S U B M I S S I O N S

ON BEHALF OF THE ESTATE OF

DONALD C. MacNEIL, Q.C.

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I N D E X

INTRODUCTION

This is the submission on behalf of the Estate of Donald C. MacNeil, Q.C. Mr. MacNeil graduated from Dalhousie Law School in 1947 and was admitted to the Nova Scotia Bar in 1948. He was in private practice in Sydney, Nova Scotia between the years 1948 and 1970. In 1968, he was appointed Crown Prosecutor on a part-time basis. In 1970, he became the full-time Chief Crown Prosecutor for the County of Cape Breton. He remained in that position until 1975. He was re-appointed Chief Crown Counsel for the County of Cape Breton on the 25th of October, 1978 but died prior to assuming the duties of that office.

DISCLOSURE SECTION

The Submissions of Commission Counsel state the only substantive allegation of misconduct made with respect to the manner in which Donald C. MacNeil, Q.C. handled the prosecution of the Donald Marshall, Jr. case was the suggestion that he had an obligation to disclose the first statements of Chant and Pratico to the defence, independent of any request being made of him to do so (Commission Submissions, p. 69).

Crown Counsel had access to the Sydney Police Department File. They knew of the existence of the previous statements of Chant and Pratico and the partial handwritten unsigned statement of Patricia Harriss (4963).

Mr. Simon Khattar, Q.C. testified that as a former prosecutor, he knew that it was Det. Sgt. John MacIntyre's practice to take written statements from witnesses and he assumed they were taken in this case (4715, 4781).

Khattar testified it was not his policy nor that of

Mr. Moe Rosenblum, Q.C. to contact Crown Counsel to discuss the case against his client (4697, 4772, 4791, 4857). He further testified it was not either his or Rosenblum's practice to request from the Crown either witness statements or statements given by accused persons (4699, 4783). In the Marshall case, neither he nor Rosenblum approached the Crown for statements since they didn't expect to get them (4783). Khattar stated this was the practice of the Cape Breton Bar but was vague in supplying lawyers' names to confirm this practice (4794).

Khattar testified that the first information he had that Donald Marshall, Jr. had given a statement was when it was tendered as an Exhibit at the Preliminary Inquiry. He first denied receiving a copy (4698), then testified he thought he got it (4713), and then acknowledged later it was the only statement he had received (4714).

Khattar's testimony was he did not interview any Crown witnesses, including Chant, Pratico and Harriss, because it was not his practice to do so prior to trial. He acknowledged that was also the practice of Rosenblum (4717). Khattar admitted Donald C. MacNeil never told him to avoid the Crown witnesses in this case (4837).

Khattar stated he made no independent inquiry in respect to this case but relied entirely on Donald Marshall, Jr. and his friends to provide him with information (4694) He never considered the use of an independent investigator but there were no financial restraints placed on the conduct of the defence (4693).

Khattar, when pressed as to whom beside Marshall he spoke to prior to the trial, admitted having no knowledge of directly speaking to either Thomas Christmas or Mary Theresa Paul (4801). He acknowledged having a faint recollection of interviewing someone at the hospital with respect to Marshall's injuries and may have talked to some person on Crescent Street to enquire if Marshall had been there and called an ambulance. Neither witness was of any assistance (4758).

He denied having any knowledge of Pratico's admission to the Nova Scotia Hospital but thought that knowledge might have helped the defence (4719). The only evidence the defence had received from Marshall's friends between the Preliminary and the trial was that Pratico was drinking heavily the night of the stabbing. Khattar testified they had no information on Chant whatsoever (4720).

Khattar was asked by Mr. Saunders about his preparation before the trial (4758):

"...Q: Is it fair for me then to say that your efforts were primarily directed to what you did in the Courtroom?
A: Correctly."

Khattar denied ever receiving a copy of the Statement of Facts (4893) and was unaware of the practice to leave a copy of the Statement of Facts and Indictment in the Prothonotory's file (4894),(4895).

Khattar claimed that during the Marshall trial, defence counsel were unaware that Maynard Chant had given an untrue statement to the police because of fear of the Accused; or that Chant had given any written statement to the Sydney Police Department (4725). Khattar, during his testimony, was asked on four separate occasions to explain Mr. Rosenblum's cross-examination of Chant where Chant revealed he had told the police an untrue story, then admitted later he had provided a written statement to the police (4727, 4819, 4839). Khattar, when pressed on this issue, stated that he was only the associate Counsel and the question was better asked of Mr. Rosenblum (4868).

Khattar testified that no attempts were made to get the statement of Patricia Harriss when it was revealed at the Preliminary Hearing that she had twice been interviewed by the Sydney Police Department and had given at least one statement (4711).

Khattar acknowledged there was no legal impediment to prevent him

from either discussing the case with the Crown or requesting disclosure (4857). Khattar admitted being unaware of the law in 1971 which would have permitted a trial judge to order that witness statements be produced for defence counsel's examination (4855).

Judge D. Lewis Matheson's evidence on disclosure was in complete contradiction of Mr. Khattar's. He testified that most defence counsel would, in the course of preparing for trial, approach Crown to discuss their case (4924). At 5103, he testified:

> "...A: Sometimes the exchange of information would involve an oral recitation of what we expected our witnesses to say. Sometimes they would be more interested and want to look at the statement itself and if they were really interested in it and wanted to work on it further, a copy could be obtained for them and was as long as it was in the parameters that I indicated yesterday, that it wasn't going to put a Crown witnesses in jeopardy or it wasn't going to disclose something that was totally against the public interest."

Matheson stated that this was the practice of Donald C. MacNeil (4925).

Asked to comment on Khattar's practice of not seeking disclosure from the Crown, Matheson replied

> "Well, if it was his practice not to ask for them, then -- well, then probably he didn't get any from me and obviously I didn't go out and volunteer to give him one."

Matheson testified, from his experience, Rosenblum was aware that witness statements were available upon request and he, in fact, recalled giving statements to Rosenblum (4949). Matheson did not recall any approach being made to him or MacNeil in respect to disclosure (4958).

