ROYAL COMMISSION ON THE
DONALD MARSHALL, JR.
PROSECUTION

FINAL BRIEF
ON BEHALF
OF

WILLIAM ALEXANDER URQUHART

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1.0 INTRODUCTION

1.1 When this Royal Commission into the Prosecution of Donald Marshall, Jr. was appointed in October, 1986, it was suspected that much of the blame for the wrongful conviction of Donald Marshall, Jr., would be brought home to the Sydney City Police and the Sydney City Police investigators particularly. This Honourable Commission, in recognition of this suspicion, felt it to be in the public interest to grant funding for Mr. Urquhart's representation at the hearings. With over eighty days of evidence having been received for consideration by the Commissioners, it is now possible to conclude that no serious allegation against William Urquhart has been substantiated.

1.2 It will not be asserted that there were no errors of judgment or misconceptions on the part of Mr. Urquhart. However, it is respectfully submitted that errors of judgment and misconceptions are one thing, misbehaviour and wilful misconduct are quite another. The submissions which follow are directed to one overriding conclusion with respect to the involvement of William Urquhart in this whole unfortunate matter: that William Urquhart performed his tasks with respect to this investigation to the best of his ability, in a spirit of fairness towards those with whom he came into contact, but also with all reasonable vigour to ensure that the public interest in the efficient and

effective detection of crime was satisfied to the extent of his appropriate role as a police officer.

2.0 THE APPROACH OF THIS BRIEF

2.1 Although William Urquhart's involvement in the Marshall matter occurred over a period of about eleven years, his connection with the case was really through a series of independent and primarily unrelated events. It is submitted that this Commission's assessment of William Urquhart's involvement and his contribution if any to this whole unfortunate matter ought to be assessed in that way as well.

2.2 It is respectfully submitted that the incidents to which this Commission will be directing its attention and which involve William Urquhart are as follows:

1. May 31-June 3, 1971 - Initial Involvement;
2. June 4, 1971 - The Pratico Statement;
3. June 4, 1971 - The Chant Statement;
4. June 4, 1971 - Marshall Arrest;
5. June, 1971 - Post-charge Interviews Generally;
6. June 17-18, 1971 - Harriss, Gushue and O'Reilly Statements;
7. November 15, 1971 - Reinvestigation
8. Further Pratico Contact
9. 1974 - Ratchford/Ebsary/Green Contact
10. 1971-1980 - Parole Contacts
11. August 26, 1981 - Contact with Dan Paul;
12. February-July, 1982 - The R.C.M.P. Reinvestigation.

Upon review of each of these incidents, it is respectfully submitted that this Commission will conclude that William Urquhart's conduct was appropriate in all the circumstances given his legal duties and even his moral obligations.

2.3 It is respectfully submitted that William Urquhart's testimony in most circumstances was and remains unnecessary to demonstrate that he conducted himself properly in relation to this case. In order to avoid undue repetition, this brief will rely primarily on the testimony of others - not that of William Urquhart himself. It is respectfully submitted that this approach will show how striking the difference is between the allegations made about William Urquhart and the facts which arise as a result of the evidence actually given before this Honourable Commission.

2.4 The list of William Urquhart's involvements in the Marshall matter set out above demonstrates that he was only associated with incidents which themselves were part of a much larger chronology of activity and events. Certainly some of the events with which William Urquhart was involved were significant in the chronology, but there is no real continuity to his involvement. In order to make the submissions contained in this brief comprehensible, Urquhart's involvements will, from time to time, need to be placed in context. Therefore, this brief may from time to time refer to other events not directly involving William Urquhart. This is done not in submission as to what those contextual facts should be if some other party contests the

appropriateness of such factual findings. The position taken on behalf of William Urquhart is that we are urging specific findings of fact only in relation to William Urquhart's activities - not of the larger series of events.

3.0 INITIAL INVOLVEMENT

May 31 and June 1, 1971

3.1 William Urquhart first became acquainted with the Sandy Seale murder investigation on Sunday evening, May 30, 1971 through a discussion with Patrolmen Walsh and McDonald (T. v. 8, p. 1330; T. v. 7, pp. 1130, 1205). On Monday, May 31, 1971, William Urquhart went to work on dayshift and was briefed by John MacIntyre about what had been done (T. v. 52, pp. 9491-9492, 9493-9494, 9496-9504). There is evidence that Urquhart also received information from Constable McDonald about an informal conversation held with Donald Marshall, Jr. the previous day in which Marshall had talked about kicking the short man with the knife (T. v. 7, pp. 1135-1136, 1180, 1207, 1253). Urquhart does not recall doing too much on the case on Monday or Tuesday, May 31 and June 1, 1971 (T. v. 52, pp. 9504-9505), and this appears to be substantiated by the documentation available (Exhibit 16 - R. v. 16, pp. 26-27).

3.2 Testimony at the Commission Hearings suggested two possible involvements by William Urquhart on the Monday and Tuesday of the week following the stabbing. R.C.M.P. Identification Officer John Leon Ryan testified that after returning to work himself on the Monday morning following the stabbing he made several efforts to contact Detective MacIntyre or Urquhart (T. v. 7, p. 1258). Ryan testified that MacIntyre was out for several calls, but that eventually contact was made

with either MacIntyre or Urquhart. Whether it was still Monday is unclear. Ryan's offer of assistance was declined (T. v. 7, p. 1259).

3.3 It is respectfully submitted that this being his only evidence on the point, it is not possible for this Commission to determine with whom contact was made by Ryan, nor on what day contact was made. It is respectfully submitted that the important conclusion for this Commission to draw from John Leon Ryan's evidence with respect to future investigations is that identification services were not secured at the earliest opportunity - most effectively the night of the stabbing. Much less weight should be attributed to any declining of identification services on the Monday or Tuesday, even if that refusal could be brought home specifically to William Urquhart, which of course it cannot.

3.4 The second suggestion about the Monday or Tuesday was that Urquhart visited the crime scene with Richard Walsh, one of the first officers on the scene the night of the stabbing, and Ambrose McDonald. This was put forward by Commission Counsel (T. v. 52, p. 9505). Ambrose McDonald indicated that a visit to the scene with Urquhart occurred some time after Walsh and McDonald had conducted their own impromptu search of the scene on the Monday or Tuesday following the stabbing (T. v. 7, pp. 1137, 1183-1184). McDonald was testifying without notes to assist his recollection. Richard Walsh indicated that the search with McDonald had occurred on the Sunday or Monday afternoon (T. v. 8,

p. 1350). Walsh also made no notes (T. v. 8, p. 1411). Urquhart had no memory of visiting the Park Tuesday but could have done so (T. v. 52, p. 9505).

3.5 It is respectfully submitted that the sum of this evidence is that at some time Urquhart visited the scene with Walsh and McDonald. A probability exists that such a visit to the scene occurred much later in the week - such as Thursday. It was the evidence of Richard Walsh - who did not speak about visiting the Park with Urquhart - that the Tuesday and Wednesday of that week would have been days off for the shift being worked by Walsh and McDonald (T. v. 8, pp. 1339-1340, 1352). Thursday would also be consistent with being <u>after</u> Urquhart's first proven involvement with respect to statements (Exhibit 16 - R. v. 16, pp. 28-30). Further support for this probability may be found in the fact that Walsh and McDonald had been on midnight shift the previous Saturday, switched to afternoon shift on Sunday and had days off on Tuesday and Wednesday. <u>Walsh and McDonald would be coming into work on dayshift on Thursday - which was the shift Urquhart was working</u>.

3.6 A further basis for concluding that the visit to the Park and crime scene was probably on the Thursday is that by Thursday the progress of the investigation needed to be re-assessed. The reason for this was that by Thursday the white Volkswagon theory could not be substantiated and the evidence being turned up from people in the Park was inconclusive about what occurred at the time of the crime itself. Obviously, it

would be appropriate for a police officer who had begun to be involved in a murder investigation to visit the scene and to consider where matters stood in relation to the evidence gathered through statements and interviews up to that point.

June 2, 1971

3.7 The first documented activity of William Urquhart with respect to the investigation of the Seale stabbing occurred on Wednesday, June 2, 1971 in the late afternoon (Exhibit 16 - R. v. 16, pp. 28-30). William Urquhart took a statement from Frankie French. Essentially this statement elicited French's knowledge of the activity of Donald Marshall, Jr. and Sandy Seale on the Friday night. It was not a significant statement. The absence of a witness on the statement was unusual given Urquhart's expressed practice of having a witness present (T. v. 52, pp. 7481-7485). Urquhart postulated that there was no witness either because the statement was taken at close to shift change or because it was anticipated that it would just be "an information statement from a witness" (T. v. 52, p. 9510). This latter possibility is borne out by the statement itself, which appears simply to contain background information on the movements of individuals on the night of the stabbing.

3.8 Ambrose McDonald testified that a young girl approached him on Wednesday, June 2, 1971, indicating that a witness from the Westmount area might shed some light on the Seale stabbing case. McDonald gave the girl's name to William Urquhart, and the witness Scott MacKay was discovered (T. v. 7,

p. 1138). The girl was likely Debbie MacPherson (now Timmins). She testified that a police officer asked her to go down to the police station on a school day when she was home sick. MacPherson agreed to go the next day - a Thursday morning (T. v. 4, pp. 712, 728). MacPherson does not recall who the police officer was who saw her at her home (T. v. 4, p. 712). It is not unreasonable to presume that William Urquhart may have been the officer who had this initial contact with Debbie MacPherson on Wednesday, June 2, 1971.

3.9 Scott MacKay's evidence was that on the Wednesday he was picked up at his home by William Urquhart and taken to the police station. There he met with three officers - MacIntyre, Urquhart, and another unknown officer (T. v. 4, p. 653). After being at the police station for four hours, MacKay was taken home by Urquhart (T. v. 4, p. 690). Urquhart was described as "genuine" and concerned, assisting with the transportation and also offering coffee and a cigarette according to MacKay's recollection (T. v. 4, pp. 689-690). With respect to his statement (Exhibit 16 - R. v. 16, pp. 31-33), MacKay indicated that the questioning for it was mostly done by MacIntyre and Urquhart (T. v. 4, pp. 653-683). MacKay found the questioning process difficult.

3.10 It is respectfully submitted that the Commission can take from MacKay's evidence that there was reason for him to remember William Urquhart as Urquhart was the officer who picked him up and returned him home on the night of June 2, 1971.

MacKay's evidence and the written statement produced (Exhibit 16 - R. v. 16, pp. 31-33) demonstrate that MacKay was questioned by John MacIntyre. This Commission can also accept that there was a third officer involved in dealing with Scott MacKay that evening. Assuming that the times on written statements are correct, MacIntyre could not have been with MacKay throughout MacKay's stay at the police station (Exhibit 16 - R. v. 16, pp. 34-37). It would also be reasonable, we submit, for this Commission to take the view that William Urquhart was in fact present at the police station while Scott MacKay was there, and perhaps even that William Urquhart participated in the process of police officer identification described by Scott MacKay (T. v. 4, pp. 654, 666, 668). However, Scott MacKay's reference to the involvement of some third unknown officer without ascribing a particular role to that officer during the evening, leaves it open that that other officer and not Urquhart was in on the questioning of MacKay.

3.11 It is respectfully submitted that William Urquhart was not a witness to the taking of the statement from Scott MacKay, given Urquhart's signing practice (T. v. 52, pp. 9486-9487, 9511-9512). Urquhart therefore did not participate in questioning MacKay for the statement. Instead, it was during the breaks when MacIntyre was not interviewing MacKay that there were intermittent and informal opportunities for MacKay to speak with Urquhart. This is a reasonable view for the Commission to adopt because the nature of the contact with Urquhart is described in a

different way qualitatively than the nature of the contact with the questioning officers (T. v. 4, pp. 689-690). This leads to an inference that different officers were involved in the questioning than those named by MacKay - at least so far as Urquhart is concerned.

3.12 The surviving impression of William Urquhart in Scott MacKay's mind is fundamentally different than the surviving impression of his emotions while being interviewed. While MacKay had reason to remember Urquhart, we suggest it was not because William Urquhart had taken part in obtaining any statement from MacKay. Instead, MacKay actually remembers Urquhart we submit because Urquhart was not involved in taking the statement. We suggest that the passage of sixteen years may well have blurred the roles of different police officers in MacKay's mind. The surviving impressions sort out the roles. MacKay remembers MacIntyre because MacIntyre took the statement, Urquhart because Urquhart was distinct from that statement, and the unknown officer remains unknown because he was a witness to the statement and participated little.

3.13 If one was permitted to speculate about events where the recollection of witnesses is uncertain or incomplete, a reasonable suggestion might be that the third unidentified police officer was "Red" M. R. MacDonald. A reasonable approach would be this. If one were planning to interview a witness who might speak about the crime scene shortly after the crime, surely the most relevant officer besides the chief investigator would be the

detective who knew most about conditions on the Friday night. That would be "Red" MacDonald. Also, regardless of who the officer witnessing the statement was, and unfortunately the evidence does not arrive at any independent confirmation of who this was, if this third officer witnessed MacKay's statement the evidence of MacKay and Urquhart before this Commission would be generally consistent with that of the other.

3.14 Urquhart picked up MacKay. MacKay was interviewed by MacIntyre and the "unknown" officer - perhaps "Red" MacDonald. Urquhart did not interview Scott MacKay but had intermittent contact with him. Urquhart took MacKay home. It is respectfully suggested to this Commission that this consistent theory of the evidence is the most probable to adopt here.

Urquhart's Notes

3.15 It appears reasonable to conclude that it was on Wednesday night, June 2, 1971, that William Urquhart wrote most of his notes which appear in Exhibit 16 (R. v. 16, pp.135-139). On their face, these notes appear to list the names of potential witnesses, whose names arose prior to or on the night of June 2, 1971. Lawrence Paul's statement indicated that he and Maria Sophocleous had been in Wentworth Park (Exhibit 16 - R. v. 16, p. 34). Debbie MacPherson was identified in Scott MacKay's statement (Exhibit 16 - R. v. 16, p. 31), although she may have also been identified by Ambrose McDonald (T. v. 7, p. 1138). The inclusion MacPherson's name is significant because she was interviewed on Thursday, June 3, 1971 (T.v.4, p. 712, 728). The

name of no other potential witness is identified in Urquhart's notes who was interviewed on or before June 3, 1971. If these notes had been made after June 2, 1971, there would have been no purpose in including Debbie MacPherson's name as someone to interview. Also, any references in the notes to the source of the names are all references to statements prior to June 3, 1971. The presence of a note about George Wallace MacNeil and Roderick Alexander MacNeil (Exhibit 16 - R. v. 16, p. 138), in conjunction with Exhibit 40, and Roderick Alexander MacNeil being contacted sometime after May 30, 1971, appears to lend support to the view that the notes were made prior to June 3, 1971 (T. v. 11, pp. 1924-1925,1929).

3.16 The notations which are made on different types of paper (Exhibit 16 - R. v. 16, p. 141-143), which are in William Urquhart's hand, should be considered separately. The remaining notes (Exhibit 16, p. 140) are dated June 14, 1971. This Commission may therefore assume that they were made no earlier than that date, and probably on that date.

3.17 The notes on different types of paper than those previously discussed (Exhibit 16, R. v. 16, pp. 141-143) should be examined in the original. Because of the presence of a note about Barbara Vigneau, it appears that at least that note was made sometime prior to June 23, 1971, when William Urquhart took a statement from her. The notes as to the O'Reilly's would only reasonably have been made prior to Catherine and Mary being interviewed on June 18, 1971.

3.18 A final point about William Urquhart's notes which is evident from the documentation available is that even though he prepared this general list of potential witnesses to be interviewed, the list was not used by him exclusively. For example, the notes concerning Dr. Virick and Merle Davis (Exhibit 16 - R. v. 16, p. 137) demonstrate that William Urquhart knew what these people might have to say, but he did not end up taking formal statements from them (Exhibit 16 - R. v. 16, p. 88). Also, the handwriting of persons other than William Urquhart does appear on the notes (Exhibit 16 - R. v. 16, pp. 136, 139).

June 3, 1971

3.19 This Commission has evidence that a few days after May 31, 1971, a police officer brought photographs of three white men to show Roderick Alexander MacNeil for the purpose of seeing whether or not he could identify any of those individuals as the individuals who had been seen in the Park on May 28, 1971 (T. v. 11, pp. 1924-1925, 1929). At least one of the photographs may have come from the R.C.M.P. (Exhibit 40). Sandy MacNeil thought that the officer who had come out was Ed MacNeil because the officer who came out had the same name as he did. Ed MacNeil did not recall ever taking any photographs to Sandy MacNeil. William Urquhart's middle name is Alexander, the same as Roderick Alexander MacNeil's. Further support for Urquhart's involvement here is found in his handwritten note about the MacNeils (Exhibit 16 - R. v. 16, p. 138).

3.20 Urquhart may have been the man with the

photographs. Urquhart neither took, nor witnessed, any formal statements on June 3, 1971 (Exhibit 16 - R. v. 16, pp. 38-40). Debbie MacPherson was interviewed this day by MacIntyre and another gentleman whose name or looks she could not recall (T. v. 4, pp. 713-714). It appears to be of no real significance whether or not William Urquhart participated in this meeting with Debbie MacPherson and her brother and uncle (T. v. 4, p. 721). She steadfastly refused to indicate that there was someone in the Park generally answering Donald Marshall, Jr.'s description of his assailants (T. v. 4, p. 714). Thursday was also the probable day for Urquhart's visit to the scene with Walsh and McDonald (Paragraphs 3.4-3.6, supra).

3.21 By the end of Thursday, June 3, 1971, the evidence before this Commission indicates that William Urquhart had been briefed about the investigation by John MacIntyre, had interviewed and taken a statement from one witness - Frankie French, had met and spoken with Scott MacKay, possibly had spoken with Debbie MacPherson and Sandy MacNeil, and then visited the scene. The evidence also appears to indicate that the exhibits of clothing and the tissue from the Park had been collected, but not by Urquhart. The initial avenues of investigation had apparently been unsuccessful at this point. William Urquhart had not really been closely involved in this first week of the investigation.

4.0 JUNE 4, 1971 - THE PRATICO STATEMENT

The Background on Pratico

4.1 In 1971 John Pratico lived on Bentinck Street in the City of Sydney with his mother and sister, a few short blocks from the Police Station. Once John MacIntyre had determined that it was necessary to re-interview the only two witnesses who apparently had seen some activity which could reasonably be connected to the stabbing which occurred, it would have been natural to make contact first with the witness who lived nearby rather than the witness who lived in Louisbourg. John Pratico was probably not in school in June, 1971 (T. v. 10, p. 2001). Pratico would therefore have been available on that Friday morning of June 4, 1971.

4.2 From the perspective of assessing the activity and conduct of William Urquhart with respect to Pratico's interview it is unnecessary initially to decide how much of John Pratico's evidence should be accepted, if any, or what level of cogency should be ascribed to it. So far as William Urquhart's interest is concerned, we invite this Commission to accept, for the moment, John Pratico's evidence at face value.

Pratico's Position

4.3 It was John Pratico's position before this Commission that he was in Wentworth Park on the night of May 28, 1971, just before he went home, and he may have seen Sandy Seale and Junior Marshall at that time (T. v. 11, p. 2033). However,

at the Commission hearings he was quite sure that that night he saw no stabbing incident (T. v. 11, p. 2033). Pratico went to the police station on Sunday May 30, and sat on a bench with Maynard Chant (T. v. 11, pp. 2038, 2043-2044). At that time John Pratico was called into a room by unidentified police officers whom he does not know to this day (T. v. 11, p. 2045). In the interview room were John MacIntyre and Sergeant "Red" MacDonald (T. v. 11, p. 2046). Today Pratico is unable to recall the May 30, 1971 statement or the facts related in it (Exhibit 16 - R. v. 16, pp. 22-23; T. v. 11, p. 2053). Pratico was unsure if the officers he had contact with knew that he was taking medication at that time (T. v. 11, p. 2054). Pratico's impression of the first interview was that John MacIntyre was asking questions in a "kind of roughish" way, conveying to Pratico that he was not being believed and that the officers felt that he knew more than he actually did (T. v. 11, pp. 2055-2056).

4.4 When John Pratico was taken to the police station on June 4, 1971, he only waited on the bench a few minutes before being taken in to give his second statement (T. v. 12, p. 2062). Pratico recalls that he was interviewed again by John MacIntyre and:

> I believe Sergeant Urquhart was there. (T. v. 12, p. 2063).

MacIntyre told Pratico:

> All we want is the truth. (T. v. 12, p. 2064).

Pratico says that there was further discussion until he was told

that he "could be going to goal" (T. v. 12, p. 2064). More discussion followed, with MacIntyre indicating that there was a witness who had identified Pratico as being in the Park that night. This was followed by more discussion concluded by MacIntyre saying:

> All we want is the truth. If we get the truth, that would be just fine. (T. v. 12, p. 2065).

A discussion took place about what had happened in the Park. Pratico says that MacIntyre told him what happened in the Park:

> In around about way. [sic] (T. v. 12, p. 2065).

Pratico ultimately gave his June 4, 1971 statement, knowing that it was not based on what he had seen, but given because he was scared, his mind was not clear, he had emotional problems, and he felt that he could not take the pressure (T. v. 12, p. 2066).

The Role of Urquhart

4.5 In his evidence to this Commission, John Pratico made no mention of the role of William Urquhart during the course of taking the June 4th statement until he was referred to the fact that in his 1982 Affidavit he had said that MacIntyre and Urquhart had told Pratico what he had "purportedly witnessed of the murder" (Exhibit 12 - R. v. 12, p. 272). John Pratico indicated that the only reason he had mentioned both names was because both MacIntyre and Urquhart were in the room where the interview took place. Urquhart was behind and to the side of Pratico "to witness to what I was saying, type thing, eh." (T. v. 12, pp. 2117-2118). Urquhart said nothing and did nothing except

introduce himself. Pratico felt that Urquhart's presence was not "of much significance" and had no reason to tell Corporal Carroll of the R.C.M.P. about Urquhart when interviewed in 1982 (T. v. 12, pp. 2217-2219).

4.6 John Pratico said nothing more about William Urquhart. William Urquhart was present but neither said nor did anything throughout. As John Pratico says, Urquhart was there to witness what was said. Assuming that what Pratico says is true about William Urquhart, and assuming that everything else he says about his interview with John MacIntyre is true, what comment is it possible to make about William Urquhart's role in the taking of this statement?

4.7 John Pratico did not think that William Urquhart's presence at the statement on June 4, 1971 was "important", and certainly not "significant". These are John Pratico's own words. John Pratico does not talk about any "good guy/bad guy" interrogation. John Pratico does not say that William Urquhart's presence caused him any fear or a whit of concern. Pratico indicates that his fear was not based on anything that any police officer did, but rather what was said about jail. However, this is the nub of the difficulty for John Pratico and, with respect, the nub of the difficulty for this Commission in determining what actually happened.

4.8 <u>John Pratico's evidence to this Commission appears to be that he understood in 1971 that William Urquhart was present at the June 4th interview to witness what was said</u> (T. v.

12, pp. 2117-2118). In his evidence John Pratico made no suggestion that William Urquhart at any time had any reason, motive or inclination to do other than tell the truth about what was said during the course of that interview. It is respectfully submitted that for counsel or this Commission to speculate about some ulterior role for William Urquhart than that ascribed by John Pratico would stretch his evidence beyond the point to which he was prepared to go. Chant, by contrast, indicated that he saw William Urquhart as part of a coercive "team" (T. v. 6, pp. 964-965). Chant's statement is dealt with below, but here it is sufficient to state that Chant's view was a view which John Pratico did not share.

Urquhart's Duty

4.9 It is respectfully submitted that these considerations leave this Commission with a determination, still accepting every word of John Pratico's evidence for this purpose, of whether or not there was some positive obligation on William Urquhart to intervene from his position as statement witness when certain remarks were made. The particular remarks which conceivably could prompt an intervention were that Pratico "could go to jail", or when John Pratico was apparently discussing with John MacIntyre what took place in the Park "in a round about way". Was it Urquhart's duty to intervene?

4.10 This Commission could make the assumption, listening only to Pratico's evidence, that a threat of jail unless a witness adopts a story not known by the witness to be

true, involves criminal conduct in the nature of counselling perjury. The Criminal Code, R.S.C. 1970, c. C-34, s. 21 (1) provides that:

> Every one is a party to an offence who
>
> ...
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it, or
>
> (c) abets any person in committing it.

John Pratico never suggests that William Urquhart told him what had happened in the Park or threatened him with jail. Therefore, Urquhart must be dealt with as a party under s. 21 (1) (b) or (c).

4.11 In the case of R. v. Hoggan (1965), [1966] 3 C.C.C. 1 (Alta. S.C., A.D.) the accused was charged with attempting to defeat the course of justice by attempting to dissuade a witness by threats from giving evidence. The two accused persons in the case, with others, went to the home of a potential witness. While both accused persons were seated in the same car, one made the threat to the witness. The other accused said and did nothing. The conviction of this second accused person was quashed on the basis that he could not have been a party to the offence. As Mr. Justice Johnson stated at p. 5:

> There are two things that must be proved before an accused can be convicted of being a party by aiding and abetting. It must first be proved that he had knowledge that the principal intended to commit the offence and that the accused aided and abetted him. Where there is no knowledge that an offence is to be

> committed, the presence of an accused at the scene of a crime cannot be a circumstance which would be evidence of aiding and abetting.

Presence alone will not make someone a party to a criminal offence, unless there is understanding about what is taking place and the party remains to encourage or assist the principal in his design: Dunlop and Sylvester v. The Queen, [1979] 2 S.C.R. 881; 47 C.C.C. (2d) 93.

4.12 This is a well-established principle. In the oft-cited case of R. v. Coney, 8 Q.B.D. 534, at pp. 557-558, Mr. Justice Hawkins stated that:

> In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abetts, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposefully present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to have prevented it and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted.

There is no evidence from any source about some expectation on the part of William Urquhart of criminal activity in taking Pratico's statement. There is also no evidence of any intentional or unintentional encouragement. We further suggest that John Pratico's evidence does not even go so far as to indicate that the alleged counselling would have been apparent to William Urquhart. What did Pratico say to prompt any comment about jail? What did MacIntyre say "in a round about way"?

4.13 Mr. Justice Cave in the same case of Coney, supra, perhaps put the whole issue more colourfully quoting from Foster's Crown Law, at p. 539:

> If A. happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory.

Mr. Justice Kellock in Preston v. The King (1949), 93 C.C.C. 81 (S.C.C.), at p. 90, commented on this citation as follows:

> I take it that the word "criminal" is here used in the sense of "morally reprehensible".

It is thus respectfully submitted that even if everything John Pratico says is true, cogent, and reliable, and this Commission assumes that Pratico was obviously counselled to commit perjury during the taking of the statement, the most that can be said about William Urquhart's role is that his passive presence was "morally reprehensible". Urquhart would have no legal duty to intervene.

4.14 We respectfully submit that of course William Urquhart's inactivity cannot even be described as being on so low a moral level. An assessment of Pratico's evidence as a whole must be made. Pratico gave evidence at this Commission that he had visited Wentworth Park in the company of only John MacIntyre before giving the statement (T. v. 12, pp. 2126-2128, 2221). This finds some support in his statement - "I stopped where I showed you" (Exhibit 16 - R. v. 16, pp. 41, 43). However, that comment in the statement is consistent with Pratico being at the Park with MacIntyre and others. At other times before this Commission Pratico testified that he went to Wentworth Park after the June 4 statement but before the Preliminary Hearing, and went with both John MacIntyre and the Crown Prosecutor (T. v. 12, pp. 2078, 2220). John Pratico never was in Wentworth Park with William Urquhart so far as anyone knows. Maynard Chant suggested he had been with Pratico in the Park (T. v. 5, pp. 846-847; T. v. 6, pp. 971-972).

4.15 This Commission may well wish to consider, if as appears likely that there was a visit to the Park before the June 4 statement, when any alleged discussions and alleged threats would reasonably have taken place - in the Park or at the Police Station? If John Pratico was walking MacIntyre through events at the Park, why would Pratico have to be pressured later to repeat what he had already shown MacIntyre? If Pratico had already given MacIntyre a narrative on the scene which was important enough to commit to writing, and which Pratico might be able to

expand upon, why would Pratico need to find out in a round about way later what had happened in the Park?

