraised of the evidence and documentation on file. It would

have been unproductive for the R.C.M.P. to have proceeded earlier. Mr. Gale now felt they could - and could do whatever they wished - following the Attorney General's order (75/13387 and 76/13534).

In conclusion, had Staff Sergeant Wheaton seen fit to declare his feelings openly to his superior officers, including Superintendent Scott and Christen, then these senior officers would have been expected to advise Mr. Gale of the concern. In this way any misunderstanding would have been quickly cleared up. If Superintendent Christen had solicited Mr. Gale's permission, then it's obvious from the evidence that it would have been immediately forthcoming.

C. THE IMPORTANCE OF SPEAKING YOUR MIND

We anticipate an argument from others that the actions of William Urquhart and Chief John MacIntyre, and possibly other officers with the Sydney Police Department, ought to have been investigated and that the Attorney General's department was dilatory in not seeing that this was done.

We reject the soundness of that proposition on two counts: First, the Crown officials who were most intimately involved in the Marshall case (Frank Edwards, Gordon Coles, Ronald Giffin and Harry How) all testified that the department's first priority was to secure Mr. Marshall's release from prison and see that his case was dealt with expeditiously on the Reference. The next major concern was to proceed with the case against Mr. Ebsary.

Everyone, including police, defence counsel, prosecutors and Department officials were proceeding very

carefully. This was new ground and there were few precedents available to assist anyone on the Crown side, particularly the Attorney General who was ultimately responsible. All concerned exercised extreme caution to ensure that no action was taken which might trespass upon a fair disposition of the charge(s) against Mr. Ebsary. Some might suggest that the wheels of justice ground slowly; however, any process which involves people who are trying to act responsibly, in novel circumstances, while exercising an abundance of caution may be perceived as being indolent. We submit it is better to be careful, but right, than to forsake the protection of an accused's rights in haste.

Despite the countless faults alleged by others, the R.C.M.P. investigation in 1982 did uncover the evidence required to obtain Mr. Marshall's release and he was acquitted by our Province's highest court. Mr. Roy Newman Ebsary was charged, prosecuted and after several appeals, ultimately convicted and sentenced.

No one could have predicted that the prosecution of Mr. Ebsary would last through three jury trials, as many appeals and a leave to appeal to the Supreme Court of Canada. This last effort came in 1986 and when leave to appeal was denied, the department was then free to convene that far-ranging inquiry into the factors which led to Mr. Marshall's wrongful conviction. Only a few months later, the process culminated in the creation of this Royal Commission.

In summary, the events which took place following Mr. Marshall's release from Dorchester Penitentiary in March, 1982, could never have been predicted. We submit it would have been grossly unfair to the rights of an accused person like Mr. Ebsary, were this department to have acceded to outside pressures and continued it's inquiries into the action of the Sydney Police department and it's members. That kind of evidence which would undoubtedly probe the circumstances of the night of the stabbing, as well as actions by the police and other witnesses in the days and weeks following, undoubtedly, would have adversely affected the rights of the accused, Mr. Ebsary. Such details would be published or leaked and jeopardize any likelihood of a fair trial. In our respectful submission there was nothing to prevent an investigation by the R.C.M.P. into the actions of the Sydney Police Force from being done. Our reasons have already been canvassed in Section 2 of this brief.

We anticipate it may also be suggested that the Attorney General's department neglected its responsibilities by failing to pursue a criminal investigation into the action of Mr. MacIntyre and/or Mr. Urquhart; for example, charges of counselling perjury or obstructing justice. On this front, we categorically reject any such submission. At no time between 1982-1986 was the Attorney General's department advised by the R.C.M.P. that such criminal acts may have been committed by Messrs. MacIntyre and Urquhart or that an investigation should be instigated to explore such actions.

Surely it is fundamental to expect any police officer, especially a senior investigator with the experience and record of Staff Sergeant Wheaton, to be clear, forthright and unambiguous in all reports filed. This is even more important in a para-military organization, setup with a series of checks and balances (such as the use of readers to review reports for thoroughness) where opinions and conclusions are to be scrutinized by superior officers. If you don't write or tell anyone what you think, no person can be faulted for mistaking your intent.

We submit Staff Sergeant Wheaton's failure to state clearly what was on his mind was crucial when he, as the senior investigator charged with the conduct of the Marshall case, submitted his written reports. He knew that they were being reviewed by his subdivision senior officer, readers and superior officers at each division in Halifax and would then be forwarded to the Attorney General's department for their review and advice.

This was clearly understood by Staff Sergeant Wheaton's supervisor, Inspector Scott. He insisted that his men be informative in the reports that they prepared and filed. They had to be unambiguous. They knew that on important cases their reports would come to the attention of the Attorney General's department, as well as senior officers at each division (51/9412).

Perhaps Superintendent Vaughan said it best:

> "Well, I disagree with you totally on that point in this respect. I know what you're alluding to, but I do consider the R.C.M.P. to be a professional police force and if we are going to make comments and reports that are subject to review, then we should be making them based on some fact and some perception or notion that comes into your mind...I believe in 1983 was the request from Mr. Gale for an overview...of practices and procedures of the Sydney City Police force. And looking at the correspondence there's nothing to indicate to him that a criminal offence has been committed..." [(emphasis added (72/12928)]

It's one thing to be careless in writing such that, to use the words of the Chairman, "this loose use of words all the time" leads to confusion or inaction (76/13543). But it's quite another thing, to say nothing at all.

Staff Wheaton's reports are as follows (the references here are to Exhibit 99 Vol. 34 of the red books):

"1. Exhibit 99/5 - Report dated 82-02-03

2. Exhibit 99/9 - Report dated 82-02-25

3. Exhibit 99/58 - Report dated 82-03-22

4. Exhibit 99/64 - Report dated 82-04-06

5. Exhibit 99/72 - Report dated 82-04-07

6. Exhibit 99/73 - Report dated 82-04-19

7. Exhibit 99/76 - Report dated 82-05-04

8. Exhibit 99/88 - Report dated 82-05-20"

These are the so-called C-237's which any field investigator completes knowing that they are being passed up the line for critical review by senior officers (47/8578).