Matheson contradicted the testimony of Simon Khattar by stating that as a member of the defence Bar, he would interview Crown witnesses (4930)

and as Crown Prosecutor, he expected defence would interview the Crown witnesses (4931).

Matheson related that the only policy he was aware of in respect to disclosure was a letter he had personally received in his early days of prosecuting from now-Mr. Justice Malachi Jones, the former Director of Criminal Prosecutions. He testified it was not in general circulation but addressed to him (4920). Matheson testified he passed the letter around to other prosecutors, but he did not specifically say Donald C. MacNeil was aware of the letter. Innis MacLeod, former Deputy Attorney General from 1969 to 1972, was not aware of the letter. It is submitted Mr. MacNeil was not appointed prosecutor until four years after Matheson's appointment and there is no evidence before this Commission that MacNeil had knowledge of the Jones' letter.

Matheson testified that if he had in his possession information of a confidential nature which he felt was vital to the defence, he would disclose. He, however, qualified this by saying that the fact would have to be one which defence could not have known on their own initiative (4927).

Matheson was asked if the fact John Pratico was hospitalized was the kind of fact you should disclose to defence (4973):

"...A: Well, I -- I believe it was commonly known. If it was something that I didn't think they would know, yes, it is something that I would say defence counsel should have known.

Q: Yes?

A: Now if they didn't know it, it wasn't as a result of our office trying to keep it a secret. Anybody that knew Pratico or had an interest in him knew his whereabouts."

Mr. Arthur J. Mollon testified to the Crown disclosure practices in Sydney in the early 1970's. He felt the Crown freely discussed the case against his client and were willing to advise him of any evidence they had (5421). Mollon, after being referred to the testimony of Simon Khattar,

completely contradicted it. He recalled a case early in his practice where, prior to trial, he did not seek disclosure from the Crown. He testified later he spoke with Donald C. MacNeil and told him he was embarrassed in Court because he had not realized the basis of the Crown's case. Mollon testified (5423):

> "...A: He (MacNeil) said, 'Why in hell didn't you ask me?' From then on I just used to call and I never felt that my case would be prepared unless I knew just what the Crown had against me. What I had to meet. I always made it a practice to find out from the Crown everything that I could find from them, and I had absolutely no problems with Mr. MacNeil. If I'd called him -- now there wasn't a situation where Mr. MacNeil would call me and offer stuff; but anytime I asked him for anything or went to his office, it was always full co-operation."

Melinda MacLean, in her evidence, seemed uncertain at times as to whether or not she had actually asked Donald C. MacNeil for witness statements (7426). She testified she was only in Sydney for a one-year period. Based on her recollection, her evidence was not reflective of Crown disclosure practices in the early 1970's.

Mr. Justice Leonard Pace asked, as former Attorney General, what obligation was on the Crown to disclose witness statements in 1971. Pace felt statements should be provided upon request but that you could not require Crown prosecutors to provide those statements in the absence of a request because of the state of the law at the time (12789).

Innis MacLeod stated that there was no policy of disclosure in 1971 (7330). In his testimony, MacLeod stated it would not be the practice of Crown to disclose witness statements unless they were requested (7332).

It is submitted that in 1971 there was no written policy in respect to disclosure provided to Crown Counsel from the Attorney General's Office. The law in 1971 did not require Crown to disclose witness statements in the absence of a request.

Mr. MacNeil should not be made a scapegoat merely because of the incompetent handling of the Marshall defence by Rosenblum and Khattar.

It is submitted that there is no evidence MacNeil willfully withheld information from the defence. It is clear that even where critical information was revealed to the defence during the course of the trial, they failed to properly pursue it.

DISCLOSURE BY CROWN AFTER THE MARSHALL CONVICTION

Judge Matheson testified that he immediately called Mr. Robert Anderson in 1971 to advise him that James MacNeil had come forward claiming another man had stabbed Sandy Seale. Donald C. MacNeil was out of the city at the time (5019). Matheson testified he briefed MacNeil on his return, and a few days later Matheson attended a meeting with MacNeil, Insp. Al Marshall and Eugene Smith. Matheson's testimony was that MacNeil had a personal friendship with Insp. Marshall. MacNeil advised Matheson that the R.C.M.P. were not reporting to them but would advise them of the results of the polygraph (5023). Matheson recalled they were only told information at the meeting concerning the results of the polygraph. Marshall advised them he would be making a full report to Halifax (5024).

Insp. Al Marshall recalled meeting Donald C. MacNeil and advising him of the results of the polygraph (5752). He testified it was not part of his mandate to advise Mr. MacNeil of the test results (5759). He recalled MacNeil phoning a person in the Attorney General's Office in Halifax whom he believed to be Leonard Pace to advise him of the results of the test (5763). Insp. Marshall had no further contact with Donald C. MacNeil after the 23rd of November, 1971. Insp. Marshall testified he expected his report to be sent to the Attorney General's Office since they had requested the investigation. The former C.I.B. Officer, Donald Wardrop's, testimony was that in the normal course of events, a copy of the Marshall report would not be sent to the

Sydney Crown Office (6786). He, as well, testified he found it irregular that Marshall would advise Donald C. MacNeil of the polygraph results (6770).

Judge Matheson testified the defence should have been made aware of James MacNeil coming forward (5026):

MR. ORSBORN

"...Q: And who should have told them?
A: The Crown.
Q: Which is you and Mr. MacNeil?
A: At that point we never saw the report. The report went on to Halifax. It certainly was not my responsibility to tell the defence or anybody what occurred. I don't think it was incumbent upon Mr. MacNeil. So far as I knew, he never saw the final report either. If the final report was in the hands of somebody in Halifax, the results of the investigation were known, Mr. Rosenblum was present with Crown Counsel on appeal and I would have -- I would have thought that if it was known, and I thought they knew everything about it that I did."

Matheson testified that he understood that Insp. Marshall's official report would be received by the Attorney General's Office in Halifax and testified (5169):

MR. CHAIRMAN

"...Q: In any event, Judge Matheson, your -- you say you're staggered to now learn, if it is a fact, that the report of Inspector Marshall was not forwarded to the Attorney General's Office in Halifax?
A: Yes, that's correct."

