SUBMISSION

OF THE

UNION OF NOVA SCOTIA INDIANS

TO THE

ROYAL COMMISSION ON THE DONALD MARSHALL, JR. PROSECUTION

OCTOBER 28, 1988

Index

Oct. 28, 1988

SUBMISSION
of the
UNION OF NOVA SCOTIA INDIANS
to the
ROYAL COMMISSION ON THE DONALD MARSHALL, JR. PROSECUTION

To: Chief Justice T. Alexander Hickman
Chairman

Associate Chief Justice Lawrence A. Poitras
Commissioner

The Honourable Gregory Thomas Evans
Commissioner

1. The Issue

A central issue for this Commission, one permeating much of the evidence throughout the Public Hearings, is this: would the justice system have malfunctioned as it did for Donald Marshall, Jr., if he were not an Indian?

Deliberate discrimination against Mr. Marshall is not the issue. Direct proof of this would obviously answer the question, but should not be expected. Direct proof would require a key actor in the administration of justice to admit male fides on his or her own part, or on the part of another, by an act or acts of deliberate discrimination. Such admission against interest would be a highly unlikely event. Discriminatory behaviour, however, can be unconscious as well as conscious, indirect as well as direct, unintentional as well as intentional, and systemic as well

as individualized. Discrimination can be inferred from the circumstances and from the outcome or effect of that behaviour. And because of the extreme difficulty in proving malice and motivation, the current focal point in looking at discrimination is the impact or effect that behaviour has. In our submission, in considering the role played by the fact Mr. Marshall is an Indian, the Commission should focus its attention on the actions (or lack of action) of various people and on the results, effects and impacts of those actions.

The Union of Nova Scotia Indians submits that the overwhelming preponderance of evidence leads to the conclusion that the various checks and balances in the justice system would far more likely have worked for a non-Indian. Put bluntly, if any of the key actors in the justice system who touched his case in the period 1971 to 1982 had fairly and competently applied their talents to whether Donald Marshall, Jr. was really guilty, the system had a chance of working. The fact that no one did and that the system failed had much to do with the fact that Mr. Marshall is a Micmac Indian.

This submission is composed of three further sections. The first presents the evidence from sworn testimony before the Commission on the problems of Indians in Sydney and in Nova Scotia connected to discrimination generally and to the administration of criminal justice. This sets the context in which Mr. Marshall's case is set. The second deals with the malfunctioning of the system connected to Mr. Marshall as an Indian. This is not exhaustive of all areas of incompetence or fault, but rather highlights those more clearly attributable to Mr. Marshall's Indianness.

The final section of this Submission will deal with recommendations. These recommendations are tentative and proposed for discussion at this stage. We propose to file a final set of proposed recommendations after the Commission's research studies have been finalized and reviewed and any further consultations have been completed.

One overarching point should be clear at the outset: discrimination is a seamless web of complex relationships. Discrimination against Mr. Marshall cannot be understood divorced from discrimination against Indians generally; discrimination in the criminal justice system cannot be understood divorced from discrimination in the rest of society; racially biased personal views cannot be divorced from the way professional or official activities are conducted; and discrimination in the sense of acting on outright bias and prejudice should not minimize the significance of discrimination through the effect or impact of subtler exercises of discretion and of the operation of justice institutions and policies. Thus, that discrimination against Indians exists in Nova Scotia and in Sydney strongly suggests it existed in the criminal justice system and was an operative factor in Mr. Marshall's case. Conversely, to find that Mr. Marshall's race was not a factor in his treatment by the criminal justice system is to suggest an immunity for one social institution that, in the absence of more appropriate safeguards, is unrealistic.

2. The Evidence of Racism in Relation to Indians

Discrimination against Donald Marshall, Jr. did not arise from a void; nor is it an isolated, singular event. Racism was part of the fabric of Sydney (and Nova Scotia) in 1971, and persists today. To understand the events that surrounded Mr. Marshall, and to appreciate the significance of seemingly minor points, the context in which his case was set must be examined. To ignore the context in 1971 would be akin to asking an appeal court to evaluate credibility and make findings of fact from a transcript without hearing and seeing the witnesses and participating in the trial. In each case there is much at play that is lost when viewed in isolation.

The purpose of this section is to show that racism in Mr. Marshall's case is consistent with and part of a larger pattern. The evidence suggesting a wider pattern of discrimination follows, without embellishment. Each tells its own story, and supports the others.

The Evidence

Sydney in 1971 was a red-necked town. In Stephen Aronson's first interview with Harry Wheaton, Aronson suggested "a redneck atmosphere" existed in Sydney in 1971. Wheaton had been stationed in Sydney between 1973 and 1975 and disagreed with Aronson. By April 14, 1982 Wheaton "had talked to educators in the town, I had talked to lawyers, doctors, merchants I knew who were present in 1971 and I learned that, in fact, Mr. Aronson was right. There was a rednecked atmosphere." By "redneck" Wheaton meant there was some racial problems, connotative of the southern United States [Wheaton 42/7682]. Staff Wheaton went on to express the view that

Marshall's race played "some part" in his conviction [42/7687] and may have been a factor in the miscarriage of justice in the Marshall case [47/8589]. Staff Wheaton indicated he as a professional investigator would not come lightly to the conclusion that a redneck atmosphere existed in 1971 and that he made sufficient inquiries of a sufficient range of people to back up the conclusion [47/8590-91]. He looked at the issue "in a cross-sectional way and took a cross-section of opinions to help me form my opinion" [47/8592]. Staff Wheaton also noted that the jury's verdict was understandable given the evidence "and the mood of the City of Sydney at the time", meaning the "red-necked atmosphere". Wheaton thought that "the fact Marshall was an Indian and that these social tensions existed . . . may have played on the jury's mind" [Wheaton 47/8595-96].

Aronson explained something of Indians in Sydney in 1971: "it was perhaps, the experience of Indians not being a part of the general way things work in Cape Breton, of constantly being outsiders and being treated like outsiders, of Indian people ashamed to speak their own mother tongue because it was something to be ashamed of" [55/10127]. "The difficulty they [Indians] had with the police. The feeling that they were picked out as specifically as Indians as being trouble-makers and as causing difficulties for the police" [55/10127]. Aronson testified that while all people from Cape Breton were not red-neck, "there's some intolerance within the community and I felt it, and Indian people felt it" [55/10129].

John Pratico says the expressions "black bastard" and "crazy Indian" were "used quite a bit around that time [1971]" and that people talked "bad about races" [Pratico 12/2187].

David Ratchford was born in Sydney and grew up there. He testified that he thought that "the Indian population that attended school in Sydney was treated differently than the White kids that went to school" [24/4382]. The Indians had a tremendous difficulty growing up speaking Micmac and not really learning English until they came into contact with the school situation. There they did not understand, and the teacher, instead of recognizing the fact that there was a problem, would "lay it on to that particular student. She would . . . she would chastise him or be very sarcastic to that individual" [Ratchford 24/4382-83]. Ratchford described Sydney Academy as having a "clique" of the kids of the "upper echelon of society", "the big names in the community", "the big business men". These kids enjoyed all the extra-curricular benefits of the school, and got the jobs at Keltic Lodge while the white kids of the blue-collar workers packed groceries in Sydney. While Ratchford felt some prejudice himself, Indians were at the bottom of the social totem pole. In school it was obvious that Indian kids needed extra help because of the language and customs barriers, yet "the teachers who were supposed to be professionals . . . didn't seem to want to extend themselves to give them help" [Ratchford 24/4463-64].