Conclusion

4.16 It is respectfully submitted that if any alleged discussions and threats occurred, the probability is that they did not occur at the Police Station, which is the only location that William Urquhart had any contact with John Pratico. The statement as it appears in Exhibit 16 (R. v. 16, pp. 43-45) in fact accurately reflects everything that was said from the beginning of the interview when William Urquhart was present until the end. Nothing in the statement itself would give any suggestion that the information being related by John Pratico was known to be false by Pratico or by MacIntyre. The statement itself is internally consistent. There is no recorded statement of hesitation, complaint or fear. Unlike R.C.M.P. statements, there was no free-wheeling unrecorded discussion first. It is respectfully submitted, therefore, that on the whole of the evidence there was no reason for William Urquhart to think that John Pratico's June 4 statement was anything other than a true recounting of what Pratico had observed on Friday, May 28, 1971. As a police officer, it was William Urquhart's duty to receive this kind of information and to act upon it: Chartier v. Attorney General for Quebec (1979), 27 N.R. 1, at pp. 26-27 (S.C.C.). It is respectfully submitted that this should be the conclusion of this Commission as well.

5.0 JUNE 4, 1971 - THE CHANT STATEMENT

The Background on Chant

5.1 Maynard Chant was the witness who was found hitchhiking out of Sydney in the early morning hours of Saturday, May 29, 1971, a blood-drenched shirt in his hands and the comment for the patrolling police officers that "he had seen what happened" (Exhibit 16 - R. v. 16, pp. 6-7), or to go by Chant's own recollection:

> I seen it all (T. v. 5, p. 787).

Maynard Chant was taken to the Sydney City Hospital to meet M.R. MacDonald, went to the Police Station, and was picked up by his father there much later in the morning. At the time Chant was 14 years old and lived in Louisbourg.

5.2 On Sunday, May 30, 1971, Chant gave a written statement to John MacIntyre about witnessing a stabbing in the Park by two men both of whom were about six feet tall (Exhibit 16 - R. v. 16, pp. 18-21). Chant gave this statement after sitting on a bench at the Police Station with John Pratico for a considerable length of time, and after having had two encounters with Donald Marshall, Jr. - one that afternoon and one on the night of the stabbing. Other than Donald Marshall, Jr., Maynard Chant was the only eyewitness that the Sydney City Police had until John Pratico gave his second statement on Friday, June 4, 1971. John Pratico's June 4 eyewitness statement did not fit with Maynard Chant's eyewitness statement of May 30, 1971. By

11:30 a.m. on Friday, June 4, it was imperative that the City Police speak again with Maynard Chant (Exhibit 16 - R. v. 16, pp. 42, 43, 44).

What the People Who Were There Say

5.3 Maynard Chant said that having signed the false statement on May 30, 1971, bothered him quite a bit. Even at that, he never really understood, so he says, the impact of what was happening at the time and his first priority was to ease the tension upon himself (T. v. 5, p. 843). However, between May 30 and June 4, 1971, Chant had not discussed his concern with any member of his family (T. v. 5, pp. 846-848). In any event, by June 4, 1971, his parents certainly understood the seriousness of speaking to the police and had admonished Maynard to tell the truth (T. v. 5, p. 849). This was confirmed by Beudah Chant (T. v. 20, pp. 3532-3533).

5.4 Chant does not recall whether he would have still been in school on June 4, 1971, nor does he really recall how he got to the Louisbourg Town Hall that day (T. v. 5, pp. 851-852). Wayne Magee says he alone picked up Maynard and requested his mother to come as well (T. v. 20, p. 3628). Both of Maynard's parents were home at the time and his mother came - but Chant is not able to indicate whether she came of her own initiative or as a result of being asked (T. v. 5, pp. 851-853). Beudah Chant says she was informed that there was an eyewitness to prove Maynard had been there and that Maynard was lying (T. v. 20, p. 3534).

5.5 The interview took place in a big room in the Town Hall with a long table (T. v. 5, p. 853). Louisbourg Police Chief Wayne Magee was there (T. v. 5, p. 853 - Maynard; T. v. 20, p. 3536 - Beudah; T. v. 20, p. 3629 - Magee). Chant's probation officer Larry Burke was there (T. v. 5, p. 853 - Maynard; T. v. 20, p. 3564-3565 and Exhibit 14 - R. v. 14, pp. 1-2 - Beudah; T. v. 20, pp. 3629 - Magee). Two detectives were there dressed in plain clothes - one was MacIntyre and "I still to this day can't recall who the other one was" (T. v. 5, p. 854 - Maynard). Chant's mother went into the big room with him (T. v. 5, p. 853 - Maynard). Larry Burke sat opposite Chant, while Chant's mother sat beside Maynard (T. v. 5, pp. 854-855 - Maynard; T. v. 20, p. 3537 - Beudah) or behind him (T. v. 20, p. 3632 - Magee). The unknown detective sat at the head of the table while MacIntyre was standing (T. v. 5, p. 855) six to eight feet away from Maynard (T. v. 5, pp. 858-859 - Maynard). Magee says Chant was at the head of the table, MacIntyre to one side and Magee on the other (T. v. 20, pp. 3632-3633). Magee say MacIntyre never stood (T. v. 20, p. 3633, 3643) but Urquhart and Burke stood throughout (T. v. 20, p. 3633). Chant does not recall whether Magee was sitting or standing (T. v. 5, pp. 854-855). Burke does not know whether or not he was present and personally believes that he was not (T. v. 20, pp. 3584-3587, 3593).

5.6 Maynard Chant says MacIntyre explained that the statement given on May 30 was believed not to be true and asked whether Chant knew anything else. Chant's mother then told

Maynard to tell the truth. Chant's laconic reply was that:

> I didn't see anything (T. v. 5, p. 856),

meaning or trying to get across that he had not seen anything at all. The police reply was:

> You must have saw something (T. v. 5, p. 856).

Wayne Magee says MacIntyre began by advising Beudah Chant that they wanted the truth from Maynard Chant which prompted Beudah to exhort her son to tell the truth (T. v. 20, pp. 3630-3631). Magee does not recall any denial of seeing anything (T. v. 20, p. 3648).

5.7 Chant says he persisted in saying that he had not seen anything "more or less to say that I just didn't want anything to do with it anymore and I didn't see anything" (T. v. 5, p. 856). It was MacIntyre's voice that Chant recalled - "very hyped" and very loud. Chant said "it was to that probably threshold of very frustrated and very persisting that I seen something" (T. v. 5, pp. 858-859). Magee recalls no raising of voices by anyone (T. v. 20, pp. 3635, 3644-3645).

5.8 Chant states that he was never asked for an explanation, nor did he offer one, as to why he had given the first untrue statement:

> I knew the first statement wasn't true, so I had no problem with that. And it was evident that they probably had no problem with that neither, but I'd never even considered saying that the or never even considered going into detail that I wasn't even there in the Park when the thing happened. (T. v. 5, p. 859).

Chant did say that he was probably ashamed at the time about having given the first false statement (T. v. 5, p. 860). Magee says that MacIntyre began by seeking clarification of the first statement in view of discrepancies that had come to light (T. v. 20, pp. 3634-3635).

5.9 After the alleged back and forth about whether Chant had seen anything, MacIntyre is alleged to have told Chant that the police had a witness who had told a story which said that Chant had been at the Park and Chant had seen what that witness had also seen. Chant was reminded that he was on probation, that by lying he was in serious trouble and could go to jail - and it was suggested that Chant could get two to five years for this (T. v. 5, pp. 860-862). Magee did not recall any of this (T. v. 20, pp. 3650-3651). Beudah Chant did not remember any two to five years, <u>but after a leading question about Maynard's probation</u> did state that it was mentioned that Maynard could be charged "if he was lying" (T. v. 20, pp. 3541-3542).

5.10 Chant's mother kept telling him to make sure that Maynard told the truth and was getting upset. Beudah Chant doesn't say she was upset, nor does Magee (T. v. 20, p. 3638). Chant was "just about in tears" himself (T. v. 5, pp. 855-857), or actually had begun to cry (T. v. 5, pp. 862-863). According to Chant, his mother had seen him cry, but only wanted to make sure that he was telling the truth (T. v. 5, p. 863). However, Chant's mother said that if Maynard had been that upset she would not have left (T. v. 20, p. 3541), nor would she have left if she

believed the police were scaring Maynard into a story (T. v. 20, pp. 3555-3556). Magee could only recall that Maynard Chant appeared co-operative (T. v. 20, p. 3637). Magee certainly did not recall any crying (T. v. 20, pp. 3638, 3646).

5.11 As far as his parents were concerned, it had come to the point in Maynard's relationship with them "that I was doing a lot of wrong and I was more or less concealed within myself at that time" (T. v. 5, p. 860). Chant stated to counsel for Donald Marshall, Jr. that if his mother had stayed he would have continued to say that he had not seen anything:

> I would just use those words, "I didn't see nothing" (T. v. 6, p. 964).

Maynard Chant's mother recalls nothing of what Maynard said had happened to this point except perhaps what Commission Counsel drew out by leading questions (paragraphs 5.6-5.10, supra):

> I know we went in the room and they had talked to him for a bit, but they thought they weren't getting anywheres with him; so they asked me if I would leave. (T. v. 20, pp. 3535, and 3538).

To that point Maynard had "maintained his story that he hadn't seen anything...hadn't seen nothing." (T. v. 20, p. 3539).

5.12 Eventually Maynard Chant's mother left the room when MacIntyre apparently told her that perhaps if she left the room Maynard would say more (T. v. 5, p. 857 - Maynard; T. v. 20, p. 3539 - Beudah). Maynard had no knowledge of any objection by his mother to this (T. v. 5, p. 863). She made none (T. v. 20, p. 3538), and believed Maynard would open up (T. v. 20, pp. 3539-

3540). Beudah Chant is positive that she left (T. v. 20, pp. 3539-3540, 3547). Magee does not recall her leaving (T. v. 20, p. 3633-3634, 3644).

5.13 Chant says that after his mother left, MacIntyre remained standing up, and moving around (T. v. 5, pp. 865-866). Sometimes MacIntyre leaned over the head of the table (T. v. 6, pp. 960-961). MacIntyre repeated that Chant was in an awful lot of trouble, the statement given the first time was not true, that he was on probation, and that Maynard could do time as a result of that (T. v. 5, p. 866).

5.14 Chant said that the mention of perjury and getting two to five years came up, he believed, after his mother left (T. v. 5, p. 862). Still in his direct examination by Commission counsel, Chant retreated and said that the actual word "perjury" had not been literally said at all by the police at the time of the second statement (T. v. 5, p. 865). However, Chant's mother now attributes Maynard's delay in recanting to a fear of perjury impressed upon him at the Town Hall (T. v. 20, p. 3555). That would have to be based on something she has been told since, which casts doubt too on the reliability of any personal knowledge on her part about a mention of probation that day.

5.15 Chant, according to his own evidence, sat back, took in the situation and then said:

> Well, what did he say that I seen

referring to the person whom the police had said had seen Chant at the Park (T. v. 5, p. 866). Chant is unable to remember any

response from the police (T. v. 5, p. 870).

5.16 Chant described what motivated and directed the statement which he then gave:

> At that point in time I just wanted to give a story. ...I just really didn't care anymore (T. v. 5, p. 867).

MacIntyre sat down and:

> ...from there on in I just give the statement. (T. v. 5, p. 868).

Chant's position was he started to give a statement basically following the lines of the first statement that he had given and figured out for himself where he would have had to be in the Park to see what was going on on the other side of the Park (T. v. 5, pp. 871-873). Chant continued:

> I didn't really see what I was doing as being so terribly wrong. I knew I was doing wrong but I thought that I was - at that point in time, it had come into my mind that Marshall was guilty. I don't know where I gathered that information from. Probably because of I heard that....(T. v. 5, pp. 879-880).

Magee testified that questioning with answers commenced immediately after the introductions (T. v. 20, p. 3639).

5.17 Chant introduced material to the statement, such as knowing the dark-haired fellow from dances in Louisbourg "to make the story believable" (T. v. 5, p. 878). Chant said he could have sought some help on the detail, but possibly could have dreamed it up as well (T. v. 5, p. 878). Chant could not remember at the Commission hearings where the detail in the statement actually came from - he could have imagined some of it,

and the rest he could have picked up from his visit to the Park with Pratico (T. v. 5, pp. 846-847; T. v. 6, pp. 971-972) - if that was before the June 4 statement (T. v. 5, pp. 847, 880-882, 884).

5.18 Chant recalls that the giving of this second statement at the Town Hall did not seem to take very long. Beudah Chant says she was only in the hallway about 20 minutes before Maynard came out (T. v. 20, p. 3453). Chant may have looked the statement over but was not a very good reader, leaving aside the fact that he probably could not have read the writing. Chant certainly acknowledged signing the statement and realizing in 1971 that pretty well the whole statement was false (T. v. 5, pp. 892-893). Chant does not recall how he got home, or if his mother had waited for him (T. v. 5, p. 894). She had (T. v. 20, p. 3453).

5.19 Cross-examination by counsel for Donald Marshall, Jr., suggested to Chant that what the police did throughout the statement taken at Louisbourg was to suggest facts and assist Chant in giving a statement that had a ring of truth about it. These points were suggested on the basis that if Chant had not seen the events that he was describing, those facts must have come from the police (e.g., T. v. 6, pp. 967ff.). However, Chant never made a definitive statement that any of the information had come from the police. On some issues Chant pointed out that he did not remember where the information came from (T. v. 6, p. 968), on others that it came from observation in the Park area

when he was there with the police and Pratico (T. v. 6, pp. 969-970), other details were based on his general familiarity with the Park (T. v. 6, p. 971), still other details could have been made up (T. v. 6, p. 973). At times Chant simply did not answer counsel's question as to the source of the detail (T. v. 6, p. 976).

5.20 The exceptions to Chant not linking the details in the statement to the police were in relation to two questions. The first deserves quotation:

> Q. Would you have known him [Pratico] if you'd have seen him?
>
> A. Not knowing him, I wouldn't.
>
> Q. That's my point. You're sitting in a meeting in Louisbourg right, and they're telling you about a dark haired fellow, you wouldn't have known whether he was in the police office in Sydney or not that particular dark haired fellow unless the police told you he was there, correct?
>
> A. Yes. (T. v. 6, p. 974).

Pratico's evidence before this Commission was that he sat on a bench with Maynard Chant at the police station on Sunday, May 30, 1971, for a considerable period of time (T. v. 11, pp. 2038, 2043-2044). Chant <u>at the Commission hearings</u>, did not remember if Pratico was at the police station and whether or not Chant saw Pratico there (T. v. 6, p. 974). Chant had also stated on examination by Commission counsel that he did not know John Pratico at all in 1971 (T. v. 5, p. 877) but Chant was with Pratico in the Park (T. v. 5, pp. 846-847; T. v. 6, pp. 971-972).

5.21 Chant did not need to identify the "particular dark haired fellow" as John Pratico in the statement of June 4, 1971. Maynard Chant was in the process of lying, using facts which were culled from his imagination and other sources unknown today. If Pratico's evidence can be believed that he in fact was sitting on a bench with Maynard Chant for some considerable time on the Sunday afternoon, and Chant had seen Pratico again in the Park, there is no reason why Maynard Chant did not choose to simply put this dark-haired person into his statement - just as he put Donald Marshall, Jr. in the position of Seale's killer. It is thus respectfully submitted that upon consideration of these factors alone, Chant's "yes" answer to counsel's assertion that the police had told him the dark haired fellow at the police station was Pratico hiding in the bushes can only be taken as an agreement to the proposition if all of these considerations are proven to be false. It is respectfully submitted that these negatives have not been established in the evidence.

5.22 On the second alleged agreement with the police being Chant's source, Chant "guessed" that the information had come from the police about Pratico hiding in the bushes (T. v. 6, pp. 970, 972). The "yes" answer to the police being the only source came after Chant indicated that <u>he did not know where the information came from if it did not come from the "re-enactment"</u>. Given these qualifications by the witness it is respectfully submitted that weight can only be given to this answer once it has been concluded that the so-called "re-

enactment" took place after the June 4, 1971, statement. This Commission has no real evidence from Chant as to when his visit to the Park with Pratico took place. The Commission does have John Pratico's evidence which puts it before Maynard Chant's second statement (T. v. 12, pp. 2126-2128, 2221), and John MacIntyre's evidence that it happened on May 30 (T. v. 32, p. 5996).

5.23 Beudah Chant could not say when it was or where it was but one of the police officers told Maynard that he could not say he saw a knife, only what looked like a knife (T. v. 20, pp. 3558-3559). In doing so, Beudah Chant adopted what she had told the R.C.M.P. in 1982 (Exhibit 14 - R. v. 14, pp. 1-2). However, Beudah Chant did not take this amiss because she thought that Maynard was only young and had never done anything like that before and this person was "just telling him the proper procedure" (T. v. 20, p. 3559). However, there is no different comment about a knife in the second Chant statement than there had been in the first (Compare Exhibit 16 - R. v. 16, pp. 19, 47).

5.24 Wayne Magee testified that during the question and answer of the statement:

> I think perhaps the answer wasn't written down immediately, but they would - they would - they would quiz each other so to speak and for clarification and they would - this is the way the statement was conducted. (T. v. 20, p. 3635).

In phrasing his answer to Commission counsel in this way, Magee had intended to convey questioning as he had described it on a

previous occasion under oath (Exhibit 13 - R. v. 13, pp. 191-192; T. v. 20, pp. 3636-3637). In Magee's view there was nothing unusual about the taking of this statement, again consistent with his evidence previously given under oath (T. v. 20, pp. 3639-3640). Some of the questioning "pertained to events that they had learned after taking the first statement. And he was quizzed on that." (T. v. 20, p. 3645). While a "scene" was not painted, Chant was advised about the location of certain things such as the bridge and the bandshell (T. v. 20, p. 3648). Magee explained:

> I believe that Maynard was - he might have been getting confused and he was given advice as to well, you know, this one in this statement didn't say that. You know, what's the situation here or there. It's - I can't recall the specifics of it but I'm - you know, that was the gist of it. They were - there may be five minutes or two minutes or a minute and a half of questioning before an answer was written down. (T. v. 20, p. 3649).

Magee could not recall any references made to specific individuals, names, or their statements. Magee recalled no other statements being produced. No suggestions were made to Maynard by Detective MacIntyre about what Maynard had seen. If Detective MacIntyre did not feel that the answer was correct, he might only ask the question again (T. v. 20, pp. 3649-3650). It was very straightforward in Magee's opinion and there was certainly no arguing (T. v. 20, p. 3650). Wayne Magee's final opinion was that at the conclusion of the interview he had no reason to believe that Maynard Chant had misled the police (T. v. 20, p.

3651):

> It is my recollection that the statement was taken in a proper manner. I do not recall any unusual situations occurring as to raising of voices or threatening of perjury or people leaving the room. I - as far as Maynard is concerned I'd known him for a number of years, nothing sticks out in my mind that would lead me to believe that he was in fact lying that day. In my opinion everything was very, very cordial and easy going. (T. v. 20, p. 3657).

5.25 During cross-examination by counsel for Donald Marshall, Jr. Wayne Magee agreed that while every word that was said in the Town Hall may not have been written down, John MacIntyre did not give Chant information about the crime <u>other than</u> with respect to locations of things at the scene, such as the Bandshell (T. v. 20, pp. 3648-3649, 3664-3665, 3671). This was confirmed in later cross-examination (T. v. 20, pp. 3681-3683, 3688-3689).

<u>Urquhart's Role</u>

5.26 In relation to Chant's second statement which was taken at the Louisbourg Town Hall on June 4, 1971 (Exhibit 31), Chant indicated that besides his mother, Burke, Magee, and MacIntyre, there was another detective sitting at the head of the table (T. v. 5, pp. 854-855). To the date of these Commission hearings, Chant could not say who this unknown policeman was, except that he wore a suit (T. v. 5, p. 854). Beudah Chant does not know Urquhart (T. v. 20, p. 3537).

5.27 In his 1982 Affidavit (Exhibit 12 - R. v. 12, p. 53) Chant had said that he gave the statement to MacIntyre <u>and</u>

Urquhart because of pressure from MacIntyre and Urquhart. Chant explained at the Commission hearings that the pressure referred to was MacIntyre saying that Chant must have seen something (T. v. 5, p. 943). As for Detective Urquhart, Chant stated that:

> I just - I'm very sorry for implicating him there. I just - I don't - I just - I was categorizing them as one in the same as far as them both being - feeling a sense of fear from both of them as just as far as them being "The Law" and me being - and just as far as me being - them being "The Law" and me being the -
>
> Q. Did you, in fact, feel any pressure exerted on you by Detective Urquhart?
>
> A. I don't know. I can't remember. Even though I had given a statement to reference to it I was - (T. v. 6, pp. 943-944).

5.28 In relation to a further paragraph in that 1982 Affidavit about having been told that he was seen in the Park by another witness, the following exchange took place between Commission counsel and Maynard Chant:

> Q. Did Sergeant Urquhart tell you that you had been seen by another witness?
>
> A. I don't really know. I know I've given a statement to that he did. Possibly when the interview was being - or when the statement was being taken - only up to this point do I recognize the other name as being - Mr. Urquhart as being one of the ones that was with Mr. MacIntyre. Only now do I realize in the statement that I'm giving that I'm implying him and -
>
> Q. Can you tell us how that statement came about in the Affidavit?
>
> A. It's - Well, I just - I was just

> giving a general statement, to the both of them. I should have been a little more specific. I wasn't being really specific to who was applying the pressure. I was - I've always had an opinion that they were both - Growing up I've always had the opinion that they were both applying the pressure. Maybe that's why the statement occurred that way.

BY MR. CHAIRMAN:

Q. Do I understand you've changed your opinion now?

A. Pardon me, sir.

Q. Do I understand you have changed your opinion now?

A. Yes.

Q. Is this the first time you've changed your opinion, today?

A. I believe so.

Q. Why have you changed your opinion today?

A. Simply because looking back on it I don't remember the other officer really applying any - really - I remember being - Mr. MacIntyre being the dominant one as far as doing all the talking and stuff like that. (T. v. 6, pp. 944-945).

In 1982 Chant did not even know Urquhart's name until he was told (T. v. 6, p. 946). The "other" police officer was simply there (T. v. 5, pp. 854-855, 1056).

5.29 On cross-examination by counsel for Donald Marshall, Jr., Chant did confirm that back in 1971 he viewed MacIntyre and Urquhart as being a team and "I didn't distinguish the difference" (T. v. 6, pp. 964-965). However, Chant followed

this up by saying that MacIntyre did most of the talking - and in his entire evidence to this Commission the only other person he identifies as speaking during this time at the Town Hall is his mother. Wayne Magee's evidence was the same (T. v. 20, pp. 3630-3631, 3635).

The Issue

5.30 William Urquhart had never met Maynard Chant prior to June 4, 1971, and Chant had no knowledge of who Urquhart was. What Urquhart would have known and must have known was that Chant had given an eyewitness statement of the stabbing which, so far as identifying an accused, was not specific. After the Pratico statement on June 4, 1971, it was obviously necessary to speak with Chant again as the statement he had given on May 30 did not sit with the statement of John Pratico on June 4, 1971.

5.31 If Chant had been telling the truth on May 30, what Pratico had said on June 4 was not correct. If what Pratico had said on June 4 was correct, then Chant must not have told the truth. While there is always the possibility that the statements of witnesses do not fit together because neither of them is telling the truth, a police officer has an obligation only to reject evidence which he knows to be unreliable: Chartier v. Attorney General for Quebec (1979), 27 N.R. 1, at pp. 26-27 (S.C.C.). It was incumbent upon William Urquhart as an assisting police officer to attempt to uncover the truth - what was reliable - and this entailed interviewing Maynard Chant a second time. Urquhart's role was to participate as a silent observer.

5.32 Chant says his first approach at the Louisbourg Town Hall was to say that he did not see anything. Chant acknowledged in evidence before this Commission that he had indeed been involved in some of the events that took place on that evening, so to say that he had not seen anything was not entirely correct. What Chant meant by telling the police in Louisbourg that he had not seen anything was that he had not seen anything about a knife going in (T. v. 6, p. 1054). Chant acknowledged that the officers questioning him in Louisbourg would have had no idea from what he was saying (when he said he had not seen anything) that he was referring to the stabbing as opposed to the general scene of events in which he was known to have been involved (T. v. 6, p. 1054). These officers knew Chant had originally offered himself as an eyewitness. If Chant indeed had seen nothing, why had he taken the initiative to say he had seen a stabbing?

5.33 Chant's real motive in stating that he had seen nothing was to avoid involvement in the case at all (T. v. 6, p. 1055), perhaps a not unusual reaction for a witness (Compare T. v. 30, p. 5618). This pressure on him to avoid involvement came primarily from within himself (T. v. 6, pp. 1055-1056). This would have been no reason for the police to simply abandon questioning Chant - who had taken the initiative on May 30 to proffer himself as an eyewitness.

5.34 It is known in light of all of the evidence that during the taking of the Louisbourg statement from Maynard Chant,

William Urquhart conducted himself appropriately as any witnessing officer would on any statement from a witness as special and crucial to an investigation as Maynard Chant had made himself out to be. William Urquhart remained silent and effectively detached from the statement-taking itself.

5.35 Thus, it is respectfully submitted that if any criticism is to be made of William Urquhart's participation in this statement, it would have to be on the basis that improprieties were obvious and apparent to William Urquhart which are not reflected in the statement which William Urquhart signed. As with the Pratico statement of June 4, 1971, it is respectfully submitted that William Urquhart had no legal duty to intervene unless some illegality was anticipated by him which became apparent in the course of taking the statement: (Paragraphs 4.10 - 4.13, supra). The real question for this Commission is whether there was anything morally or ethically wrong in the conduct of William Urquhart which led to the securing of this statement from Maynard Chant.

Urquhart's Duty

5.36 In 1971 just as today the law is clear that an out of Court statement by a witness, oral or written, sworn or not sworn, is not admissible upon a trial of a criminal offence for the truth of the assertions contained in it: Deacon v. The King (1947), 89 C.C.C. 1 (S.C.C.). [Statutory exceptions to this rule do exist which do not apply here: e.g., Criminal Code, R.S.C. 1970, c. C-34, s. 643.] Some of the reasons for this were

explained by Mr. Justice Rand in Deacon, supra, at p. 7 as based on "the long experience of the Courts" that such out of Court statements are made under circumstances where there is not opportunity for cross-examination and free rein may exist for omission or fabrication given the context of circumstances which exists at the time when the out of Court statement was made. To permit an out of Court statement to be admitted for the truth of its contents would expose an accused person to an entirely fabricated account of events. However, to not permit such statements to be admitted to test the credibility of a witness would similarly expose an accused to an account of events fabricated for the first time at trial. Thus, the use of such statements must be limited in Court to the question of the reliability of the witness who is asserting a certain account of events - in other words, credibility.

5.37 That is the rule which the Courts have chosen to use as the most practical in the truth seeking process. The same rule applies today: R. v. Gillingham, (1981), 65 C.C.C. (2nd) 42 (N.S.S.C., A.D.). This is the critical difference between a statement made orally or in writing by an accused person and that made by an ordinary witness (see generally: Kaufman, F.; The Admissibility of Confessions (3d ed.), The Carswell Company Limited (Toronto, 1979)).

5.38 If a witness gives a different account of events before the Court than he had earlier given out of Court, the witness may be questioned about the previous statement for the

purpose of either refreshing memory, expanding the evidence of the witness, or contradicting the witness for the purpose of credibility. Clearly the opportunity exists when such questioning occurs in the course of a trial for the witness to deny ever having made the statement, or to explain, modify and contradict in turn important particulars of the contents of the written statement. The witness may, when the statement is put to him, acknowledge that it is the truth even though he had already testified to the contrary or omitted to say things contained in the statement. In the latter case the witness adopts as the truth previous statements made by him and recorded. The witness' adoption of the previous statement makes the previous statement evidence given under oath - which will be subject to the full rigours of cross-examination.

5.39 One example of witnesses going both ways on previous statements is the case of R. v. Antoine (1949), 94 C.C.C. 106 (B.C.C.A.). The only conclusion which may be reached applying to all out of court statements from witnesses who are not accused persons is that the statement has no practical or direct effect upon the guilt or innocence of an accused person unless the witness adopts the account given as the truth.