Matheson's testimony was that the Sydney Crown Office did not receive either the re-investigation report of Insp. Marshall or a copy of Eugene Smith's polygraph report. Matheson stated once the Appeal Notice was filed, all pertinent information in the Crown's file was sent to Halifax (5186). Matheson said Appeals were held in Halifax and it was not the custom for the Attorney General's Office to call Sydney in respect to a file (5105). Milton Veinot who handled the Appeal in Halifax testified he never contacted

Donald C. MacNeil (7061).

Judge Robert Anderson stated that prior to any meeting he may have had with the R.C.M.P., he had received the results of the polygraph. He indicated he could have possibly received this information from Donald C. MacNeil (9148). Anderson felt that the fact the R.C.M.P. had been called in to re-investigate the Seale murder was known by members of the Attorney General's Department (9148), including Milton Veinot (9143). Anderson stated that it was the duty of Donald C. MacNeil to disclose the information concerning Jimmy MacNeil to the defence (9145). He, however, had no recollection of advising either Mr. Matheson or Mr. MacNeil to disclose the information and did not feel he had any obligation to provide this advice to them. He also acknowledged that an obligation would have been on Milton Veinot to disclose the information to Mr. Rosenblum (9162). Anderson's testimony was that he expected to receive a written report from the R.C.M.P. as part of the normal practice (9148). Anderson's testimony was that on the 16th day of December, 1971, he was appointed to the Bench. He could not recall ever briefing Gordon Gale, his successor, on any on-going matters (9150).

The then-Attorney General, Leonard Pace, felt the duty to disclose rested with Anderson in the Halifax Office, since Anderson had the knowledge of the results and as Director of Criminal Prosecution, it was his duty to designate the Crown Counsel who was to handle the Marshall appeal (12813).

The then-Deputy Attorney General, Innis MacLeod, testified that once a Notice of Appeal was filed, the local prosecutor had nothing else to do with the file (7147). MacLeod felt that after the appeal had been filed, the obligation to disclose information concerning Jimmy MacNeil rested with the Attorney General's Office in Halifax (7347). MacLeod testified that if the report from the R.C.M.P. to the Attorney General had been received, a file would be created by Mr. Anderson as Director of Criminal Prosecutions. Mr. MacLeod felt that once the Appeal Notice was filed in Halifax, a file would also be created, and when asked whether this would be a separate file,

he stated they would be the same file (7352).

It is submitted the obligation to disclose rested with the Attorney General's Department in Halifax. Once the Appeal was filed on the 16th of November, 1971, conduct of the file was transferred to Halifax. Judge Robert Anderson had been immediately advised of the Jimmy MacNeil revelation and he requested the R.C.M.P. to re-investigate. He should have received the final report in his weekly meeting with the C.I.B. Officer of the R.C.M.P. Mr. MacNeil only knew of the polygraph result and conveyed those forthwith to the Attorney General's Office. On the evidence, he didn't know of any other details of the Marshall re-investigation. Presumably, in a complete investigation, the polygraph was only one portion of the re-investigation. The evidence is clear that Donald C. MacNeil was not expected to receive Inspector Marshall's Report.

When Judge Anderson was appointed to the Bench, there was clearly not a proper transfer of his duties as Director of Criminal Prosecutions to Mr. Gordon Gale. If Judge Anderson would have opened a file when he made the request to the R.C.M.P. for the re-investigation or put a letter in the Appeal file if it had been opened, then Gale or Veinot would have been properly apprised of the situation. Presumably if the Report was not received, they would follow it up. Mr. MacNeil in Sydney should not be held responsible for any bureaucratic ineptness in the Attorney General's Office in Halifax.

Commission Counsel, in their submissions, maintain the disclosure ssue was the only substantive allegation of misconduct made against Donald C. MacNeil. There were, in the course of the Commission Hearings, other allegations made against Donald C. MacNeil, and I propose to briefly deal with each allegation.

ALLEGATION MacNEIL COACHED OR THREATENED WITNESSES WITH PERJURY

JOHN PRATICO

John Pratico testified to meeting with Donald C. MacNeil on three occasions prior to the Marshall trial. He met with Mr. MacNeil once in Wentworth Park prior to the Preliminary and at that time, his second statement was reviewed with him (2221). He corrected his earlier testimony that MacNeil was with him in the Park when he was told by Det. Sgt. MacIntyre that the Sydney Police Department had a beer bottle with his fingerprints on it (2079, 2128, 2221). Pratico was asked whether he felt coached by Mr. MacNeil in the Park (2222):

> "...A: I felt more coached by the police, moreso than by Mr. MacNeil. Mr. MacNeil would just sit on the side sort of taking it all in and making sure everything was done right."

Pratico then recalled being spoken to by Mr. MacNeil prior to the Preliminary. He indicated MacNeil came up to him as he was sitting outside the Court and asked "Are you ready?", and that is all he said to him (2083).

The third meeting between Pratico and Donald C. MacNeil was a couple of days prior to the trial. The meeting occurred at the Court House. Donald C. MacNeil reviewed the second statement with him and he was not aware whether Mr. MacNeil had his first statement. In describing the method of review, Pratico testified (2095):

"...A: Just reviewing and getting ready for my testimony.
Q: I see, and did you indicate to Mr. MacNeil at the meeting at all anything about the fact that you hadn't been telling the truth?
A: No, sir."

He further testified to being questioned by MacNeil in what only could be described as a congenial manner. He described that MacNeil would jokingly ask him whether he was sure when questioning him in regard to his statement (2133).

He testified to being frightened of the legal system but was not specific in whether he was frightened of Mr. MacNeil. When asked directly if he felt threatened by MacNeil, he answered "not really" (2222). Pratico testified that the person who pressured him to lie was Det. Sgt. John MacIntyre (2135). It is submitted that on the evidence before this Commission, John Pratico was neither coached nor threatened with perjury by Donald C. MacNeil.

MAYNARD CHANT

Maynard Chant's evidence was that he was taken to Wentworth Park by the police prior to the Preliminary Inquiry. He believed John Pratico was with him, as well as a number of police officers. When asked whether Mr. MacNeil was present (906):

"...Q: Did the Crown Prosecutor, to your recollection, at any time visit the Park with you?
A: I don't remember. I don't believe. I only remember being at the Park once."