Barbara Floyd hung around with Indian kids, such as Artie Paul, Junior Marshall, Edward Kabatay, Lawrence Paul, Kevin Christmas, Jimmy Gould, Tom Christmas [Floyd 18/3121]. White people later would say to Barbara Floyd - "How could I hang around with them. How could I ever go out with an Indian boy" [Floyd 18/3123]. This question was asked of her "a lot of times. Even within the last year" (prior to her testimony) [Floyd 18/3181]. She thought those asking the question were friends "until they

asked me it" [Floyd 18/3181]. Sandra Cotie (nee MacNeil) hung around with Indian boys and had the same experience: "I found out later that--that they [supposed friends] didn't or they couldn't understand why I was hanging around with them [Indians]" [Cotie 18/3190]. In fact her one close friend at the Sydney Academy was asked by other kids "why she would associate with me [Cotie] when I was hanging around with Indian people" [Cotie 18/3190-91]. Sandra Cotie said, concerning how people felt about her in high school: "If you were hanging around with Indian kids, you might as well have been Indian because it was the same thing . . . You were based on the same opinion" [Cotie 18/3238]. Cotie believes not many people approached her to be friends because she associated with Indians [Cotie 18/3269].

Mary Csernyik (nee O'Reilley) and her sisters hung around with Indians, but never invited them to her home because "my parents are prejudiced . . . they didn't really like us hanging around with them" [Csernyik 18/3276]. Their parents had tried telling them not to have anything to do with Indians [Csernyik 18/3339]. Catherine Soltesz (nee O'Reilley) said that her parents and the parents of the other girls knew they were hanging around with Indians but "they didn't want to know". Hanging around with Indians "was a no-no . . . in the public's eyes . . . there was a lot of prejudice at that time" [Soltesz 19/3350-51]. She knew that Pratico was not to be believed but "wasn't allowed to go to the court, any of the hearings or anything" by her parents [Soltesz 19/3389]. Her parents made express reference to hanging around with Indians and said they did not approve of that [Soltesz 19/3391], although this concern was in relation to Indian boys rather than Indians generally [Soltesz 19/3404].

Bernie Francis has never seen an Indian person work up front in stores in the Sydney area as a retail salesman or car salesman or hotel clerk [22/4110]. He would never see "any Native person actually sell clothes in a retail outlet or . . . be involved where food was being sold" [Francis 22/4113].

Bernard Francis indicated that he grew up on the Membertou reserve, living with his stepfather, while his four brothers were adopted into different families [22/3898-99]. The language at home and among the children was Micmac. He attended Grades Primary through Three on-reserve at the Membertou Indian day school, and was taught by a lady who only spoke English [22/3898]. Grades Four through Six were done off-reserve at St. Anthony Daniel School [22/3899]. In Grade Four there were about 10 Indian children in a class of about 37. The Indian children were treated differently than the white kids, mainly by the principal: "[I]f there was any problems in the classroom or problems outside the classroom, we were treated with such disrespect that she would grab a hold of our ear and shake us like this and say, "You Indians". I remember the phrase really well" [22/3900]. Further, "it was pointed out to us that we weren't as cleanly and neatly dressed" and, for a competition about drinking milk at home, "we had to lie so that we weren't sort of set aside from other students by saying that we drank . . . pretty close to what other people were drinking when, in fact, we didn't have milk in the house because we couldn't afford it" [22/3901]. At St. Anthony Daniel the Indian students would drop off after each year because "they were having difficulty in adjusting . . . to the classroom and to other children who spoke nothing

but English. They had difficulty understanding what it is that they were expected to do; so a lot of them for instance couldn't ask for help at home simply because their parents weren't also speakers of English" [22/3902]. On the Membertou reserve now Micmac is hardly used by people under the age of 35 and most households are using English as the language around the house [22/3904]. This may be in part because the Indian day school was closed and children are fully educated off the reserve [22/3904]. It was "the beginning of the end" [22/3905].

Stephen Aronson had "considerable experience in dealing with native people both in Cape Breton and in mainland Nova Scotia" [55/10124; 56/10315]. He found "the attitude towards Indians in Cape Breton to be quite poor and quite intolerant [55/10125] and this "perhaps more blatant on mainland Nova Scotia than in Cape Breton" [56/10315]. Aronson described one particular trial in the late 1970s in Windsor, N.S. when the Prosecutor made remarks concerning Indian defendants, "They're all on welfare" and "Don't go potato-picking down in Maine", comments that Aronson took in the context as "blatantly racist" [56/10317-19].

Judge Cacchione, of Italian background, believes that racism is present in our society, and since the criminal justice system is made up of members of our society, there is a danger of racism in the administration of justice [65/11667-68].

Former Attorney General Giffin stated that "when we see an Indian person before the courts and in conflict with the law then what we're really looking at is the end result of centuries of discrimination and exploitation and a long, sad history . . . that is just tragic in nature . . . [W]hen we

have native persons coming before the courts that's the end result of what has gone on for generations" [59/10735].

Michael Whalley has been the City Solicitor in Sydney since 1958. In that 30 year period no Indians were employed on the Sydney police force [Whalley 62/11232-33]. He knows of no Indians on the City fire department [62/11235]. No Indian has practiced law on Cape Breton Island in those 30 years, and there have been no Indian judges [62/11235]. No court personnel have been Indians, and no Indians have been on city council [62/11235-36]. Whalley has never run across any Indian teachers in the City's schools and has no knowledge of Indians who have been elected to the district school board [62/11236-37]. Of 400 employees working for the City of Sydney at a cost of 3 or 4 million dollars annually, none, to Whalley's knowledge, are Indians [62/11237-38]. And no Indians whatsoever have been employed by the City since 1958 [Whalley 62/11238]. Mr. Whalley made much of the City's affirmative action policy, but nothing whatsoever seems to have been done to comply after several years with the terms of the agreement the City signed with the N.S. Human Rights Commission.

No Indians were regular members of the Sydney P.D. from 1931 to 1973 [MacAskill 17/3068].

In the 42 years John MacIntyre was with the Sydney Police Department, there has never been an Indian on the Sydney Police Commission [35/6562].

Sydney Police Officers received no instructions with respect to dealing with Indians or entering the Membertou reserve and most had little or no informal or social contact with Indians [Dean 9/1545; Mullowney

9/1607; 1608; A. McDonald 7/1243; M.B. MacDonald 10/1792-93]. There was no training offered with respect to dealing with minority groups [A. McDonald 7/1242] although such cross-cultural training is available to the RCMP [Ryan 11/1909]. In the period 1966-73 there were no community relations programs in the Sydney P.D. [MacAskill 17/3047].