5.40 In addition to statements being available for use in criminal trial proceedings for these various purposes, depending upon the response of the witness once he gets to Court, a statement is primarily an investigative aid as to what a particular person may say if called to give evidence under

oath. No witness can ever be compelled to assert as the truth something that he has told the police or some other third party, but there should be tis memorandum of what a witness has said he can say.

5.41 It follows from these comments that the police investigating a crime have a responsibility to get the most complete and reliable account possible from a witness. If the police do not pursue the lead which produces an initially reluctant witness, then the police could properly be criticized for not discharging their duty to detect crime and apprehend those responsible, as well as to test the reliability of other evidence which may have been gathered in the course of the investigation. The police also have a responsibility to the witness and the judicial process to ensure that a witness statement is as complete as possible so that apparently reliable evidence is not discredited unfairly.

5.42 For example, in R. v. Coll (1889), 24 L.R.Ir. 522, the witness had made a deposition giving an account of the alleged crime without connecting Coll's name with it, and on cross-examination this was emphasized. The Crown then tendered in evidence another statement made by the same witness in which Coll was mentioned as taking part in the alleged crime. Mr. Justice Holmes stated, at p. 542 that:

> Now, this is consistent with a casual omission, arising from momentary oversight, or with the view that the witness had afterwards invented the charge against Coll, under the influence of some wicked motive. I presume that if

> the cross-examining counsel had expressed this imputation in a direct question the witness would not merely been at liberty to deny it, but also to have shown that it was not the true inference to be drawn from the passage in the deposition, by proving that he had previously told how Coll was a party to the attack. But skillful counsel do not always deal in direct imputation. The same effect can be produced in even a more striking way by delicate suggestion. The cross-examination of the previous day; the renewal of it on the apparent inconsistency, the three questions that followed, and the subsequent attempt to show that the witness, when before the magistrates, had shaped his evidence in accordance with the suggestion of others, all taken together, convey as clearly as any language could, that Varilly had, subsequent to the month of March, fabricated the story about Coll. This was the opinion of the Judge, who had the opportunity of hearing and seeing all that happened at the trial; and it is impossible for me to come to any other conclusion. That being so, I am of the opinion that the evidence to show that Varilly had made the charge against Coll at an earlier date was clearly legitimate.

as quoted in R. v. St. Lawrence (1949), 93 C.C.C. 376, at pp. 379-380.

5.43 Indeed, a very similar situation had arisen in St. Lawrence, supra, where the Crown sought to introduce evidence that an eyewitness had identified the accused shortly after the event. This evidence was opposed by the Defence. Mr. Justice McRuer explained the matter this way:

> The crime was committed on Saturday night. The witness Parrington was cross-examined at considerable length to show that when the police interviewed him on Sunday he denied knowing anything about

it. On Monday, an item appeared in the morning paper indicating that the accused, who had been detained for questioning, had been released, and stating that one Cox had told the police that he had seen Parrington leaning over the deceased. Counsel for the accused asked Parrington a question of this character: "Why did you change your tune?" and directed the witness's attention to the item that appeared in the morning newspaper and suggested to him that he had become afraid that the crime might be "pinned on him". He then put to the witness the question: "Then you thought you had better tell a different story?" a portion of the transcript of the evidence was given at the preliminary hearing was read and the witness was asked to state whether he had been asked these questions and made these answers. The important ones read as follows:

"Q. Why you became frightened they might pin it on you?

A. That is right.

Q. It was then you decided the man running across that distance was St. Lawrence. Is that right?

A. That is right."

It is clear to me that the cross-examination was intended to suggest that the witness did not have it in his mind until Monday that the accused man was the man he saw on the night of the crime, and that his failure to identify him with the crime earlier, or to acknowledge that he had seen him at or near the scene of the crime, was because such was not the fact, and the story was a fabrication.

I think if the case were left in its present position it would be clearly open to argue to the jury that Parrington's story, insofar as it implicated the accused, was an after thought and concocted for the purpose of shielding

himself.

> The evidence is admissible, not as proof of the fact stated but merely as proof that the witness connected the accused with the crime on Saturday night, not withstanding that he did not disclose this information to the police when interviewed on Sunday. (Emphasis added)

R. v. St. Lawrence, supra, at pp. 380-381. If the previous identification was adopted by Parrington, that would be evidence, which now given under oath, would destroy an insinuation of recent invention. If not adopted as the truth, it would cast doubt on the reliability and significance of the omission.

5.44 It is respectfully submitted that the police would be doing the pursuit of justice and the witness' own reliability a disservice if they were not complete in determining what exactly the witness recollection of events was. Failure to be complete with respect to all critical aspects of the witness' personal knowledge could serve to expose a witness and the Court to a misrepresentation of the reliability of the witness.

5.45 It is worthwhile referring to one further case: R. v. Pelletier (1973), 13 C.C.C. (2nd) 266 (B.C.C.A.). That case involved a situation where a witness admitted telling the police everything that the police had recorded that he had said. The Court explained at p. 273:

> In effect, his earlier statements were accepted by him and were admitted as true under oath. However, although testifying that all the way through his statements to the police he had referred to the second man who drove the pick-up truck as "Pelletier", he hastened to add that he had used that name only because Corporal

> MacDougall had mentioned it as the name of the second man while they were driving to the airport in Montreal, and not because he knew or had known the second man by that name. He pointed out that he had had the Corporal record in the notebook in which the conversation was recorded that he had been using the name "Pelletier" only because he had been told that that was the name of the man he was discussing. It is clear that this so as such a note was found, and initialled, in the officer's notebook.

The legal effect of this evidence was summarized:

> Having regard to the five years that had passed since the occurrence and four years in the case of the statements there was amazing consistency. Really all that was new that was elicited from the cross-examination on the statements was the use of the name "Pelletier". The witness explained that use and that explanation was the subject of rebuttal. If the jury accepted the officer's evidence that he did not mention the name "Pelletier", then they could only conclude that the witness' explanation of the use of the name was untrue or he got the information elsewhere or he did in fact know the man's name. I think the Judge should have told the jury that, if they disbelieved Corbin's explanation, the fact that he had used the name "Pelletier" in the statement adopted under oath did not prove that he appellant was the man who did the things that the witness said were done. But, by the same token, I cannot conceive of the jury failing to reach that conclusion without any instruction. It would be completely obvious to them that the issue or dispute as to the explanation so rebutted involved nothing more than the credibility of Corbin and whether he was or was not telling the truth when he said he did not know Romeo Pelletier and the appellant was not the man whom he called Pelletier and who was involved in the crime.

5.46 Applying these principles to the Chant statement of June 4, 1971, it is obvious that "evidence" was not being manufactured. What was being recorded as Maynard Chant's answers was not even "evidence". All that the June 4, 1971 statement would be, was, and remains, a record of Maynard Chant's responses on a given day to certain questions which at the time were to be taken as indications of the evidence which he might give at a trial. There was no obligation on Maynard Chant at any time just as there was no obligation on John Pratico or any other witness, to adhere to an unsworn statement to the police. The only obligation which rested upon Maynard Chant and Maynard Chant alone on June 4, 1971, was to not mislead the police and thereby set on foot a criminal proceeding.

5.47 When John MacIntyre and William Urquhart went to Louisburg on June 4, 1971 they were entitled to the truth from Maynard Chant, just as John MacIntyre had been entitled to the truth from Maynard Chant on May 30, 1971. The police were under an obligation to ensure that any statement that Maynard Chant gave would reflect accurately the statement he was willing to give at that time and which contained Chant's recollection of events in as complete a way as possible.

5.48 It is respectfully submitted that when John MacIntyre and William Urquhart went to Louisburg on June 4, 1971 it would have been irresponsible of them, without making some firm inquiry, to accept Maynard Chant's initial reaction that he had seen nothing. Chant on two previous occasions had told a

total of at least three members of the Sydney City Police that he had seen everything - first the very night of the stabbing, and second when he described his apparent recollection in more detail on May 30, 1971.

5.49 William Urquhart's duty given his role as statement witness would have been to observe what Maynard Chant wished to say and did say, ensure that the statement reflected what Chant asserted as to what he saw, and that the final statement contained what William Urquhart honestly believed was the true and most complete possible recounting of Maynard Chant's personal knowledge of the events of Friday, May 28, 1971. It is respectfully submitted that William Urquhart fulfilled his duty and never had any legal or moral obligation, or indeed reason, to intervene in the taking of Maynard Chant's June 4, 1971 statement.

Conclusion

5.50 It is respectfully submitted that this Commission in assessing the June 4, 1971 statement of Maynard Chant should accept the evidence of William Urquhart, John MacIntyre, Wayne Magee, and Beudah Chant that the commencement of the taking of the statement from Maynard Chant was not the great trauma described in Maynard Chant's evidence. Whatever Maynard Chant may have felt within himself as a result of his recent history of dealing with the "Law" and the shame of even having his own mother admonishing him to tell the truth when he knew that he had lied in his first statement, William Urquhart cannot be held

responsible for these internal and unexpressed feelings.

5.51 Contrary to what Maynard says, there was no crying or near crying while his mother was present (T. v. 20, p. 3541), and while Beudah Chant was present the police were not intimidating Maynard into a story (T. v. 20, pp. 3555-3556). Even Maynard Chant says that there were no threats of perjury at any time, nor any mention of jail for two to five years while his mother was present (T. v. 5, pp. 862-865). That this statement taking was not a traumatic event maybe inferred also from the total absence of recollection displayed by Larry Burke. Everyone who was present at the Louisburg Town Hall on June 4, 1971 testified that Larry Burke was present for the taking of Maynard Chant's statement - with the exception of Larry Burke. No one testified that Larry Burke left the room where the statement was being taken at any time. The fact that Larry Burke has no recollection, even though he was just new to his position as a Probation Officer and who would not in any event have many opportunities to sit in on a witness statement taken in the course of a criminal investigation, strongly suggests that the statement was as Wayne Magee described it - "everything was very, very cordial and easy going" (T. v. 20, p. 3657).

5.52 Should this Commission prefer the evidence of Maynard Chant and Beudah Chant to that of John MacIntyre and William Urquhart on the point of whether or not Beudah Chant left the room, it is respectfully submitted that it becomes more difficult for this Commission to reasonably conclude that there

was any wrong doing with respect to the statement. Beudah Chant says she was only out of the room for approximately twenty minutes before Maynard was finished, and Chant himself recalled that the giving of the second statement did not seem to take very long. The statement itself is in excess of three full hand written legal size pages. Chant has not alleged that anything was written down which he did not say or that questions were written down which were not asked. Given what this Commission may conclude about the time it takes to write out by hand a dictated statement there would not be much, if any, time left for suggestions or promptings or threats of jail. We respectfully submit that for this reason this Commission must have extreme doubt that any threats of any kind occurred. Certainly no one who is alleged to have remained in the room (other than Maynard) recalls such threats.

5.53 With respect to alleged prompting, Chant's evidence is that when he finally asked the police what this other witness said that Chant had seen <u>there was no response so far as Maynard Chant could recall</u> (T. v. 5, p. 870). Chant's evidence did not categorically indicate that any of the information in the statement came from the Sydney City Police. Wayne Magee's evidence was that Maynard Chant was assisted with locations but not with respect to the substance of the crime in issue. Certainly no one has suggested <u>in evidence</u> that John MacIntyre suggested or prompted that Donald Marshall, Jr. was the perpetrator of the offence.

5.54 The Commission may ask what it is to make of Wayne Magee's recollection that at times an answer would not be written down immediately, and the fact that there may be "five minutes of two minutes or a minute and a half of questioning before an answer was written down". Magee did say that that sometimes John MacIntyre would simply repeat the question that he had asked, indicating that there was an uncertain or delayed response from Maynard.

5.55 It is respectfully submitted that even if this Commission goes the step of finding that there were discussions about locations in the Park, and that these obviously are not written down, there is still no cause to criticize William Urquhart' position with respect to this statement. Maynard Chant had been Wentworth Park before, and may well have been there with John MacIntyre some time between the day of the stabbing and the date of the June 4, 1971 statement, as Pratico's evidence indicates. If Chant was at times apparently confused about the physical locations involved it would be appropriate for the police to have corrected any misapprehension which was not an indication of lack of personal knowledge. The only fault that could be found with William Urquhart in that event would be that his recollection of the Maynard Chant statement has been influenced by too high a standard for a witness statement - that every word was written down. Urquhart's recollection holds him to a higher duty than did the law - then or now.

5.56 In the result, it is respectfully submitted that

this Commission should disbelieve Maynard Chant when he says that he was openly threatened with jail at the time his second statement was taken by the Sydney City Police. One might speculate why that particular allegation never surfaced until the second time that the R.C.M.P. took a statement from Maynard Chant in April, 1982 (Exhibit 99 - R. v. 34, pp. 47-48, 81-83). It is sufficient to conclude here without making any further allegations that no wrong doing with respect to William Urquhart's participation in the June 4, 1971 statement has been made out to the extent of the slightest probability - whether or not Maynard Chant regarded John MacIntyre and William Urquhart as a team or not.

6.0 JUNE 4, 1971 - MARSHALL ARREST

Authority to Arrest

6.1 On completion of the Maynard Chant statement of June 4, 1971 at Louisbourg which, like the Pratico statement of earlier in the day, identified Donald Marshall as the killer of Sandy Seale, the police had two eyewitness statements pointing to one accused person. These statements were taken to the Crown who directed the laying of a charge, which John MacIntyre did. A warrant for the arrest of Donald Marshall, Jr., was sworn, so MacIntyre and William Urquhart proceeded to execute it.

Arresting Marshall

6.2 MacIntyre and Urquhart first went to Membertou. Donald Marshall, Jr.'s brother indicated that Donald was at Baddeck (T. v. 54, p. 9886). Arriving at the Baddeck R.C.M.P. Detachment, MacIntyre and Urquhart saw the officer in charge in relation to assistance which might be given in locating Donald Marshall, Jr. (T. v. 52, p. 9540).

6.3 Corporal Stan Clarke testified before this Commission and recalled assisting MacIntyre and Urquhart arrest Donald Marshall at Whycocomagh (T. v. 38, p. 7004). Based upon his notes (Exhibit 87), Clarke testified that the Marshall family had been staying at the home of John Googoo who had died a few weeks previously. It appears from Constable Clarke's evidence that MacIntyre and Urquhart explained to him something about the case in view of the fact that Clarke had notes about the

statement which Donald Marshall had originally given to the police.

6.4 Clarke, MacIntyre and Urquhart went to Whycocomagh in an R.C.M.P. vehicle and were directed to the Googoo home. MacIntyre and Clarke got out of the vehicle, Donald Marshall, Jr. was contacted, asked to get a jacket, and then escorted to the police vehicle. Clarke held open the back door for Donald Marshall, Jr. (T. v. 38, pp. 7004-7007). Clarke does not recall that Urquhart got out of the R.C.M.P. vehicle at Whycocomagh at any time (T. v. 38, p. 7012).

6.5 Urquhart was sitting in the rear seat of the R.C.M.P. vehicle behind the driver. Just after Marshall got into the car Detective Urquhart helped Marshall to re-bandage his arm (T. v. 38, p. 7010).

6.6 The four drove to the highway at which time the "standard police caution" and the warrant were read to Donald Marshall by John MacIntyre (T. v. 38, pp. 7007-7008). At that point William Urquhart handcuffed Marshall in accordance with standard practice for the safety of all occupants (T. v. 38, pp. 7008, 7012). The R.C.M.P. vehicle would not have had a screen between front and back seats and the rear doors would have been operable from inside the vehicle (T. v. 38, p. 7012). Donald Marshall hunched himself over, sobbed, and when he was told to sit up by John MacIntyre, Marshall made his only statement of that trip:

> I did not do it. (T. v. 38, p. 7009)

6.7 Upon arriving back at the Baddeck Detachment, Clarke searched Marshall (T. v. 38, pp. 7009-7010). MacIntyre and Urquhart left Baddeck with Marshall at approximately 8:50 p.m. (T. v. 38, p. 7010). Upon the return of MacIntyre, Urquhart and Marshall to Sydney, Marshall was placed in the care of Wyman Young in the Courtroom at the old Sydney Police Station (T. v. 17, p. 3099) before being remanded to the County Jail over the weekend. There is no further comment in the evidence about any involvement of William Urquhart at this time.

The Exculpatory Utterance

6.8 It has been suggested by counsel for Donald Marshall, Jr. - perhaps more so with respect to John MacIntyre than William Urquhart - that some notation ought to have been made of the exculpatory statement made according to the notes of Corporal Clarke (T. v. 38, p. 7009) but which William Urquhart could not recall (T. v. 52, p. 9541). The assertion by counsel for Donald Marshall, Jr., which was agreed by Corporal Clarke, was that "an honest police officer" would be expected "to note any statements protesting innocence", "and to write them down so that they could be available for trial later if required" (T. v. 38, p. 7011). Donald Marshall, Jr., had already given one exculpatory statement (Exhibit 16 - R. v. 16, p. 17). Doubtless such a comment as was reported by Corporal Clarke is common for persons suddenly charged with a serious, or any, offence.

6.9 The legal position was clear in 1971 and remains so today. An exculpatory statement given by an accused person some

time after the alleged offence need not be produced in evidence by the prosecution: e.g., R. v. Adams, MacAllister and Stables (1956), 117 C.C.C. 93 (N.S.S.C.), nor may it be introduced into evidence simply at the motion or on questioning by the Defence: e.g., R. v. Blondin (1970), 2 C.C.C. (2d) 118 (B.C.C.A.). A more recent application appears in R. v. Simpson and Ochs (1983), 6 C.C.C. (3d) 516 (B.C.C.A.). A self-serving statement upon arrest is nothing more than an early plea of not guilty. There are of course exceptions which would not apply here - for example, to rebut an argument of recent fabrication. Whether this evidentiary rule is for good or ill is a question for the Courts or perhaps this Commission to consider. With respect to William Urquhart, it cannot be said that there was any obligation upon him to note or remember this comment by Donald Marshall, Jr. Indeed, it appears John MacIntyre made a note about Clarke's involvement which could have led to discovery of the exculpatory utterance if someone had thought it relevant in 1971 (Exhibit 16 - R. v. 16, pp. 133-134).

Analysis

6.10 It is respectfully submitted that the arrest of Donald Marshall, Jr. is a clear example of William Urquhart assisting in the investigation of the Seale murder to the best of his ability, in a spirit of fairness towards those with whom he comes into contact, but also exercising all reasonable vigour to ensure that the public interest in the effective enforcement of the law is achieved. While this incident has no real continuing

significance in the wrongful conviction of Donald Marshall, Jr., it does give this Commission an independent perspective of William Urquhart's approach to his duties. It is respectfully submitted that this Commission will want to weigh Corporal Clarke's detailed notes heavily in considering the probabilities of how William Urquhart conducted himself where independent evidence is not so available. William Urquhart's conduct was appropriate and fair given the role which he was expected to perform at the time.

7.0 JUNE - 1971: POST-CHARGE INTERVIEWS GENERALLY

June 4-13, 1971

7.1 On the evening of June 4, 1971, there was a incident involving John Pratico, Tom Christmas and Howard Hawkins. As a result of a complaint received from Mrs. Practico, the Police became involved on the understanding that John Pratico had been threatened during this encounter with Tom Christmas. Ambrose McDonald testified that on June 4 he and Richard Walsh were told to be on lookout for Tom and John Christmas as well as Lawrence Paul for the purpose of arresting them on the offence of obstruction of justice (T. v. 7, pp. 1140-1141; and Exhibit 33). Tom Christmas testified that the next morning he was picked up at home by William Urquhart and John MacIntyre, and then released to appear in court the next Monday, June 7, 1971 (T. v. 23, pp. 4180-4183). A notation confirming this appears in McDonald's notes (Exhibit 33).

June 14, 1971

7.2 It appears from the documentary evidence available that William Urquhart continued to have some involvement in identifying potential witnesses and interviewing them over the next several weeks. The only date which can be fixed in William Urquhart's notes (Exhibit 16 - R. v. 16, pp. 135-143) appears to be June 14, 1971 (Exhibit 16 - R. v. 16, p. 140). That evening it would appear that he arranged to interview Maria Sophocleous

who was the third one on the list which we have suggested was made up on Wednesday, June 2, 1971 (Paragraphs 3.15 - 3.18, supra; Exhibit 16 - R. v. 16, p. 135). It appears that while Sophocleous was in the park at about 11:50 p.m., she saw nothing. However, she identified people that she was with, and brought to the attention of the Police the names of other persons - including Patricia Harriss.

7.3 After interviewing Maria Sophocleous at 7:15 p.m. there is further documentation to indicate that William Urquhart went to interview Brian Doucet who lived on Crescent Street and who had gone to the hospital with Leo Curry. Doucet's was the fifth name on Urquhart's list of potential witnesses (Exhibit 16 - R. v. 16, p. 136). There is a notation beside Doucet's name of "745 P.M.", and Doucet's formal statement is indicated as beginning on June 14, 1971 at 7:55 p.m. (Exhibit 16 - R. v. 16, pp. 61-62). That statement was completed at 8:20 p.m. The timing of the Sophocleous interview and Doucet statement indicate that the other time notations in Urquhart's notes for potential witnesses Margaret McDonald, Patricia Ware and Karen McDonald must have related to at least two other evenings of work (Exhibit 16 - R. v. 16, pp. 135, 136).

Robert Patterson

7.4 At some point after the stabbing incident the Sydney City Police must have determined that it was important to talk to Robert Patterson, who originally had been described in Donald Marshall Jr.'s May 30 statement as drunk and in the Park:

> We met Bob Patterson. He was drunk. We asked him if he knew us and he called us by name. We told him to sit down. (Exhibit 16 - R. v. 16, p. 17).

John Pratico's first statement had also referred to "Bobby Robert Patterson" identifying the two people running from the direction of the screaming being from "Toronto Saints Choice Bike Gang" (Exhibit 16 - R. v. 16, p. 22). Patterson's name was initially not included on the numbered list of individuals whose names appeared from earlier statements (Exhibit 16 - R. v. 16, pp. 135 - 136, 139). Given the lack of fruitfulness of the statements taken on the afternoon and evening of June 2, and those taken on June 3, 1971, a judgment must have been made to speak with Patterson to see whether he could provide any information at all. Urquhart added Patterson's name at the top of the list of names of potential witnesses. The absence of a first name could indicate that Urquhart was familiar with who Patterson was.

7.5 There is no notation or other documentation indicating that Robert Patterson was ever interviewed by the Sydney City Police and indeed the evidence before this Commission is that the Sydney City Police were unable to locate him in 1971 (T. v. 33, pp. 6010-6021; T. v. 52, pp. 9548-9563; 9565-9567). Incidently, this Commission also has evidence that Robert Patterson could not be found in 1982 by the R.C.M.P. even though witnesses were found in such far places as Boston and Calgary (T. v. 41, pp. 7520, 7544-7546).

7.6 Robert Patterson was found by the investigators for this Commission. Patterson testified that he left school in

1970 or 1971, and during 1971 was delivering for Davis Market in Sydney, spending most of the rest of his time in Wentworth Park or at the Pool Hall on Charlotte Street (T. v. 55, pp. 10009,10012-10013). On the night of May 28, 1971, Patterson describes himself as having been "pretty loaded" (T. v. 55, p. 10016). Despite being around Sydney as he says, and being close friends with Patricia Harriss, Terry Gushue, Donald Marshall Jr., Frankie French, Artie Paul and others, Patterson did not hear about the stabbing or the death of Sandy Seale until after Donald Marshall Jr., was charged (T. v. 55, p. 10018). Patterson had gone to sleep on one of the benches in the Park and had seen nothing (T. v. 55, p. 10014).

7.7 At some point two uniformed Police Officers picked up Patterson and took him to the Police Station. At the Police Station Patterson was met in the Detective Office by William Urquhart and John MacIntyre (T. v. 55, p. 10019). Patterson described the Detective's office as one room without a stenographer (T. v. 55, p. 10052).

7.8 Patterson says that the first thing that happened was that he was handcuffed to a chair and then MacIntyre began questioning him (T. v. 55, p. 10020). One or two sets of handcuffs were used (T. v. 55, pp. 10062-10064). "Bill Urquhart meanwhile had gotten up and left the room." (T. v. 55, p. 10021). About 10 or 15 minutes later William Urquhart came back into the room with "a statement already typed out". Nothing was ever handwritten (T. v. 55, p. 10059):

> Bill Urquhart said to me, he says, "Okay, sign this." And I said "What is it?" And he said, "Just a statement saying that you've...you were with Jr., and you saw Jr., doing the stabbing." And I said, "I'm sorry, but I'm not signing that." I said "because I wasn't even with Jr., that night, I didn't even see him." Like I said I don't even remember seeing him that night. (T. v. 55, pp. 10021-10022).

The statement was 2 or 3 pages long (T. v. 55, pp. 10059). Urquhart refused to let Patterson read it (T. v. 55, pp. 10060).

7.9 At that point Urquhart and MacIntyre both went outside, leaving Patterson handcuffed to the chair. Later they both came back in and Urquhart watched as MacIntyre was "slapping" Patterson around again (earlier beating had occurred out of Urquhart's presence) for two or three hours, "maybe a little longer" (T. v. 55, p. 10022). However, later he revised this estimate to total time of 15 minutes of being slapped around (T. v. 55, p. 10061). Urquhart played the "sympathy copy" (T. v. 55, p. 10058).

7.10 As Patterson persisted in his refusal to sign, eventually the handcuffs were unlocked and Patterson was told to "get the hell out" (T. v. 55, pp. 10022-10023). Patterson estimated that he had been taken to the Police Station just after getting up in the morning before breakfast and not was released until sometime after lunch at about two o'clock (T. v. 55, p. 10028).

7.11 Patterson made no complaint about this incident, not to his mother, nor to Donald Marshall, Jr. when they were both in the County jail later that year (T. v. 55, pp.

10067,10071-10072). Patterson could not recall ever having been physically abused at any other time, either by the Sydney Police or any other Police (T. v. 55, p. 10023). On cross-examination, Patterson went back on his earlier assertion that he had never been manhandled by either the Sydney Police or any other Police (T. v. 55, pp. 10046-10051, 10072). Indeed, he said he had been manhandled on many occasions.

7.12 On an initial level, the identification of William Urquhart as a participant in the events described by Robert Patterson is insufficiently grounded in objectively verifiable characteristics. We submit that it would be unsafe for this Commission to conclude that William Urquhart was involved in such events even assuming that everything Patterson has to say is true (T. v. 55, pp. 10075-10076). Robert Patterson's story is, however, also highly improbable in many of its details. Indeed, Patterson's story is so replete with errors that we submit that the whole of his evidence should be swept away like a house of cards.

7.13 For example, Robert Patterson described the Detective's Office as one room without a stenographer (T. v. 55, p. 10052). The evidence is that Patterson had reason to be familiar with the Detective Office anyway (Exhibit 120). Kay O'Handley worked in the Detective Office as the stenographer. Patterson says there was no stenographer. Perhaps Patterson was talking about a weekend. However, if Patterson's alleged ordeal had taken place on the weekend, there would have been no

stenographer to type up a two or three page statement. Some may say that all that typing could have been done beforehand. However, and this is perhaps the most critical error that Patterson made in testifying before this Commission, neither John MacIntyre nor William Urquhart would have had any reason to force Robert Patterson to sign a typed statement. It would have been highly unusual to have a handwritten signature on a typed sheet. No witness statement taken in the Marshall matter by the Sydney City Police involved the typed version being signed. The documents before this Commission indicate that with respect to the Sydney City Police at least statements were always taken in handwriting first and then signed or not signed as the witness may have wished. It is respectfully submitted that Patterson's story falls apart on the basis of this exuberant detail alone.

7.14 It is respectfully submitted that this Commission might well not hold such errors on the part of other witnesses as being so fatal. However, Robert Patterson's evidence contains severe allegations which justify fact-finders giving Patterson's kind of evidence extremely close scrutiny and regarding it with great suspicion. It is respectfully submitted that this Commission ought to be on its guard to accept any of the evidence of Robert Patterson who has a lengthy history of dishonesty both in relation to property (over a dozen theft and fraud charges) and with respect to authority by virtue of convictions for failures to appear in Court, failures to obey Probation Orders and violations of terms of mandatory supervision. It is

respectfully submitted that this witness has a demonstrated history of dishonesty and that this Commission ought not to repose any trust in him.