The only meeting with the Prosecutor which Chant recalls occurred either prior to the Preliminary or the trial. His recollection of this meeting and who participated in it are extremely vague (900 - 903). His recollection is that Pratico, Donald C. MacNeil and one other unidentified male were present. He did not know who that male person was and when asked whether it was Det. MacIntyre, he did not know. Pratico's evidence does not

support Chant's testimony that he was present with Maynard Chant in Mr. MacNeil's office. Pratico also refutes Chant's evidence that he stayed at Pratico's house during the trial (2159).

Judge Matheson testified as to MacNeil's practices in interviewing witnesses. Matheson testified that it was not MacNeil's practice to talk with a number of witnesses at the same time (4976):

"...A: They would have -- they would have come in the afternoon. The order in which they appeared, I wasn't there, I don't know. When I arrived, Pratico was leaving. Now Mr. MacNeil would not have taken the three in together. He would have dealt with them individually."

Chant appears to be confusing his visit to the Park with the meeting he had with the Prosecutor. Based on the evidence, it is submitted that Pratico was not present at the meeting with MacNeil. Chant recalls that during the meeting, his statement was reviewed with him (905). Chant denied the suggestion by Mr. Ruby that he was being drilled or coached by MacNeil at the meeting (986):

"...A: I had a feeling of -- I had a feeling of making sure everything was right. I don't know if I could classify it as drilling or not."

Chant testified the only meeting with MacNeil lasted maybe 15 minutes (985).

Chant, in an Affidavit sworn the 14th of July, 1982 (Vol. 12, p. 52), swore that he had spoken with the Crown Prosecutor, MacNeil, after the Preliminary and was informed by MacNeil that if he changed his statement, he would be charged with perjury. Chant was asked by Commission Counsel (920 - 921):

"...Q: OK. Again, after you had given your evidence at the Preliminary Inquiry and before the trial, do you recall having any discussions with the Crown Prosecutor?
A: No."

When asked about the allegations against MacNeil in the Affidavit, he claimed to have no recollection of this discussion with MacNeil (922). Chant then testified that he did not tell Donald C. MacNeil that his second statement was false, nor did he ever inform MacNeil he lied at the Preliminary Inquiry (926).

It is submitted that Donald C. MacNeil would have no knowledge that Chant was lying when Chant was cross-examined by MacNeil at the trial on his earlier evidence given at the Preliminary. Any suggestion that MacNeil threatened Chant during this time is not accepted because the complete exchange, including the voir dire, occurred in open Court and is part of the Trial Record. Chant claimed in testimony being told after the trial he did not deserve his witness fees because of the way he testified (988). He did not recall it being Donald MacNeil and there is no evidence before the Commission as to the manner of payment of witnesses, whether it is handled by the police, Court Clerks' Office, or Crown Office.

Chant testified the reason he lied at the Preliminary and the trial was because of fear of "superiority" (914). When asked to clarify this by Commissioner Evans (917):

> "...Q: What did the fear of superiority -- to what -- to what was that directed?
> A: Well, I felt fear coming from Marshall. I felt fear coming from the detectives. The whole thing was scary."

There is no evidence MacNeil threatened Chant with perjury. It is argued that one 15-minute session with a prosecutor cannot be termed "coaching or drilling" a witness. As evidence of this, Chant indicated in testimony that MacNeil told him he could say "shiny object" not knife (905). Chant, in his statement of the 4th of June, 1971, had indicated that he saw Marshall stab Seale with a "shiny, long object". It was proper for Crown to advise Chant that unless he saw a knife, he should not testify to it. Chant, however, at the Preliminary, despite MacNeil's interview, testified that Seale was stabbed with a knife (Vol. 1, p. 38).

PATRICIA HARRISS

Patricia Harriss testified she had no recollection ever meeting Donald C. MacNeil (2848). If MacNeil did interview Harriss prior to the trial, it obviously did not have much significance if she no longer recalls the meeting.

Judge Lou Matheson testified as to his knowledge of MacNeil's practices in dealing with witnesses (4977):

> "...A: Well, if they went over and over the story -- how many times is over? If they went over it three times, I wouldn't think there was anything unusual about that. If they went over it a 150 times, that would be unusual. MacNeil would ask them, and I'm sure he'd ask them to repeat it, and I'm sure he'd question them about it, and probably ask them to repeat it again, not to rehearse them, but to satisfy himself that what he was hearing was the truth."

Matheson also stated that he did not think Mr. MacNeil saw much of the witnesses: Harriss, Pratico or Chant (4976).

There is no evidence that key witnesses in the Marshall case were pressured or threatened by the Crown Prosecutor. It is submitted that MacNeil followed standard Crown practices in meeting with witnesses in order to review their statements prior to the trial.

RECANTMENT OF JOHN PRATICO

Pratico testified before he gave evidence at the Supreme Court trial he approached Mr. Marshall, Sr. in the hallway and told him what was being done wasn't right. His testimony was that Marshall, Sr. called over the Sheriff, then got Mr. Khattar. He told the three individuals in a meeting lasting five minutes that he didn't know what happened (2098).

His testimony was Donald C. MacNeil and Staff Sgt. MacIntyre then took him to a room without consulting with Khattar. In the room, he was told by MacNeil (2100):

> "Look, John, all we want is the truth. You have nothing to be afraid of."

Pratico testified he felt in a bind because Mr. Khattar didn't come into the room with him and he didn't know whether Khattar believed him or not. He stated after he left the room, he was called to testify.

BY PRATICO (2101):

> "...A: So when I got in the Courtroom, and I got on the stand, nobody questioned me of what happened out in the corridor, and I wonder right to this day, why nobody questioned me in that Courtroom to the -- to what I said in the corridor."