Sydney Police Officers referred to Indians as "Piutes" [A. McDonald 7/1255] "broken arrows", and "wagon burners" [Walsh 9/1467; Edward MacNeil 15/2688-89]. Some members of the Sydney P.D. exhibited prejudice against Blacks and other ethnic groups [Edward MacNeil, 15/2677]. Edward MacNeil said, in response to the question that other Sydney P.D. officers would be familiar with the terms "wagon burners" and "broken arrows" being used in relation to Indians: "Oh, I'm sure every member of the department is familiar with those terms, yes." [15/]. Except for Ed MacNeil and the present Chief Walsh, no one else admitted such conduct or knowledge.

Sydney Police did not want youth hanging around Wentworth Park and would "chase" them out of there [Pratico 12/2238-39]. The Indian youth tended to hang out around the band shell [Pratico 12/2239]. The Police regarded the Park as a focal point for possible trouble among the youth, with bushes that could be used for drinking and smoking up [Edward MacNeil, p. 2643]. Other people besides Indians would hang around in the Park [Soltesz 19/3426] and bum matches, cigarettes and small change [Soltesz 19/3429]. If the police found Indian youth in the park they would search for alcohol and the Indian youth would flee [Soltesz 19/3429]. The police would not chase or interact with other racial groups [Soltesz 19/3429]. The police would tell Tom Christmas and his friends to leave the Park, "to

get back on the Reservation . . . where you belong" [Christmas 23/4135-36]. The police would tell the White girls with the Indian boys to go home, not to bother with Tom and his friends and that they were "nothing but trouble" [Christmas 23/4136]. The police would give the Indians "sass", "start calling us down first . . . see what reaction they got off us . . . and sometimes we answer them back . . . and that is what they wanted . . . something they can . . . put us in for . . . they'd put us in the old Sydney lock-up" [Christmas 23/4137].

Floyd knew the Indian youth felt they were being hassled a lot more than the white kids were [Floyd 18/3146]. " [T]he general attitude, general assumption of everyone [was] that the police didn't like them [the Indian kids] very much. [A]lmost every weekend . . . someone [an Indian kid] would be picked up [by the police]" [Cotie 18/3194-95]. The Indian boys "didn't like the police any more than the police liked them. That's what the general opinion was". The Indian boys thought they were being picked on by the police [Cotie 18/3202-03]. Catherine Soltesz was of the opinion that the police were harder on Indians than non-Indians and harder on girls that hung around with Indians than with girls who did not [Soltesz 19/3436]. Eva Gould described one incident of the police coming to the reserve and taking away a child of 14 without providing any information to the parents and keeping the child in the lock-up.

Complaints about the treatment by police of Indian youth were brought to the Chief of Police [Gould 21/3756]. Remarkably, several sheets survive, Ex. 65, of typical complaints from Indian teenagers in 1970. These were taken by Chief Roy Gould to the Chief of Police, who said he

would look into it but never got back to Chief Gould [21/3757-58]. The problems between the Indian youth and the Sydney P.D. were much more widespread than was indicated in Ex. 65 [Gould 21/3883]. Indeed Indians were constantly being picked up by the police simply because they looked Indian and the police wanted to assert their authority [Gould 21/3883-84]. Tom Christmas confirmed the incident about being hit with a billy club while running from the police at the Park [Christmas 23/4203]. Christmas says he was dragged by the hair and told why don't you people listen [23/4204].

When the dam shutting off the water flow to Wentworth Creek (to allow a search for the knife to be conducted) let go, the Indians were blamed by the police without any apparent evidence to support that view [Edward MacNeil, p. 2634] or charges being laid [Edward MacNeil, p. 2665].

Other persons besides Indians were supplying liquor to Barbara Floyd, Joan Clemens and their girlfriends, but none of the girls were warned not to hang around with the non-Indian suppliers [Floyd 18/3182].

One night Barbara Floyd was stopped by the Sydney P.D. and asked what she was doing on the Reserve and told that she'd better go home [Floyd 18/3171].

Terry Gushue said it was his perception that Indians were not treated as fairly as Whites by the police and received a rawer deal and had a greater chance of being arrested [Gushue, p. 2736; 2738; 2782].

There were complaints to the Sydney P.D. about lack of police services to the Reserve community. Requests for assistance to Sydney P.D. were not often responded to promptly [Gould 21/3754-56]. Because the Sydney

P.D. was not responding to calls, a vigilante group was formed around 1969-70 [Gould 21/3759]. A band constable was appointed in 1970 who was supposed to be supervised and trained by the Sydney P.D. [Gould 21/3764], but there was still reason to complain to the Sydney P.D. [21/3766-67] and Roy Gould thought the Sydney P.D. had little respect for the band constable [21/3768]. To Chief Gould's understanding, the band constable did not receive any training from the Sydney P.D. [Gould 21/3889].

The Sydney P.D. identified accused persons from the Membertou Reserve as being from "Membertou" on Informations filed. This would identify and call attention to the fact someone was an Indian [MacDonald 10/1785-86].

After a show one night months before Jr. was convicted, Mary Csernyik and her two sisters were walking near Townsend and George Streets with Pious Marshall, Junior Marshall and Artie Paul and the Sydney police stopped them, took the girls' names and addresses and then called or visited the girls' parents and told them they were "walking with the Indians and that" [Csernyik 18/3278]. The police made it clear to their father that they were concerned about "the company that we were keeping" [Csernyik 18/3281]. Mary's sister Catherine confirms the incident and says the "police made it clear that that was bad company . . . that we were in very bad company" [Soltesz 19/3351]. Catherine is sure the police would have gone to her home and parents because they were with Indians--if they had been walking with anyone except Indians the police would not have done this [Soltesz 19/3355].

Underdevelopment and cultural imperialism characterized the Membertou Reserve from the time of Roy Gould's birth (1946) to at least the 1970s. The state of housing, sewer, water, street paving illustrate underdevelopment, while the absence of Micmac in the Indian day school on the Reserve is an example of the latter [Gould 21/3719-24].

At St. Anthony Daniel School the white kids would use derogatory terms on the Indians such as "redskin" or, to the girls, "squaws" [Gould 21/3732-33]. Very few Indians made it past grade nine [Gould 21/3738; Cotie 18/3265]. Roy Gould did not complete grade seven [21/3739]. Only a handful of Micmacs from Membertou have completed high school [Gould 21/3847].

Indian people in Nova Scotia were opposed to the 1969 federal White Paper policy on Indian affairs. This policy was to integrate Indians into Canadian society. From this opposition the Union of Nova Scotia Indians sprang [Gould 21/3773-75].

While Roy Gould was on the Nova Scotia Human Rights Commission there was a problem having Indian children integrated with white children in an off-reserve daycare centre. A year and a half of investigative work by Commission officers did not result in a successful resolution and the Micmac children were removed. Mr. Gould believes there was political interference in the Commission's work [Gould 21/3785-86] because the Minister of Social Services at the time had his children in the same school and there was a connection between him and the lady that ran the school [Gould 21/3894].

Roy Gould testified that Micmacs from the Reserve had a hard time going into Sydney and feeling comfortable, and indeed there still are people who find that difficult. They feel they are not accepted without hassles [Gould 21/3795]. In the bars and taverns the Indians "would be looked down on and their service would be slower. If they do get a little loud they would be barred more easily than non-Indians . . . . " [Gould 21/3895].