7.15 Regardless of Robert Patterson's evidence about being interviewed by the Sydney City Police, it appears that Detective Urquhart did find Robert Patterson in September, 1971 with respect to a charge of property damage (Exhibit 120, p. 11). Obviously this would have been an opportunity for William Urquhart and John MacIntyre to interview Robert Patterson. We know in hindsight that Robert Patterson had no evidence of relevance to give with respect to Ebsary, MacNeil, Seale, or Marshall. Patterson's name had originally been left off the list of potential witnesses, perhaps on the strength of what Donald Marshall, Jr. had to say about him (Exhibit 16 - R. v. 16, p. 17). Patterson's name was later put on the list. However, between the time of Patterson's name being inserted on the list of potential witnesses and September 1, 1971, Patricia Harriss had given a statement which confirmed Marshall's that Patterson would have been in no condition to provide anything of assistance (Exhibit 16 - R. v. 16, pp. 64, 67).

7.16 It is respectfully submitted that the necessity of speaking to Patterson was less acute in September than had appeared when his name was added to the list (Paragraph 3.21, supra). If William Urquhart even adverted to the fact that he had earlier wanted to speak with Patterson about the Seale stabbing, but decided not to interview Patterson, there appears

to be no basis upon which to criticize this judgment. If Urquhart made the decision not to interview Patterson in September 1971 there would be no reason for him now to even recall that he had come across Patterson. Of course, it may have put more minds at ease in 1987 and 1988 if there had been a notation about talking to Patterson on the Seale case or deciding not to talk with him, but on the whole of the initial investigation and subsequent reinvestigations, the failure to speak with Patterson contributed nothing to Donald Marshall, Jr.'s misfortune.

June 23, 1971

7.17 William Urquhart has a note on a small sheet of paper (Exhibit 16 - R. v. 16, p. 142) giving the address and telephone number of Barbara Vigneau. There is also a handwritten statement written by William Urquhart and witnessed by "Red" M.R. MacDonald taken from Barbara Ellen Vigneau on Wednesday, June 23, 1971 (Exhibit 16 - R. v. 16, pp. 83-84). Like the Frankie French statement which signalled William Urquhart's first formal involvement with respect to the Seale murder investigation (Exhibit 16 - R. v. 16, pp. 29-30), the Barbara Ellen Vigneau statement appears to be the recounting of an interview seeking background information, but with little assistance being provided.

7.18 It is respectfully submitted that Barbara Vigneau's statement does signify that William Urquhart's approach to interviewing and taking statements from witnesses was a normal

habit. Urquhart did not limit formal statements to the crucial witnesses. One might suppose that there is less information of interest in the Barbara Vigneau statement which was taken than there would be in the information which might have been disclosed had a more formal statement been taken during the Maria Sophocleous interview on June 14, 1971 (Exhibit 16 - R. v. 16, p. 140). It may well be an aberration that a statement was not taken in Sophocleous' case. In any event, the taking of Barbara Vigneau's statement concluded William Urquhart's involvement in the initial investigation of the Seale stabbing.

Subsequent Events

7.19 Donald Marshall, Jr. was put through a Preliminary Hearing on July 5, 1971, and remanded to stand trial in November (Exhibit 1 - R. v. 1). In August William Urquhart went to Wentworth Park to assist John Leon Ryan photograph the scene, as had been requested by the Crown Prosecutor (T. v. 7, pp. 1261, 1264, 1269-1270; and Exhibit 16 - R. v. 16, p. 96). This event occurred sometime between August 14 and August 24, 1971. William Urquhart did not attend the Preliminary Hearing or the trial, which was held between November 2 and 5, 1971.

8.0 JUNE 17-18, 1971 - THE HARRISS, GUSHUE AND O'REILLY STATEMENTS

Patricia Harriss: Going to the Police Station

8.1 Patricia Harriss was contacted for questioning on June 17, 1971 by the Sydney City Police through her mother, Eunice Harriss, who brought Patricia to the Police Station (T. v. 16, pp. 2951-2953). Eunice Harriss was unsure what police officer telephoned, but guessed that it might have been William Urquhart (T. v. 16, p. 2952). Evidence indicated that this contact would have occurred shortly before the time for the first movie show, as that is where Patricia had planned to go that evening (T. v. 16, p. 2953). No evidence was led to indicate what the showtimes were in Sydney theatres in June, 1971.

8.2 In June, 1971, Patricia Harriss was 14 years old. Patricia testified at this Commission that when she was questioned by the police in June, 1971, she did not know by whom she was being questioned (T. v. 16, p. 2796). However, she also recalled that William Urquhart introduced himself to her on June 17, 1971, by saying:

> You know me, I'm a friend of yours (T. v. 16, p. 2915)

Harriss based this remark, and an acknowledgment that she knew Urquhart, on the fact that she had had a "run-in" with Urquhart prior to 1971 (T. v. 16, p. 2915).

8.3 While we propose to deal with this issue in more

detail later, it is worthwhile noting that these Commission hearings were the first time that Patricia Harriss ever spoke of a specific run-in with William Urquhart prior to 1971. Her evidence on Discovery in the C.B.C. civil action was that from getting into trouble and being young "I knew of him" (Exhibit 13 - R. v. 13, p. 166). Leaving aside any question raised in the Commission's mind about how a "run-in" becomes a basis for Urquhart indicating friendly prior knowledge, it is reasonable to conclude that prior to Patricia's arrival at the police station on June 17, 1971, she did not know the police officers well or, except perhaps for Urquhart, at all.

8.4 Patricia's mother, Eunice, had known John MacIntyre from when she and he had both been young people (T. v. 16, pp. 2955, 2983). Eunice Harriss did not know "Red" M.R. McDonald, and June 17, 1971 was the first and only time she has ever met William Urquhart personally (T. v. 16, p. 3000).

Uncontested Facts about Patricia Harriss

8.5 While there are a number of facts surrounding the obtaining of statements from Patricia Harriss which are contested, there are a greater number from William Urquhart's perspective which are not in dispute. The following undisputed facts may be drawn from the evidence of Patricia and Eunice Harriss.

8.6 During the evening of June 17-18, 1971, Harriss was questioned for a period of time by William Urquhart and for another period of time by John MacIntyre. Patricia, like her

mother, remembers two officers being present while giving her first 8:15 p.m. statement (T. v. 16, pp. 2924, 2954). Obviously, Eunice Harriss was present at that time (T. v. 16, pp. 2925, 2953, 2954). Patricia gave her first 8:15 p.m. statement to William Urquhart (Exhibit 55; Exhibit 16 - R. v. 16, p. 63). Patricia maintained this story as related in the first statement for a few hours (T. v. 16, pp. 2799, 2954, 2956). Eunice Harriss recalled that Detective Urquhart began the questioning by asking Patricia whom she had seen in the Park on May 28, 1971, whether they were young or old, what they were wearing, where she had seen them, and who was at the dance (T. v. 16, pp. 2954-2955). Detective Urquhart was making notes (T. v. 16, p. 2955).

8.7 Patricia recalls that during the interviews on June 17-18, 1971, some detectives whom she now cannot identify came in while others left (T. v. 16, p. 2926). More than an hour after the questioning had first begun Eunice Harriss left the room where the questioning was taking place (T. v. 16, pp. 2956, 2959). At some later point Patricia left the interview room to see her mother who was sitting outside (T. v. 16, pp. 2799, 2817, 2867, 2913). At some point Terry Gushue, Patricia's boyfriend, spent some time in the interview room alone with her (T. v. 16, pp. 2819, 2862-2865, 2913).

8.8 Patricia gave a statement beginning at 12:07 a.m. on June 18, 1971 which she signed (Exhibit 56; Exhibit 16 - R. v. 16, p. 65; T. v. 16, pp. 2801-2802). At the conclusion of this statement, Patricia was taken home by her mother who was still at

the Police Station (T. v. 16, pp. 2805, 2868; cf., 2963, 2986).

The Allegations of Patricia and Eunice Harriss

8.9 Eunice Harriss has alleged that whenever Patricia related that part of her recollection involving the "two men" as described in Exhibit 55, William Urquhart would crumple the notepaper and toss it to the floor. This happened approximately twelve times (T. v. 16, pp. 2955, 2957, 2959). In addition, Detective Urquhart would say:

> "There wasn't two men there, Patricia."; or
>
> "Come on now you didn't see two men."; or
>
> "Tell us now, who else did you see."; or
>
> "Well, you didn't; you couldn't have."
>
> (T. v. 16, pp. 2957-2958).

8.10 For her part, Patricia was not able to be as specific as her mother. Patricia related that the police officers told her that the "two men" was not proper (T. v. 16, pp. 2798, 2875) or:

> Patricia, you didn't see that. There wasn't two men there, was there, Patricia. (T. v. 16, p. 2799).

Patricia Harriss felt that she was under a lot of pressure throughout the evening and described herself as angry in addition to emotions of fear (T. v. 16, pp. 2799, 2880). Both Patricia and Eunice Harriss testified that Patricia cried during her interviews with the Sydney Police (T. v. 16, pp. 2799, 2880, 2956, 2959, 2991-2992).

8.11 Eunice Harriss could not recall any pounding of the table, though Urquhart may have had his hand come down on the table (T. v. 16, p. 2991). Patricia testified that at some point during the evening a fist was pounded on the table, but does not think it took place at the very end of the evening and does not imagine that it took place from the moment she went into the interview room for the first time (T. v. 16, pp. 2880, 2927). The questioning was virtually continuous until the 12:07 a.m. statement was completed.

The Issue

8.12 From William Urquhart's point of view the primary issue is whether or not he has been reliably identified as being involved in the activities which form the subject-matter of the allegations related above. We respectfully submit that William Urquhart has not been reliably identified first according to criminal standards of proof, and second, not even upon the basis of probabilities. It is respectfully submitted that upon a review of the whole of the evidence given some sixteen years after the event, this Commission should find that William Urquhart took no part in questioning Patricia Harriss after taking down in writing everything Patricia first told him at 8:15 p.m.

8.13 We would note that this is a particularly important factual issue for this Commission to sort out with respect to William Urquhart - perhaps the most important of any events which appear to involve William Urquhart and which are before this

Inquiry. It is this interviewing of Patricia Harriss which led Staff Sergeant Harry Wheaton of the R.C.M.P., and numerous others who appear to have accepted Wheaton's assumptions, to say that Urquhart's conduct here was most improper and led to the unethical presentation of evidence before the Supreme Court of Nova Scotia. (Exhibit 20 - R. v. 20, pp. 34-35). Wheaton did not take the step of suspecting Urquhart's involvement was criminal. Short of accusing William Urquhart of an actual criminal offence, no greater criticism or charge could possibly be made against a police detective. For this reason, we would ask the Commissioners to give particularly close consideration to the necessary findings of fact in relation to Patricia Harriss.

8.14 It is respectfully submitted that the evidence surrounding Patricia Harriss' contact with the police does not reliably identify William Urquhart as involved after the 8:15 p.m. statement because of the following reasonable inferences from the evidence. First, it is reasonable to conclude from a syntactical and content analysis of the statements that:

(a) Patricia Harriss' 8:15 p.m. statement demonstrated some uncertainty in her mind about what she was relating to the police;

(b) Patricia Harris' 8:15 p.m. statement was not limited to personal knowledge but included references which must have been secondhand information; and

(c) Further information was received from Patricia Harriss than appears in the page which still exists from the 8:15 p.m. statement, based on the probable fact that a second page existed as part of this statement at some time.

Second, evidence related to the circumstances of the securing of a statement from Patricia Harriss by the Sydney City Police supports the conclusions on the first ground that Patricia Harriss related at the time of her first statement information which was secondhand and that this could have come from conversations at school generally or with specific individuals. Third, documentary evidence exists which had to have been in existence on or before June 18, 1971, and the only logical source for that information would have been Patricia Harriss - information which creates real grounds for suspicion that the first statement of Patricia Harriss was not based entirely on personal knowledge. Finally, evidence exists which suggests that Patricia Harriss' secondhand information related to the most critical aspect of her 8:15 p.m. statement.

8.15 It is respectfully submitted that as a result of all of this evidence which existed in June, 1971, it is reasonable to infer that the Sydney City Police, and particularly William Urquhart, would have been aware at some point of Patricia Harriss' confusion of personal and secondhand knowledge. Based on Patricia Harriss' evidence at the Preliminary Hearing in 1971 and evidence given by Staff Sergeant Harry Wheaton about his knowledge and experience of William Urquhart's method and approach in taking statements, a reasonable basis of fact exists to infer that he went out of the presence of Patricia Harriss after becoming apprised of the possible secondhand nature and source of Patricia Harriss' 8:15 p.m. statement to pursue

investigation of that while other officers continued to interview Patricia Harriss to determine what she did know strictly from her own personal knowledge.

8.16 It is respectfully submitted that if this Commission considers this scenario as a reasonable possibility (at minimum) then this Commission would not be able to conclude that William Urquhart has been reliably identified as an officer who interviewed Patricia Harriss continuously between 8:15 p.m. and 12:25 a.m. It is respectfully submitted that such a conclusion would preclude this Commission from supporting any allegation that William Urquhart refused to listen to Patricia Harriss about two men, that he crumpled up a dozen or so statements, that he pounded his fist on the desk, or persisted in questioning Patricia Harriss out of the presence of Patricia's mother for several hours until the statement he wanted had been secured.

The Statements Themselves

8.17 Patricia Harriss' first statement is intriguing from a syntactical as well as from a content point of view. It is respectfully submitted that the wording used indicates the recounting of a story with a sense of uncertainty. This could either be due to difficulty in recalling events some three weeks previously which Patricia had otherwise not had cause to recall, or that she was consciously or unconsciously trying to fit her own recollection with what she may have heard had occurred.

8.18 Dealing with the statements first from a

syntactical point of view, Patricia begins the statement with a positive assertion about leaving the dance with her boyfriend at 11:45 p.m. Patricia then indicates that she and Terry sat on a bench near the "Grandstand" (Exhibit 55) or "Bandstand" (Exhibit 16 - R. v. 16, p. 63):

> We sat on a bench near the Grandstand.

Patricia then apparently repeated that statement in shortened form, perhaps to fill a pause while she reassured herself in her mind about what came next:

> We sat on a bench.

Patricia then put together three complete sentences which, however, each became progressively shorter:

> Robert Patterson was on the grass sick
> throwing up. We smoked a cigarette.
> Terry and I left.

The punctuation for the next sentence is unclear in the handwritten version (Exhibit 55), but has been supplied in the typewritten version (Exhibit 16 - R. v. 16, p. 63). The three phrases involved each deal with locations:

> Walked back of the bandshell
>
> on to Crescent St.
>
> in front of the big Green building

It appears that Patricia stated each of these locations without attributing or providing a subject in the grammatical sense. The only phrases which could begin with capital letters are the first and second, but perhaps only the first on "walked". An

examination of the word "bandshell" in Exhibit 55 as compared with the earlier "grandstand" suggests that there may have been a break between the "band" and the "shell" as has in fact been made in the typewritten version (Exhibit 16 - R. v. 16, p. 63). It is respectfully submitted that all of these factors indicate a lack of flow to what was being stated, in turn leading to an inference of possible uncertainty, or a calculated effort to ensure that each step of the events of that evening which were being written down coincided with the narrative which Patricia had in her mind. To this point there had been no questions.

8.19 After the three location phrases, Patricia again makes another complete statement:

> We saw and talked to Jr. Marshall.

Then with incorrect grammar which suggests that the phrase was added as an afterthought:

> With Marshall was two other men.

At this point there would have been sufficient pause by Patricia for William Urquhart to ask his first question:

> Describe the other men to me?

Patricia's response is at first quite definite:

> One man was short with a long coat.

Patricia then adds two phrases, one of which is repetitive of the initial statement, again indicating some hesitation as she ensured that key aspects of the description would be given to the

Police:

> Gray or White hair. [or a comma after "hair"]
>
> With a long coat.

There may well have been another pause because the next sentence in Patricia's statement goes back to repeat what she had already said before William Urquhart's first question:

> I was talking to Jr.

8.20 The narrative then continues without reference to a description of the second man:

> Terry got a match from.

It appears that there was a pause, and then:

> Jr.

Patricia then comes to the point of bringing the narrative back to what she wanted to say about talking with Marshall:

> And Jr. said they are crazy, they were asking him Jr. for a cigarette.

After this it is reasonable to believe that there was a pause, as William Urquhart was permitted to ask his second question:

> Did you see Sandy Seale in the park?

Patricia simply answers "No", suggesting that she had said what she felt it important to say. William Urquhart asked a third question:

> Was there anyone else in the Park?

Patricia's answer could indicate that this question was somewhat off the point of what she had been expecting to talk about. It was a second opportunity to describe the second man. Her answer is at first entirely general:

> Yes, boys and girls walking through the park.

After an apparent pause, Patricia added:

> Gussy Dobbin.

There is a further apparent pause, and then Patricia adds:

> And Kenny Barrow.

Patricia Harriss concluded her answer to Urquhart's third question with one of her most complete sentences of the statement:

> They left while we were still on the bench.

8.21 In comparison with the statement taken immediately upon Patricia Harriss' arrival at the police station by William Urquhart, the statement taken from Patricia Harriss at 12:07 a.m. on June 18, 1971 (Exhibit 56; Exhibit 16 - R. v. 16, pp. 67-68) has a much more assertive and confident syntactical structure. Most sentences are longer, and they are complete sentences. Answers are direct and to the point. It is respectfully submitted that this later statement on its face indicates a full appreciation about what is being asked, and answers which arise spontaneously from personal recollection or non-recollection.

8.22 In the preceding paragraphs the actual words and phrases used by Patricia Harriss in her statements have been examined, to the extent that the first statement survives. There are further inferences to draw from how the first statement is written. Does the absence of any writing on the last line of Exhibit 55 indicate that Patricia Harriss' statement was stopped at that point? It is respectfully submitted that the answer to this question is unclear. On the one hand, if the statement had been completed and signed signatures would be expected at the bottom of the first page, as appears from the statement Urquhart took from John Joseph MacNeil on November 15, 1971 (Exhibit 16 - R. v. 16, p. 172). However, William Urquhart did not sign the front page of the statement which he took from Frankie French (Exhibit 16 - R. v. 16, p. 29). Frankie French did. The statement could have been continued but still not signed on any page by Harriss. If she continued the statement but declined to sign it, Urquhart's notation to this effect could have been noted at the end only. However, this Commission can only consider this possibility by comparison with a one-page statement (Exhibit 48 - R. v. 22, p.8).

8.23 Another transcription factor to consider is whether or not the non-use of the final line of the page is significant. Was further information given by Patricia Harriss on a second page which has now been lost? In no statement which William Urquhart took in this investigation did he begin writing a question on the last line of a page, as would have been required

with Harriss' statement (Exhibit 16 - R. v. 16, pp. 29, 61, 83, 172). A comparative review of statements taken by John MacIntyre during this investigation shows that he did not begin questions on the last line either, and rarely on the second to last line of a statement - the only exception being Jimmy MacNeil's November 15, 1971 statement (Exhibit 16 - R. v. 16, pp. 20, 32, 39, 57, 67, 72, 76, 80, 175, 183, 184, 189, 193, and the one exception at p. 178).

8.24 Another syntactical factor for consideration is that the statement of Patricia Harriss at 8:15 p.m. does end with a complete thought. However, unlike all other statements from major witnesses this statement relates an incomplete narrative by Patricia Harriss. The statement does not indicate what she or Terry Gushue said, did, or anything else that happened after Marshall is alleged to have said that these two men were crazy asking him for a cigarette. It is respectfully submitted that this is a valid consideration when dealing with the structure of the statement because in order for there to be a complete statement from a witness there ought to be a full recounting from the first involvement until the end of involvement - as appears in other statements actually taken by William Urquhart (Exhibit 16 - R. v. 16, pp. 28, 60, 82, 171).

8.25 It is respectfully submitted that while the evidence does contain some uncertainty, the copying down of the first statement and its syntactical structure both support to there having been a second page which between 1971 and 1987

became lost in some way. There is no positive evidence of destruction, just as there is no positive evidence of a second page ever having existed. It is uncertain whether microscopic examination now of Exhibit 55 would be able to disclose in some positive way whether or not it had ever been fastened to some other piece of paper. There is also no way to know what that other piece of paper would be if there was one. Perhaps this is one of those factual issues which must now always remain unknown due to the ambivalence of the available evidence.

8.26 Turning to a content analysis of Patricia Harriss' 8:15 p.m. statement, the narrative which is disclosed is that she and Terry Gushue left the dance shortly before midnight, went to the Park, sat on a bench, went to go home via Crescent Street, where she and Terry Gushue met Donald Marshall and got a light for a cigarette. Patricia Harriss described one of the two men that Donald Marshall was with at the time. It is respectfully submitted that the crucial factual issues to deal with in this 8:15 p.m. statement are:

(a) The identification of the <u>two</u> men;

(b) The men asking Marshall for a cigarette; and

(c) The route taken by Patricia Harriss and Terry Gushue.

8.27 The extent of Patricia Harriss' description of one of the men she saw with Marshall was that he was short, with grey or white hair, and was wearing a long coat (Exhibit 16 - R. v. 16, p. 64). This was consistent on each of the three points with

the description given by Donald Marshall to John MacIntyre on May 30, 1971 (Exhibit 16 - R. v. 16, p. 17). There was one common point of shortness with the May 30 statement of John Pratico (Exhibit 16 - R. v. 16, p. 22). Patricia Harriss' description had perhaps three points in common with the statement of George Wallace MacNeil and Roderick Alexander MacNeil (Exhibit 16 - R. v. 16, p. 26). Two of Patricia Harriss' points of description were referred to by Arthur Paul in his statement of June 2 (Exhibit 16 - R. v. 16, p. 36), by Mary Patricia O'Reilly (Exhibit 16 - R. v. 16, p. 74), by Catherine Ann O'Reilly (Exhibit 16 - R. v. 16, p. 78), and by Rudolph Poirier (Exhibit 16 - R. v. 16, p. 85). It is worth noting that Paul, the O'Reillys, and Poirier all emphasized the old man with grey hair - though Paul spoke of grey or white hair.

8.28 Although hardly specific, Patricia Harriss' description is more complete than that related in the statements of Paul, the O'Reillys, and Poirier. An obvious inference to take from that is that Harriss had first-hand knowledge from seeing the old man <u>in the long coat</u>, while others such as Pratico, Poirier, Paul, and the O'Reillys did not. However, these last five got their descriptions from the eyewitness Marshall and simply may not have included in their statements to the police all of the communicated points.

8.29 It is respectfully submitted that if Patricia Harriss had indeed seen the particular man whom she described she would have noticed more than the three points of description

which she relates without interruption in the 8:15 statement. After all, only three weeks had passed since the event. A more telling point of significance is her weakness of description in that she is the only person who says she came into direct contact with Ebsary and the person who must be MacNeil who says absolutely nothing about MacNeil.

8.30 George and Sandy MacNeil had cogently and simply described a man who could be Jimmy MacNeil (Exhibit 16 - R. v. 16, p. 26). Maynard Chant in his first statement after speaking with Marshall describes someone with a description that could fit MacNeil, as does Pratico (Exhibit 16 - R. v. 16, pp. 18, 22). Poirier, who got his description from Marshall, also conveys in his statement a description of two men, possibly fitting both Ebsary and MacNeil (Exhibit 16 - R. v. 16, p. 85). Paul talks about a second man but gives no description (Exhibit 16 - R. V. 16, p. 36). The O'Reillys are the only witnesses other than Patricia Harriss to omit any description of the second man despite being given an opportunity to speak of him. This Commission will want to consider why Patricia Harriss leaves out any description of the second man when she, and not the O'Reillys, was supposed to be present. Marshall was stated to be the source for all of the witnesses referred to except Patricia Harriss. However, on this point, her "personal knowledge" evidence is not as good as much of the hearsay.

8.31 One further point with respect to these omissions of the second man's description must be made and not lost sight

of in assessing Patricia Harriss' 8:15 p.m. statement. That fact is that after giving the description of the short old man with grey or white hair and a long coat, Patricia Harriss appears to have changed the subject. Harriss began taking the narrative forward rather than providing a complete answer to William Urquhart's question:

> Describe the other men to me? (emphasis added) (Exhibit 16 - R. v. 16, p. 64)

Today Harriss has no positive recollection of what the two men with Marshall looked like (T. v. 16, pp. 2792, 2835-2836, 2897). This Commission must therefore rely upon her recorded recollection so far as it may appear in Exhibits 55 and 56. Nothing, exists today with respect to the second man. The second description may never have been written down, it may have been destroyed, or it may never have been given. It was not given in the appropriate sequence in the 8:15 p.m. statement.

8.32 The second factual content point worth noting in Patricia Harriss' 8:15 p.m. statement is the narrative she chose to insert rather than the description of the second man with Marshall. According to Harriss, Donald Marshall indicated to her that the two men were crazy because they were asking him for a cigarette (Exhibit 55). Mary Patricia O'Reilly's version was apparently that Seale and Marshall were asked for a cigarette and Marshall said that at least Seale did not have a cigarette (Exhibit 16 - R. v. 16, p. 74). Catherine O'Reilly indicated that she had spoken with Marshall and Marshall had told her that

the two men asked for a cigarette and "they" - Seale and Marshall - said no (Exhibit 16 - R. v. 16, p. 78). Catherine O'Reilly maintained that position before this Commission (T. v. 19, pp. 3368, 3370-3371). Mary O'Reilly could no longer recall (T. v. 18, p. 3301). The story related by Poirier was that the two men had asked Seale for a cigarette and a match, and when Seale said that he did not smoke, Seale was stabbed (Exhibit 16 - R. v. 16, p. 85). Poirier and the O'Reillys thus identified the refusal of a cigarette as the cause for the stabbing of Sandy Seale. Patricia Harriss' point was that asking Marshall for a cigarette simply demonstrated the foolishness of the two men. One might be tempted by this to postulate that Patricia Harris had personal knowledge of the issue.

8.33 Donald Marshall's statement on May 30, 1971, however, is to the completely opposite effect of Harriss and the admitted hearsay witnesses. Marshall clearly indicated <u>that he gave Ebsary and MacNeil the cigarettes which they asked for:</u>

> They asked us for two cigarettes. I gave them to them; also a book of matches. (Exhibit 16 - R. v. 16, p 17).

This is also the version reported to this Commission by Artie Paul (T. v. 23, pp. 4159, 4162-4163, 4220). It is respectfully submitted that wherever Poirier and the O'Reillys got their story, it is highly unlikely that Patricia Harriss got hers from personal observation <u>if Marshall's May 30, 1971 statement is to be believed</u>. The problem with Patricia Harriss' 8:15 p.m. statement is that if she did not get the cigarette information

from personal observation, where did it come from? There is no evidence that Patricia Harriss ever spoke with Poirier. There is some evidence that Patricia Harriss did have contact with the O'Reillys, or one of them.

8.34 Mary Patricia O'Reilly's statement indicates that she discussed the matter with Patricia Harris and told her that there was supposed to be a grey haired man, and that Harriss should tell the police about the grey haired man if questioned (Exhibit 16 - R. v. 16, p. 75). We will deal with the O'Reilly's statements further below, but accepting for the moment that what Mary Patricia O'Reilly's statement says is true, and Patricia Harriss was told to talk about the grey haired man, it is also reasonable to conclude that Mary Patricia O'Reilly would have indicated how the grey haired man was supposed to be involved - stabbing Sandy Seale when Marshall said that they didn't have a cigarette as had apparently been related to Mary O'Reilly's sister.

8.35 Patricia Harriss' problem was that if the refusal of a cigarette had caused the stabbing, what were Marshall and the old man supposed to be doing still standing around when Harriss and Gushue came along? In what way could she still give a statement dealing with seeing the grey haired man but also with the refusal of a cigarette when there had not yet been any stabbing? Harriss' 8:15 p.m. statement forecloses any argument that personal contact by her was before cigarettes were mentioned.

8.36 The assertion by Harriss that there was a refusal or inability to supply the old man with a cigarette is also inconsistent with other evidence that was available in 1971. George Wallace MacNeil and Roderick Alexander MacNeil had both given a statement on May 31, 1971 identifying persons who could have been Ebsary and MacNeil walking through the Park asking for a cigarette (Exhibit 16 - R. v. 16, p. 26). Terry Gushue had cigarettes and got a light from Marshall in the presence of this old man, according to Patricia Harriss (Exhibit 55). If the old man was looking for a cigarette and had been unable to obtain one from Marshall, why is there no narrative of the old man at least asking Gushue for a cigarette when they were in quite close proximity? It is respectfully submitted that the most reliable inference is that Marshall did in fact supply Ebsary and MacNeil with cigarettes, and that Patricia Harriss' assertions, like those of the O'Reillys and Poirier, are to some extent secondhand.