Mr. Khattar testified that during the course of the trial in the corridor he was told by Pratico that Marshall didn't stab Seale. Khattar testified that he then got the Sheriff and Pratico again indicated that Marshall didn't do the stabbing and what he said was not true. The Sheriff then went and got Donald C. MacNeil. Khattar recalled a meeting in the Barristers' Room with Pratico, the Sheriff, Donald C. MacNeil, and Det. MacIntyre. During the meeting Khattar asked Pratico (4731):

> "Pratico, what are you trying to tell me. He said, 'What I said before in the Court was not true. Donald Marshall didn't stab him.' 'Well', I said to him, "Well, why didn't you tell the truth?'. He said 'Well, I was afraid.'"

Khattar testified Donald C. MacNeil asked Pratico:

> "Did I threaten you in any way?"

He said, "Oh no -- you didn't."

Khattar testified Det. MacIntyre asked Pratico:

"Did I scare you or threaten you?",

and Pratico replied:

"No".

Khattar stated (4733):

> "My recollection is that I was the last man to talk to Pratico when we left to go back into the corridor and I was the one that said to him, 'When you go into that Courtroom, you tell the truth.' 'Don't you be afraid of anyone.'..."

Khattar did not recall MacNeil telling Pratico to tell the truth and did not recall anyone speaking to Pratico out of his presence.

Judge Matheson in testimony recalled seeing Pratico standing in the hallway with Mr. Marshall, Sr. and Khattar. He was told by Khattar that Pratico had changed his story. He then went and got Donald C. MacNeil (5000). He recalled there was a huddle around Pratico in the hallway. He recalled Pratico, Khattar and MacNeil being there, but he did not hear the conversation. There was a conference in the Barristers' Room between Khattar, Rosenblum, MacNeil and Matheson, without John Pratico being present. At this meeting, they discussed what they should do. It was decided to take Pratico into the anteroom off the Library of the Barristers' Room and have a meeting with all Court Officers, with the exception of the Judge. Matheson recalled himself, Khattar, MacNeil, Det. Sgt. MacIntyre and John Pratico being present. He recalled all the people spoke:

> "I don't remember what was said, except to say this, that I listened carefully and I was satisfied that -- that it was communicated to Pratico that he was -- that it was a very important matter, that we all realized he was young and that the burden -- that every -- the burden on him and what everybody expected of him was to tell the truth so far as he could recall it, and if he couldn't recall it, to say nothing, and -- and to tell the truth. And there may have been a reference to perjury because I remember the last thing that was said in the room, Mr. MacNeil said 'About the perjury and about anything you've said before', he said, 'Forget about that; you don't have to worry about it'."

He recalled the purpose of the meeting was to try to set the young fellow at ease and to impress upon him to tell the truth.

Matheson was asked about Det. Sgt. MacIntyre's presence (5003):

"...Q: Did Sgt. MacIntyre say anything?
A: Yes.
Q: Do you remember what he said?
A: I don't remember what he said but I was well aware he was a police officer. I listened to what he said and I -- I was satisfied there was nothing disruptive in any way about it, and Mr. Khattar was there for sure. Mr. Khattar had no comment on it and I'm pretty sure Mr. Rosenblum was there and Mr. Rosenblum made no comment on what MacIntyre had to say."

In his jury address (Vol. 2, p. 64), MacNeil recalled the incident in the hallway and informed the jury there had been a consultation with defence counsel and Mr. Matheson after Mr. Pratico's recantment. MacNeil said all Counsel agreed that

> "The boy will be put under oath, put him under oath and let him tell his story under oath and if he says what he said in the Barristers' Room to you under oath, then that's an entirely different matter."

When the trial resumed, the Crown attempted to have Pratico relate to the court what happened in the hallway. The Trial Judge admonished Mr. MacNeil and told him to get on with the events relating to the night of Seale's death. Pratico then gave the same evidence he gave at the Preliminary. Mr. Justice Dubinsky, during cross-examination by Mr. Khattar (Vol. 1, p. 187) used Section 11 of the Canada Evidence Act to limit cross-examination of Pratico. Professor Archibald, in his evidence (5515) testified that the Trial Judge's interpretation of Section 11 was totally wrong.

MacNeil, following a voir dire, was permitted a limited re-examination as to why Pratico made the inconsistent statement outside the

Courtroom. The misinterpretation of Section 11 confused all Counsel and the Trial Judge.

In the MacNeil re-examination, he was attempting to elicit from Pratico why he had made the inconsistent statement in the hallway. Pratico, although agreeing he understood the question when asked by MacNeil and the Trial Judge, began relating an incident when he was threatened by Artie Paul. MacNeil stopped Pratico from continuing, the Trial Judge then interjected (Vol. 1, p. 206):

THE COURT

"...Q: I don't want you to say -- you can tell Mr. MacNeil people that you saw or who came to see you, but you don't say anything what they said. Who came to see you?

MR. MacNEIL

"...Q: Who came to see you?
A: I seen Tom Christmas and Theresa Mary Paul and I seen Artie Paul.
Q: Was this yesterday?
A: No.

THE COURT

"...Q: Did you see anybody else?
A: When, yesterday?
Q: Not yesterday.

MR. MacNEIL

"...Q: Anytime?
A: No.
Q: Alright, yesterday did you see anyone else discuss this case with anyone else?
A: Mr. Khattar.
Q: No, before you discussed it with Mr. Khattar?
A: Mr. Marshall.

MR. MacNEIL

"...Q: Donald Marshall. Alright, now why did you -- Sr., that's Donald Marshall, Sr?

A: Yes.
Q: Now, why did you make that statement yesterday that Mr. Khattar referred to as being made -- why did you make that statement which is inconsistent with your evidence as given before these gentlemen and His Lordship in this trial?
A: Scared.

THE COURT

"...Q: What's that?
A: I was scared.
Q: Scared of what?
A: Of my life being taken."

Pratico was then examined by MacNeil and the Court as to whether he was ever threatened by the accused. He testified he was not. The Court then asked:

THE COURT

"...Q: Any further re-examination?

MR. MacNEIL

A: There is a question that is bothering me, My Lord.

MR. ROSENBLUM

"...Q: Perhaps we had better approach the Bench rather than have the jury go out.

THE COURT

A: No, he is going to ask you a question. Don't answer it.

MR. MacNEIL

Q: The question, My Lord, would be to the witness. What is the basis for his fear. He said that he had fear.