That institutions in the administration of justice can operate in a discriminatory or racist way is illustrated by the evidence of Diahann McConkey. In the Corrections Canada documentation (Ex. 35, p. 3) the statement appears: "Marshall is the typical young Indian lad that seems to lose control of his senses while indulging in intoxicating liquors." McConkey was not the author, but agrees this is an inappropriate and racist remark [71/12614]. Later documentation (Ex. 35, p. 170) shows that psychological tests were administered to Marshall. These tests are based on white Caucasian American norms and are applied to all inmates. However, "they don't work when applied to native inmates" and didn't work for Marshall. The more Indian a person is, the more a person is part of a strong Indian culture, the less likely the test is to be valid [McConkey 71/12618-20]. When coming before the National Parole Board "natives statistically have a lower parole grant rate than non-natives" [McConkey 71/12626; 12632].

Provincial youth court worker (formerly known as a probation officer) Lawrence Burke, worked in the Sydney area, including the Membertou reserve, which he had been responsible for for 18 years [Burke 20/3579]. He testified there was nothing about the culture of the Indian kids that led

him to treat them differently, yet he had no training and had done no reading with respect to the cultural differences of Indians [Burke 20/3578-79]. His work put him on the reserve and into Indian homes, talking to his case subjects and their parents about their problems [Burke 20/3580]. Mr. Burke began on the proposition that there are no special problems when carrying out his duties in relation to Indian youth and that he approached cases on an individual basis [Burke 20/3599]. Yet under cross-examination he indicated the importance of taking into account the social and economic context of individuals [20/3595]. On the reserve social and economic conditions are bad, with high unemployment and a drinking problem [20/3600]. He admitted the operation of different norms of conduct on the reserve [20/3601]. With respect to curfews, parents feel just being around the Reserve rather than in the house is sufficient [20/3601]. All the Reserve members "know each other very well and . . . there is a lot of coming and going". Indian youth had a different perception about questions of time and punctuality. "Indian kids are a little quieter". "You get very direct one word answers from them" [20/3602]. With respect to a lot of the Indian youth the first language spoken in the home is Micmac [20/3603]. Extended families are a common phenomenon and so supervision of children is provided as well by grandparents, uncles, and other relatives [20/3604]. Finally, he did agree that there are particular problems to be sensitive to and to take into account in his work when dealing with Indian youth [20/3605].

Only one native person has been involved as a probation officer in the Sydney area in the 18 years Lawrence Burke was there, and that is an

Assistant Probation Officer who has been there for only a couple of months [20/3606].

In the 2 1/2 years Roy Gould was Chief of Membertou, he was never approached to contribute information in the preparation of pre-sentence reports [Gould 28/5245].

There is a section of the Canadian Psychiatric Association that deals with native mental health and a body of knowledge that deals with psychiatric and psychological problems more peculiar or common to Indians [Mian, p. 2498]. Those problems are associated with the cultural, social and economic background of Indians and problems of acculturation with the White society [Mian, p. 2499]. Psychiatrists in diagnosing persons take into account social/cultural factors [Mian, p. 2500]. Indians respond to anxiety provoking situations, such as testifying in court, giving evidence in their own defence, or giving statements to police, by becoming quieter and quieter. They tend to withdraw, be aloof and detached [Mian, p. 2501]. The white police, judge, prosecutor and jury might misdiagnose and misconstrue the reaction they observe.

Bernard Francis began the court worker program for the Union of Nova Scotia Indians around 1970 [22/3916]. It was his experience that Native people were just pleading guilty to things they just did not understand [22/3917]. The initial response by the court system was great, but that attitude changed as dockets were becoming full because Native people were not simply pleading guilty any longer [22/3918-19]. A prosecutor was making statements to the effect, "What are you doing coming here in the City causing problems"; "Why can't you stay on the Reservation

where you belong"; "Why are you Indians coming here and upsetting the peace and quiet in the City of Sydney" [22/3921]. Mr. Francis had a confrontation with Judge John F. MacDonald in his Chambers when someone said in court that a fence should be built around the Eskasoni reserve so that Indians could not get out to come to Sydney to cause problems [22/3921; 22/4031-33].

Bernie Francis said native people in the courtroom were very shy; they didn't like being in the spotlight; they wanted to get out of there as quick as they possibly could; and they would plead guilty so that they could get out of the courtroom without fully understanding the consequences [22/3926]. For example, the Indian accused would not understand the difference between common assault and assault causing bodily harm [22/3926]. There was a tremendous amount of language difficulties for native people in the courtrooms [22/3928]. For example, Micmacs misunderstood the word "guilty" because there is not such word in the Micmac language [22/3931]. As a witness responding to questions, a native person would attempt to satisfy the person asking the question [by giving the answer sought] regardless of the truth [22/3934]. "[I]n most cases Native people needed interpreters and in most cases they weren't granted interpreters" [22/3935]. Prosecutors were raising a fuss about interpreters because "they found the art of cross-examination to be very difficult when they were doing it through an interpreter" [22/3935]. One reason interpreters were necessary in court as opposed to casual conversation is because the setting and questions were more formal and precise answers were required [22/3936], or different concepts of common phenomena such as time could distort the answers [22/3937]. In many cases this would make it look to the court as

though the Native person was not ready to cooperate in seeing to it that all the facts were brought out. The court would become impatient [22/3938]. "Donald C. MacNeil was quite good at seeing to it that the judges became impatient" [22/3938]. Sometimes Native people "would try to come across as people who spoke the English language well" when they didn't [Francis 22/3941-42]. "[A] Native person [would] walk into a courtroom with his hat sort of under his arm, hair a little bit messy, perhaps lumberjack boots, lumberjack sweater; just want to get out of there so fast, that they would do anything or say anything to do just that. And they felt extremely uncomfortable in the courtroom and they felt very lowly and they didn't really know what to expect. All they wanted was to . . . was to get out of there no matter what" [Francis 22/3941]. The Micmac language is very inflexional and expresses emphasis and emotions through words and endings rather than tone of voice. Thus a Micmac person expressed his or her innocence "without the raising of voice or becoming extremely emotional". If an Indian testified in this way "the misunderstanding sometimes would be that, gee, this person is not very strong in his exertion [assertion?] about his innocence, therefore, there must be something there" (Francis 22/4082-84]. Micmac does not have concepts such as "please" and "excuse me" and so Indians might neglect to use these words in speaking English in court, which an observer might take as a sign of disrespect [Francis 22/4084].

Diahann McConkey indicated some points of native culture to be sensitive about. Long pauses in conversation make Caucasians uncomfortable, but not Natives. The Native sense of time is "not the same rush-rush,

go-go, hurry-hurry of white man's society". The "sense of family and tradition is much greater for Native people than it is for white people", therefore, the relocation of inmates to another part of the country is not a reasonable option for natives [71/12621-22].

Judge Lewis Matheson, when asked to generalize on the demeanor of Indians on the witness stand, stated that when compared to White people, Indians give the appearance of being "reticent" [27/5038]. He noted that Black people communicate better than Native Indians do [27/5038-39].

Bernie Francis advised Native defendants against opting for judge and jury "unless it was a clear clad case . . . where it . . . could never be even questioned that he was innocent" [22/3939]. Despite the fact that you do not have to be a landowner any longer to serve on a jury in Nova Scotia, no Micmac person has served on a jury [Francis 22/3940].