In none of these reports does Staff Sergeant Wheaton even remotely suggest that Mr. MacIntyre or Mr. Urquhart broke the law or that they ought to be investigated and possibly charged with obstruction or counselling perjury.

Staff Wheaton's next detailed report is found in Exhibit 20/8. This is his report to the C.I.B. officer at each division, dated 83-05-30, which was prepared in direct response to the request from Mr. Gale for a report on "any instances of improper police practices or procedures" of the Sydney Police department. Surely this report was the opportunity for candid expression by Staff Wheaton. It was his duty to be forthright if he thought a criminal offence had been committed or that an investigation into the likelihood of such should be commenced. If he felt this was the case, clearly it was his responsibility to make this clear in his report.

Staff Wheaton failed in that duty. Any reading of his report will confirm that although Staff Wheaton was critical of Mr. MacIntyre's actions, he goes no further than to describe them as being "improper" or "unethical". He felt there were many reasons why Marshall, Chant and Pratico had perjured themselves. He concluded that "the case was skillfully prosecuted" and that the decision of the jury was "understandable based on the evidence they heard and the mood of the City...". At no time in his report does Staff Wheaton say anything about obstructing justice or counselling perjury (Exhibit 20/12).

And surely whatever credit might otherwise be given to suggestions by Staff Wheaton or others that the Attorney General's department ought to have moved more quickly in proceeding against Mr. MacIntyre and Mr. Urquhart is absolutely defeated when one considers his evidence on the allegation that Mr. MacIntyre deliberately withheld the first Patricia Harris statement from the R.C.M.P.

If such a revelation were true, it would be one of the most serious heard during the course of these Royal Commission hearings. This would provide overwhelming evidence of deliberate obstruction on the part of Mr. MacIntyre and, if one were to accept that this occurred after April 20, 1982, it would have been in direct violation of the Attorney General's order.

Yet Staff Wheaton's best opportunity to bring this monumentally important incident to the attention of his superiors and the Attorney General's department was not expressed in his report dated May 30, 1983. In the quiet of his office he had the chance to explain exactly what occurred, yet he did not do so. To the contrary, the incident drew only passing reference at the bottom of page 4 (Exhibit 20/11) of his report. Wheaton writes:

> "In reviewing the Sydney City Police file after the order had been made by the Attorney General that they turn over all documentation, I found a partially completed statement dated 17 June, 1971 - 8:15 P.M..."

There is no mention of being in Chief MacIntyre's office or of Mr. MacIntyre dropping paper(s) on to the floor. Not a word is made about Sgt. Davies accompanying Staff Wheaton,

nor any mention of Davies observing Mr. MacIntyre withholding paper(s).

Instead, the only interpretation which any reasonable person could place on that segment of Staff Wheaton's evidence is that he came across the first Patricia Harriss statement while casually going through the papers contained in the SCPD file.

It was not until four years after his involvement in the case, in a report dated 86-06-05 which responded to a memo to the C.I.B. officer at each division, that Staff Sergeant Wheaton wrote that if he were interviewed for the CBC he "would undoubtedly cast the Department of the Attorney General in bad light (sic)" and he would be forced to reveal that he believed "Chief John MacIntyre should be charged criminally with counselling perjury" (Ex. 20/59).

Naturally, this memorandum drew an immediate reaction from Staff Wheaton's superior, Superintendent Vaughan. By memo dated 86/06/12, Superintendent Vaughan demanded to know the background and factual basis for such assertions. He had reviewed the file - the same reports which had been sent to the Attorney General's department four years earlier - and could find nothing to even remotely support these bold accusations. Little wonder that Mr. Gale, the Deputy Attorney General, and how Mr. How, the Attorney General, never considered or acted upon it. They were never told! They were simply left in the dark.

Before leaving Staff Wheaton's final report dated 86/07/14 (E. 20/63), it is interesting to note in his final paragraph that he no longer speaks of the three separate cases under his charge. Rather it is one investigation which he divides into three phases (almost identical language to the views expressed by the Attorney General's department officials four years earlier!) and that the "third phase...the investigation of former Chief MacIntyre has not been completed". In a strict sense this presumes that the investigation was at least started which, of course, is the very point understood all along by Mr. Gale. Even Mr. Gale himself thinks that it bears "further investigation", which can be reasonably interpreted as meaning that it is already underway. Why then would the police look to the department for special permission to get on with their job?

The impression Staff Wheaton tried to leave on direct examination was that he had discussed with the prosecutor, Mr. Frank Edwards, charging Mr. MacIntyre with a criminal offence. On cross-examination, Staff Sergeant Wheaton finally admitted that he didn't know if, following the alleged incident of John MacIntyre withholding documents, he had told Mr. Edwards that MacIntyre should be charged with an offence (46/8391). Shortly thereafter, Staff Wheaton admitted that he could not say whether or not he and Mr. Edwards had discussed charging Mr. MacIntyre with a criminal offence (46/8392).

Staff Wheaton knew the importance of his various C-237 Reports (46/8451). He had never discussed the case with Messrs.

Gale and Coles. Furthermore, he admitted knowing full well that whatever those gentlemen knew about Staff Sergeant Wheaton's investigation would have to come from his reports (46/8452). He was hard pressed to answer why he did not deliberately state in his written reports to Superintendent Christien that Mr. MacIntyre ought to be charged (46/8464-65). He agreed that a reasonable interpretation of the way he wrote his report was that he just happened to find the first Patricia Harris statement while perusing the file.

Staff Wheaton presumed Superintendent Christien would have known that he (Wheaton) was a witness to a deliberate concealment of documentation by John MacIntyre; i.e. a deliberate obstruction of justice. We reject his presumption. Staff Sergeant Wheaton's evidence is contradicted by his own superior officer, Superintendent Christien, who had no recollection of being told by Wheaton of either the incident or potential charges (54/9995-96).