THE COURT

A: He answered not due to anything the accused said. Now if anybody else said anything to him, I'm not interested. He has given you an explanation, namely he was scared of his life.

MR. MacNEIL

A: I was pursuing the matter just for the basis of whether his fear was justified or not but I accept your Lordship's ruling. That's all.

THE COURT

Q: That man's name was Tom Christmas, was it?
A: Yes.

MR. ROSENBLUM

Q: And Mary Theresa Paul?

THE WITNESS

A: Artie Paul."

The evidence before the Commission is clear that John Pratico in 1971 was threatened. Thomas Christmas was charged and committed to trial on a charge of obstruction.

The course of the trial and the conviction of Donald Marshall, Jr. may have been altered had Mr. MacNeil been permitted to immediately allow John Pratico to give his testimony about the recantment. John Pratico had been prevailed upon by all Counsel to tell the truth when he testified after this incident. MacNeil, it is submitted, was justified in believing the testimony that he then received from Pratico was the truth. MacNeil is not to be faulted because of the Trial Judge's misinterpretation of the Canada Evidence Act. This error hampered both Crown and defence from seeking what each believed to be the truth.

There is no evidence of any improprieties on the part of Mr. MacNeil during the recantment incident. John Pratico is the only witness who claims that he was taken alone into a room with MacIntyre and MacNeil. Neither Simon Khattar nor Judge Matheson support his testimony on this point. Even if the evidence of John Pratico is accepted, it is clear that all MacNeil

wanted from Pratico was the truth. The presence of John MacIntyre, if considered inappropriate, should have been addressed by Khattar or Mr. Rosenblum.

MARSHALL'S TATTOO

Mrs. Merle Davis testified at the trial that she had noticed a tattoo on Marshall's arm that wasn't there the night of the stabbing. She indicated she had noticed the tattoo while seated in the body of the Courtroom waiting to testify (Vol. 1, p. 134).

Mr. Rosenblum, during his cross-examination of Dr. Virick, had asked Donald Marshall, Jr. to come forward and pull up his sleeve in order that the scar could be examined (Vol. 1, p. 117):

MR. ROSENBLUM

"...Q: Now, Doctor, I would ask you to examine the left arm of the accused. Pull up your sleeve, just walk over near the doctor. Turn around so the jury can see you. Is this the wound, that you see on the left arm of the accused, that were speaking about?
A: Yes.
Q: And it would be about how long?
A: Approximately about four inches -- three to four inches.
Q: And you put 10 stitches in that.
A: Yes.
Q: Now from its appearance today, Doctor -- OK, he has seen it and the jury has seen it...."

On the evidence the scar and presumably the tattoo were exhibited to the jury. It must have been an obvious tattoo if Davis could read it from the body of the Courtroom. Mr. MacNeil asked Mrs. Davis what the tattoo said and when she replied "I Hate Cops", neither Mr. Rosenblum nor the Trial Judge objected to the question.

REFERENCE TO MR. MARSHALL, SR. IN THE JURY ADDRESS

In his address to the jury, Mr. MacNeil referred on two occasions to the conference in the hallway when Pratico recanted his testimony. MacNeil referred, in his address, to the conference with Donald Marshall, Sr. (Vol. 2, p. 56) and explained to the jury that Pratico admitted making statements out in the hallway which were inconsistent with his evidence. MacNeil paraphrased Pratico's evidence (Vol. 2, p. 57) as being "I made those statements because I was scared of my life". MacNeil, in his address, gives the names of the people Pratico spoke to prior to the trial. They were Thomas Christmas, Miss Paul and another man whose name MacNeil couldn't recall, presumably Artie Paul.

Further, in his address to the jury, explaining any inconsistencies in the eyewitnesses, MacNeil indicated that Pratico and Chant were nervous (Vol. 2, p. 64):

> "They admitted they were nervous, they were frightened, that they were scared. And what would give Mr. Pratico the impression as he told you, the explanation for the remark yesterday, after consultation with Donald Marshall, Sr., that he was scared for his life?"

Mr. MacNeil never directly stated that Donald Marshall, Sr. threatened Pratico. He gave the names of the persons threatening Pratico and did not include Donald Marshall, Sr. MacNeil's reason for referring to Mr. Marshall, Sr. was as a reference point to when the recantment occurred.

It is submitted that if the impression that Donald Marshall, Sr. had threatened Pratico was left with the jury after Pratico's testimony, then Khattar should have called Marshall, Sr. to the stand to refute the serious ramifications of Pratico's testimony. Mr. Khattar was asked why Donald Marshall, Sr. was not called to testify (4749):

> "Well, I think the Trial Judge stopped all the cross-

examination on his ruling."

Khattar, however, made no effort to address the issue with the Trial Judge. The Judge may have permitted him to call Mr. Marshall, Sr. to prove that Pratico's testimony was untrue. If the jury were left with the impression that Mr. Marshall, Sr. had threatened an eyewitness, it was too important an issue for defence to silently acquiese because of a Trial Judge's earlier ruling. It is also advanced that if MacNeil's use of Mr. Marshall, Sr.'s name was interpreted by the jury as referring to threats to Pratico, Rosenblum or Khattar should have objected and sought a mistrial. Significantly, the issue was not one that was raised on appeal by Mr. Rosenblum. The Trial Judge, during the voir dire appeared to invite Counsel to appeal his ruling on this issue (Vol. 1, p. 199):

> "I can only make my rulings as I see it which may certainly not be in accord with people -- as we call it 'upstairs'."

NON-RULE HEARSAY

Professor Archibald gave evidence on the misinterpretation of the hearsay rule during the Marshall trial. It is submitted that Crown Counsel do not determine what is admissible and inadmissible evidence. It is the Trial Judge who is the ultimate arbitrator on issues of admissibility. It is always open to either defence or Crown to appeal any Judge's ruling.

It is argued that it is highly speculative for Professor Archibald to suggest that the Crown's misinterpretation of the Hearsay Rules influenced the Trial Judge (Ex. 83, p. 18). The issue was one which should have been argued on the Marshall Appeal.