The documentation in Ex. 41 and the evidence surrounding it from such witnesses as His Honour Judge Harry How [61/11046-96] and the Honourable Ronald Giffin [59/10742-57] and Gordon Coles illustrates that for more than a decade the Micmac have sought to persuade the Province of Nova Scotia to establish a native courtworkers program and a Micmac police force. Hurdles have consistently been put up and neither program has gotten off the ground.

Apparently Indians must say they are landowners in order to post security to obtain release on bail [Francis 22/3988-89; Ex. 48 p. 42].

Indians were treated more disrespectfully by Judges in court, and tend to be referred to by their last name. "There is no such thing as, for instance, to say, 'Would you stand up please, Mr. Christmas'. It would be

something like, 'Christmas, get up', something like that." For other accused there was a "Mister" in front of their last name [Francis 22/4089].

Dispute resolution was more community oriented than adversarial under Micmac traditions. Elders and family members would observe whether an offender made amends and would ostracize the individual if he did not, rather than have conduct dictated by a person in authority. The person making the mistake was expected to correct it [Francis 22/4101-03].

Imprisonment in a place like the Cape Breton Correctional Centre "wasn't as big a deal for Native people as it was for the non-Native public" since there was not much by way of jobs or recreation to come back to. "In many cases it didn't make any difference to a Native person simply because while he was incarcerated here in Sydney, he would be getting three squares a day and there's not a whole lot has changed in his life with the exception of the possibility that there would be no liquor brought to him" [Francis 22/4106].

The emotional and psychological difficulties many Indians face in coming to court were effectively illustrated before this Commission by Arthur J. Paul. The first time he was scheduled to give evidence he came to the hall in the morning, "felt pretty tense", had a pain in the chest, felt he was getting sick and left [Paul 24/4360-61]. Then on the day he did begin his testimony, he became confused and the Commission adjourned early [23/4325].

Artie Paul lost his ability to speak the Micmac language when he was forced to attend the Indian Residential School in Shubenacadie. Indian children from all over the Maritimes were taken to that school, where Micmac

was prohibited and English forced on the Indian children [Paul 24/4362-64]. His father was deceased and his mother worked off the Reserve cleaning houses for merchants, businessmen and professionals in Sydney [24/4364-65].

One evening Artie Paul was taken to the Sydney police station when he was with an acquaintance who had earlier been in a scuffle. Paul was not involved in the scuffle. When he tried to explain he was not involved, he was punched in the stomach and had the wind knocked out of him. Artie was put in a cell for being drunk in a public place [Paul 24/4371-73]. Another time the Sydney police pulled Artie out of a hole literally by the hair, and kept him overnight in the lock-up, releasing him to walk home in bare feet [24/4373-75]. Usually, however, the police would chase Artie and not catch him [24/4375].

In all of his practice Simon Khatter had never seen an Indian juror on the panel, and certainly no Indians on Marshall's panel [Khatter 25/4729]. Matheson has never seen an Indian on a jury [27/4998]. To Roy Gould's knowledge, there has never been a Native person on a jury or summoned to do jury duty in the City of Sydney [28/5246-47]. In about 15 years of practising law in Sydney with Nova Scotia Legal Aid, Art Mollen has never seen an Indian on a jury panel [29/5424].

Bernie Francis testified that Assistant Crown Prosecutor Lewis Matheson made statements in court about Indians to the effect: "What are you doing coming here in the city causing problems?" "Why can't you stay on the Reservation where you belong?" "Why are you Indians coming here and upsetting the peace and quiet in the City of Sydney?" and that "a fence should be built around the Eskasoni Reservation so that the Indians couldn't

get out to come to Sydney to cause problems" [22/3920-21]. Judge Matheson denied making these statements in court, but when asked if it was possible that he made such statements said "Yes, I'm -- I'm capable of making a statement like that in jest. Yes" [27/5034-35]. He admitted this would be taken by someone hearing the statements as a reflection of his attitude towards Indians and that "we should all be careful what we say . . . in matters of that kind" [27/5035]. Later in his testimony he again said "I may've made such a statement in jest or in frustration, yes" [28/5157].

Eva Gould confirmed that the incident in the court of Judge John F. MacDonald described by Bernie Francis happened, although in slightly different terms. Judge MacDonald suggested, in order to keep a particular Indian out of his court: "We'll build a fence around the reserve or what?" and Prosecutor Matheson said "I don't know, Judge, maybe we have to" [73/13021]. Francis later confronted Judge MacDonald in his chambers [73/13023-26].

Lewis Matheson, as Assistant Crown Prosecutor, was not aware and was not made aware of the unique cultural setting of Micmac Indians [Matheson 28/5153] and only had contact with Indians as door-to-door basket sellers and as accused [27/5152-53]. In his role as a Provincial Court judge, he "didn't see a need" for seminars or workshops to deal with the unique situation of Indians in the courts [27/5154-55]. Judge Matheson and his fellow Provincial Court judges have never had any workshops, etc. on cross-cultural training with respect to Indians [28/5158].

Judge John F. McDonald testified that he was never briefed and

received no communication from the A.G.'s Dept. on the role and responsibilities of court workers such as Bernie Francis [28/5197].

Judge John F. McDonald did not recall a radio program in which Bernie Francis spoke about discriminatory behaviour by Judge McDonald. Yet Art Mollen recalled Judge McDonald asking him about the radio broadcast and discussing discrimination [Mollen 29/5428; 29/5456].

Art Mollen confirmed that Indians "didn't have what one could call a very good grasp of the English language", and gave as an illustration an Indian youth who said the police "attacked" him when he meant the police "arrested" him [29/5429]. Mr. Mollen would interview Indians with Bernie Francis, who could ask Mollen's questions in Micmac and so be sure he and the accused understood each other [29/5430-31]. Mollen also found Indians sometimes would tell him things they thought he wanted to hear, but if they spoke in Micmac they would say what they wanted to express [29/5431].

On the Dept. of the Attorney-General's response to the Supreme Court of Canada's decision in James Mathew Simon, for two years (fall 1985 to fall 1987) the AG's instructions to law enforcement officers was to process Indians as you would anyone else for wildlife violations [Beaver 30/5393-94]. Different instructions, including not seizing deer carcasses, applied for hunting in the fall of 1987 [30/5594-95]. But by the fall of 1988, it was business as usual with provincial government press releases and at least 13 Micmacs charged with hunting offences--despite the Simon case.

In the years 1971 through 1979 while Kevin Lynk worked preparing assessments on inmates for parole and release purposes, no natives were so

employed in Nova Scotia [Lynk 40/7450-51]. In preparing such reports, Lynk came into contact with all the reserves in Nova Scotia, yet he received no training with respect to dealing with people of native ancestry or their cultural background [40/7451-52].

3. The Evidence of Racism in Donald Marshall, Jr.'s Case

The criminal justice system consists of a series of official actors, each carrying out particular duties and relating to other actors in the system. This series of relationships between actors ensures that no one person or institution is too powerful and that each is in some way balanced and kept in check by others. All of these checks and balances failed Donald Marshall, Jr. until, after 11 years, Stephen Aronson, Harry Wheaton and Jim Carroll became involved in his case. Even after Mr. Marshall's wrongful conviction became clear, the system did not serve Mr. Marshall well.