8.37 The final point of substance in Patricia Harriss' 8:15 p.m. statement is with respect to the route which she states that she and Gushue followed to get from the Park to her home on Kings Road. Harriss states that she and Gushue came from the dance at St. Joseph's to a bench near the Grandstand. The next movement on the way to Patricia Harriss' home on Kings Road at its intersection with Byng Avenue was, according to her 8:15 p.m. statement, that she and Gushue "walked back of the Bandshell" (Exhibit 55). Whether Harriss and Gushue walked back around via

Pollett's Drug Store at the corner of George and Argyle, and then around to Crescent Street, or took the walkway closest to the Bandshell which goes directly to Crescent Street, either route has the inherent improbability of leading away from Patricia Harriss' home (Exhibit 22). In examining Maynard Chant before this Commission, Commission counsel laid great stress upon the improbability of Maynard Chant having walked in circles according to his statements (e.g. T. v. 5, pp. 824-829, 871-873). It is respectfully submitted that the same improbability must be considered with respect to Patricia Harriss, as was raised in a question from counsel for Donald Marshall, Jr. (T. v. 16, p. 2843).

8.38 In any event, Patricia Harriss ultimately arrived on Crescent Street in front of the green apartment building, which is the sixth lot from the east end of Crescent Street. According to Harriss' 8:15 p.m. statement this is where she met Marshall and the two men. This makes Patricia Harriss' comments about heading behind or back of the Bandshell more puzzling as to get to the green apartment building from anywhere in the Park it is unnecessary to go "back of the Bandshell", or indeed to go anywhere near the Bandshell.

8.39 The walkways around the first pond meet at the bridge and lead on to a pathway which arrives at Crescent Street three houses from the green apartment building. As can be seen from Exhibit 22, the pathway leading up to Crescent Street closest to the green apartment building forms a "V" with another

walkway leading towards the Argyle Street end of Crescent Street. Both pathways flow from the bridge. Donald Marshall and Sandy Seale had been called up from that bridge to Crescent Street by Ebsary and MacNeil (Exhibit 16 - R. v. 16, p. 17). It is unclear which of the two possible pathways Marshall and Seale used to get to Ebsary and MacNeil.

8.40 Patricia Harriss would have been familiar with the Park. If Patricia Harriss and Terry Gushue had been taking the most direct route home through Wentworth Park to Crescent Street while Marshall and Seale had taken the pathway up to Crescent Street closest to Argyle Street, then Harriss and Gushue could have missed Marshall, Ebsary, and MacNeil by a full sixty feet on a dark, poorly lit street at about midnight. That would hardly permit Patricia Harriss to observe a short old man with grey or white hair with Marshall. The only way that Patricia Harris could be sure that her statement to the police would be consistent with where Donald Marshall had told the police he and the old man were would be to describe her movements in such a way that on her way home with Gushue she covered the full length of Crescent Street from the Argyle Street end down to the green apartment building. Assuming that Marshall and the old man were on Crescent Street, Harriss and Gushue would have had to run into them at some point.

8.41 It is respectfully submitted that this movement analysis aspect of the 8:15 p.m. statement represents a further indication that Patricia Harriss was attempting to tell more than

she knew from personal observation in a plausible context. It led her into improbabilities. While there can be no doubt that Harriss and Gushue did in fact meet Marshall, and this may have been on Crescent Street, the encounter took place according to Donald Marshall, Jr. some sixty feet away from where Seale, Ebsary and MacNeil were (Exhibit 99 - R. v. 34, p. 53). No one has suggested any reason for Marshall to have embellished this fact in 1982. At trial in 1971 Marshall could not recall where on Crescent Street he met with Gushue and Harriss (Exhibit 2 - R. v. 2. pp. 14024) but did state that after giving Gushue a light, he [Marshall] "came back" to the two men (Exhibit 2 - R. v. 2, p. 24).

8.42 From this exhaustive syntactical and content assessment of the 8:15 p.m. statement, it is respectfully submitted that that statement was not a recounting of events which Patricia Harris knew from her own personal observation. While there were aspects of the statement which could be confirmed through the evidence of others, the apparent hesitations and repetitions, the improbabilities and the misstatements which are at variance with Donald Marshall, Jr.'s account given within days of the incident, all indicate that Patricia Harriss was attempting to tell the police more than she knew. It is not submitted that Patricia Harriss did this in any deliberate way to shore up or assist Donald Marshall, Jr.'s story. There is only scant basis upon which to make such an assertion. It is respectfully submitted that there is a more

probable and reasonable interpretation to be placed upon all of the circumstances involved here.

Analysis of Related Evidence

8.43 Patricia Harris acknowledged to this Commission that she was a very confused fourteen year old at the time of these events (T. v. 16, p. 2926). When she was called upon by the police she intended to be helpful. However, in doing so there appears to be a probability that she not only related her personal knowledge but also information from others which she incorporated in her story.

8.44 When Patricia Harris went to give her statement to the police on June 17, 1971, we suggest she knew sufficient background about the case, at least from Donald Marshall, Jr.'s point of view, to speak about more than she actually knew herself from her own personal observations on May 28, 1971. She advised Frank Edwards in 1982 that prior to the Preliminary Hearing she knew what Donald Marshall's defence was going to be (Exhibit 17 - R. v. 17, pp. 5, 30; T. v. 66, pp. 11757-11758). Harriss acknowledges speaking with her friends Catherine and Mary O'Reilly about the case (T. v. 16, pp. 2787, 2813, 2928). Harriss knew, and this Commission may take as fact, that Mary O'Reilly knew Donald Marshall (T. v. 16, p. 2928). Harriss acknowledged that she could have discussed Donald Marshall's involvement in the events at the Park with Mary O'Reilly prior to her interviews with the police although no big discussion was made about it (T. v. 16, pp. 2928, 2845). Mary O'Reilly now

takes the extreme position that what Patricia Harriss says about discussing the case was "not possible" (T. v. 18, p. 3309).

8.45 William Urquhart's notes indicate that the stabbing was a subject of discussion at Sydney Academy (Exhibit 16 - R. v. 16, p. 139). There is no reason to suspect that Central School which Harriss attended was any different (T. v. 16, p. 2786). According to Staff Sergeant Harry Wheaton, Donna Ebsary says the stabbing and the old man were discussed at school (T. v. 42, pp. 7738-7740; Exhibit 99 - R. v. 34, p. 78). Also it is respectfully submitted that if this stabbing electrified the citizens of Sydney, and caused as much public concern as counsel for Donald Marshall, Jr. asserts, then certainly it would have been a prime subject for discussion among associates, acquaintances, and others in the same general age group as Donald Marshall, Jr. and Patricia Harriss.

8.46 The disclosure of the possibility that Harriss' recollection had a source in addition to personal knowledge - which could have been disclosed as innocently as in Poirier's statement - would have raised a justifiable concern with the Police (Consider: T. v. 11, pp. 1894-1896). The process of separating Harriss' personal knowledge from the hearsay would have been a necessary task. So would finding the sources of some of Harriss' information. It is respectfully submitted that at some point the disclosure of a secondhand source occurred between Harriss and the police. William Urquhart immediately assumed the latter task of seeking out Harriss' source or sources of

secondhand information.

8.47 A note in John MacIntyre's handwriting exists which indicates essentially the same information as appears in the June 18, 1971 statement of Mary Patricia O'Reilly (Exhibit 16 - R. v. 16, p. 129). This note is written on different, smaller paper than other notes written by John MacIntyre (e.g., Exhibit 16 - R. v. 16, pp. 127-128). Mary O'Reilly's name had surfaced in the June 3, 1971 statement of Gary Vincent Tobin as being in the company of some people at the dance whom Tobin wished to see (Exhibit 16 - R. v. 16, p. 38).

8.48 MacIntyre's note is different in that it indicates that Mary O'Reilly might know something about the circumstances of the stabbing. The first point of information had nothing to do with the stabbing but dealt with Sandy Seale's movements at some point during the evening - movements that had been difficult to trace. Mary O'Reilly, as things turned out, didn't know Sandy Seale (Exhibit 16 - R. v. 16, p. 74), but the police would not have known that until June 18, 1971. This is a circumstance which suggests that some information, albeit incorrect, about Mary O'Reilly must have been brought to the attention of the police by someone before June 18, 1971. The most logical and indeed only apparent source would be Patricia Harriss - and that is consistent with the second half of the notation.

8.49 Another circumstance to consider about the notation written by John MacIntyre (Exhibit 16 - R. v. 16, p. 129) is that it slips back and forth between the third person and the first

person. This is not consistent with the note being made as a result of actually speaking with an individual witness, as an individual witness would use the word "I" instead of a name. Instead, the note is consistent with information being related to John MacIntyre - as he is the one who wrote the note - and during the conveying of this information phrases and sentences are quoted from some other source, such as a written statement:

> The Reilly twins told me....
>
> Mary told me that....(Exhibit 16 - R. v. 16, p.129).

John MacIntyre testified that this note could have been made as a result of information given to him over the telephone (T. v. 35, pp. 6578-6579).

8.50 As indicated above, Mary O'Reilly gave a statement to John MacIntyre on June 18, 1971 first thing in the morning (Exhibit 16 - R. v. 16, pp. 76-77). Incidently, William Urquhart's name does not appear on the handwritten version of this statement but it does appear on the typed version (Exhibit 16 - R. v. 16, p. 75). In her June 18, 1971 statement Mary O'Reilly indicates that after discussions with Donald Marshall, Jr. about what happened at the Park she discussed the matter with Patricia Harriss and took it upon herself to say:

> I told her there was supposed to be a grey haired man there. I told her if she was questioned by the police, she should tell about the grey haired man that Jr. told me about. (Exhibit 16 - R. v. 16, p. 77)

If believed, this statement would be significant evidence to consider in assessing whether or not Patricia Harriss'

description of the grey haired man to the Police on June 17, 1971 had in fact been her own personal knowledge. If known in some form on June 17, 1971, it further supports the theory that Urquhart would have had reason to believe he was getting more than personal knowledge in the 8:15 p.m. statement.

8.51 At these Commission hearings Mary O'Reilly (now Csernyik) took the position that while she did not remember a number of aspects of giving her statement to the police, she could be categorical that she had not said the part about the grey haired man, and that the police must have mixed up some statements (T. v. 18, pp. 3302-3308). When Commission Counsel proposed three other alternatives to her about how material got into her statement, Mary O'Reilly did not hesitate at all to indicate that she had not made the statement at all. Someone inserted the grey haired man material:

> ...somebody must have put it there because I didn't.
>
> Q. Why do you say that?
>
> A. Because I don't recall saying that at all. If I did, I did, but - ....(T. v. 18, p. 3308).

8.52 It is respectfully submitted that Mary O'Reilly's assertion with respect to her June 18, 1971 statement is not credible, and certainly it cannot be regarded as conclusive. Her evidence before this Commission demonstrates a willingness to shift responsibility entirely away from herself despite the fact that she is unable to recall everything that took place in that room or even all the conversation that took place during the

giving of the statement (T. v. 18, pp. 3328-3329). Mary O'Reilly could not come up with any reason why another alleged insertion would have been made in the statement relating an account of the event consistent with Donald Marshall, Jr.'s innocence (T. v. 18, pp. 3334-3335). Also, if one were to accept Mary O'Reilly's speculation as true, it would mean that the Sydney City Police had worked out a memorandum of imaginary evidence (Exhibit 16 - R. v. 16, p.129) in anticipation of interviewing two people who had not otherwise been identified to them as being anywhere near the Park on Friday, May 28, 1971, knowing that they would insert into the statement of one of these witnesses some evidence about discussions with other actors in the investigation. For such an evil scenario to hold water, this Commission would also have to assume that the police would be able to control where the witness signed, since no such insertion would be possible given how Roy Gould and Barbara Vigneau signed their statements (Exhibit 16 - R. v. 16, pp. 57-58, 84). The evidence can certainly not support so much fabrication as would have been necessary.

8.53 The criminal law approach in this circumstance would simply be to conclude that Mary O'Reilly's June 18, 1971, statement is nothing because it is only recorded hearsay which has not been subsequently adopted: R. v. Gillingham (1981), 65 N.S.R. (2d) 42 (N.S.S.C., A.D.). However, taking away the statement still leaves Mary O'Reilly's evidence that she knew Patricia Harriss and was in the same Grade 7 class at Central High in 1971 (T. v. 18, p. 3304). O'Reilly says now that to have

discussed the Seale stabbing in any aspect with Patricia Harriss was "not possible" (T. v. 18, p. 3309). Counsel for Donald Marshall, Jr. established that Mary O'Reilly and Patricia Harriss would see each other regularly and would talk (T. v. 18, pp. 3321-3322). This is generally consistent with Patricia Harriss' position (T. v. 16, p. 2813), although Harriss has conceded that "probably the odd mention was made of it without any big discussion" (T. v. 16, p. 2928), and this could have occurred prior to her interviews with the police (T. v. 16, p. 2945). It is respectfully submitted that O'Reilly's denials cannot be regarded as definitive on the issue of whether or not there was any such discussion given the fact that this Commission is dealing with recollections of 16 and 17 years previously.

8.54 The circumstance which we submit this Commission ought to take from Mary O'Reilly's evidence, and indeed from Patricia Harriss' evidence, is that these two girls knew each other in 1971. They had some knowledge about each other in 1971 (T. v. 18, p. 3307). They had the opportunity and possibility existed that they would have had some conversation about the Seale stabbing.

8.55 Another indication that Harris was not speaking from personal knowledge in the giving of her first statement at 8:15 p.m. on June 17, 1971, would have been the information supplied by Terry Gushue to the police which was significantly different than that of Harriss. Staff Sergeant Harry Wheaton and others have written off Gushue as a drunk - both in 1971 and in

1982. Unlike Staff Sergeant Harry Wheaton, Patricia Harriss was with Terry Gushue on the night of May 28, 1971 and testified that Gushue was not "half-in-the-bag" but rather was in a fine enough condition to walk her home and was neither staggering nor obnoxious or anything else of that nature (T. v. 16, pp. 2876-2878). It will be recalled that Gushue's name appears to have come to the attention of William Urquhart during his June 14, 1971, meeting with Maria Sophocleous (Exhibit 16 - R. v. 16, p. 140). Gushue initially told the Sydney Police that he had not been in Wentworth Park and knew nothing about the stabbing - because he did not want to be involved in any way (T. v. 15, p. 2708). Although Harriss does not confirm this, Gushue later asked Patricia Harriss to go along with seeing nothing (T. v. 15, p. 2709). Gushue eventually relented and gave a statement about his contact on May 28, 1971, with Donald Marshall, Jr. (Exhibit 54; Exhibit 16 - R. v. 16, pp. 72-73). Gushue's recollection as related in that statement is not different today (T. v. 15, p. 2724). Gushue was with Harris throughout and therefore he and she must have generally seen what the other saw. Gushue saw Donald Marshall, Jr. on Crescent Street with another man whom Gushue did not know.

8.56 It is respectfully submitted that in her 8:15 p.m. statement it is reasonable to conclude that Harriss incorporated facts as she understood them, no doubt honestly endeavouring to be as complete as possible, as helpful as possible - and as consistent as possible with the story as she understood it

through the grapevine. It is respectfully submitted upon the basis of the analysis conducted above that it is logical to conclude that at some point in the course of William Urquhart taking the 8:15 p.m. statement, information came to light which disclosed that Patricia Harriss was indeed telling the police more than what she could actually say of her own personal knowledge. As stated above, it may have occurred as innocently as in the Rudy Poirier statement on July 2, 1971 (Exhibit 16 - R. v. 16, p. 85). Harriss could well have replied at any time when she was with the police something to the effect that "Mary O'Reilly said that" such and such had happened. This is not an unreasonable proposition to put forward in light of the documentary evidence which exists.

What Urquhart Did

8.57 William Urquhart would have had no personal knowledge to rebut anything in the 8:15 p.m. statement which Patricia Harriss asserted as her personal knowledge. That is why William Urquhart dutifully copied down Patricia Harriss' 8:15 p.m. statement through each hesitation and change of subject. This statement was not crumpled up, ripped up, or otherwise destroyed. The evidence of Eunice Harriss that Urquhart crumpled up the first and some 11 other statements when Patricia began to speak of the two men is not accurate with respect to the one statement this Commission knows was transcribed by William Urquhart.

8.58 As indicated above, it is likely given all of the

considerations referred to above that it became evident at some point while the first 8:15 p.m. statement was being taken that Patricia Harris was giving more than her personal knowledge to the Sydney Police. At that point, William Urquhart took whatever that information was (probably the O'Reilly information: Exhibit 16 - R. v. 16, p. 129) and set out to find the O'Reillys. Staff Sergeant Harry Wheaton expressed the opinion, having worked with William Urquhart and having discussed William Urquhart's investigative practice that:

> Mr. Urquhart from my experience with him is an [sic] intuitive type. He is a hard worker and would follow up leads and be a type to...he's a very good worker.
>
> Q. Hum - now, if on the 17th of June he had suddenly been confronted with information after speaking with Patricia Harriss that Harriss had spoke to the O'Reilly girls, it would be perfectly consistent for Mr. Urquhart to haved rushed out at that time and try to find the O'Reilly girls.
>
> A. Yes, sir. (T. v. 45, pp. 8346-8347)

Also consistent with that scenario is the fact that the only statement known to have been started, taken or completed in Mr. Urquhart's handwriting is the one taken when Patricia Harriss first arrived at the Police Station at 8:15 p.m.

<u>Identifying Urquhart:Harriss</u>

8.59 It does not appear that any of the intervening crumpled up statements after the 8:15 p.m. but before the 12:07 a.m. have survived, if they ever existed. Thus, it is not possible to independently verify William Urquhart's

participation or non-participation with those through handwriting analysis or otherwise. William Urquhart's name does not even appear on the handwritten versions of the Gushue and Harriss statements taken later that night (Exhibits 56 and 74). On the typewritten versions of the same statements he is indicated as a witness (Exhibit 16 - R. v. 16, pp. 65-66, 69-70). William Urquhart testified that if he was there he would have signed the original (T. v. 52, pp. 9486-9487), and that this was an invariable practice on his part (T. v. 52, p. 9531).

8.60 The lengthy review which we have undertaken of the Patricia Harriss' statements has been to demonstrate that there was reasonable cause for the statement-taking which was commenced by William Urquhart to have been interrupted at some point. The evidence must then be regarded as ambivalent about the presence of William Urquhart continuing to interview Patricia Harris for the next four hours, virtually continuously according to her evidence.

8.61 The difficulty for this Commission comes from the fact that Patricia Harriss testified that the best of her recollection is that she was mainly interviewed by William Urquhart (T. v. 16, pp. 2796, 2829-2833, 2879). Patricia Harriss indicates that in 1971 she was not particularly familiar with any of the police officers although she had known William Urquhart to some extent prior to 1971 (T. v. 16, pp. 2796, 2915). At the Preliminary Hearing in 1971 Patricia Harriss was questioned about the interview she had had with the Sydney City Police (Exhibit 1

- R. v. 1, pp. 26-27). Harriss identified "Red" Michael MacDonald who was actually sitting in the court room as involved when she first told the story about having met Donald Marshall, Jr. Harris said that she talked to "Red" Michael R. MacDonald about two times. The second time that Harriss was interviewed it was in the presence of John MacIntyre - also present in the court room when Harris was testifying - and "Red" MacDonald. That was the time she gave a written statement.

8.62 The Preliminary Hearing transcript also contains the statement by Harriss that she had in fact met with a total of three Detectives. This Commission knows that this third officer - Urquhart - was involved in writing out an initial but apparently unsigned statement. It is respectfully submitted that this Commission should weigh strongly the evidence of Patricia Harriss at the Preliminary Hearing, two weeks after June 18, 1971 when she gave her second statement, and find that she gave that second statement to "Red" Michael MacDonald and Sergeant MacIntyre as she says. After all, if Patricia Harriss is to believed that her concern was about what was contained in the second statement (or rather not contained in it - the two men) this is certainly the one she would have had in mind when testifying at the Preliminary Hearing. No one has ever suggested that all three officers - MacIntyre, "Red" MacDonald and Urquhart - were present for Patricia Harriss' second statement. Harriss says she knew Urquhart in 1971, but she never mentioned him by name in connection with any of the discussions she says she had

with the police on the statement she was concerned about - the one without the two men. If the Commission feels able to make that finding, this Commission will need to consider when Urquhart was out of the picture.

8.63 Patricia Harriss did not recall mentioning Urquhart by name when she spoke with Staff Sergeant Harry Wheaton in 1982 (T. v. 16, p. 2916). Frank Edwards notes that when Harriss spoke with him shortly after speaking with Wheaton that it was fair to say that Patricia Harriss did not specifically recall William Urquhart's participation in the statement-taking of June 17-18, 1971. Instead what Harriss did remember was Urquhart's name from that era (T. v. 69, pp. 12245-12246; Exhibit 17 - R. v. 17, pp. 5, 30).

8.64 Some of these points were confirmed with Patricia Harriss before this Commission. Harriss acknowledged that she could not dispute that Urquhart had been present early in the evening but left and was not there through the middle of the evening (T. v. 16, pp. 2927-2928), and Harriss does not recall Mr. Urquhart personally being present for the last statement (T. v. 16, p. 2926).

8.65 Finally, much as with the Scott MacKay statement described earlier (paragraphs 3.9-3.14, supra), Patricia Harriss did distinguish between her general experience of the evening, which was bad, and some other time during the course of the evening:

> There would be times where it'd be very comfortable and I would calm down and

> then it would get very flared up again and bringing me something to drink pounding their fists on the table and saying I wasn't telling the truth...not that hard...[but] Hard enough to upset me. (T. v. 16, pp. 2800-2801).

It is respectfully submitted that this too would be consistent with an unchallenging interview early on with a nervous witness, later deteriorating as interviewing continued with less familiar officers.

8.66 Patricia Harriss does not recall and did not know who Sergeant MacDonald was (T. v. 16, p. 2924)though when she saw him in July, 1971 she identified him. Neither did her mother know who Sergeant M.R. MacDonald was (T. v. 16, p. 3000). Eunice Harriss was present for the first statement, and therefore would have been observing a statement being taken by two officers. Eunice Harriss had been introduced and thus knew that one of the officers was a Mr. Urquhart. Eunice Harriss was meeting Urquhart for the first and only time.

Conclusion on Harriss

8.67 It is respectfully submitted, based on all of the factors set out at length above, that Patricia Harriss has mis-identified William Urquhart. In the course of a stressful night of June 17, 1971, and in discussions which Eunice Harriss and Patricia Harriss have held on the subject since, the name Urquhart has likely been an habitual reference point. There is nothing which prevents the reasonable inference that while Patricia and Eunice Harriss may have used the name Urquhart as a convenient label for one of the police officers with whom

Patricia feels she had difficulty in 1971, the probabilities are that she has attributed the Urquhart name to the person who is actually "Red" MacDonald - not the man before this Commission named William Urquhart. "Red" MacDonald is the officer identified in 1971 as being in on all tellings of the story. Urquhart, though known in 1971 by Harriss, is not mentioned at all. It is respectfully submitted that this Commission may conclude that Patricia Harriss' memory may simply have played a trick on her which has run unchecked through various hearings until the hearings before this Commission.

Terry Gushue Statement

8.68 Terry Gushue was Patricia Harriss' boyfriend in 1971 and his statement has been discussed above (Paragraph 8.55, supra). The only issue with respect to Gushue's statement (Exhibit 74) is whether or not William Urquhart was a witness on the statement, and thus present at the Sydney Police Station shortly before Patricia Harriss' second statement was taken. Terry Gushue testified that he had no independent recollection of the names of the officers by whom he was interviewed (T. v. 15, p. 2716). Gushue mentioned MacIntyre, and then after a mention by Commission counsel of the name Urquhart, Gushue indicated that he recalled the name, and he was satisfied that those were the two (with the addition of MacIntyre) who were present the night of June 17, 1971 (T. v. 15, pp. 2716-2717). However, Gushue in 1987 did not even remember the name of Staff Sergeant Harry Wheaton from 1982 (T. v. 15, pp. 2727-2728).

8.69 Given William Urquhart's signing practice with respect to statements, and the absence of evidence as to how his name came to be typed on this particular statement (Exhibit 16 - R. v. 16, pp. 69-71), we would respectfully submit that there is insufficient identification of William Urquhart to come to a positive conclusion that he indeed sat in on this statement as a witness. It is respectfully submitted that the most that can be taken from Gushue's evidence on the point of who took the statement is that he recalls two people in the room, one doing the questioning and the other just sitting witnessing the statement (T. v. 15, p. 2766).

O'Reilly Statements

8.70 The statements of Mary Patricia O'Reilly and Catherine O'Reilly were taken on the morning of June 18, 1971. Again, William Urquhart's name appears on the typed version of the Mary Patricia O'Reilly statement but not on the handwritten (Exhibit 16 - R. v. 16, pp. 74-75, 76-77). Mary O'Reilly does recall that there were two police officers, one of whom was John MacIntyre (T. v. 18, p. 3295). Mary O'Reilly did not know who the other person was (T. v. 18, p. 3326). Mary O'Reilly's sister gave a statement the same morning, about a half hour after Mary O'Reilly's statement was completed. Mary O'Reilly indicated that her mother had taken her from school to the police station (T. v. 18, p. 3293). Mary O'Reilly's sister came separately and walked in on the statement being taken from Mary O'Reilly (T. v. 18, pp. 3293-3294).

8.71 Catherine O'Reilly (Soltesz) confirmed much of what her sister said. She was met at school by a police officer and taken down to the police station (T. v. 19, pp. 3375-3376). Catherine O'Reilly knew John MacIntyre and testified that she was questioned by MacIntyre. She recalls the other officer present during the taking of the statement but did not believe that it was the same as the police officer who had picked her up. The officer she recalled as witnessing the statement wore a uniform and was "tall, thin, just like", apparently, Commission counsel Orsborn (T. v. 19, p. 3376). There is no doubt that Catherine O'Reilly's statement on June 18, 1971 was witnessed by William Urquhart, as can be seen by reference to the original of the statement itself (Exhibit 16 - R. v. 16, pp. 80-81).

8.72 It is respectfully submitted that this Commission had William Urquhart before it during two days of testimony, and whatever else William Urquhart can claim, it is doubtful that he could ever have been described as tall and thin. It is respectfully submitted that if Catherine O'Reilly's recall is lacking to the extent of being able to identify someone of Urquhart's type as a result of being in his presence during the taking of the statement, and being the only witness who would put Urquhart in a uniform it is reasonable to conclude that Catherine O'Reilly could also be wrong about who picked her up at the school. It is respectfully submitted that it is as reasonable to consider that William Urquhart was out getting Catherine O'Reilly at the time of Mary O'Reilly's statement, as it is to assert that

William Urquhart was present during the taking of Mary O'Reilly's statement. Indeed, given the significance of what Mary O'Reilly would be expected to say, given advice which had previously been rreceived (Exhibit 16 - R. v. 16, p. 129), it would be more reasonable to expect that the same officers to whom Patricia Harriss gave her second statement would be the appropriate officers to take Mary O'Reilly's statement. That did not include Urquhart.

Conclusion

8.73 The submissions made with respect to the Patricia Harriss, Terry Gushue, and O'Reilly statements have been couched primarily in terms of identification because without identification of William Urquhart in relation to these statements there can be no valid ground to direct criticism at him personally, just as it would be impossible to convict him of a criminal offence or hold him liable in a civil proceeding. Identification is fundamental, and no recitation needs to be made of authorities which hold that the mere recitation of a name or something akin to a dock identification is insufficient. Some distinguishing characteristic or history of familiarity must accompany and constitute part of the identification or it will be valueless: e.g., R. v. Sophonow (No. 2) (1986), 25 C.C.C. (3d) 415, at pp. 438-453 (Man.C.A.).