CHARGES AGAINST THOMAS CHRISTMAS

Christmas was charged with obstruction following an incident in which Pratico was threatened. He was committed for trial following a Preliminary Inquiry (Vol. 22, p. 22). After Christmas had plead guilty to a charge of break and enter with intent on the 5th of October, 1971, he was sentenced to a two-year term of imprisonment. The Crown offered no evidence in order to dispose of the obstruction charge. Christmas, in testimony, did not recall being offered any deal by the Crown (4195). He recalled having no knowledge of the obstruction charge being withdrawn (4196).

The manner in which the charge of obstruction against Christmas was disposed is a common Crown practice. He plead guilty to a more serious charge and the Crown elected to call no evidence to clear the charge from its docket.

Christmas indicated in testimony he expected to be called as a witness in the Marshall trial (4193). Simon Khattar did not recall interviewing Christmas. He testified he was not aware Christmas expected to be called as a defence witness in Marshall's Trial (4860). Khattar testified that even if Christmas were to have been called, he could have subpoenaed him and had him transported to Sydney from Dorchester Penitentiary (4841). During the course of the trial, Mr. Justice Dubinsky became aware of the threats against Pratico by Christmas. MacNeil advised the Court, out of the absence of the jury, that an Information had been laid against Christmas and that Christmas was a resident in another Province, undoubtedly referring to the fact that Dorchester Penitentiary is in the Province of New Brunswick.

MacNEIL'S STYLE AS A PROSECUTOR

The allegation was made against Donald C. MacNeil by Mr. Bernie Francis that MacNeil was the type of lawyer who really wanted to win very badly and he would do anything to win (3924). Francis provided no example of what he meant by "anything to win". He described MacNeil as an aggressive, tenacious fighter in the Courtroom (3923). Judge Matheson, when asked about Francis' comment, stated that MacNeil respected the rules as he knew them and understood them, and to say he would do anything to win was an insult to MacNeil (4938). He testified MacNeil, in the discharge of his prosecutorial duties, would not have deliberately circumvented the law (5057). Matheson was asked to comment on his own testimony that MacNeil wanted to win. Matheson testified (5068):

> "...A: Well, I always wanted to have a successful result in cases that I participated in, and I'm sure you do too, Mr. Ruby. In the sense that you and I both wanted to have successful conclusions to our cases, yes, Donald MacNeil wanted to win."

Simon Khattar testified he felt MacNeil was a fair prosecutor (4827).

Staff Sgt. Murray Wood of the Royal Canadian Mounted Police described MacNeil as being an extremely capable and competent prosecutor who treated both police and accused fairly (1842). Staff Sgt. Wheaton described MacNeil as an aggressive, competent, fair prosecutor who was very interested in his work (8349).

It is submited that any lawyer who is interested in his work whether as a prosecutor or defence counsel likes to win. Mr. Michael Whalley, when asked whether Moe Rosenblum shared the same reputation in Sydney as MacNeil as being an aggressive lawyer who liked to win, testified (11197):

> "Absolutely, they all like to win."

It is submitted that on the evidence MacNeil's reputation was as a fair, competent, aggressive prosecutor. To argue that the Crown never wins is fine in academic circles, but in the interest of justice, the Crown is not expected to take a "roll over and die" approach.

The Marshall case has been examined more closely perhaps than any case in Canadian history. It is submitted that any four-day criminal trial placed under a microscope is going to have flaws, either by defence counsel or Crown. Any suggestion that MacNeil's prosecution of the case was an example of his wanting to win badly and prepared to do anything to win is not borne out on the evidence. It was an example of MacNeil's aggressive style but that was the man (9411). As defence counsel, MacNeil shared the same reputation.

With the wide publicity this Inquiry has received, there has not been one witness called by Commission Counsel who has alleged unfair treatment in the Courts by Crown Prosecutor, Donald C. MacNeil. That is a factor which should be weighed in any determination of the prosecutorial practice of Donald C. MacNeil.

TESTIMONY OF OSCAR AND LEOTHA SEALE

Sgt. Michael MacDonald was called by Crown to establish continuity of exhibits. He testified that clothing belonging to the victim had been turned over to him by Mrs. Leotha Seale (Vol. 1, p. 138D). MacNeil requested and was granted permission by the Trial Judge to call Mr. and Mrs. Seale in order to establish continuity of the Exhibits (138V). Oscar Seale was called and testified he had picked the clothing up at the hospital and gave them to his wife (138W). Mrs. Seale briefly testified that she received the Exhibits from her husband and turned them over to MacDonald.

Judge Matheson testified that the Seale parents were called to establish continuity. When asked by Mr. Ruby if Seale's parents testifying was not an attempt to elicit sympathy from the jury over the death of their

son, Matheson testified (5069):

"...A: Oscar Seale was well known in the community...Oscar Seale took an interest in the trial and the Crown would not have had to call him to testify to draw attention to his presence in Court."

The evidence clearly indicates that MacNeil did not anticipate calling the Seales prior to the testimony of Sgt. MacDonald (p. 138):

MR. MacNEIL

"...Q: My Lord, I am going to ask your permission. It is a technical matter. I realize they are not on the indictment, but for continuity of possession of the Exhibits. Detective MacDonald just said that he received the Exhibits from Mrs. Seale. I would like to call Mr. and Mrs. Seale to prove continuity of the Exhibit."

Simon Khattar testified as to Crown practices in respect to continuity of exhibits at the time of the Marshall trial (4708):

MR. MACDONALD

"...Q: That it was clear that the defence were going to require proof of continuity of all exhibits?
A: Not that the defence was going to require it, this was the practice to establish that."

At 4709:

COMMISSIONER EVANS

"...Q: As I understood it, there was no waiver by defence of their right to have continuity established in evidence.
A: No, we did not waive any of the -- our rights at all with respect to any part of the trial."