Some of this malfunctioning might be dismissed as bad luck and as benign. However, the consistent malfunctioning by a variety of actors cannot be so easily dismissed: there is a pattern that must be explained by more than coincidence. In our respectful submission the pattern of failure by so many actors in the system is attributable to one common thread: Mr. Marshall is an Indian. No one believed he was innocent (except, perhaps, John MacIntyre, who may have induced the fabrication of evidence; William Urquhart, who must have known of MacIntyre's activities and the weakness of the case; and Donald C. MacNeil, who may have had the prior inconsistent statements and dealt with Chant and Pratico in pre-trial preparation). No

one cared whether Marshall really was guilty or not. The fact that Mr. Marshall was an Indian made it easy for all to accept the likelihood of guilt and slough off his personal situation as of little importance in the scheme of things because he was just another Indian.

The more specific evidence linking the treatment of Donald Marshall, Jr. and the fact he is Indian follows. The list is not exhaustive and does not include all aspects of incompetence and inadvertence.

The Evidence

The youth at the Membertou reserve did not get on well, in general, with the Sydney Police. Bernie Francis, who was "more or less a spokesman for the young fellows on the Reserve at that time" [A. McDonald 7/1178], on the Sunday after the stabbing, told Walsh and Ambrose McDonald: "Look the boys are not going to tell MacIntyre anything" [Walsh 8/1343]; "they wouldn't tell MacIntyre the time of day" [Walsh 8/1343]; "the boys out here won't tell MacIntyre anything, they don't like him" [A. McDonald 7/1133]. Complaints were made by the Indian community [A. McDonald 7/1233] but apparently no one took them seriously. About John MacIntyre Indian youth made "statements to the effect that MacIntyre was not interested in the truth, but he was interested in Indians and that was it" [Francis 22/4091]. Tom Christmas was one who made the remark that MacIntyre "was not after the truth but was after Indians". That was what MacIntyre's conduct seemed like to him [Christmas 23/4227]. When the MacIntyre gravestone was apparently knocked over, the police engaged in a "round-up" of the Indian youth [Christmas 23/4138-39]. Five Indians including Jr. Marshall were separately picked up by MacIntyre and Urquhart and put in the lock-up together

[23/4139-40]. Christmas was in the lock-up "all that morning right through dinner hour and all that afternoon" [23/4144]. Only Tom Christmas from the group who spent the day in jail was charged [23/4147]. The Indians were locked up but never placed under arrest and not told of their right to counsel [23/4268].

Scott MacKay said Jr. Marshall was grabbed by Sydney Police Officers and thrown in the back of their patrol car on the night of the stabbing [MacKay 4/650].

Constables Ambrose McDonald and Walsh were detailed to go to the Membertou Reserve on the Sunday following the stabbing because of rumors of repercussions from the Black community. McDonald received this information through other officers on the Department, but the rumors were completely unfounded. Indeed, there was never any trouble between the Black and Indian communities [A. McDonald 7/1130-31]. The Sydney Police feared racial problems between the black and Indian communities even before Marshall was considered a suspect [Walsh 8/1340; 1347] although there was no apparent basis in fact for the fear [Walsh 8/1347]. Former Deputy Chief Norman D. MacAskill says that after the stabbing there were rumors that the Black people might cause some trouble at the Indian reserve. This was the first time MacAskill had a concern about possible clashes between Blacks and Indians [MacAskill 17/3025-26]. Threatening phone calls came to the Marshall family during the week after the stabbing and Roy Gould arranged for their telephone number to be changed to an unlisted one. One caller talked about possible violence on the reserve. Detective Urquhart spoke about the reserve preparing itself for possible violence because there was

too much talk in town of violence and possible clashes between blacks and Indians [Gould 21/3807-09]. The two biggest Sydney police officers, with a car and long nightsticks, were dispatched as a back up to the Reserve's own reinforcement [Gould 21/3812]. This all took place before Marshall was arrested [21/3814]. Threatening calls also came to the Membertou Band Council Office [Gould 21/3880].

Photographs of the crime scene were taken by the RCMP. The negatives were possibly, according to John L. Ryan, turned over to the Sydney P.D., and no one now knows of their whereabouts [Ryan 7/1271-72].

The Sydney P.D. had a fairly accurate description of Ebsary from Donald Marshall the very night of the stabbing [Michael B. MacDonald 9/1632 and 10/1726], but it became muddled [MacDonald 10/1666]. MacAskill had noted Ebsary prior to stabbing from his sailor's cap and badges on his jacket [MacAskill 17/3057-58].

John MacIntyre considered Donald Marshall a suspect on the morning following the stabbing [Wood 10/1802-03; Ex 40; 1821; 1824-25]. Yet he had no evidence: and one would not be a suspect simply because he was there when it happened [Michael B. MacDonald 10/1670]. At the time MacDonald turned the investigation over to MacIntyre the next morning (Saturday) there were no suspects as far as MacDonald was concerned [MacDonald 10/1673; 1685; 1687].

Normally Sydney Police accept assistance when offered by the RCMP, but MacIntyre refused it here [Wood 10/1820; 1825-27]. The RCMP (Sydney) inquired of the Sydney P.D. at the time of the stabbing if there was anything they could do to assist and were told "Not at this time" [Ryan

7/1259]. Identification services were available to the Sydney P.D. [Ryan 7/1267] and such services should be provided all the time as soon as possible after the commission of a crime [Ryan 7/1275]. The Marshall case was the only one Deputy Chief MacAskill can remember where the RCMP were not brought in for Ident or other services at the early stages of the investigation [MacAskill 17/3067].

Ebsary says he told MacIntyre on Nov. 15, 1971 that he took a swipe at Seale and Marshall [Ebsary 2/244]. MacIntyre first saw Ebsary in the same blue burberry he wore the night of stabbing on Nov. 15, 1971 [2/349-50].

Maynard Chant purported to be an eyewitness, but, knowingly, out-and-out lied [Chant 5/915; 1075]. The justice system must take account of witnesses lying about Indians because "they are probably guilty anyway". While most of the responsibility for Chant lying must be laid upon the Sydney Police, the Crown Prosecutor and Chant himself, he places some blame upon Donald Marshall, Jr.'s comments at the police station. He says he was frightened of Marshall, and part of the reason was Marshall's "appearance" [Chant 5/831]; he was "a rough looking character" [Chant 5/820]. Chant says he did not know at the time Marshall was an Indian [Chant 5/820; 991]. But Marshall's strong ethnic Indian features [Chant says Marshall's face was about 2 feet from his: 6/1027. Note Dect. Mike B. MacDonald, who had not previously known Marshall, recognized him at the hospital as an Indian: 9/1633], coupled with Chant's racially sheltered existence [Chant 6/1093; 1096], Chant's obsessive fear of Indians admittedly present after the trial [Chant 6/991-92; 1001; 1112-13] and the difficulty of rationalizing every