If Superintendent Christien didn't know, (and he said he didn't) and if it wasn't in the reports (and we know it wasn't), then the Attorney General's department could not have known. Despite a personal interview, Staff Sergeant Wheaton never told Superintendent Vaughan of the deliberate withholding of documents by Chief MacIntyre. Superintendent Vaughan testified at this Commission that the first time he heard of such a thing was during the Commission hearings (72/12883). Mr. Gale

also testified that he was never told of this incident (75/13452).

For these reasons, we submit that no fault lies with the Attorney General's department for failing to pursue Officers Urquhart and MacIntyre for their conduct during the investigation of the Sandy Seal murder.

Based on the foregoing analysis and conclusions we make the following recommendations:

(1) Revision of the R.C.M.P./Province of Nova Scotia policing contract so as to clearly delineate the circumstances in which the R.C.M.P. may investigate a municipal police force, and the scope of such an investigation so as to make it clear that the R.C.M.P. are neither expected nor obliged to obtain the approval of the Attorney General's Department before continuing or embarking upon their work;

(2) Stipulate the required means of transmittal and record keeping for all communications between the Attorney General's Department and the R.C.M.P. to ensure they are properly logged.

(3) State a policy making it clear to police and prosecuting officers throughout the province that the ultimate right to lay a criminal charge (information) lies with the police, subject only to the right of the Crown, in the exercise of its director, to withdraw or stay the proceeding.

XII. THE SECTION 617 REFERENCE

This submission will deal with the Crown's conduct of the Reference ordered by the Minister of Justice pursuant to Section 617 of the Criminal Code of Canada. Various topics will be canvassed including:

(a) The position that Donald Marshall, Jr. was to some extent responsible for the outcome;

(b) The conduct of the reference by prosecuting officer Frank Edwards as well as other officials within the Attorney General's department;

(c) A consideration of the procedures involved in such a Reference and the adequacy of such an exercise of the Minister's discretion.

For ease copies of Code Sections 617 and 613 are attached as Appendix E.

A. DONALD MARSHALL, JR.'S OWN RESPONSIBILITY

Much has been written of the phrase "author of his own misfortune". The exact origin of this phrase and the attachment of it to Mr. Marshall is rather mysterious. Typically, the concept is applied in tort law to support either a partial or absolute defence based on contributory negligence.

The phrase does not appear in the decision of the Nova Scotia Court of Appeal following the 1982 Reference. What the Court did say is:

> "By lying he helped to secure his own conviction. He mislead his lawyers, presented to the jury a version of the facts

> that he now says is false, a version that was so far fetched as to be incapable of belief." (Ex. 4/145)

And further:

> "He is obviously not prepared to admit at this stage that he was engaged in a robbery." (Ex. 4/143)

And also:

> "There can be no doubt that Donald Marshall's untruthfulness through this whole affair contributed in a large measure to his conviction." (Ex. 4/146)

The cases and authorities which describe the many factors to be taken into account when assessing credibility are legion. Some of these authorities were set out in Commission Counsel's own brief at page 15ff. For example, Chief Justice Appleton, stated:

> "... the promptness... of his answers or the reverse... their directness...or evasiveness, are soon detected... The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence... are all open to observation, noted and weighed by the jury." Evidence 220(1860)

So too are these factors weighed by an appeal court. Mr. Marshall testified as a witness. His deportment and credibility were before the court. That is exactly what the members of the Court of Appeal had an opportunity to observe during the two days of evidence in December, 1982. This and the other viva voce and documentary evidence before the court may well have led it to reach certain conclusions.

None of this was lost on Staff Wheaton who sat and observed the proceedings at the Reference. His notes confirmed that:

> "Donald Marshall poor witness. Wouldn't speak up. Robbery v. rolling." (Ex. 108).

Staff Wheaton admitted that Mr. Marshall's demeanour was poor (46/8411). It was readily apparent to him that Mr. Marshall had been admonished on countless occasions by his own lawyer, the Crown and the trial judge to speak up while testifying in November, 1971 (46/8412).

Demeanour of a witness, particularly an accused, "is a very important factor in the ultimate disposition of a trial" according to Staff Wheaton (46/8412). He also admitted that it may well have made a difference in the conduct of Mr. Marshall's defence in 1971 "whether his lawyers were informed of the whole story" by their client (46/8412 and 46/8415).

Staff Wheaton also agreed that the best person to say whether or not it would have made a difference to the defence would be Marshall's own lawyer, Simon Khattar (46/8415).

Staff Wheaton admitted that on one occasion Mr. Marshall was telling him that he was robbing someone, whereas on another occasion he was simply saying he was "rolling someone" or "wanted to get some money". However, at the Reference in December, 1982, Mr. Marshall would only admit that he was "rolling someone". Furthermore, Staff Wheaton admitted knowing

that Mr. Marshall had withheld this information from his own lawyers (46/8414).

Although Staff Wheaton did not subscribe to the view that Mr. Marshall was to some extent the author of his own misfortune, he did admit that his superior officers all held a contrary opinion (46/8416-17). For example, the CIB officer at "H" division, Supt. Christien wrote:

> "The fact the stabbing resulted from resistance offered at a robbery attempt, appears to be much more plausible than the suggestion an argument ensued between Marshall and Seale, which resulted in the stabbing." (Ex. 19/43)

Staff Wheaton's own superior officer, Inspector Scott, who was in charge of the Sydney subdivision, wrote a year after Mr. Marshall's acquittal:

> "Marshall himself by lying certainly did not help his situation." (Ex. 20/23)

Some four years later, in 1986, R.C.M.P. Supt. Al Vaughn wrote:

> "I also do not totally agree that Donald Marshall was not the author of his own misfortune. It is mentioned numerous times throughout the file that Marshall refused to admit he was planning to commit a robbery at the time of death. If he had told the truth from the beginning, the case may have been handled completely different (sic)." (Ex. 20/67)

We respectfully submit that Mr. Marshall cannot now say that he didn't mean what he said to the R.C.M.P. when they interviewed him at Dorchester Penitentiary in 1982. Whether he meant it, or deliberately misled the police officers by

espousing a story which he knew they had already heard from Mr. Ebsary in order to secure his release from prison, is not the point. The reality is that he said it and things happened as a result. The system and the people working within it took over as a consequence of what Mr. Marshall had revealed.