It is submitted Mr. MacNeil was required to call the Seales to establish continuity. Messrs. Khattar or Rosenblum could have agreed to waive their right to have continuity established. An examination of the Seale testimony does not reveal any suggestion that the Crown used the Seales to garner sympathy from the jury. To the contrary, the evidence was brief and

MacNeil, in referring to the evening of the Seale murder, used the terms "the night this event took place" (138V) and "the night in question" (138W). The importance of the continuity of exhibits was shown in the examination of Sandra Mrazek (Vol. 1, p. 101) and Adolphus Evers (102) of the R.C.M.P. Crime Lab. Mrazek testified to finding only O-type blood present on both pieces of Seale's clothing. The importance of blood types and testimony of whether Donald Marshall, Jr.'s wound bled was of great significance during the course of the trial. The prosecution may well have been open to criticism had they not tendered the exhibits as evidence.

RACISM

There is no evidence before this Commission to support any allegation Donald C. MacNeil treated native Indian accused persons any differently than he treated other accused individuals. More importantly, there is no evidence that the prosecution in this case treated Marshall differently because he was a native Indian.

Bernie Francis spared few officers of the Cape Breton Court, including Judges, prosecutors and defence counsel in his testimony. When asked by Commission Counsel (3924):

> "...Q: Did you have any sense from your experience with him as to whether or not he treated whites any differently from natives?
> A: No, not really -- I didn't with him because — I didn't feel that he had any particular feelings against native people."

Eva Gould testified that she felt MacNeil showed a little more respect for people who came from a higher or better class or a more educated type of person (13015). She described a general impatience with both natives and non-natives. When asked if MacNeil treated people from lower socio-economic classes with less respect, she replied, "sometimes" (13016). Mrs. Gould's criticisms cannot be termed "racial". The evidence before this Commission does not support her perceptions.

No other native Indian, including Thomas Christmas, Artie Paul and Roy Gould, who may have had dealings with Donald C. MacNeil was asked to express an opinion on Mr. MacNeil's treatment of native Indians.

Any other witnesses, when asked to express an opinion of Mr. MacNeil's treatment of native Indians, stated they did not feel they received any different treatment than other persons.

The Commission was referred on several occasions to a 1969 complaint against Donald C. MacNeil to the Nova Scotia Human Rights Commission (Vol. 17, p. 83). Judge Matheson, when asked to comment on this, testified that prior to the incident, he was aware that the Sydney Crown Office had received complaints from people on the Reserves that they were concerned about their personal safety and property (4936).

The complaint arose out of a comment MacNeil made during a sentencing of a native Indian on a serious assault conviction. The crime occurred on the Eskasoni Reserve and MacNeil asked the sentencing Judge to take into account the large number of serious crimes coming from the area in the past six months. MacNeil stated that many decent, respectable citizens in the Eskasoni area were entitled to the protection of the Courts.

The Human Rights Commission investigated and their finding was that MacNeil's remark did not constitute a contravention of a particular section of the Human Rights Act but his remarks ran contrary to the spirit of the Act.

MacNeil then was not censured or reprimanded by the Human Rights Commission as suggested by other Counsel.

In a letter sent by the then-Attorney General, Richard Donahoe (Exhibit 17, p. 85), to the Chairman of the Human Rights Commission, Donohoe concluded MacNeil had acted properly; when he brought to the attention of the

presiding Judge what MacNeil had believed to be an unusual number of serious crimes arising out of the Eskasoni area during the period between December 1968 and early 1969. Donohoe's letter went on to list these offences. Donohoe's conclusions were that he would not urge Donald C. MacNeil to withdraw remarks as they were properly made; and, in future, he would not direct Crown prosecutors to refrain from making similar comments where it may be a prosecutor's duty to direct the Court's attention to a prevalence of crime in an area.

In conclusion, Donald C. MacNeil was completely exonerated by the Attorney General's Department in respect to the complaint made by the Nova Scotia Human Rights Commission.

CONCLUSION

Donald Marshall, Jr. was convicted on the perjured testimony of the two eyewitnesses. Judge Matheson stated that the Crown had concerns about the case, including; lack of murder weapon, young witnesses, the intoxication of John Pratico (4943), and the lack of an autopsy report (4944). The fact, however, remained that there were two independent eyewitnesses who had no connection. They didn't know one another. They lived 31 miles apart. The only common denominator was they were both in the Park the night Sandy Seale was stabbed. The Crown felt that the only way they could have had the same story was that they were telling the truth.

There is no evidence that Donald C. MacNeil pressured or threatened these key witnesses in giving perjured testimony. He had no knowledge of pressures placed on these witnesses by the Sydney Police Department.

MacNeil knew both Rosenblum and Khattar as experienced defence lawyers; lawyers who he would have expected to properly prepare for the defence of Donald Marshall, Jr. There is no evidence to support any allegation that MacNeil willfully withheld information from the defence. The reasons Rosenblum and Khattar would not seek disclosure can only be a matter for speculation. Did they conclude early that Marshall was guilty?

Disclosure practices have evolved with time but defence counsel, according to the testimony of Martin Herschorn, the present Director of Criminal Prosecutions, are still expected to initiate the request. This is the triggering event. Crown and defence do not exist in separate vacuums. They must communicate.

The second significant factor which contributed to Mr. Marshall's conviction was the threats against the witnesses. These threats

explained why Maynard Chant was reluctant to identify Donald Marshall, Jr. as the person who stabbed Sandy Seale at trial. The threats, Donald C. MacNeil believed, were the reason that John Pratico changed his story outside the Courtroom. We now know in 1988 that the reluctance on the part of both Chant and Pratico to testify was because they were lying but it took four Royal Canadian Mounted Police investigations to determine that fact.

There is no evidence before this Commission that Donald C. MacNeil coached the testimony of Chant, Pratico or Harriss. It is clear he reviewed the statements with them, but any suggestion that they were drilled or conditioned through long hours of preparation is not borne out in this case.

If Donald C. MacNeil was deceived by these witnesses, he was not alone. Pratico, Chant and Harriss were believed by Judge Matheson, Moe Rosenblum, Judge John F. MacDonald at the Preliminary Inquiry, the Grand Jury, and ultimately the 12 members of the Jury.

These are the submissions on behalf of the Estate of Donald C. MacNeil, Q.C. I reserve, however, the right to address any other issue in respect to Donald C. MacNeil, Q.C. arising out of the submissions of other Counsel which I may not have anticipated.