motivation of Chant as a 14 yr old child [Chant 6/956] makes it reasonable to think Chant's actions can be partly attributed to the fact that Marshall was an Indian. Maynard's evidence should be contrasted with his mother's. Beudah Chant says that before testifying Maynard Chant "was afraid to go into Sydney or anywheres" and told stories "about people being beat up" because "he was the one that had said he seen it [the stabbing]" [B. Chant 20/3553-54]. When aware that Maynard had given false testimony Beudah Chant nevertheless thought Marshall was still guilty [B. Chant 20/3556]. Beudah Chant knew Marshall was an Indian [B. Chant 20/3557]. She did not pursue the question of whether Marshall was in fact guilty. Beudah Chant testified that Maynard expressed fear about Indian youth prior to him giving evidence at Marshall's trial [B. Chant 20/3563]. Chant also failed to come forward to someone in authority for some 11 years after the trial [Chant 6/940]. He attributes this to thinking Marshall was guilty anyway [Chant 5/908; 914]. Was part of the reason Chant thought Marshall was guilty the fact he was an Indian? Did Chant feel Marshall's incarceration, guilty or not, was less important than his own fate if he admitted lying? Chant tried to tell others that he had lied at Marshall's trial: in 1979 he tried to tell his father and his Pastor, but they weren't "open" or "sensitive" to it [Chant 6/938-39; 949-50]. Why not? Chant was probably an instrument through which society's view of Indians was acted out, and Marshall was the victim of the attitude. When Staff Wheaton asked Chief MacIntyre why Chant lied in the first instance, in addition to a fear of Mr. Marshall himself, "Chief MacIntyre indicated, the Indians. Not as many overt acts, if you will, in the case of Mr. Pratico but that's what he advised me" [Wheaton 41/7548].

Then Mr. Orsborn asks: "Q. That Mr. Chant was afraid of Indians of which Mr. Marshall was one?" and Staff Wheaton replies: "A. Yes" [41/7549]. Later Mr. Orsborn asks about Staff Wheaton's own interview with Chant: "Q. Was there any indication from him [Chant] that he was scared of Mr. Marshall or scared of Indians?" and Staff Wheaton replies: "A. That came out during that first interview, yes" [41/7558]. Much later in his testimony Staff Wheaton again affirmed that Chant's first statement and his reluctance to finger Marshall at the trial was, according to MacIntyre, because of the Indians and that Chant was afraid of Indians [47/8600]. There is no evidence whatsoever of any Indians approaching Chant. Chant's fear of Indians was something of his own making, without justification. Sgt. Jim Carroll confirms that there was no evidence of contact between the Indian population and Chant [49/9108].

Roy Ebsary bears personal responsibility for the mistreatment of Donald Marshall, Jr. He committed the stabbing and in his own mind on his own admission knew that he at least had swiped at Sandy Seale with a knife [Ebsary 1/46; 2/303]. MacNeil said Seale screamed [3/431] and Ebsary later told MacNeil not to go to the cops and that it was self-defence [3/448]. In 1982, Ebsary was prepared to suggest the swipe he took at Seale might have connected and he might have been Seale's killer [Ebsary 2/316]. We in fact know he killed Sandy Seale. Yet at no time before Marshall's acquittal did Ebsary come forward to own up to any involvement voluntarily [Ebsary 2/308], even years later. While his powerful self-interest in not admitting guilt may explain his actions in part (Note: Ebsary himself says the idea of not getting himself in trouble never entered his mind: Ebsary 2/248 and that he

would implicate himself if necessary: Ebsary 2/249; 250), he also was a person who was bizarre and held Indians and blacks in low regard. This makes Marshall's original explanation of the stabbing more credible (i.e. that Ebsary said he did not like blacks and Indians). It also helps explain an easy conscience over the suffering he caused Marshall in failing at any time to acknowledge publicly his guilt, even before this Commission [Ebsary 2/216-17] (Note: Ebsary claimed not to know Marshall was an Indian until about Feb. of 1982: Ebsary 2/356-57, yet told Sarson the incident involved a "nigger" and an "Indian"). Ebsary's racial views are reflected in his desire to meet Mr. Marshall's mother, to see her face and judge her, to see where they lived and the type of house they lived in [Ebsary 1/35]. Ebsary wanted to find out if Marshall was a "half-breed" [Ebsary 2/355]. Ebsary had never been to the Membertou Reserve and had not met any other Indians [Ebsary 2/355]. The Commission did not permit Ebsary to answer a direct question on his views about Indians [Ebsary 2/358]. Roy Ebsary would use the term "nigger", and did in relation to Sandy Seale [Ratchford 24/4516]. That Roy Ebsary was racist is confirmed by the language he used in describing Seale and Marshall. Even years later, long after he knew the names Seale and Marshall, he refers to them, in describing the incident to Sarson, as "the nigger", "the coon" and "the Indian" [Carroll 49/9100-02]. Jim Carroll, who got to know Ebsary better than any of the other reliable witnesses, agreed that Ebsary was somebody who held Blacks and Indians in low regard [49/9102]. Ebsary also wanted to visit Marshall's parents "to see their lifestyle, what kind of a home they had, whether it was decent or otherwise. And possibly even the way they dressed and that

sort of thing". Ebsary's intention was not to cooperate in getting Marshall out unless he approved [Carroll 49/9103].

Photographs were taken of the crime scene on Donald MacNeil's instructions [Ryan 7/1264]. Photographs were personally turned over to MacNeil and have disappeared [Ryan 7/1265]. The photographs were not used at trial.

MacNeil was a person who liked to win his cases and tried hard to win his cases [Wood 10/1851]. MacNeil, with MacIntyre, took Pratico to the Park to go over his story [Pratico 12/2078]: "They were sort of coaching me—as to what I saw, eh?" [Pratico 12/2080]. [Pratico felt "more coached by the police more so than by Mr. MacNeil": Pratico 12/2222.] MacNeil should have had all of the statements of all of the witnesses. MacNeil knew that Pratico had recanted in the Courthouse, and did not get to the truth of his evidence [Pratico 12/2098-2101]. MacNeil was the Crown Prosecutor in court at the time an obstruction of justice charge against Tom Christmas for threatening Pratico was dismissed [Pratico 12/2241]. Yet later during Donald Marshall's trial he did not draw this to the Court's attention and conveyed the impression that Christmas had in fact threatened Pratico despite his acquittal. Bernie Francis described Donald C. MacNeil as a man "who really wanted to win very badly and he would do anything to win" [22/]. Lewis Matheson relates that a police surveillance was put on Pratico because of a concern that he might be threatened [26/4971]. At a restaurant one night Matheson was with Donald MacNeil and RCMP Corporal McKinlay. MacNeil asked McKinlay if anyone, and specifically Tom Christmas, had that evening threatened Pratico [26/4971]. The answer was "no". The

surveillance was kept on and no material evidence developed that Tom Christmas or anyone threatened Pratico [26/4972]. MacNeil knew all of this when he said what he did at Marshall's trial. Donald MacNeil in his address to the Jury casts improper innuendos at Donald Marshall, Sr. He says the Defence "forget to mention to you [the Jury] a little conference that Pratico had with Donald Marshall, Sr.! Now, what was that conference? What was that conference?" and links this with Pratico being scared for his life [27/5050]. Professor Bruce Archibald stated that MacNeil making this linkage between the accused's father and Pratico being scared for his life was "prejudicial" to the accused [30/5581], and linking Tom Christmas, Artie Paul and Theresa Paul to Pratico being scared was "unfair" and "improper" [30/5581-82] and would lead him to conclude Marshall should have had a new trial [30/5583].