Mr. Frank Edwards concluded that the story now advanced by Mr. Marshall was much more plausible. He gave it credence. Senior R.C.M.P. officers from 1982-1986 found this version to be much more plausible and forthright and these opinions were voiced in reports furnished to officials within the Attorney General's department. Such officials, including Attorney's General How and Giffin, can hardly be faulted for relying upon the accuracy of such reports.

Put another way, how could the department, based in Halifax, ignore the remarks and conclusions made by investigators and lawyers in the field?

Staff Wheaton admitted under cross-examination that had he been the investigator in 1971, Mr. Marshall's credibility in his eyes would have been enhanced had he admitted to the robbery in the first instance (45/8193). It is not idle speculation to suppose that things may have been different, that Mr. MacIntyre's investigation may have been more purposeful had Mr. Marshall told the whole truth.

The conclusions recorded by our Nova Scotia Court of Appeal in their decision were not lost on Mr. Douglas Rutherford, Assistant Deputy Attorney General, with the Federal Department of

Justice. He commented on the "conclusion from a five member bench of the Court of Appeal of this province" (53/9735) which read:

> "There can be no doubt that Donald Marshall's untruthfulness through this whole affair contributed in a large measure to his conviction." (Ex. 4/146)

and that this was a:

> "...judicial finding that was part of that judgment." (53/9735)

We submit that this court had a duty to speak out and comment on a witness' credibility and veracity.

How could any government department ignore the decision filed by a court which had been directed to consider the case by the Minister of Justice?

We also submit that it would have been foolish, unreasonable and unrealistic to have expected either this Department or the Federal Department of Justice to have ignored such commentary from Nova Scotia's highest court.

Not surprisingly, the government's position on compensation took the decision into account (57/10403).

The implausibility of what Mr. Marshall had said to the police was restated very well by former Attorney General Harry How in his testimony:

> "Well, yes, from the memorandums (sic), particularly those of Edwards, it appeared that the police did not accept the explanation of Mr. Marshall given at the time of the charge laid against him, that the murder was committed by one of two men who he

> described as appearing to be priests...The problem in Mr. Marshall's explanation, apart from the two strange individuals...(was) ....when he related....that one of them had attacked Mr. Seale and then him in turn...simply because they didn't like Negroes or Indians. It was considered apparently from the scenario in the memorandums that the police didn't think this provided sufficient motive and that therefore a better theory was that one stabbed the other, without a compelling motive...they felt it was unlikely that a person would just come up and stab somebody because they might not like their race or colour. Now that's what I gather from this..." (60/10820-21)

Every lawyer for the Crown who has been involved in the Donald Marshall, Jr. case maintains the belief that Mr. Marshall bears some responsibility for the outcome which flowed from the episode in the park. Messrs. Edwards, Herschorn, Gale, Coles, How and Giffin all subscribed to that belief (63/11349 and 63/11353). Senior, experienced and talented police officers like Inspector Scott, Supt. Christien and Supt. Vaughn also shared an identical view. Five justices from the Nova Scotia Court of Appeal arrived at the same conclusion.

We submit that these conclusions are just and proper.

It is still Mr. Edward's belief today that Mr. Marshall bears some responsibility for the tragedy which resulted (67/11978ff;68/12097ff). Also, in the view consistently held by former Attorney General Harry How, Mr. Marshall was not totally blameless (61/10939) or innocent (61/10955).

We submit it is patently wrong to argue that it would be meaningless for Mr. Marshall to have disclosed his involvement

in the robbery to his lawyers, because regardless they would not have acted upon that information. To do so is to admit that disclosure of Mr. MacNeil's statement in November, 1971, was irrelevant because Messrs. Khattar and Rosenblum would have done nothing about it either. That is, the logical extension of the first assumption reveals the inherent weakness in the argument.

We are not suggesting that Mr. Marshall was forced to give up his right to remain silent. That protection afforded to Mr. Marshall or any other accused is fundamental. But Mr. Marshall was no neophyte to the criminal justice system. He had been questioned, arrested, charged and jailed on other occasions, and he knew the system and the risks.

Any one who seeks the protection of our system of justice must comply with its rules. If one decides, as Mr. Marshall did, to give up that right to silence and provide an explanation to either the investigating police or a trier of fact, that explanation must be complete and true, or if not, that person will be accountable. This issue will be more thoroughly canvassed in Section XV.

Once he decided to speak, Mr. Marshall had to accept some responsibility for his own defence and well-being. By only telling his lawyers, the police and the jury half his story, his complaints that he was not well served by the system of justice ring hollow.

Mr. Edwards testified that Mr. Marshall's obligation was to tell the whole truth "the full truth" (68/12099). These

sentiments were echoed by Mr. Edward's superior, Deputy Attorney General, Gordon Coles (77/13833 and 13848).

Mr. Gale remembered Supt. Christien reporting that Mr. Marshall should have been more forthcoming (75/13360). Mr. Coles felt that Mr. Marshall contributed to his own predicament (78/13834). It "was his responsibility" (78/13841).

We submit that these views have been shown to reflect the separate concurrence of both the Court of Appeal and senior R.C.M.P. officers and we submit they are justified on the evidence.

B. CONDUCT OF THE CASE

The processing of Mr. Marshall's case as a Reference under Section 617 of the Criminal Code did not occur by chance, nor as a result of some cold, uncaring discussions between government officials. In response to petitions from Stephen Aronson, on Mr. Marshall's behalf, there was frequent contact between officials of the Provincial and Federal Governments to determine how best to proceed with what was a novel and critical situation.

We submit that officials at both levels applied the best of intention and effort to obtain a fair and quick resolution of the proceedings, always balancing the fair treatment of Mr. Marshall against protecting the legitimate rights and interests of someone else who might later be an accused (Mr. Ebsary).

Mr. Aronson was actively engaged on Mr. Marshall's behalf, even several months before Mr. Marshall's release from Dorchester penitentiary. He and Mr. Edwards appeared on several occasions before the Nova Scotia Court of Appeal to determine procedures and obtain directions from the court regarding the kind of evidence which the court was prepared to receive. If at any time Mr. Aronson took exception to the views expressed by Mr. Edwards or the manner in which he conducted the Reference, it was incumbent upon Mr. Aronson to intercede and object.