8.74 In the context of these hearings, Terry Gushue's only identification of William Urquhart was brought out through a leading question and there is contrary evidence in the absence of

William Urquhart's signature on the original of his June 17, 1971 statement. We respectfully submit that that identification is valueless. Catherine O'Reilly demonstrated an inability to recall and identify William Urquhart even though other evidence clearly establishes that he was present for the taking of her statement. Mary O'Reilly did not know who the other person was on the statement she gave, and without any evidence as to how William Urquhart's name appeared on only the typewritten version of her statement, it is respectfully submitted that there is no identification here as well. Finally, with respect to Patricia Harriss, her own evidence establishes that she has no independent recollection of the person she now recalls as William Urquhart being present at the final statement. The characteristics she describes in relation to the person she calls William Urquhart are inconsistent not only with the one written statement we know was taken by William Urquhart, but also inconsistent with the type of police officer which William Urquhart has been demonstrated to be through other independent evidence. Thus, it is respectfully submitted that the Patricia Harriss identification of William Urquhart is unreliable and improbable to the extent that she connects him with any of the alleged improprieties of June 17-18, 1971.

8.75 In the event that this Commission should disagree with the submissions and find that a cogent and reliable and trustworthy identification of William Urquhart has been made by any of these witnesses, the nature of the allegations made by

some of them are such that this Commission should be hesitant to accept their evidence without qualification. However, for purposes of this submission the uncertainties and contradictions and contrary contextual factors will not be recited. That we leave to the close consideration of the Commissioners.

9.0 1971 NOVEMBER 15, 1971: REINVESTIGATION

The Conviction

9.1 The trial of Donald Marshall, Jr. occupied four days commencing November 2, 1971 and concluding on November 5, 1971 (Exhibits 1, and 2 - R. v. 1, and 2). James William MacNeil had not thought that Donald Marshall, Jr. would be convicted, and did not attend the trial (T. v. 3, p. 624). MacNeil was concerned about the conviction because he knew that Donald Marshall, Jr. had not done the stabbing, he continued to deal with the stress of this knowledge through alcohol and drugs (T. v. 3, pp. 455-456, 582-584, 597). It was only upon the return of his older brother John from Ontario that Jimmy MacNeil was persuaded to discuss the matter, and then persuaded to go to the police (T. v. 3, pp. 456-457). Jimmy MacNeil acknowledged to this Commission that on November 15, 1971 he had been drinking prior to going to the police (T. v. 3, pp. 457-458, 581). At the Police Station Jimmy MacNeil met either William Urquhart or John MacIntyre - he did not know either of them at all (T. v. 2, pp. 458-459). The police whom he did meet treated him well, and gave him a chance to tell everything that he wanted to say (T. v. 3, pp. 469-470).

9.2 Jimmy MacNeil and his brother John also took their brother David with them to the Police Station (T. v. 28, pp. 5313-5314). David MacNeil does not really recall whom he met when the three arrived at the Police Station (T. v. 28, pp. 5315-

5316). As for the statement which David MacNeil gave himself, he indicated that the police "just wrote it down as I told it to them" (T. v. 28, p. 5317). David MacNeil did indicate that once the statement was completed (Exhibit 16 - R. v. 16, pp. 174, 175), he was advised not to mention anything about it to anybody (T. v. 28, p. 5317).

John Joseph MacNeil

9.3 The MacNeil brother who prompted Jimmy and David to go to the police was John Joseph MacNeil who had returned home from Toronto the morning of November 15, 1971. It is apparent that John Joseph MacNeil took charge by getting Jimmy MacNeil to go down to the Police. It also appears reasonable to believe that John Joseph MacNeil was taking the most active and authoritative role when the three MacNeil brothers arrived at the Police Station because it was John Joseph MacNeil who was interviewed first at 6:25 p.m. on November 15, 1971 (Exhibit 16, R. v. 16, pp. 171, 172-173). This initial statement was taken by William Urquhart, and disclosed that another of the MacNeil brothers appeared to know about the stabbing in the park and was asserting the innocence of "a fellow [who] got life for it and he had nothing to do with it" (Exhibit 16, R. v. 16, p. 171). Unlike the typed version of this statement from John Joseph MacNeil, the handwritten version begins with a continuous narrative setting out essentially the whole story which John Joseph MacNeil had to tell before any question was asked (Exhibit 16 - R. v. 16, pp. 172-173).

9.4 William Urquhart took this statement from John Joseph MacNeil with "Black" Michael J. MacDonald as a witness. The statement was hurriedly taken down, lasting a mere fifteen minutes. Unfortunately, no further circumstances surrounding the taking of this statement and John Joseph MacNeil's participation in the events of November 15, 1971 are available since John Joseph MacNeil died approximately three years ago as a result, according to his brother Jimmy, of "excessive drinking" and otherwise not looking after his health (T. v. 3, pp. 607-608; T. v. 28, p. 5313).

9.5 Assuming that the times indicated on the following statements that evening are correct, at least with respect to the MacNeils, after receiving John Joseph MacNeil's essentially hearsay evidence there was a delay of thirty minutes before a brief statement was taken from David William MacNeil, and finally James William MacNeil (Exhibit 16 - R. v. 16, pp. 174-180).

9.6 Given the consistent involvement of John MacIntyre in the taking of important statements with respect to the Seale murder investigation on which he was the principal investigator, it would appear reasonable to assume that he was not present at the Police Station when the MacNeils first arrived or he would in all likelihood have taken the first statement. Every other statement that evening - from the MacNeils and the Ebsarys is taken by John MacIntyre (Exhibit 16 - R. v. 16, pp. 174-194). William Urquhart or "Black" Michael MacDonald must have contacted John MacIntyre in the half hour between the conclusion of John

Joseph MacNeil's statement and the beginning of David William MacNeil's statement. Whether Urquhart and MacDonald were advised to wait until MacIntyre's arrival, or chose to wait until MacIntyre's arrival, it is clear that within an hour of the first statement being commenced the Sydney Police were in a position to take a statement from a new alleged eyewitness to the Seale stabbing.

9.7 The eyewitness was the third witness of the three spoken to by the Police. This allowed them to get the background from Jimmy MacNeil's brothers as to how he suddenly appeared ten days after the trial of the Seale murder had concluded. It is respectfully submitted that this was appropriate procedure to follow in this case - to interview the accompanying "witnesses" before the eyewitness because it would be important to explore the question of why this person was coming forward now when he had not come forward earlier. That is the way the investigation proceeded on that evening.

The Results

9.8 As a result of taking the statements from the MacNeils, the Sydney Police had an eyewitness account of the Seale stabbing which was consistent with the injuries received by the victim, consistent with the racial identification of the two youn men involved; consistent with Donald Marshall, Jr.'s initial statement on May 30, 1971 - but most important specifically identifying the individual who committed the stabbing as Roy Ebsary (Exhibit 16 - R. v. 16, pp. 176-177, 178-180). This was

something no other witness had been able to tell prior to November 15, 1971. Indeed that name first appeared only in the statement of David William MacNeil (Exhibit 16 - R. v. 16, p. 174).

9.9 Assistant Crown Prosecutor Lew Matheson had been notified of the developments in the case, likely as soon as James William MacNeil's statement had been taken. Matheson advised ths Commission that one evening a short time after the trial while having a late supper he received a telephone call to go to the Police Station because a new witness had come forward indicating that somebody other than Donald Marshall, Jr. had stabbed Seale (T. v. 27, pp. 5008, 5009). Matheson also indicated that upon arrival within five minutes of the telephone call he was handed "a statement that the police told me they had taken from another gentlemen who was in the building" (T. v. 27, p. 5009). Matheson identifies this as the Jimmy MacNeil statement, which would indicate that he arrived sometime after 8:00 p.m. when that statement had been completed (Exhibit 16 - R. v. 16, pp. 177, 180).

9.10 Matheson became alive to the concern that:

> ...what was most compelling at the time was people were in and out. The fact that James MacNeil had come forward and made a statement was known, at that point, to my knowledge among enough people that I feared that somebody would get to...Ebsary family and - alert them that they were going to be confronted with this. I didn't want to - them to have time to prepare a story that wasn't true. And I felt that the quicker they were confronted the better and I felt

> that had to be regardless of anything else that had to be done that night. (T. v. 27, pp. 5015-5016)

It is respectfully submitted that Matheson would not have had this concern if he were simply dealing with Jimmy MacNeil and the police. It is respectfully submitted therefore that David MacNeil and John Joseph MacNeil were probably still at the police station as well. Given Matheson's feelings, they would be consistent with Matheson having given a direction to David MacNeil not to discuss the case with anyone given the further investigation that needed to be conducted (T. v. 28, p. 5317). Lew Matheson then directed the Sydney Police Officers there to "go and round-up the Ebsary family wherever they were. To isolate them and to confront them with MacNeil's story and to record their answers." (T. v. 27, p. 5016).

The Ebsarys

9.11 Crown Prosecutor Matheson's direction was followed and by 8:45 p.m. the wife of Roy Ebsary was being interviewed by John MacIntyre with William Urquhart as a witness (Exhibit 16 - R. v. 16, pp. 181-185). It will be noted that the statement is warned. It is respectfully submitted that the obvious basis for the warning were the comments made by Jimmy MacNeil in his statement of earlier that evening. MacNeil had advised about Mrs. Ebsary possibly having participated in an attempted intimidation of him with respect to coming forward about his story about Roy Ebsary (Exhibit 16 - R. v. 16, p. 177). Mary Ebsary's statement confirmed what Jimmy MacNeil had attributed

directly to her. However, it was also apparent as the statement progressed that Mrs. Ebsary's concern was primarily domestic. Mary Ebsary at the time commented about the Seale stabbing in relation to MacNeil and her husband by saying:

> I don't think Jim or my husband would have anything to do with that. Roy only weighs about 115 lbs.
>
> Q. Was there any discussion about this affair by Jimmy or your husband.
>
> A. No. (Exhibit 16 - R. v. 16, p. 182)

9.12 William Urquhart witnessed this statement, and his signature appears on all three hand written pages of the document (Exhibit 16 - R. v. 16, pp. 183-185). William Urquhart had no further involvement with the re-investigation that night, and the evidence from E. Alan Marshall is that to the best of his knowledge William Urquhart had no further involvement in the 1971 re-investigation of this matter (T. v. 31, p. 5757). Ultimately, William Urquhart found out what the results of the 1971 R.C.M.P. re-investigation had been in a general way, but without ever actually being given an opportunity to read the R.C.M.P. re-investigation report (T. v. 52, pp. 9613-9614, 9616-9618).

Conclusion

9.13 It is respectfully submitted that William Urquhart's limited participation in the 1971 re-investigation was appropriate and proper. He initially received and recorded information which related to the Seale stabbing. Urquhart not only received the information which related directly to the Seale stabbing but also secured information giving background to the

source and potential factors which might have influenced this new eyewitness to first hold back and then come forward. Upon receiving some of this information, Urquhart notified or caused to be notified his superior officer. The Crown Prosecutor became involved and directed that further statements be taken and that this matter not be disclosed further. The testimony before this Commission indicates that disclosure of any of this police information to the Defence would have been through Crown counsel (T. v. 26, pp. 4831-4832). It is respectfully submitted that William Urquhart did everything that it was appropriate for him to do with respect to the new information which he was presented with on the evening of November 15, 1971.

10.0 FURTHER PRACTICO CONTACT

Nova Scotia Hospital Transportation

10.1 The Nova Scotia Hospital is a mental care and treatment facility in Dartmouth, Nova Scotia. In 1971 patients were sent to the Nova Scotia Hospital from the Sydney area for numerous things, including alcohol and drug abuse. The family doctor would make the referral (T.v. 52, p. 9620). The procedure followed was that the Chief of Police would detail a police officer on days off to transport patients, for which payment was received from the County of Cape Breton (T.v. 10, p. 1700). This practice no longer exists (T.v. 10, p. 1699). It was normal practice to leave in the morning quite early (T.v. 52, p. 9619), pick up the patient and a sealed envelope for the hospital, and deliver both to Dartmouth (T. v. 52, p. 9620).

Transporting John Pratico

10.2 John Pratico and his mother both testified that prior to the Marshall trial in 1971, Sydney Detective "Red" M. R. MacDonald drove John to the Nova Scotia Hospital (T. v. 12, pp. 2090-2091; T. v. 13, pp. 2279-2280). This admission had been arranged for Pratico by Dr. A. B. Gaum at Pratico's request:

> ...Just told him my nerves were really bad and I had a lot of things on my mind and I need to get away...-- and get help (T.v. 12, p. 2091; see also p. 2143).

With respect to this first trip with "Red" MacDonald, Pratico

does not recall any discussions in the car between Sydney and the Nova Scotia Hospital, but does recall that his mother and sister were with him at the time (T. v. 12, p.p. 2090-2091).

10.3 After giving evidence at the trial, Pratico felt that his nervous condition worsened (T. v. 12, p. 2121). Pratico indicated:

> That was my breaking point. That's where I broke. My nerves went completely....I went back to the hospital....Very shortly afterwards. (T.v. 12, p. 2103).

John's mother Margaret did not recall exactly when John went back to the Nova Scotia Hospital, and did not go with him that time (T. v. 13, p.p. 2282-2283). Margaret Pratico could not recall either whether John had been picked up at the house or not (T. v. 13, p. 2283). However, she did acknowledge that his nerves were sufficiently bad after the trial that it justified John going back to the Nova Scotia Hospital (T. v. 13, p.p. 2283-2284). Both John Practico and Margaret Pratico indicated in their testimony that John had a significant drinking problem at all times in 1971 (T. v. 11, pp. 2005-2008; T. v. 12, pp. 2105-2106, 2131; T. v. 13, pp. 2252-2253).

10.4 John Pratico's medical records from the Nova Scotia Hospital (Exhibit 47) indicate that on November 29, 1971, William Urquhart had occasion to escort John Pratico to the Nova Scotia Hospital (Exhibit 47, p. 83-unpaginated). William Urquhart had no specific recollection of this encounter with Pratico (T. v. 12, p. 9619), but indicated from general practice that he would

have used a private car for the five hour trip and could well have left Sydney at 5:00 a.m. in order to have delivered Pratico for admission by 10:30 a.m. (T. v. 52, p. 9619).

Significance of the Encounter

10.5 It has been suggested that if only Donald Marshall, Jr. or his lawyers had known that John Pratico was mentally unstable, Pratico could have been more convincingly discredited at trial. Simon Khattar, one of Marshall's Defence counsel, expressed the view to this Commission that at the time of the Trial he was of the view that Pratico had been sufficiently discredited that the case was won anyway (T. v. 25, pp. 4733, 4756). Khattar indicated that knowledge of Pratico's stay at the Nova Scotia Hospital between the Preliminary Inquiry in July and the Trial in November might have helped (T. v. 25, p. 4719), but Khattar also acknowledged that in 1971 any information about a Crown witness would have come from and through the Crown Prosecutor:

> We didn't go to the police (T. v. 26, p.p. 4831-4832).

10.6 As indicated above, John Pratico's re-admission to the Nova Scotia Hospital occurred on November 29, 1971 (Exhibit 47, p. 83-unpaginated). John Pratico was discharged subsequent to this admission to the Cape Breton County Hospital on March 29, 1972 (Exhibit 47, p. 73-unpaginated). Pratico remained in the Cape Breton Hospital until June 13, 1972 (Exhibit 47, p. 69-unpaginated), was re-admitted to the Cape Breton Hospital on

December 7, 1972, and transferred by Cape Breton Hospital personnel to the Nova Scotia Hospital again on December 12, 1972 (Exhibit 47, pp. 45, 69-unpaginated).

10.7 The Induction Training Officer at Dorchester Penitentiary who prepared the Cumulative Summary for Donald Marshall, Jr. on July 21, 1972 indicated that Donald Marshall had been admitted to that institution on June 20, 1972, and some time within the next month had expressed the view that:

> According to inmate, one of the witnesses is presently in the Provincial Hospital in Dartmouth, N.S., under protection for fear of Indian Tribe wanting to kill him. (Exhibit 112-R. p. 35, pp. 2-3).

John Pratico's release from in-patient care had occurred just a week prior to Marshall's transfer to Dorchester Penitentiary from the Cape Breton County Jail. It is reasonable to deduce from all of this documentation that Donald Marshall, Jr. himself was well aware prior to his transfer to Dorchester Penitentiary that John Pratico had been admitted to a mental care institution.

Conclusion

10.8 There is no evidence that William Urquhart would have had any understanding about John Pratico's particular problems when he delivered Pratico to the Nova Scotia Hospital in November of 1971. There is no evidence that it would even have been expected that William Urquhart would convey this kind of information to Defence counsel. Urquhart would not have had information to convey, not knowing the reason for John Pratico's

admission because this information would be contained in a sealed envelope. It is not reasonable in any event to expect that William Urquhart should have breached any medical confidentiality which might attach to the simple fact of admission to a mental cave facility, particularly when any supposition about why the admission occurred would have been pure speculation on William Urquhart's part.

10.9 It is respectfully submitted that William Urquhart had no duty or moral obligation to provide the information that he had transported John Pratico to the Nova Scotia Hospital to anyone concerned with Donald Marshall, Jr.'s Defence. It appears that Donald Marshall, Jr. was aware of that information anyway by at least June, 1972. The Appeal of Marshall's conviction was heard on January 31, 1972 (Exhibit 2-R. v. 2, p. 117), and decision was not delivered until September 8, 1972 (Exhibit 2-R. v. 2, p. 117). If Donald Marshall, Jr. and his counsel on the Appeal, Mr. C. M. Rosenblum, Q.C., regarded the information about John Pratico as significant, there was clearly time between the receipt of information and the delivering of the Appeal Division's decision to have made an application for a re-hearing and introduction of such further new evidence as Marshall and his counsel deemed relevant: Criminal Code, R.S.C. 1970, c. C-34, s. 610; e.g., Horsburgh v. The Queen, [1968] 2 C.C.C. 288 (S.C.C.); R. v. Young and Three Others, [1970] 5 C.C.C. 142 (N.S.S.C., A.D.); and as to re-hearing, either through suspension of adjudication of the appeal: Easton v. The Queen (1961), 36 C.R.

392 (Que. Q.B., A.S.), or by reference: Reference re Regina v. Gorecki (No. 2) (1976), 32 C.C.C. (2d) 135 (Ont. C.A.).

10.10 It is respectfully submitted that there is no basis upon which to attribute fault to William Urquhart with respect to his involvement in transporting John Pratico to the Nova Scotia Hospital in November, 1971. This did nothing to contribute to the fact or length of Donald Marshall Jr.'s imprisonment for the stabbing of Sandy Seale.

11.0 1974 - RATCHFORD/EBSARY/GREEN CONTACT

The Nature of the Story

11.1 William Urquhart's next alleged involvement with the Marshall case came in February or March of 1974 (T. v. 24, pp. 4392-4393, 4401). The story essentially reduces itself to the proposition that within one day in the late Winter or early Spring of 1974, Detective Urquhart was visited by David Ratchford, Donna Ebsary, and later by R.C.M.P. Officer Gary Green. The alleged purpose of these contacts was to advise the Sydney Police that Donna Ebsary believed that her father Roy had stabbed Sandy Seale. Very simply, the allegation is that the Sydney City Police, and William Urquhart in particular, did not want to hear anything from these individuals and refused to consider the possibility of this as new evidence casting doubt upon the appropriateness of the conviction of Donald Marshall, Jr.

11.2 This alleged series of events occupies a rather bizarre place in the categories of evidence heard by this Commission. The main protagonist and promoter of the allegation, David Ratchford, is nothing if not an impressario. The key to the allegation is a reluctant witness whom even this Commission chose not to pursue though her attendance had previously been secured in the Nova Scotia Courts. The third actor in these strange events is an R.C.M.P. officer, Gary Green, who does not appear to be an investigator and who kept no notes of his

involvement in this matter at all. According to other R.C.M.P. officers testifying before this Commission, note-keeping is one of the basic things to do (e.g., T. v. 38, pp. 7002, 7003).

11.3 The story which this Commission must assess is made even more mysterious by the fact that essentially the same information which this trio attempted to offer, prompted these same Sydney City Police officers to call upon the Crown in 1971, 1981 and 1982. It is respectfully submitted that this Commission should disbelieve much, if not all, of the evidence given with respect to this incident by Ratchford; that this Commission should consider Gary Green's evidence as unreliable; and finally consider that the sworn evidence of the reluctant witness Donna Ebsary can only really support the great suspicions about whether there was really any event involving William Urquhart to create this story.

Ratchford's Version to this Commission

11.4 One night in early 1974 Donna Ebsary confessed to Ratchford that her father Roy had stabbed Sandy Seale (T. v. 24, pp. 4393-4398ff). As a result of hearing this confession, Ratchford felt "under both a legal and a moral obligation to try to do something" and resolved to inform the "proper authority" - the Sydney Police Department (T. v. 24, pp. 4400-4401). This he and Donna Ebsary did the next morning (T. v. 24, p. 4401). Ratchford walked into the police station, and without having had any prior contact with MacIntyre or Urquhart, and not knowing them, but saying he knew who they were and what they looked like,

asked specifically for both MacIntyre and Urquhart by name (T. v. 24, pp. 4402-4403, 4449, 4453, 4464).

11.5 Ratchford only spoke with Urquhart (T. v. 24, p. 4404), but MacIntyre was in the same office and towards the end of the conversation came out to listen to what Ratchford had to say (T. v. 24, pp. 4404, 4449, 4466, 4467). Ratchford and Donna Ebsary were at the police station for about five minutes (T. v. 24, pp. 4404, 4452, 4466, 4467). Urquhart and Ratchford stood throughout (T. v. 24, pp. 4451, 4467).

11.6 Ratchford says that he introduced himself and said that he had brought "this girl" with information that might help with the Donald Marshall case; that according to her, her father was responsible; that his name was Ebsary (T. v. 24, p. 4403). Ratchford did not testify directly that he had introduced Donna Ebsary although his evidence as led by Commission counsel may be some evidence that he did (compare T. v. 24, pp. 4403, 4453, 4467-4468). However, at one point in cross-examination Ratchford made a remark to the completely opposite effect:

> Q. Was the name Ebsary mentioned at all in the conversation with them?
>
> A. Again I have to say that I cannot recall ever bringing his name up to them at all. (T. v. 24, pp. 4454-4455).

1.7 Urquhart's response was apparently official, plain, ourteous, and not rude (T. v. 24, pp. 4404, 4483). Urquhart uggested that Ebsary had already been in for questioning and hat the case was closed and the police had the person whom they

considered to be the man responsible safely behind bars (T. v. 24, p. 4403). Ratchford also indicated that Urquhart gave the impression that several other people had come forward and that Urquhart did not want to hear any more about it (T. v. 24, pp. 4454-4455, 4468, 4483).

Ratchford's Version to the R.C.M.P.

11.8 David Ratchford gave a written statement to Staff Sergeant Harry Wheaton on March 29, 1982 (Exhibit 74). Ratchford acknowledged giving this statement, reading the statement through before signing it, and then signing it (T. v. 24, pp. 4510, 4518, 4522). Ratchford also acknowledged on the stand that his recollection in March, 1982 would have been as good or better than it was when he testified before this Commission (T. v. 24, pp. 4518, 4522).

11.9 The germane portion of the statement reads:

> I recall that one evening she told me an amazing story about her father....
> I felt that this should be reported to the police immediately. I phoned the City Police and talked to Bill Urquhart I believe. He said that the case was over and they were not prepared to re-open the case. I believed this girl and felt that this was most improper. Cst. Gary Green was a good friend so I reported it to him.
> I understood that he also ran into a blank wall with the City Police. (Exhibit 74)

11.10 There are three main points of interest in this 1982 statement which affect critical aspects of Ratchford's oral testimony. As with his oral testimony to the Commission, Donna Ebsary related her feelings about her father to Ratchford in the

evening. Unlike his oral testimony to this Commission, Ratchford does not indicate in his R.C.M.P. statement that he waited to contact the City Police until the next day. Instead, he states that:

> I felt that this should be reported to the Police immediately. I phoned...(Exhibit 74)

Use of the telephone is a more consistent reaction with "immediately" than is waiting until the next day. The second and perhaps major point of difference in the statements and his oral testimony is the fact that Ratchford says nothing about going to the Police station - either by himself alone or with Donna Ebsary. Instead, in 1982 he told the authorities that he had telephoned the Sydney City Police. There would have been no opportunity to stand face to face with William Urquhart for five minutes, and to be joined by John MacIntyre. Finally, in his 1982 statement to the R.C.M.P., Ratchford is not even sure that it was William Urquhart to whom he spoke.

11.11 When confronted with the statement and these three rather major inconsistencies, Ratchford insisted to this Commission that he did actually visit the Police and did not call as indicated in his statement (T. v. 24, pp. 4517, 4520). The possibility that he had not gone to the Police with Donna Ebsary was "in my humble estimation extremely remote" (T. v. 24, p. 4523). Interestingly, Ratchford did acknowledge that he was uncertain in 1982 that it was William Urquhart with whom he had spoken in 1974 (T. v. 24, p. 4526). Any certainty he had with

respect to Urquhart's identification has come since 1982 - in other words, it is not based on a recollection of events in 1974.

11.12 It is not possible in this written brief to convey the striking change in demeanor of the witness Ratchford when confronted with his 1982 R.C.M.P. statement. Ratchford had already admitted to this Commission that he was a "professional actor" (T. v. 24, p. 4380). In preparing to testify, Ratchford "had forgotten all about this" statement (T. v. 24, p. 4510). Ratchford explained away the inconsistencies of his 1982 statement with his oral evidence on the basis that when he gave that statement to the R.C.M.P., he had not "rehearsed" his evidence (T. v. 24, pp. 4525-4526). That Ratchford does not feel that he was "rehearsed" is puzzling in light of the fact that he acknowledged that he may well have been the one to contact the R.C.M.P. to offer assistance - as appears from Staff Sergeant Wheaton's Report of the context in which the statement was taken (Exhibit 19 - R. v. 19, p. 86; T. v. 24, pp. 4528-4529). Also, Wheaton's Report refers to media coverage prompting Ratchford's offer of assistance (Exhibit 19 - R. v. 19, p. 86). Ratchford's evidence to the Commission was that prior to talking to Wheaton he had heard nothing in the media "and then suddenly - and then after I - had the audience with them at the high school, then things started to unfold" (T. v. 24, p. 4530; emphasis added).

11.13 A further pont dealing with Ratchford's reliability as to significant events may be assessed in terms of independently verifiable details which, until confronted,

Ratchford asserted with as much directness and authority as one might expect from a "rehearsed" witness. For example, Commission counsel actually spent a good deal of time dealing specifically with the question of dates, with which Ratchford had some considerable difficulty (T. v. 24, pp. 4436 ff). Dates were also assiduously studied with Ratchford by counsel on behalf of Oscar Seale (T. v. 24, pp. 4497-4498). Before this Commission Ratchford indicated that his confusion about dates was because of the "so many dramatic events" in his life at those particular times (T. v. 24, p. 4428; emphasis added). It is respectfully submitted that where there is not independent verification of the stories related by Ratchford to this Commission, his evidence should be entirely disregarded.

Gary Green's Version

11.14 Gary Green joined the R.C.M.P. in 1967 and served mostly as a detachment constable and on highway patrol before becoming involved in financial services for the Force (T. v. 38, pp. 7076-7077). Green was in Sydney between 1973 and 1977 (T. v. 38, p. 7076). Green kept no notes of this particular matter even though "normally I had a note book" (T. v. 38, p. 7077). It appears that during his time in Sydney Green had no experience with Detective Urquhart (T. v. 38, p. 7081).

11.15 Green placed the time of his contact as the fall of 1974 (T. v. 38, p. 7083). Green's first contact with Ratchford and Donna Ebsary with respect to this matter was to advise them to go down and speak with the City Police (T. v. 38, pp. 7086-

7087). Green does not know whether they did go or not:

> Q. Do you know if Mr. Ratchford and Donna Ebsary did go to the Police?
>
> A. I assume that they did because my next contact, if we had more than one, is that they had been done [down?] and they hadn't accomplished anything.
>
> Q. You were aware then at some time that Ratchford and Donna, or one of them, had been to the Sydney Police and had not accomplished anything.
>
> A. It was my assumption or my conclusion that they had both gone down. He to support her and to give her moral support, so to speak. (T. v. 38, p. 7077).