It is important to recall that at no time did Mr. Aronson oppose Mr. Edward's efforts to proffer the statement given by Mr. Marshall to officers Wheaton and Carroll at Dorchester Penitentiary. In hindsight it may have been appropriate for Mr. Edwards to establish the voluntariness of that statement through a voir dire [for example see Monette v. The Queen (1956), 114 C.C.C. 363 (S.C.C.), and other authorities cited in McWilliams, Canadian Criminal Evidence (2nd Ed.) 1047]. We submit that one ought not to prematurely conclude that had a voir dire been conducted, the statement would be ruled inadmissible. One may question the usefulness of any present criticism about putting the statement to Mr. Marshall during cross-examination without first establishing its voluntariness.

Whatever Mr. Marshall's motive may have been in giving the statement in the first place, it was taken by investigating police officers and Crown lawyers to be significantly different than the version he gave under oath in 1971. In their

collective efforts to vindicate Mr. Marshall and secure his acquittal, they relied upon his truthfulness.

The discussions which ensued between Messrs. Gale and Edwards for the Province and Mr. Rutherford for the Federal Department of Justice were best described by Mr. Rutherford in his testimony (commencing 53/9701ff). Meetings were held in Halifax. Various drafts of the Reference order were reviewed. The preference was for the Minister to order a Reference pursuant to Section 617(c) of the Code. The Minister of Justice, Mr. Jean Chrétien, agreed to this procedure and that particular option on June 15, 1982. It was a view shared by Messrs. Rutherford and Gale that the primary concern was to get a mechanism in place to deal with the innocence or guilt of Mr. Marshall (53/9793). All other matters, including for example the conduct of the police, played a secondary role.

Mr. Gale testified that in his opinion the best way to proceed was under subsection (c) of Section 617. In that way they were "only asking the opinion of the court" and that (75/13389):

and that

> "...it would be possible to have a complete hearing of all of the issues, including why the recanting witnesses had lied at trial." (75/13389)

As a courtesy to the Court, the Chief Justice was advised of the Minister's intentions. He apparently indicated that his "immediate" and "unstudied reaction" was to ask whether

the Court of Appeal had the power to hear fresh evidence or permit the examination of witnesses if the Reference were convened under s. 617(c). The Chief Justice was referred to the decision in R. v. Gorecki No. 2 (1976) 32 CCC (2nd) 135 but he apparently still had concerns whether his Court would have the authority to hear new, fresh evidence under s. 617(c) and left the ultimate decision to the officials with the Department of Justice (53/9707).

The conclusion reached in that department was to have the case dealt with:

> "... in a way that the Court could look as broadly as it thought appropriate at as much evidence as it thought was appropriate..." (53/9708)

and the decision was made to bring the Reference under subsection (b) rather than (c).

No one involved in these deliberations wanted a new trial. Attorney General How testified that he was gratified when the Court of Appeal ordered an acquittal rather than a re-trial (60/10847).

Mr. Gale confirmed that there was no consultation with him or his office by federal officials before the change was made (76/13639). Mr. Edwards testified to first learning of this alteration while watching a news broadcast on television that night.

Both of them were concerned. Mr. Gale felt that by proceeding under subsection (b), this might well restrict the

inquiry (75/13390). Mr. Edwards' concern was that he would lose the control of the action. Now the proceeding would be dealt with as an appeal, effectively leaving responsibility for calling evidence "as if it were an appeal" to Mr. Aronson. As well, a 617(b) appeal allowed for the possibility that the Court would order a retrial.

Mr. Edwards was left in the position of having to react to the evidence called by Mr. Aronson. Whether because of a lack of resources or experience, that placed Mr. Marshall's case at a disadvantage, possibly something this Commission will choose to comment upon.

After watching two days of evidence, Mr. Edwards was concerned that the testimony "was not coming out as overwhelmingly convincing" as he thought it would (67/11989). He determined that a good way, perhaps the only way, to obtain an acquittal (notwithstanding that both the defence and the Crown were urging such relief upon the court) was if the Crown put forth a theory which blamed Marshall. If he did not adopt that strategy, then Mr. Edwards' major concern was that the court would order a new trial (67/12010).

The court, after all, was being asked to decide whether there was sufficient evidence to warrant an acquittal or sufficient evidence against Mr. Marshall to maintain the conviction. The third possibility was that the court might decide there was considerable doubt and send it on for a new trial (75/13397).

The evidence clearly establishes that Mr. Edwards, as the lawyer most intimately involved and familiar with the file, was left in charge of the conduct of the case at the Reference. Despite the novelty and significance of the case and without minimizing Mr. Edwards' considerable talents, the fact remains that he had never conducted an appeal before. Ideally, were sufficient resources and manpower available, Mr. Edwards ought to have been provided with some assistance.

The department is prepared to concede that for a case of such importance, Mr. Edwards ought to have been provided with co-counsel and that senior officials, including Messrs. Herschorn, Gale and Coles, should have provided ongoing support, guidance and supervision for such things as strategy, contents of the factum, the appropriateness of making certain representations designed to achieve a particular result, etc.

We recommend that in future, every effort be made by the Department to have both the prosecutor who handled the original trial and the department's solicitor responsible for the appeal, act in concert to conduct such appeals as are in the opinion of the Director so significant as to warrant that kind of treatment.

C. THE PROCESS AND ITS ADEQUACY

Provincial and Federal officials sought a means by which the merits of Donald Marshall's conviction could be quickly and fully explored.

Initial thinking led to the conclusion that subsection (c) would best enable such an analysis, commend itself to a full review and leave the carriage of the action to the resources and expertise of Crown counsel. Some doubt was raised in other quarters whether the text of Section 617(c) was broad enough to permit such a full consideration of the evidence, including leave to call fresh evidence.

The wording of the Minister's ultimate reference outlined the task he expected the Court of Appeal to perform:

> "... pursuant to Section 617(b) hereby refers said conviction to This Honourable Court for hearing and determination in the light of the existing judicial record and any other evidence which the court in its discretion receives and considers, as if it were an appeal..." (Ex. 124/64)

The clear meaning of that direction, which was confirmed by Messrs. Edwards and Aronson in their testimony, is that it was left to the court to decide what evidence it was prepared to consider. That accounted for the number of applications made by Messrs. Edwards and Aronson to the Court for directions.

Officials at both levels of government expressed a disadvantage to proceeding under subsection (c) in that it would call for subsequent executive action of some kind by the Minister following receipt of the Court's opinion. The disadvantages expressed of another option, namely a free pardon, were that it would effectively foreclose the opportunity for a complete

review, and might also impact upon any subsequent proceedings against Mr. Ebsary.

Any reference directed under Section 617(b) then brings into play the powers of a Court of Appeal pursuant to Section 613 of the Code. These provisions, together with the evidence and witnesses which the Court was prepared to consider, are set forth in the first few pages of the court's decision. As well, reference is made to Palmer and Palmer v. The Queen (1979) 50 C.C.C. (2a) 193 (S.C.C.) and the rules respecting fresh evidence.

As was contemplated by Messrs. Gale, Rutherford and Edwards, the Crown would have the lead if the proceeding were convened under Section 617(c). This would have avoided any disadvantage to defence counsel who may have felt constrained by lack of resources or experience to handle the case convincingly.

It is submitted a further disadvantage of Section 617(b) is that it may be more adversarial than proceeding under (c) where simply the "assistance" and "opinion" of the Court is solicited. Under 617(b) we have an appellant and respondent and all the natural competing forces that come to the surface in any adversarial approach.

During these hearings we have heard contrasting philosophies whether an inquisitorial as opposed to an adversarial approach is to be preferred. Which method will best lead to a discovery of the truth? In a unique proceeding such as a Reference, should the Crown take a position when (after

completing its own investigation) it concludes that the original conviction ought be overturned? Should a Crown prosecutor argue for an acquittal? Should the prosecutor take "no position"? Or, to adopt the approach of Gordon Gale, should the prosecutor recommend various options to the court depending on the evidence presented? For example,

> "If you accept this ... then ...
> Whereas if you accept this ... then ..."

What factors ought to persuade a Minister or his advisors as to the preferred course of action under subsection (a), (b) or (c)? This Commission may wish to express itself on these points. This and other cases have confirmed the care which must be taken during any Reference to preserve legitimate rights of others and avoid trespassing on the sanctity of another case.

It is our recommendation that to avoid some of the uncertainty evidenced in these proceedings, to clarify the role of the court and responsibilities of counsel, this Commission should consider recommending either a revision of the language of Section 617 or the incorporation of a new subsection (d) to the effect that the Minister of Justice may:

> **"refer the matter to the Court of Appeal for a full inquiry into the circumstances of the original conviction, or sentence, or appeal with power to review the record, admit new evidence, given direction as to whether the Crown or the person convicted will have conduct of the inquiry as appellant and consider such other matters as the Court deems relevant and necessary in order to complete its determination."**

XIII. COMPENSATION

It is the Attorney General's position that it is not within the mandate of this Commission to examine the quantum of compensation paid to Donald Marshall, Jr. As was noted by Commission Counsel in their opening remarks at the Halifax portion of these proceedings, the process leading to the payment of compensation, but not quantum would be examined by the Commission through evidence of those negotiations (37/6734). Although it is anticipated counsel for Donald Marshall, Jr. will ask this Commission to recommend additional compensation for their client (as Commission Counsel has done in its submission, to make such a recommendation would be erroneous for the following reasons:

1. Quantum of compensation is not within the jurisdiction of this Commission's mandate;

2. There has been no evidence upon which a recommendation for further compensation could be based;

3. Through counsel, Mr. Marshall actively participated in negotiations for compensation and at the conclusion of those negotiations, executed a full and final release from any other claims "arising in any way from the arrest and incarceration of Donald Marshall, Jr., for a crime for which he was subsequently acquitted" (Ex. 135/532).

Notwithstanding, this Commission is urged to examine the procedures which were used and which might be used in other cases where similar claims arise. In addition to the oral and

documentary evidence presented at the hearings, the unpublished paper of Professor H. Archibald Kaiser entitled "Wrongful Convictions and Imprisonment: Towards an End to the Compensatory Obstacle Course" (July, 1988) is recommended to the Commission for its thorough canvassing of the issues which arise when the justice system errs and an innocent person is wrongfully convicted.

A. HOW COMPENSATION WAS DETERMINED

The process of determining compensation for Donald Marshall, Jr. began in November, 1983 when Felix Cacchione approached the Attorney General and put forward a formal request (64/11480). Prior to that it was hoped that the Federal Government would assume responsibility for compensation (64/11471) and the Provincial Government responsibility for the conduct of an inquiry. The inquiry had been requested in September, 1983 (Ex. 125/262).

In November, 1983, the Honourable Ronald Giffin, Q.C., became Attorney General. Soon thereafter he met with Mr. Cacchione, who previously had requested meetings with the Attorney General but in fact had only corresponded with the Deputy, Gordon Coles, on the topic of an inquiry. Subsequent to a meeting between Felix Cacchione and Ronald Giffin on November 21, 1983, a press release (Ex. 125/280) was prepared, although not released. It summarized the position of the government: since Donald Marshall, Jr. chose to seek redress through the courts [an option which Professor Kaiser considers, as does the

Federal Provincial Task Force which dealt with this matter (Ex. 157)], and while the court proceedings were ongoing, the Attorney General felt it would be premature to consider the request for compensation. The evidence of Mr. Giffin (57/10418) elaborates upon this.

With the actual application for compensation and the repeat of the request for a public inquiry, the government struggled with an unprecedented situation. The options available were being considered by the government without the benefit of any previous local or Canadian experience. Mr. Giffin indicated that in early 1984 the Cabinet considered the idea of a commission under the Public Inquiries Act to recommend to government a quantum of compensation for Mr. Marshall (64/10449). These discussions occupied many weeks until, in late February, the government decided that a commission to examine compensation only, under the chairmanship of Mr. Justice Alex Campbell, would be established. A broader mandate for the Commission was forestalled by the stated intention of Mr. Ebsary's counsel to appeal his most recent case as far as the Supreme Court of Canada if necessary (64/10450). This factor was repeated on numerous occasions as a basis for limiting the scope of any inquiry while the Ebsary matter was before the courts.