11.16 Upon understanding that Ratchford and Ebsary had not been satisfied with their contact with the City Police, Green went down himself to see the detectives he knew, John MacLeod and Edward MacNeil (T. v. 38, p. 7088). Understanding that they were out of town for a week, Green then met the senior investigator, the Detective Urquhart whom he knew but with whom he had not had a lot of dealings (T. v. 38, p. 7089). Green continued as follows:

> I went into the detective office, which is away from the main booking area, down the hall, into the right, and I said, "I have to come down to make sure that certain information was passed on to you, and it concerns Donna Ebsary, on the night of the stabbing she saw her father washing blood off a knife in the kitchen. This is what she's indicated to me....and that they had been down." Some how in the conversation the Marshall file was brought out and put on the table and I indicated that I wasn't there to read

> the file or to take the file, I was simply there to pass on this information....and the response to that was that in his opinion Donna Ebsary was a disturbed, disgruntled young lady who had just left home, and he wasn't going to re-open this file or this investigation based on another rumour, the way I recall him saying it.

Green recalls this as a very intense moment, following which Urquhart advised that the R.C.M.P. had already reinvestigated the case. Green left (T. v. 38, pp. 7089-7090). If Ratchford had been to the police and spoken with Urquhart, why would Green need to say "they had been down"?

11.17 Green gave further evidence that he went to the Sydney R.C.M.P. General Investigation Section and had a discussion with an officer about the facts which were prompting him to want to look at the R.C.M.P. file on the matter (T. v. 38, pp. 7090-7094). Green went back and explained to Ratchford that there already had been a reinvestigation involving Roy Ebsary (T. v. 38, pp. 7094-7095).

11.18 Green did not expand upon his direct evidence much under cross-examination. Green's impression was that Urquhart was familiar and aware of Donna Ebsary, but did not agree that it was his impression that Urquhart had already spoken with Donna Ebsary on a previous occasion (T.v. 38, p. 7099, 7109). Green felt that Urquhart was not particularly interested in the information brought about Donna Ebsary (T.v. 38, p.p. 7108-7109). Green acknowledged that the Sydney City Police Marshall file had been made available to him to examine without any

request by him, and Green chose not to examine it. Green disagreed with evidence to the contrary which had been given by David Ratchford (T.v. 38, pp. 7112-7114). Green did acknowledge that at some point during his inquiries he was made aware that the re-investigation by the R.C.M.P. a few years before had involved the same allegation that he was essentially reporting (T. v. 38, p. 7115). Green did indicate that he was speaking with Urquhart for 15 or 20 minutes but could recall little detail of the conversation itself (T.v. 38, p. 7123). Green does not believe that Ratchford ever identified for him the person with whom Ratchford had spoken at the Sydney City Police (T. v. 38, pp. 7124-7125).

11.19 The evidence of Gary Green is that his entire involvement and association with the Marshall case lasted about four hours on one day in 1974, during or after which he took no notes nor made any report in writing to anyone for the next 13 and one-half years. Even his involvement in the 1982 R.C.M.P. re-investigation was limited to a telephone call with Staff Sgt. Harry Wheaton (T. v. 38, p. 7119). Gary Green is unable to confirm whether Ratchford alone or with Donna Ebsary actually went to the Sydney Police Department in 1974. On other points of Ratchford's description about how Green was treated at the Sydney Police station, Green is unable to account for Ratchford's assertions. Green's evidence does not even confirm that if some contact was made by Ratchford and/or Donna Ebsary with the Sydney Police, that Urquhart was the officer with whom they had contact.

11.20 With respect to the contact which Green describes between himself and William Urquhart it is acknowledged that Green showed no deviation from his basic story. However, the Commissioners will have noticed how his evidence often appeared to be following a script which he had composed for himself and which he hesitated to deviate from, even to give a direct answer to a straightforward question (e.g., compare T.v. 38, pp. 7089-7090 with pp. 7111-7112, 7113-7114, 7114-7115, 7122-7123, 7126, 7127-7128).

11.21 It is important, we submit, to note that Green's main point about Urquhart's reaction was that Urquhart was not going to re-open the case on the basis of "another rumour". That is inconsistent with William Urquhart's limited involvement in the 1971 re-investigation, and most inconsistent with William Urquhart's reaction to similar second hand, hearsay information received in 1981 from Dan Paul (see Section 13). William Urquhart has testified as definitively as, and we suggest more definitively than, Green that he did not have any contact with Gary Green in relation to the Marshall case (T. v. 52, pp. 9620-9623). As to which of Urquhart or Green ought to be believed, it is respectfully submitted that considering the demeanour of the witnesses, and the consistency and inconsistency of the various pieces of evidence, that this Commission should prefer the evidence of William Urquhart.

11.22 Preference for the evidence of William Urquhart does not require the entire disregard of the evidence of Gary

Green. In particular, the only point upon which this Commission needs to have suspicions about Green's evidence is in his identification of Detective Urquhart as the Sydney police officer with whom he spoke. Why would Green remember that it was Urquhart when he could not remember the officers on his own force with whom he dealt on that same day about the same matter? In addition to the other factors of Green's reliability about which reference has been made above, this Commission may note that when Green was initially asked whether he had "any experience with either Sgt. MacIntyre of Detective Urquhart" in his time in Sydney, Green said no (T. v. 38, p. 7081). He did know MacIntyre and Urquhart to see them but that was it (T. v. 38, p. 7082). It is respectfully submitted that this is an ambivalance which ought to be considered by this Commission in the identification of Urquhart, given all the other circumstances but particularly Urquhart's Paul contact in 1981.

11.23 This Commission may also consider on the point of identification that William Urquhart has not otherwise been shown in evidence before this Commission to be the kind of police officer to indulge in the kind of sneering remark attributed to him about Donna Ebsary. As this Commission has observed, William Urquhart is not the kind of police officer who chooses to engage in the criticism of others (T. v. 54, pp. 9894-9896). Also, Donna Ebsary has consistently testified in statements and under oath that she did not leave home until 1978 or 1979 - which would also demonstrate the absolute unreliability of Green's recall

about Urquhart's alleged sneer (Exhibit 15 - R. v. 15, pp. 298, 300, 316, 355). The date when Donna Ebsary left home - four or five full years after this alleged event - has been independently confirmed in evidence to this Commission by Donna Ebsary's mother (T. v. 25, p. 4582).

Donna Ebsary's Version

11.24 Donna Ebsary of course did not testify before this Commission, but she has given sworn evidence before the Nova Scotia Supreme Court on more than one occasion. Donna Ebsary also gave a statement to Staff Sgt. Harry Wheaton during the course of his 1982 re-investigation, which is an appropriate place to begin. In that statement, Donna Ebsary indicates with respect to her speaking with David Ratchford in 1974 that:

> We got a hold of the Sydney City Police and apparently they would do nothing. We also got a hold of Cst. Gary Green of the R.C.M.P. and they apparently got nowhere with the City Police either. (Exhibit 15 - R.v. 15, p. 298).

This statement does not indicate whether or not Donna Ebsary went to the Sydney City Police Department. This statement does indicate that "we" contacted the Sydney City Police, but also states that "apparently" the Sydney City Police would do nothing. If Donna Ebsary had been in personal contact with the Sydney City Police, any action or inaction by the Police would not be "apparently" -- she would have been able to say that the Police would do nothing. This suggests Ratchford either went to the Police himself, which he denies, or that he simply made a

telephone call, which he also denies. Donna Ebsary does not relate the Sydney City Police contact to any particular officer.

11.25 In the Nova Scotia Supreme Court, Appeal Division Reference in 1982, Donna Ebsary testified that:

> I myself did not speak with the police but I spoke with a friend who suggested that I --...go to the police. (Exhibit 15 -- R.v. 15, p. 306).

In 1983 Donna Ebsary testified to the Nova Scotia Supreme Court, Trial Division (the first Ebsary trial) that at a previous time her efforts to report this matter to the police consisted of:

> I talked it with a friend of mine and my friend went to the police but I myself did not. (Exhibit 15 -- R.v. 15, p. 332).

In the final Ebsary trial in November 1985, Donna Ebsary again testified in the Nova Scotia Supreme Court, Trial Division that on an unknown date a few years after the Seale stabbing she told David Ratchford about her feelings, but did not go to the police after that conversation with David Ratchford (Exhibit 15 -- R.v. 15, p. 357). Donna Ebsary at that time said nothing about Ratchford doing anything.

11.26 This Commission has no reason to disbelieve the evidence given by Donna Ebsary under oath before the Courts of this province. It is clear that Donna Ebsary does not confirm David Ratchford's testimony about actually going down to the Sydney Police Department, <u>because Donna Ebsary did not go down to</u>

the Police Department. If Donna Ebsary did not go down to the Police Station with David Ratchford, there is nothing before this Commission which could independently confirm that David Ratchford himself went down to the Police Station. In some of the evidence given by Donna Ebsary there is not even a mention about following through and contacting the Sydney Police in any way. This may or may not be due to the fact that certain questions were not asked in the Supreme Court. However, that is the sworn evidence which this Commission has in evidence here.

11.27 From Donna Ebsary's other evidence, which it is unnecessary to detail here, she was obviously well aware that the Sydney Police had been aware of her father in November, 1971. Donna Ebsary felt that what was needed to bring this crime home to her father was to find the knife that she suspected had been used on the night of the stabbing to kill Sandy Seale (Exhibit 15 - R. v. 15, p. 298). Donna Ebsary did not have that knife in 1974, and therefore would have had no particular reason to establish contact with the Sydney Police at all. On this point Donna Ebsary's written statement to the R.C.M.P. goes farther than any of her sworn evidence. As between the sworn evidence and the statement, if a judgment needs to be made, it is respectfully submitted that the sworn evidence should be taken for what it says -- no more and no less.

Conclusion

11.28 It is respectfully submitted that having reviewed all of the evidence in relation to this alleged report in 1974 to

the Sydney City Police, this Commission should conclude that either it did not happen or, if it did happen the facts and circumstances must have been so radically different that an acceptance of the version of David Ratchford would be an acceptance of a grossly distorted version of events. Gary Green's evidence is troubling because of its incompleteness and the witness' own apparent uncertainty at times before this Commission. Considering the whole of this matter as presented to this Commission, it is respectfully submitted that this Commission ought to make no factual findings adverse to William Urquhart's interests on the basis of this alleged incident. It is respectfully submitted that other evidence before this Commission can give the Commissioners confidence that if indeed William Urquhart had received the kind of information which Ratchford says he presented -- whether or not this was in the presence of Donna Ebsary -- that Urquhart would have taken steps to obtain from Donna Ebsary what information she had to give and he would have kept the Crown advised throughout.

12.0 1971-1981: PAROLE CONTACTS

Contact With Correctional Officials

12.1 Like his other contacts with the Marshall case, William Urquhart's contacts with Correctional Services and associated institutions was irregular and intermittent. Urquhart's first contact in this regard was to respond to a letter from the National Parole Board dated August 24, 1973, confirming Donald Marshall, Jr.'s arrest date and whether or not bail had been granted in connection with the matter at any time (Exhibit 112 - R. v. 35, p. 8).

12.2 Urquhart's next involvement appears to have been in May or June, 1978 (Exhibit 69, p. 3). Kevin Lynk was directed by Diahann McConkey on March 3, 1978, to prepare a Community Assessment in relation to Donald Marshall, Jr.'s "future management" (Exhibit 69, pp. 1-2). Part of Lynk's directions included speaking with Chief John MacIntyre of the Sydney Police Department as "the Detective involved in the investigation of the murder events" (Exhibit 69, p. 2). Kevin Lynk testified that despite this direction he went to Inspector Urquhart with whom Lynk usually dealt even on cases where Urquhart had not been personally involved. (T. v. 40, p. 7412). Urquhart's reaction to the stated purpose of Lynk's visit was:

> Well, if you're talking about Jr. Marshall, we go in to see the Chief" (T. v. 40, p. 7412).

Urquhart showed Lynk into Chief MacIntyre's office and then left

(T. v. 40, p. 7413). According to Lynk, that was the extent of William Urquhart's involvement at that time.

12.3 About two years after Lynk had made his Community Assessment, a further Community Assessment was directed on August 26, 1980, and completed on September 24, 1980 (Exhibit 112 - R. v. 35, pp. 149-151). The Parole Service Officer involved was a Robert W. MacDougall, who did not testify before this Commission. At issue was whether a three day temporary leave of absence should be granted to Donald Marshall, Jr. to permit him to return to Membertou Reserve "with hopes of gaining support for his appeal". MacDougall's report indicates that he interviewed Inspector William Urquhart, in accordance with the direction from Diahann McConkey to make contact with the "relevant police department". MacDougall reported that:

> As expected, the police reaction in this case is quite negative, as they are very concerned about the risk the subject presents should he return to the area. Inspector Urquhart feels that the subject is a high risk for re-offending and should not be given that opportunity to do so. As earlier stated, the reaction of the Sydney Police to the subject's return to the Membertou Reserve is negative. (Exhibit 112 - R. v. 35, p. 151)

Assuming that this report is accurate, it is respectfully submitted that all it shows is that William Urquhart was concerned about a convicted murderer returning to the area where the crime had been committed "with hopes of gaining support for his appeal".

12.4 <u>Urquhart's alleged reaction should be considered in</u>

the context of what had been communicated to the Parole Service Officer by the inmate's relatives - in particular that one of the Crown's witnesses had been coerced into making a false statement at the original trial (Exhibit 112 - R. v. 35, p. 150). There is an indication in the report that Chief Alex Christmas needed to talk to Donald Marshall, Jr. before the Membertou Band Council could make any decision about soliciting funds for Marshall's appeal. Still, the inmate's expressed purpose in coming to Membertou in conjunction with concerns about witnesses could reasonably be seen to create a risk of interference with witnesses who had testified at the original trial.

12.5 According to MacDougall's report, William Urquhart assessed the risk of Marshall re-offending as "high" (Exhibit 112 - R. v. 35, p. 151). MacDougall does not explicitly connect Urquhart's feeling about re-offending with the interference with witnesses. It is, however, respectfully submitted that this is the only reasonable inference to take from the document as a whole.

12.6 In the absence of any knowledge on the part of William Urquhart about whether any Crown witness had been coereced into lying at the trial, or indeed in the absence of any evidence of William Urquhart's motivations in allegedly expressing the views contained in MacDougall's report, it is respectfully submitted that the views are not unreasonable. Such views appropriately reflect a judgment being made about the need for public safety and the prevention of breaches of the peace:

The Act to Incorporate the City of Sydney, S. N. S. 1903, c. 174, s. 334; Criminal Code, R. S. C. 1970, c. C-34, s. 31. See: Blanchard v. Galbraith (1966), 10 Crim. L. Q. 122 (Man. Q. B.); Hayes v. Thompson et al (1985), 18 C.C.C. (3rd) 254 (B.C.C.A.).

12.7 William Urquhart did not recall the interview referred to in MacDougall's report and disassociated himself from the remarks attributed to himself in that report (T. v. 52, pp. 9625-9628). The report contains Robert MacDougall's words which, when closely considered, are ambivalent in meaning. For example, was the negative police reaction "as expected" because the offence was murder, or because Donald Marshall, Jr. was involved, or was it because the Sydney Police simply were negative on all cases of potential temporary leave? We have already reviewed the uncertainty as to what the "high risk for re-offending" referred to - whether generally or in relation to the Crown witnesses from the original trial.

12.8 It is recognized that this Commission may have great difficulty if it attempts to determine an issue of credibility without there having been an opportunity to hear directly from the author of this report. It is respectfully submitted that so far as the objectives and concerns of this Inquiry are concerned, any need to approach the question of how much of the report to believe as it relates to William Urquhart can be put aside in light of oral evidence from another Parole Service Officer - Kevin Lynk.

12.9 Counsel for Donald Marshall, Jr. drew out the

evidence before this Commission that the opinion of police departments is not a determining factor in whether or not temporary leaves are granted:

> It doesn't make it or break it. (T. v. 40, p. 7424).

Whatever weight may be attached or not attached to Kevin Lynk's opinion, it appears from the documentation available that the requested temporary leave was not granted for October 1980, because Marshall was "in disassociation for the good order of the institution" at that time (Exhibit 112 - R. v. 35, p. 148), after a summer of deteriorating behaviour at Springhill Institution, leading to a return to Dorchester Penitentiary (Exhibit 112 - R. v. 35, p. 153). Thus, even if everything Robert MacDougall said in his Community Assessment was true, and any factors which would tend to demonstrate the reasonableness of William Urquhart's apparent responses are rejected, there was no effect upon Marshall's institutional experience.

12.10 William Urquhart's possible final contact with Parole Officers in relation to the Marshall case came in November, 1981, when Archie Walsh prepared a Community Assessment in relation to a request by Donald Marshall, Jr., for an unescorted Temporary Absence to visit his family at Christmas (Exhibit 112 - R. v. 35, pp. 164-167; also Exhibit 69, pp. 6-9). Archie Walsh testified before this Commission that normally he spoke with Inspector Urquhart when preparing a Community Assessment with which the Sydney Police Department would be involved (T. v. 40, p. 7461). With respect to this Community

Assessment, Walsh went to the Police Station to talk with William Urquhart but ended up speaking with Chief John MacIntyre and does not recall that he had any contact with William Urquhart at all (T. v. 40, pp. 7462, 7477). Indeed, Walsh conceded that he likely did not have contact with William Urquhart on this occasion or he would have remembered it (T. v. 40, p. 7477).

Other Issues

12.11 Both Kevin Lynk and Archie Walsh testified that in preparing Community Assessments and speaking with the Sydney Police, Inspector William Urquhart was the "designated officer" with whom Parole Service Officers spoke - whether or not William Urquhart had been involved in the investigation of the original crime (T. v. 40, pp. 7411-7412, 7461). Both agreed with assertions by Commission Counsel made through leading questions that the Sydney Police were more prone than other police departments to have a negative attitude about parole (T. v. 40, pp. 7416, 7467). Similar leading questions were asked by their own counsel on behalf of the Correctional Service of Canada and the National Parole Board (T. v. 40, pp. 7458-7459). Depending upon the weight the Commission may wish to give these responses, and the weight which this Commission may wish to give Robert MacDougall's Community Assessment report and his phrase "as expected, the police reaction in this case is quite negative" (Exhibit 112 - R. v. 35, p. 151), it would be open to this Commission to conclude that for some reason William Urquhart himself as the so-called "designated officer" was more prone to

be negative about parole than other police forces around Nova Scotia would have been.

12.12 None of the two Parole Officers who testified in this case had ever dealt with the Sydney Police on a murder case before their involvement in this matter (T. v. 40, pp. 7438, 7467). Lynk stated that he did not give much weight to opinions given to him by the Sydney City Police (T. v. 40, pp. 7418, 7423-7425), even though in the particular case under discussion the concerns which had been expressed to him by John MacIntyre were not regarded as unreasonable (T. v. 40, p. 7440). Walsh restricted his opinion to the contact made in relation to the Marshall case and indicated respect for Chief MacIntyre's opinion (T. v. 40, p. 7466). If it had been his place to do so, Walsh would have recommended a denial of leave on the basis of concerns expressed by the Chief (T. v. 40, p. 7469). Lynk acknowledged that he only worked in the Sydney area between 1975 and 1979, and was one of three Parole Officers doing Community Assessments involving the Sydney City Police (T. v. 40, pp. 7443-7444). Lynk was not assuming to speak for the experiences of the police attitude by other Parole officers (T. v. 40, p. 7443). Lynk testified that he did not always make an appointment with the Sydney Police before coming to speak with them for a Community Assessment, indicating that any perceived negative attitude may simply have been a reflection of the lack of time which the police were given to consider the appropriateness of temporary absences in particular cases (T. v. 40, p. 7443). It is

respectfully submitted that the sum of this evidence gives this Commission precious little upon which to base any generalized conclusion that the Sydney City Police or William Urquhart were more negative towards parole than was the experience elsewhere.

12.13 Indeed, it is respectfully submitted that this Commission has other cogent evidence upon which it may come to the conclusion that William Urquhart was certainly not, in the words of Kevin Lynk, "generally against parole itself" (T. v. 40, p. 7416). Of course, there is William Urquhart's own evidence with respect to the regard with which he held the parole system (T. v. 52, pp. 9627-9628). If William Urquhart's sworn testimony to this Commission were not enough, this Commission does have before it William Urquhart's record of involvement on the Board of Directors of Howard House in Sydney, between 1978 and 1986, a term which extended well beyond his retirement from the Sydney City Police Force on June 30, 1983 (Exhibit 119).

12.14 Howard House was, at one time, an operation of the John Howard Society. It is now jointly funded by the Federal and Provincial Governments to house people on parole (T. v. 54, p. 9886). The House has ten or twelve beds, and provides meals, counselling, and a location from which parolees may look for work in the community (T. v. 54, p. 9887). William Urquhart was originally appointed from the Sydney Police Department to sit on the Board, which he did with Parole Review Officer Robert MacDougall (T. v. 54, p. 9887). When Urquhart retired from the Sydney City Police he had intended to resign, but the Chairman of

the Board at the time, Father John Graham, asked Mr. Urquhart to stay on - which he did until moving out of Sydney (T. v. 54, p. 9887).

Conclusion

12.15 It is respectfully submitted that all of this gives substance to a conclusion that William Urquhart had a positive and useful view of parole. Otherwise, it can be presumed that William Urquhart would not have been asked to remain on the Board of Howard House after the end of his career as a police officer. It is respectfully submitted that Kevin Lynk's personal views about Urquhart's sincerity with respect to parole were the result of one initiative which Lynk took outside the scope of his employment for an ex-inmate. This one initiative foundered upon the disagreement of William Urquhart (T. v. 40, pp. 7444-7445). Thus, it is respectfully submitted that William Urquhart can be subject to no criticism or suspicion by this Commission that he did not conduct himself appropriately in his contacts with Parole Officers - either with respect to this case or as a general practice.

13.0 AUGUST OF 1981 MESSAGE FROM DAN PAUL

Receipt of Information

13.1 Late in the afternoon of August 26, 1981, Dan Paul gave William Urquhart a piece of paper on which was written Roy Ebsary's name, age, and address, together with a further notation that this information related to Jr. Marshall (Exhibit 16 - R. v. 16, p. 215). Unknown to Urquhart this note was in the handwriting of Roy Gould made as a result of a telephone conversation which Gould had received from Donald Marshall, Jr. (T. v. 21, p. 3836). Roy Gould turned the note over to Court worker Paul that same day and it was delivered to Urquhart the same day (T. v. 21, p. 3836).

13.2 Dan Paul told William Urquhart that Donald Marshall, Jr. had indicated that Roy Ebsary stabbed Sandy Seale (Exhibit 16 - R. v. 16, p. 215). It appears from the plain words which William Urquhart added to the note from Dan Paul that Marshall had received the information about Roy Ebsary from some third person. It may be inferred that Dan Paul did not know who this third person was or that name would have been indicated orally or in Paul's note. If indicated orally Urquhart would have written the name down. William Urquhart encouraged Dan Paul to obtain this unknown information.

13.3 The raising of Rob Ebsary's name in connection with the Seale stabbing was not new information. Indeed, by August, 1981, it was information which was almost ten years old. It was

information that had been provided to the Royal Canadian Mounted Police at least once (e.g., Exhibit 16 - R. v. 16, p. 204ff), and perhaps more than once (e.g., David Ratchford to R.C.M.P. officer Gary Green). It was the possibility that there was now a third person who could implicate Roy Ebsary which would be important. At the same time, the possibility existed that the third person would be Jimmy MacNeil - about whom the police were already aware. The third person could also have been someone conveying a rumour without any personal knowledge about the stabbing or the principals involved. One would have thought that the discovery and disclosure of the identity of this third person would have been a relatively straightforward matter.

Urquhart's Response

13.4 The fact that William Urquhart was put in a position where he was alerted about the possibility of receiving some new reliable information about the Seale stabbing, is confirmed by a memorandum of Crown Prosecutor Brian Williston (Exhibit 129). As stated in his own note, Urquhart immediately contacted the Prosecutor's office in Sydney to advise of the possible development in the case. According to Urquhart's own note, he apparently informed the Crown Prosecutor before notifying his own superiors through Deputy Chief M.J. MacDonald about mid-day on August 27, 1981.

13.5 Williston's note shows that in his conversation with Urquhart, Urquhart would have apprised him of who Ebsary was in relation to this matter. William Urquhart received no special

instruction from the Crown despite the fact that Urquhart must have impressed Williston with the potential significance of such information. Otherwise there would be no reason for Williston himself to prepare a memorandum on the point. In an ordinary case the Crown would leave memoranda and reports about the initiation of an investigation to the police. (Compare Frank Edwards in 1982, who only commenced his note-taking several days after the start of the re-investigation: T. v. 65, pp. 11710-11711).

13.6 Although the Commission does not have Brian Williston's viva voce evidence, and this is perhaps regrettable from all points of view, it is respectfully submitted that the known facts lead to an inference that further communication would be received by William Urquhart from Dan Paul. This inference is supported by a subsequent reporting memo between Brian Williston and Frank Edwards (Exhibit 17 - R. v. 17, pp. 35-36) where it is stated that Urquhart said that he would advise Frank Edwards "if their investigation turned up any facts in support of this allegation". At that point the new information could be passed along through the Crown to the R.C.M.P. to re-involve themselves in the case - as they had become involved in 1971, and as they were to become involved in 1982. This Commission will recall that on both occasions the R.C.M.P. became involved after the communication of new information to the Sydney Police, and then from the Sydney City Police to the Crown Prosecutor's office.

13.7 As to what Urquhart actually planned to do, it is

acknowledged that his notation is open to two interpretations, as may Brian Williston's report memo of May 4, 1982. One reasonable reading of Urquhart's note is that Urquhart planned to "interview Dan Paul for further details and information supporting this allegation" when Dan Paul got back to Urquhart with the new information. It appears from his own note and Williston's that William Urquhart's intent was to put this "new" information into the hands of the Crown when Urquhart received it. Urquhart's apparent statement in Williston's note that Urquhart would get back to Frank Edwards regarding "the results of his inquiry" refers, we suggest, to Dan Paul's inquiry - not any inquiry by William Urquhart. That is certainly a reasonable interpretation since William Urquhart had nowhere further to go than Dan Paul himself unless he were to actually commence a reinvestigation by speaking with Donald Marshall, Jr. or Roy Ebsary themselves. Also, it cannot be forgotten that the discovery or disclosure of the source of new information should have been a straightforward matter for Dan Paul or Donald Marshall, Jr. William Urquhart felt, in 1981, that his response was sufficient and it is respectfully submitted that nothing more could have reasonably been expected of William Urquhart at that time (T. v. 54, p. 9866).

13.8 An alternative interpretation of Williston's memorandum was put forward by counsel on behalf of the Union of Nova Scotia Indians and was not supported by the evidence (T. v. 54, pp. 9881-9885). This alternative interpretation was that

William Urquhart fully intended to re-interview Dan Paul after speaking with the Crown Prosecutor, without there necessarily being any new information to gather from Dan Paul about the note on the Seale stabbing. It is respectfully submitted that this is not a reasonable interpretation of Williston's memorandum. Any information which Dan Paul had to give would have been conveyed at the first contact with William Urquhart. The only justification for re-interviewing Dan Paul would be to secure new information which Dan Paul could provide and which Dan Paul obtained after that first meeting with Urquhart. It is not reasonable to suggest that William Urquhart undertook to simply re-interview Dan Paul in the abstract.

Native Reaction

13.9 This Commission does not have any evidence from Dan Paul, under oath or otherwise, about his contact with William Urquhart on August 26, 1981. This Commission does have some evidence from Roy Gould that Dan Paul and many others were disappointed in William Urquhart's reaction to the information supplied (T. v. 21, p. 3837-3838). However, the evidence before this Commission is that at least Roy Gould did not know in 1981 that the R.C.M.P. had investigated Roy Ebsary for the stabbing of Sandy Seale ten years earlier (T. v. 21, p. 3864). In short, Roy Gould, and perhaps the others who were described as disappointed, did not know and were not informed that the information which had been supplied was not new information. It is respectfully submitted that if Roy Gould and others had been aware of that

fact, their emotion might not have been one of disappointment.

13.10 It is also unclear that William Urquhart's interest in receiving further new information which might lead to some connection between Roy Ebsary and this crime was ever communicated by Dan Paul or Roy Gould to others. Gould knew that "Urquhart wanted more information". (T. v. 21, p. 3837; see also pp. 3864-3865). It is respectfully submitted that the best inference is that William Urquhart's interest on behalf of the Sydney City Police was not communicated because no efforts were made by Paul or others to provide Urquhart with this further information.