On March 4, 1984, Premier Buchanan announced the appointment of the Campbell Commission (Ex. 135/342). It was at this time that Reinhold Endres became involved. Deputy Attorney General Coles asked him to participate in the Campbell Commission

"to safeguard, protect or represent the public interest...not per se the government...the public interest" (73/13073).

In terms of issues affecting compensation, the government was influenced at the time by the reasons of the Appeal Division in the Section 617 Appeal. Mr. Giffin did note, however, that his predecessor had indicated a request for compensation would be given sympathetic consideration (57/10406).

The next two months were taken up with preliminary matters concerning the Commission. Then on May 16, 1984, a meeting was held among Hugh MacIntosh, Gordon Coles, Felix Cacchione and Reinhold Endres to discuss procedures for the Commission (73/13074, Ex. 135/424 [Mr. Cacchione's notes], Ex. 135/425 [Mr. Endres' notes]). At that meeting, no consensus was reached on the scope of the Campbell Commission. Mr. Cacchione wanted the police investigation to be part of the inquiry whereas the Deputy Attorney General, Mr. Coles, felt that compensation would be payable only for the period of incarceration. His views were succinctly expressed in his letter of May 17, 1984, to Mr. MacIntosh (Ex. 135/435). Because of these different views and the possibility that the Commission's proceedings would be bogged down in challenges to its mandate, Mr. Cacchione raised the possibility of negotiating compensation rather than having an inquiry recommend a sum (see Ex. 134/499 and 64/11152).

Besides holding different views on the scope of an inquiry, very different tactics were used by Mr. Endres, for the

government, and Mr. Cacchione, for Donald Marshall, Jr., in the ensuing negotiations. Mr. Endres characterized his role as trying to negotiate the lowest figure possible. An ex gratia payment was "simply, recognition of a hardship, of suffering, which the government felt compelled to compensate in some fashion without any acceptance of responsibility or liability" (73/13080). On the other hand, Mr. Cocchione's approach was affected by an expectation that his client's entitlement was beyond doubt and would be viewed that way by the government.

Although at the beginning, the negotiations dealt with heads of damages (see Mr. Cacchione's letter of June 7, 1984 to Mr. Coles - Ex. 135/453), as they progressed the parties "became uncomfortable with the applicability of tort principles - they did not give the guidance that we needed" (73/13125). As well the time period for compensation was not a major factor. Mr. Endres noted "I do not recall any particular exchange between Mr. Cacchione and myself once we got into the negotiations themselves to the effect that (sic) which time period we were talking about" (73/13087). It was Mr. Endres's view that the Commission would have dealt only with Mr. Marshall's 'incarceration following conviction' (Ex. 135/437 and 73/13087). He carried that view into the negotiations. If Mr. Cocchione held a different view, he did not maintain it strongly, or at least was prepared to back away from it.

Mr. Endres was aware of the strengths of Mr. Cacchione's case and the degree of public support he had

(73/13112). Overall, Mr. Endres' concern was "that there be an appropriate forum, a fair forum, for determining an amount of compensation" (74/13162). Though money was an issue, it was not the major concern for him.

Mr. Cacchione's negotiating strategy was somewhat confusing. Though he had to deal with a fragile client (64/11525) he did not make specific recommendations to Mr. Marshall, rather he put to him various scenarios and let Mr. Marshall decide (64/11521). Expecting the government to deal primarily on a compassionate basis (64/11526), he disclosed to Mr. Endres that 'This guy is falling apart. He's cracking up' (64/11525). n negotiations he started with his bottom line figure of $550,000 (64/11519). e did not move from that until the government offer reached an $270,000, when he advised Mr. Marshall that if the Commission recommended more than $270,000, the government could reject it. He told Mr. Marshall 'if you want to put this behind you and start your life, then take it'. That figure was then accepted.

Mr. Cacchione felt that he could not go to the Inquiry because Mr. Marshall could not stand the pressure of being in the spotlight. This was not communicated to Mr. Endres (64/11531). On the other hand, Mr. Endres felt the government could go to the Commission and was prepared to do so. He felt there was little likelihood that the government would not accept the figure recommended by the Commission (73/13100), though he was prepared to use that slight possibility to his advantage.

The role of the Attorney General and the Deputy Attorney General in negotiations was minimal. At the outset, no figures were mentioned (Ex. 135/434). When the Minister was briefed on June 26, 1984, and a figure of $275,000 plus $85,000 for Mr. Aronson's fees was mentioned, he indicated that this was reasonable, but gave no particular instructions (72/13142). When Mr. Endres next met with Mr. Cacchione on June 16, 1984, he offered $260,000 which included the $25,000 paid earlier (72/13145). On June 28, 1984, the Minister indicated he would take that figure to Cabinet (74/13150). On July 18, 1984, the Deputy Attorney General suggested that $15,000 might be added to the $260,000 offered previously (72/13155). It was then that Mr. Endres offered $270,000 and negotiations concluded.

It will be suggested that Mr. Endres acted unfairly in the course of negotiations. We do not agree. Both sides were represented by competent counsel. Although Mr. Cacchione had a difficult client, to represent, the option of a public inquiry for which he petitioned in November, 1983, was still open to him. The public support and pressure which such an inquiry would garner was a very strong card for him.

To negotiate other than with resolve and by playing "hard ball" would amount to a dereliction in Mr. Endres' duty as a public servant. To expect compassion was somewhat naive on Mr. Cacchione's behalf. To say that because Mr. Endres didn't write a blank cheque, he was dishonest or unfair is not proper. No one forced either side to negotiate, and in fact the suggestion to

negotiate came from Mr. Marshall's counsel. Mr. Cacchione should have expected and did participate in hard negotiations. Perhaps from Mr. Cacchione's perspective, a public inquiry was not a viable option (a fact which he kept from Mr. Endres), but surely Mr. Marshall's sensitivities or anxieties could have been provided for in an inquiry. It would appear that Mr. Cacchione felt differently and that factor weighed heaviest on him.

B. OPTIONS TO DETERMINE COMPENSATION

The Federal and Provincial governments have recently agreed to a series of guidelines to be applied when circumstances like this arise (Ex. 148). It is these guidelines which should be examined in light of this case.

Professor Kaiser has expounded in detail upon the guidelines and their value in light of Canada's international obligations. His piece is thoughtful and merits consideration. This is not the forum for agreeing or disagreeing with his views (we do not agree with all his suggestions). However, in light of the promulgation of the guidelines, a number of specific comments should be made in light of this case.

The guidelines are broken down into four sections dealing with the rationale, the guidelines for eligibility to apply for compensation, procedure, and considerations for determining quantum. Our comments are directed primarily at the guidelines but with some suggestions regarding procedures and considerations for determining quantum.

(i) The Guidelines

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

If compensation is to be limited to cases of egregious errors (as opposed to those that result in minor penalties or those overturned on appeal), this seems to be a reasonable guideline.

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

If it is felt that a spouse, children and/or family should not receive any compensation, then the guideline implements that policy.

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

Although imprisonment for a breach of a provincial statute will be limited to six months, there is no logical reason why provincial statutes should not be included in the guidelines. (Of course that would necessitate provincial legislation to cover other aspects of the guidelines.) Again, this guideline reflects a policy that only wrongful convictions for serious offences will result in compensation.

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

The obvious difficulty with this guideline stems from the possibility of the Court of Appeal ordering a new trial from

a Section 617 appeal. If the new trial must result in an acquittal to trigger the guidelines, then there would still have to be a free pardon under Section 683(2). This seems rather cumbersome after an acquittal has been entered. The final sentence on page 2 states:

> "A Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence."

This may provide an avenue in these circumstances, but a review of the guidelines might be more appropriate.

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

Implicit in this guideline is the fact that no compensation is payable to a person acquitted in the course of a normal appeal and that the "newly discovered fact" emerges after the exhaustion of all appeals. Further, it is hoped the concept of "miscarriage of justice" here is used in the narrow sense that any wrong verdict results in a miscarriage of justice.

Two subsidiaries criteria are stated as well:

(a) If a pardon is granted under Section 683, a statement on the face of the pardon based on an investigation, that the individual did not commit the offence.

It is unfortunate that an acquittal is not sufficient to trigger compensation. This criteria may suggest that "proof

of innocence" is to be grafted onto our criminal law, a concept which is foreign and hardly worth importing.

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

This criteria assumes that on a Section 617(b) Appeal, the Minister of Justice can ask a question under Section 617(c). The language of the Code does not clearly provide that both paragraphs can be used.

(ii) Procedure

The procedures set out are minimal and still leave much to the discretion of a particular government. By not creating a right for the wrongfully convicted person to trigger the procedure, delays are inevitable. As well, the question of the roles of the wrongfully convicted person and the Crown are not spelled out, e.g. who has the burden of carrying the case-counsel to the Commission, the wrongfully convicted person or the Crown? What standard is to be applied in proving "damages"? What information will be provided to the wrongfully convicted person? Should the proceedings be adverserial?

(iii) Considerations for Determining Quantum

There is little problem with the heads for "non-pecuniary losses" but it should be stated they are not considered exhaustive. The ceiling of $100,000 should be subject to an inflationary increase, as was the figure set by

the Supreme Court of Canada for non-pecuniary damages in serious personal injury cases.

The headings for pecuniary losses should also not be seen as exhaustive, e.g. the legal fees associated with the original proceeding are not specifically listed.

As a qualifier on quantum, consideration is to be given to the following:

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

1. due diligence on the part of the claimant in pursuing his remedies.

The major concern with both of these is that they open an inquiry on compensation into an inquiry on why the person was wrongfully convicted. That may not be undesirable, but if it is what is wanted, then the guidelines should state that specifically.

Many days in these hearings have been spent analyzing what Mr. Marshall was doing in the park on May 28, 1971. That is all directed towards determining whether there was "blameworthy" conduct. It is surely an exercise which will detract from the main purpose of determining what amount of compensation is to be paid.

C. FREEDOM OF INFORMATION

When Mr. Cacchione sought information to assist in his representation of Mr. Marshall, he made an application to the Attorney General's department for information in their files. Whether or not the information existed is mute, for the procedures used in responding to the request demonstrated the inadequacy of the present legislation. Mr. Giffin attested to this when he was first on the witness stand.

In light of the experience in this matter, we believe the Freedom of Information Act should be amended to delineate how a deputy minister is to exercise he or her discretion on the exercise of information, requiring reasonable efforts to be made to ascertain whether the requested information exists, requiring the applicant be informed of the reasons for refusal to provide information and description of the documents which are not provided, and allowing for a meaningful and realistic appeal from the deputy's decision to other than his/her minister.

D. CONCLUSION

Even if guidelines are in place, they lack the force of law which would be required to create a right to compensation. It has been argued that legislation is required to fully comply with Canada's international obligations. Whether that is so or not is for others to determine.

Finally, it must be noted that even with guidelines in place, the procedure followed in this case could still result. Negotiations to "settle" are inevitable if the option is a prolonged and adverserial proceeding. With negotiations will

come hard bargaining, the assertion of relative strengths and if there is an agreement, a full and final release. The model followed here resulted in a substantial amount of money being paid to Mr. Marshall. Where money is our system's imperfect vehicle to compensate for pain and hurt, no amount will ever bring back good health. The same is true for deprivation of liberty. Once lost, it can never be restored. Money is simply the vehicle we use to make amends.

In that context, what occurred here was reasonable. The option of negotiations will always exist when one claims money from another side who feels no legal liability to pay. The guidelines do not create a right, only a means for determining quantum. In the absence of legislation there will continue to be contests over liability.

In light of the experience in this case and the evidence of these hearings, we believe the guidelines contained in Ex. 148 should be further revised to clarify the ambiguities in them and to improve the procedures when claims for compensation are made.