Points of Criticism

13.11 One can perhaps be critical of William Urquhart on two points with respect to this encounter with Dan Paul and its aftermath. First, one might be tempted to criticize William Urquhart for not apparently disclosing to Dan Paul, and therefore the wider native community, the fact that Roy Ebsary had been investigated in 1971. One might be tempted to criticize Urquhart for not being explicit that what he felt was needed to justify reinvestigation of the matter was some new information, some other reasons that had not been canvassed to his knowledge in 1971, which could connect Ebsary with committing the crime. This is a difficult issue to deal with. Essentially it comes down to a question of whether a police officer is justified in advising an interested member of the public that some other private citizen has been investigated for a criminal offence but not

charged and tried.

13.12 To put the matter fairly, the issue should be dealt with in the context of what would have been required in this case: public disclosure of an imputation of a particularly serious personal injury offence. We suggest that an officer wishing to make such disclosures would first have to consider very carefully the laws of libel and slander, and then choose his words very carefully, before commenting on alleged criminal involvements where a charge had never even been laid. The judgment exercised not to disclose in this case may have been unfortunate in its consequences, but it is not a judgment which can easily be described as wrong. To say that Urquhart was wrong here would be tantamount to saying that Harry Wheaton's disclosures about a certain fire in Port Hawkesbury were appropriate (T. v. 43, pp. 7952ff.). The only difference, we submit, may be in the size of the public audience.

13.13 The second ground upon which William Urquhart might be criticized in relation to the Dan Paul incident is that when he did not hear from Dan Paul, Urquhart did not seek Paul out about the further information about the unknown third person. Commission counsel diligently pressed this point (T. v. 52, pp. 9628-9633). The information which Paul had conveyed was skeletal at best. It was a name. In 1981 Urquhart had not reviewed the 1971 R.C.M.P. report but knew that this person named Ebsary had been cleared as a result of that R.C.M.P. investigation. William Urquhart relied upon that knowledge in not making an

investigative initiative himself without there being something more, something that Urquhart could take to the Crown and say "Was this angle looked at in 1971?".

13.14 Thus, the question on this issue comes down to whether Urquhart can be criticized for relying upon the result of the 1971 R.C.M.P. investigation. At that time there was no apparent cause to question the reliability of E.A. Marshall's report. The R.C.M.P. and perhaps the Attorney-General's Department had never questioned the report's reliability at that point (e.g., T. v. 37, pp. 6769, 6791, 6798, 6801-6802). In the context of the circumstances known in August, 1981, it was reasonable for Urquhart to have relied upon E.A. Marshall's conclusion about Roy Ebsary until there was something apparently new to connect with the Ebsary name. It should have been a straightforward matter to provide the new information to William Urquhart if it existed.

Conclusion

13.15 As we know from both the 1971 and 1982 R.C.M.P. reinvestigations, the effective starting point for such an investigation is new information (e.g., MacNeil or Sarson) rather than information which has already been dealt with by the authorities or the Courts at some previous point in time. Also, if there had been justification to take an investigative initiative on the basis of the information supplied by Dan Paul, it would appropriately have fallen to the R.C.M.P. on direction of the Crown rather than upon the Sydney City Police Detectives

once the new information was identified. This would be so for the same reasons as it was appropriate for the investigation to be handled by the outside force in November, 1971 and in February-April, 1982. William Urquhart's appropriate role as a Sydney City Police Detective would have been limited to accepting any new information which anyone could provide and turning that over to an outside investigation through the Crown Prosecutor's office.

13.16 Certainly, it is unfair to describe this whole incident as either an unsuccessful attempt to cover up evidence or even a refusal to reopen the case as has been asserted by some (Exhibit 130, p. 2). Whether or not William Urquhart misconceived his appropriate role after meeting with Dan Paul, and whether or not there was some misunderstanding as between Urquhart and Paul or as between Urquhart and Williston about what Urquhart was to do, the key remains the ease with which William Urquhart could have been put in possession of the new information by Paul or by Donald Marshall, Jr. himself (e.g., Exhibit 16 - R. v. 16, p. 214; T. v. 9, pp. 1592-1594). This Commission has no reason to single out William Urquhart for some special criticism on this matter.

14.0 FEBRUARY-JULY, 1982: R.C.M.P. REINVESTIGATION

Contact with Staff Sergeant Harry Wheaton

14.1 Staff Sgt. Harry Wheaton was assigned to re-investigate the Marshall case on or about February 3, 1982, after his immediate superior Donald Scott had met with Chief John MacIntyre and Crown Prosecutor Frank Edwards (T. v. 41, p. 7508). The steps taken in Wheaton's re-investigation at least so far as what statements were taken from what witnesses and where is well documented (e.g., Exhibit 19 - R. v. 19, pp. 5-123). At no time during this investigation was a statement taken in which William Urquhart was specifically named or identified by name with a particular problem in the original investigation. Staff Sgt. Harry Wheaton had worked closely with William Urquhart in investigations, and indeed had participated on a joint investigation with William Urquhart shortly before this re-investigation (T. v. 41, p. 7499).

14.2 Staff Sgt. Harry Wheaton waited to interview members of the Sydney City Police Force until May, 1982, and at that time left much of the interviewing to his assistant, Corporal James Carroll. In the reports which Staff Sgt. Harry Wheaton forwarded to his superiors, it is apparent that, unlike John MacIntyre, there was no consultation with William Urquhart at different points during the course of the re-investigation.

14.3 The first mention of William Urquhart in connection with the investigation was as a witness to the Chant second

statement (Exhibit 19 - R. v. 19, p. 23) in a report dated March 12, 1982. Wheaton's view at that time of the Chant situation was that:

> He [Chant] advises that he repeated the story to the police because when he was checked on George Street near Shadwick he advised he saw it all meaning the wound, blood, intestines, etc. From that point, he was interviewed by the police and felt obligated to say something so he repeated the story told him by MARSHALL in the car around the lake and at the scene and waiting for the police. On the 4th of June, when interviewed by the Police he was told he was seen in the Park so he agreed to it and from thereon he was afraid not to agree. He emphasized that he was fourteen turning fifteen years of age at the time and pressured into helping the Police and Prosecutor. He advised that the Prosecutor threatened him with a charge of perjury if he changed his story after the Lower Court hearing. (Emphasis added) (Exhibit 19 - R. v. 19, p. 26)

14.4 There is no mention of Urquhart in relation to Patricia Harriss who is described in that same March 12, 1982 report as having stated that:

> ...she was pressured into saying that two other people were not present. She was quite upset with the way she was treated by the Police, and felt forced to lie on the stand because she had given a written statement. (Emphasis added) (Exhibit 19 - R. v. 19, p. 28).

Wheaton said she mentioned Urquhart in the discussion prior to the statement (T. v. 41, pp. 7609-7610). Patricia Harriss says she did not (T. v. 16, pp. 2916-2917).

14.5 Inspector Donald Scott's addendum to the March 12, 1982 report also makes no specific reference to William Urquhart

- just that "our two eyewitnesses to the murder lied on the stand and, that the other main witness, HARRISS, lied as well, under pressure from the Sydney City Police." (Exhibit 19 - R. v. 19, p. 31). The non-attribution of any complaint to William Urquhart in particular is consistent with the formal statements taken by Staff Sgt. Harry Wheaton and Corporal James Carroll to that point.

14.6 After the reports of March 12, 1982, the next specific mention of William Urquhart is in relation to the "attempt" by David Ratchford to interest Urquhart in the Donna Ebsary story, and the discussion subsequently which is alleged to have occurred between Constable Gary Green and Urquhart (Exhibit 19 - R. v. 19, pp. 86-87). That situation was examined earlier in this brief (Part 11, supra).

14.7 Staff Sgt. Harry Wheaton next refers to William Urquhart in a report dated May 4, 1982, only with respect to the fact that Urquhart's name appears on the June 4, 1971, Chant statement and the June 18, 1971, Mary O'Reilly statement (Exhibit 19 - R. v. 19, p. 108).

14.8 Finally, on May 20, 1982, Staff Sgt. Harry Wheaton prepared a report in which he expressed the following conclusion:

> It would appear that this juncture that all interviewing, compiling of the case and interviews with Crown Prosecutor, Donald C. MacNeil were handled by Chief MacIntyre and Det. Inspector William Urquhart. The only evidence given by these two officers was by Chief MacIntyre at Preliminary Hearing and not at Supreme Court...

> ...Discussions were held with Crown Prosecutor, Frank C. Edwards, in regards to interviewing Chief MacIntyre and Insp. Urquhart in regards to the allegations of CHANT, PRATICO and HARRISS that they were induced to fabricate evidence in the original trial in this matter. Mr. EDWARDS has advised me that he further discussed the matter with Mr. Gordon, GALE of the Attorney General's Department, and it was felt that these interviews should be held in abeyance for the present. (Exhibit 19 - R. v. 19, pp. 120-121).

14.9 Despite the limited comments about William Urquhart and his role in the 1971 investigation, Wheaton and his superior, Donald Scott, prepared a "Red Book" (Exhibit 21 - R. v. 21) for the purpose of allowing readers of the book "to judge for himself why the witnesses lied in their statements to the police and during the trial of Marshall." (Exhibit 19 - R. v. 19, p. 111). This "Red Book" was forwarded from Sydney on May 5, 1982. The "Red Book" did, however, contain one direct and specific criticism which it made in relation to William Urquhart:

> Patricia Harriss will state that she.... It is interesting to note that in regard to her claim of police distortion of her statement, an unsigned statement which appears uncompleted, was found written in Insp. W.A. Urquhart's hand. This statement is dated 17 June 71, time 8:15 p.m., and in it she states...thus corrororating the length of time held, and the fact that the police, at least at 8:15 p.m., were aware that a man answering Ebsary's description, was on Crescent Street. It would appear that, as she now states, the Inspector did not want to hear this. (Exhibit 21 - R. v. 21, p. 3).

This criticism was apparently included in the "Red Book" in error

(T. v. 51, pp. 9395-9408).

14.10 In May, 1983 the R.C.M.P. re-investigators were asked to comment about any instances of improper police practices or procedures based upon the information available to them (Exhibit 20 - R. v. 20, p. 4). Wheaton discussed the Patricia Harriss June 17, 1971 statement at that time. Wheaton says that Harriss was actually interviewed commencing some time prior to 7:00 p.m. - even though there is no documentation to support this (Exhibit 20 - R. v. 20, p. 11). Wheaton considered the Harriss situation and concluded:

> Again, in regards to proper police practice, I feel the police felt they had a rather mature fifteen year old on their hands, however, be that as it may, if Miss HARRIS' story is accepted and there is documentation in the form of two statements as well as my interview with her mother, then this is certainly not proper police practise and using her as a witness is unethical.

Although the conclusion is strong, it is couched in conditional terms. Wheaton concluded that report indicating that:

> This case was investigated solely by Chief MacIntyre with some help from Detective Urquhart and was basically solved in one day....(Exhibit 20 - R. v. 20, p. 13).

As part of the same review process, Corporal James Carroll pointed out as improper police practice the threatening of Chant by MacIntyre and Urquhart with perjury and that the penalty would be Dorchester Penitentiary (Exhibit 20 - R. v. 20, p. 14). That comment is not supported by the documentary evidence nor by the viva voce evidence given before this Commission. The third

officer in line was Plain Clothes Co-ordinator Tom Barlow who added that:

> In August, 1971, Det. Urquhart received information Ebsary was responsible for the murder. Then, in November, 1971 James MacNeil came forward....(Exhibit 20 - R. v. 20, p. 22).

Barlow acknowledged in evidence to this Commission that he had realized his error on this date shortly after preparing the document but did not take any steps to correct it (T. v. 71, p. 12772). It is significant that no R.C.M.P. officer involved in the 1982 reinvestigation ever suggested that William Urquhart's conduct could in any way be described as criminal, or as even raising a suspicion of criminal conduct (Compare Exhibit 20 - R. v. 20, pp. 59, 63-65).

14.11 At these Commission Hearings, Staff Sgt. Harry Wheaton testified that he had discussed the Marshall matter with Inspector William Urquhart during the course of the re-investigation, even though this does not appear in any report. Indeed, Wheaton recalls speaking with Detective Urquhart "several times" (T. v. 42, p. 7790) during the re-investigation. Wheaton indicated that no formal statement was taken from William Urquhart because he had been one of the principal investigators in the Marshall matter (T. v. 42, p. 7790). However, when Wheaton also acknowledged that he had taken a formal statement from "Red" M. R. MacDonald who was "certainly a principal investigator". Wheaton indicated that his reasoning had been that:

> William Urquhart could really not give any evidence in relation to Roy Ebsary's guilt or innocence to the best of my knowledge. (T. v. 42, p. 7792)

Still later, Wheaton advised that he had been directed not to proceed with interviews of Detective Urquhart and was not offered any reasons for this (T. v. 42, p. 7796).

14.12 Staff Sgt. Harry Wheaton indicated that one of the several times that he spoke about this investigation with William Urquhart was when they both flew to Halifax to attend a meeting in relation to some "province-wide roundup", stayed together, and then flew back the following day (T. v. 43, p. 7842). Wheaton could not be specific that this was at the time of the re-investigation but it was "during the period" (T. v. 43, p. 7843).

14.13 Apparently during those discussions William Urquhart expressed the view that he felt that Marshall was guilty in 1971, and Urquhart offered no explanation for why witnesses were recanting (T. v. 43, p. 7843). At no time did the suggestion that there may have been a mistake in the Marshall case creep into the discussions with Detective Urquhart (T. v. 43, p. 7847). The statement-taking approach of Urquhart and Wheaton was discussed. While Urquhart's approach was different than Wheaton's approach, it was in no way improper (T. v. 43, pp. 7855-7857).

14.14 It is respectfully submitted that William Urquhart was not consulted about the 1982 reinvestigation except perhaps in a casual way, and the R.C.M.P. assessment of his participation

based upon information which they gathered has really left no issue which remains unanswered by evidence given at this Commission. From time to time suspicions were expressed about William Urquhart which went beyond the documentation or information available to the R.C.M.P., but William Urquhart's interests before this Commission are satisfied if this Commission indicates that they were indeed suspicions which have now been shown to be unfounded.

Contact With Frank Edwards

14.15 The evidence discloses that during the time of the R.C.M.P. re-investigation of the Seale stabbing, there was intermittent contact between William Urquhart and Crown Prosecutor Frank Edwards. On February 15, 1982, Urquhart called Edwards with advice that journalist Parker Donham had been to the Cape Breton Post to dig out old news clippings regarding the Seale stabbing (Exhibit 17 - R. v. 17, pp. 1, 22). Edwards related this information to a discussion with Staff Sergeant Harry Wheaton in the presence of Corporal James Carroll to limit any information given to the media to a minimum. Indeed, it appears that Edwards had a phone call to return to Parker Donham (Exhibit 17 - R. v. 17, pp. 2, 22) when the discussion with Wheaton and Carroll occurred. Urquhart's advice had been useful.

14.16 As the Seale re-investigation was beginning, Frank Edwards and William Urquhart were in contact with respect to an existing murder investigation known as the "Weatherbee Case". Edwards met with Urquhart about this investigation on Sunday,

February 21, 1982, at the Sydney Police Station. It appears that at some point Chief John MacIntyre was present at the police station and "kept me back", according to Edwards, after the Weatherbee meeting. In the presence of William Urquhart, John MacIntyre inquired about the re-investigation but Edwards told him that he was not able to say much about it. There was apparently discussion and expression of concern that the media were questioning witnesses (Exhibit 17 - R. v. 17, pp. 2, 23).

14.17 On Friday, March 5, 1982, Frank Edwards spoke with William Urquhart on a matter unrelated to the R.C.M.P. re-investigation. At that time, apparently John MacIntyre came on the phone asking about the re-investigation and again Edwards indicated that he was not at liberty to discuss it (Exhibit 17 - R. v. 17, pp. 6, 12, 31, 43). It is unclear whether William Urquhart was included as part of the conversation.

14.18 On Monday or Tuesday, March 8 or 9, 1982, William Urquhart was at the Crown's office. Urquhart apparently asked about the R.C.M.P. re-investigation but Edwards told him that he was not at liberty to discuss it (Exhibit 17 - R. v. 17, pp. 6, 31).

14.19 Two weeks later, on Monday, March 22, 1982, Frank Edwards had a telephone conversation with William Urquhart who was disturbed about hearing about the Marshall case on the street. Edwards continued to take the position that because he was privy to the investigation, Edwards could not comment (Exhibit 17 - R. v. 17, pp. 6, 32).

14.20 The "story broke" on March 24, 1982. On Thursday, March 25, 1982, William Urquhart called Edwards to determine whether Roy Ebsary was being charged the next Tuesday. Frank Edwards gave a negative response (Exhibit 17 - R. v. 17, pp. 6-7, 33). The case was still a Sydney City Police mother at that time (Exhibit 16 - R. v. 16, p. 22). There is no notation or other evidence about any further contact between William Urquhart and Frank Edwards until July 12, 1982, after the entire contents of the Sydney City Police file had been turned over the the R.C.M.P.

14.21 Before dealing with the meeting of July 12, 1982, there are only two other notations about William Urquhart in Frank Edwards' notes (Exhibit 17 - R. v. 17, pp. 5, 7, 30, 33). These notes were the result of Edwards receiving information about alleged contact between Patricia Harriss and Urquhart, as well as about alleged contact by Ratchford and Green with Urquhart.

14.22 Reviewing William Urquhart's role or activity with respect to all of the contacts with Edwards described above, it appears clear that William Urquhart was not injecting himself into the re-investigation in any way or pressing the Crown unduly for information. The context of the time was that information about the case was appearing on a fairly regular basis in the media. The information was such that even Edwards himself as an experienced prosecutor found the revelations intriguing (T. v. 69, pp. 12241-12242). It is not unreasonable for this Commission to consider that William Urquhart would have been at least as

intrigued, and in some circumstances greatly concerned because of the criticisms being put forward about the Sydney City Police (See generally Exhibits 130, and 131 - R. v. 38). By making notes of the contacts which William Urquhart had with him which related to the Marshall case, Frank Edwards meant no suggestion that these contacts were in anyway improper (T. v. 69, p. 12242).

July 12, 1982

14.23 July 12, 1982, was the day John MacIntyre, Michael Whalley, Frank Edwards, and Staff Sergeant Harry Wheaton met in Frank Edwards' office to discuss the case, or, in Staff Sergeant Harry Wheaton's words:

> ...to afford the Chief the opportunity to speak to these various accusations and what have you. (T. v. 42, p. 7803).

Staff Sergeant Harry Wheaton does not recall Urquhart being there (T. v. 42, p. 7807). Frank Edwards' notes indicate that John MacIntyre, Mike Whalley, and Harry Wheaton were present at his office (Exhibit 17 - R. v. 17, pp. 12, 44). However, the second, third, fourth, and fifth pages of the notes attribute remarks to Urquhart (Exhibit 17 - R. v. 17, pp. 13, 45, 46, 47, 48). Michael Whalley was never directly asked the question as to whether William Urquhart was present at the July 12 meeting, though the inference from Whalley's evidence is that Urquhart certainly was (T. v. 62, pp. 11150, 11153-11160). Whether or not William Urquhart was present, it appears that if present, he took little active participation in the meeting, limiting himself to advising about his position on particular statements on the basis

of his own recollection.

14.24 It appears from the notes of Frank Edwards that Urquhart expressed views, or had views attributed to him, that: he had recollections with respect to the Chant statement on June 4, 1971; he could not recall the Harriss or O'Reilly interviews; there were no pressure tactics on the statements he witnessed June 4, 1971, from John Pratico; he had no knowledge of Roy Ebsary prior to the Seale stabbing; and he could not recall any line up. At this time the Sydney City Police file had been in the possession of the R.C.M.P. for some three months - since April, 1982 (T. v. 69, p. 12243). As to what materials from the file, if any, Urquhart may have been shown during that July meeting, there is no evidence to assist (T. v. 69, pp. 12243-12244).

14.25 On the basis of the discussions held in Frank Edwards' office on July 12, 1982, a further meeting took place on July 22, 1982 to deal with the Affidavits which Edwards had drafted for MacIntyre and Urquhart based on the July 12 meeting (Exhibit 17 - R. v. 17, pp. 14, 50). The Affidavits drafted by Edwards were forwarded to Mike Whalley to review with MacIntyre and Urquhart. According to Whalley, both MacIntyre and Urquhart had the opportunity to read these Affidavits and indeed made some corrections (T. v. 62, pp. 11162-11163). This appears to be confirmed by Frank Edwards' notes (Exhibit 17 - R. v. 17, pp. 14, 50). It appears from the notes that William Urquhart, like MacIntyre, wanted to delete a paragraph regarding his lack of

knowledge of John Pratico in 1971. John MacIntyre indicated that it was possible that John Pratico's mother would have told him that her son was on pills at the time. No basis is given as to why William Urquhart wanted the paragraph deleted on his own behalf. Suppositions on this point are not really fair or possible in the absence of a copy of the draft paragraph which was rejected. At the conclusion of this meeting, Edwards advised that he would make the changes requested and then get the Affidavits signed (Exhibit 17 - R. v. 17, pp. 14, 50).

14.26 Edwards thinks that the exhibits referred to in the draft Affidavit had been attached for William Urquhart's review prior to the July 22, 1982 meeting (T. v. 69, p. 12244). Edwards felt that the Affidavits accurately reflected the account which the officers had given him (T. v. 67, pp. 11898-11900). Commission counsel put to Edwards William Urquhart's sworn Affidavit (Exhibit 14 - R. v. 14, pp. 237-238), and contrasted it with evidence given by William Urquhart at these Commission hearings (T. v. 67, pp. 11902-11906).

14.27 On the basis of the evidence put to Edwards, Edwards agreed that William Urquhart appeared to have had changed his position from what was put forward in the 1982 Affidavit. With respect to the Pratico statement referred to in paragraph 7, Edwards explained what had been meant by that paragraph, given Edwards' own note of July 12, 1982 (Exhibit 17 - R. v. 17, pp. 13, 47; T. v. 67, p. 11903). Indeed, Edwards indicates that he perhaps overstated Urquhart's expressed position with respect to

Pratico.

14.28 Commission counsel also raised with Frank Edwards the fact that William Urquhart gave evidence in his Affidavit about being present for the second statement of Patricia Harriss. It is clear that if at the time of making up this Affidavit William Urquhart had access to any version of the second Harriss statement, he must have had access to the typewritten version the time error of 1:20 a.m. (rather than 12:07 a.m.) is stated, and the person who actually wrote out the statement is misstated as well. If William Urquhart had had an opportunity to review the original of the second Patricia Harriss statement (Exhibit 56), he would not have sworn an affidavit indicating that he was the one to take the statement and that it occurred at approximately 1:20 a.m. Urquhart would not have mistaken John MacIntyre's handwriting for his own, nor will anyone with more than a passing familiarity with the documentary evidence before this Commission.

14.29 Given that William Urquhart was forced to rely upon the typewritten version of the June 18 of Patricia Harriss, and given the fact that the Sydney City Police file was no longer in the possession of that force for William Urquhart to review, William Urquhart would not have had the opportunity to discover that on the hand written version of the second statement his name does not appear at all. Had that documentation been available to him in 1982 as it was in 1988, his Affidavit may well have been different.

14.30 It is respectfully submitted that all of this evidence demonstrates sufficient question about circumstances involved in the preparation of Urquhart's affidavit, and his misconceptions about having been involved in Harriss' second statement, that it would be unfair to William Urquhart to impute to him any intent to misrepresent or mislead, then or now, on the strength of that affidavit. Whatever problems may have been involved in transposing William Urquhart's views to the affidavit, it remains clear that William Urquhart's testimony to this Commission was consistent with every attributed recollection in Frank Edwards' notes of July 12, 1982 (Exhibit 17 - R. v. 17, pp. 13, 44-48). That is, we submit, the persuasive point for this Commission to consider in relation to William Urquhart's reliability.

15.0 CONCLUSION

15.1 This narrative analysis of William Urquhart's association with the Marshall matter from 1971 until 1982 demonstrates in our submission that no serious allegation against William Urquhart has been substantiated. William Urquhart performed his tasks with respect to this matter to the best of his ability, in a spirit of fairness towards those with whom he came into contact, but also with all reasonable vigour to ensure that the public interest in the efficient and effective detection of crime was satisfied to the extent of his appropriate role as a police officer. William Urquhart was called upon from time to time to perform different functions and throughout each of these there can be no finding in any of the evidence any clear malice, misconduct, or misbehaviour on William Urquhart's part.

15.2 Undoubtedly, some will earnestly attempt to fix blame upon individuals such as William Urquhart so that the procedures of the criminal justice system in the Courts and in the correctional facilities can be absolved. That would not be justified here. It is respectfully submitted that nothing more can be expected of police officers such as William Urquhart than that they act in good faith and, where authorized by law, on reasonable and probable grounds. Not even the most circumspect investigator making constant notes can avoid the fact that some citizens will choose to lie, and do so convincingly. So long as the finding of fact in the Court system depends on the same thing

as a police officer does in taking down a statement - upon human assessments of credibility - there will be opportunities for the scientific truth to be misinterpreted and untruths to prevail.

15.3 Two final quotations are apposite. Our system of justice depends upon witnesses to act as responsible citizens. And yet, as Timothy Findley wrote in his novel The Telling of Lies, Penguin Books Canada (1987), at pp. 131-132:

> The order of events - with all its obvious importance - depends on witnesses; on testimony. I testify according to my witness. Whatever happens next to me creates my personal sense of order. Whatever happens next to someone else will, necessarily, create a different sense of order and, therefore, a different sequence of events.
>
> This, in part, was the meaning of Joel's encounter with his interrogators out in the lane. They wanted to impose a sequence of events that didn't jibe with his experience; his witness. Their motive was sinister; yes. But it need not have been. I, too, have rearranged the order of events - according to my ability to grasp their meaning.
>
> Memory is like that. It buffets you with stories out of sequence. It harries you with the past and it blinds you to the present. It seems to take all its cues at random - failing to deliver what you want to know, while it offers up data that seems to have no bearing on the moment.
>
> Of course - I know better.
>
> Memory is also a shield. A form of self-protection. There are things we do not want to know. Only now am I beginning to grasp what I have not wanted - of these years - to know about Bandung. And only now am I beginning to understand what I do not want to know about Calder's death.

> I did not want to know that anyone could die the way my father died - before my eyes. And now, I do not want to know that anyone can kill the way I fear they have - before my eyes.
>
> To be a witness is to be accountable.
>
> And I do not want to know that.

This passage recalls to mind Chant, Pratico and perhaps Harriss. The frailties of recollection or even the willingness to recollect on some basis of personal responsibility are formidable foes for William Urquhart to contend against.

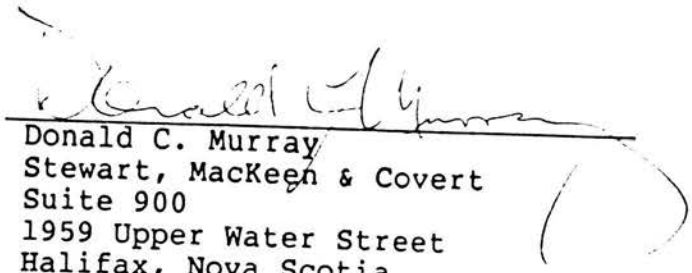
15.4 Finally, while there may be a great outcry when a great wrong has been done, it would be simplistic - though easier on the consciences of all of us - to rush in heaping blame upon new victims, other individuals, rather than the inherent weaknesses of our justice system itself. As Hannah Arendt explained in Eichmann in Jerusalem: A Report on the Banality of Evil, Penguin Books (1978), at p. 276:

> They knew, of course, that it would have been very comforting indeed to believe that Eichmann was a monster, even though if he had been Israel's case against him would have collapsed, or, at the very least, lost all interest. Surely, one can hardly call upon the whole world and gather correspondents from the four corners of the earth in order to display Bluebeard in the dock. The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal.

What is horrifying to contemplate is that a great wrong was

perpetrated on Donald Marshall, Jr. without the intervention of positive misbehaviour. This is not to suggest that this Commission cannot recommend improvements to the system of justice in Nova Scotia to protect the innocent as well as the guilty. The point is that the public must not expect that the system of justice which we have and which committed this harm to Donald Marshall, Jr., can be cured by pursuing vengeance upon specific individuals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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