Khatter was told in the Courthouse by Pratico that he didn't know what happened. He allowed Pratico to be taken away into a closed room by MacNeil and MacIntyre and didn't act forcefully to bring this information to the trial judge's attention [Pratico 12/2098-2102]. Even after the conviction, Khatter did not contact Pratico to get at the truth [Pratico 12/2232]. Barbara Floyd and others (Joan Clemens, Ann and Mary MacNeil, etc.) all said, when the Cape Breton Post came out, about John Pratico's testimony, that "he couldn't have seen anything" because "he was at the dance" [Floyd 18/3137]. She phoned Rosenblum's office, told this to a man who came on the line after asking for Marshall's lawyer, and was told she was "too late" [Floyd 18/3139-40]. She felt she was speaking to Mr.

Rosenblum [Floyd 18/3160]. This is confirmed by Sandra Cotie [Cotie 18/3213-15].

Bernie Francis testified that one defence lawyer, Rosenblum, was less vigorous in his defence work where he represented an Indian. Other evidence indicates a lack of diligence in the preparation of Marshall's case (no investigation; no interview of witnesses; no testing of the Crown's witnesses at the Preliminary) and that Rosenblum, for no apparent reason, believed Marshall was guilty [Khatter 25/4761; Ex. 69; M. Veniot 38/7043]. Barbara Floyd phoned Rosenblum's office during the trial to say Pratico could not have seen what he testified to and the male person she spoke to (no other male worked in his office but Rosenblum), whom she felt was Rosenblum, was "blunt" and just said she was "too late" [3140-41].

Tom Christmas was charged with obstructing justice by threatening a witness, John Pratico. Yet Pratico does not describe the incident this way (Tom only wanted Pratico to tell the truth) [Pratico 12/2072; 2073].

Quite often there would be drinking in the park and the police would come along [Floyd 18/3124]. There would typically be drinking in the park and when the police came along everyone would hide or run [Cotie 18/3192]. The same would happen in the graveyard [Cotie 18/3192-93]. Everyone hanging out in the park was a minor, so if one had liquor and shared it "would have been a minor giving it to a minor" [Cotie 18/3246-47]. The practice was that "whoever bought the liquor that night would pass it around". "Sometime or another it would have had to have been Junior" [Cotie 18/3247]. Yet of the 15 or so kids hanging around, only Donald Marshall, Jr. was charged with giving liquor to a minor.

Floyd felt that telling the police that Pratico could not have seen anything would not do any good because the head of the investigation, John MacIntyre, didn't like Junior [Floyd 18/3142].

David Ratchford and Donna Ebsary went to the Sydney Police Department around February or March of 1974 [24/4393] with information that Roy Ebsary had killed Sandy Seale and dealt with MacIntyre and Urquhart [Ratchford 24/4402]. David Ratchford brought Donna Ebsary to MacIntyre and Urquhart, telling them her father Roy Ebsary was responsible and that they "should listen to her story". MacIntyre and Urquhart refused to even listen to them and they left [Ratchford 24/4403-05]. Ratchford contacted Constable Gary Green of the R.C.M.P., who said he went to the Sydney Police and got nowhere. Green said he believed Donna Ebsary and passed the information on to his superiors [Ratchford 24/4405-07].

When MacIntyre was telling Emily Clemens that Junior Marshall was not a proper person for her daughter to hang around with, he thought it important to let her know Junior was an Indian [E. Clemens 19/3463; 19/3515-18].

Prior to Marshall's arrest, "talk around the reserve was that if they didn't find the real murderer that it's going to be pinned on him" [Roy Gould 21/3815].

Roy Ebsary's name and age was passed by Marshall to Roy Gould in 1981, from Gould to Danny Paul of the Union of Nova Scotia Indians, and from Paul to the Sydney Detective's office [Gould 21/3836]. The person who received the information was said to be Detective Urquhart [Gould 21/3837].

Dan Paul came back from meeting with Urquhart "pretty disgusted" [Gould 21/3837].

The Native Communications Society of Nova Scotia submitted a proposal to the Canada Works Program to conduct a study on native people and the criminal justice system. Support for the study was sought from sources. All supported the project except the Sydney Police. Chief John MacIntyre did not support it, saying there was no need for the program, "everything was in place, everything was all right" [Gould 21/3844]. Roy Gould suspects: "Looking at [the] matter today, maybe he didn't want us to uncover anything" [Gould 21/3884].

Jr. Marshall's English was okay in an informal setting but "very poor in a formal setting. I think that there would be an awful lot that he wouldn't understand." Marshall was also the sort of person who would not admit it when he did not understand what was going on [Francis 22/3980]. Khatter says Marshall was a "terrible witness, bad witness, poor witness" [25/4756]. Marshall had the "unfortunate habit . . . of holding his hand over his mouth" [Khatter 25/4757]. Carroll also felt Marshall made a poor witness on his behalf "in that he spoke in a low voice and he was not volunteering very much" [49/9110]. This would be typical of Indian witnesses [Carroll 49/9110-11]. Indian witnesses are often "passive" [Carroll 49/9111].

Tom Christmas was worried about the obstruction charge because he wanted to be at Marshall's trial to say that one of the eye-witnesses, John Pratico, wasn't telling the truth [23/4193]. He pleaded guilty to a break and enter charge after being told by a police officer he would probably

get two or three months [Christmas 23/4194] and so he would still be there for Marshall's trial [23/4196]. Christmas believed the police wanted him out of Sydney before Marshall's trial because with Christmas in Sydney, Pratico might end up telling the truth [23/4287]. Frank Elman confirms that "the object of the exercise appeared to be to get Tommy Christmas out of the way prior to the Marshall trial [23/4286], although he later said he meant to get Christmas' trial out of the way, not Tom personally [24/4378].

In regard to juries, it was a concern in this case of defence lawyer Simon Khatter as to whether a prospective juror was biased against Indians [Khatter 25/4728]. In reviewing the jury list, a question defence lawyers asked was: "what would this person's view be towards Indians?" [Khatter 26/4808]. The juror's attitude towards race was the defence's principle concern on jury selection [Khatter 26/4809]. This concern about racial attitude was based on Khatter's "common experience" [26/4810]. Marshall's jury was likely composed of all white males [Matheson 27/4997-98].

Simon Khatter testified that he had the suspicion that the fact Donald Marshall, Jr. was an Indian had something to do with the verdict. Khatter was surprised at the conviction; he "thought that we had it". He thought that despite the contradictions in the stories of Chant and Pratico, the jury must have said to itself: "He's an Indian and most likely he would've done it. He's a bad Indian; so let's get--He probably did commit it. He did commit the offence" [Khatter 25/4576]. When confronted on cross-examination with the juror's oath to try the case on the evidence presented, he responded: "The intellect is only a speck in the sea of

emotions" [26/4852-53]. On the question of Marshall's guilt or innocence, Khatter "felt he had a burden being an Indian" [26/4888].

Simon Khatter testified that he was informed at Marshall's Preliminary Inquiry that Donald C. MacNeil "didn't like Indians" [26/4807]. Khatter also described MacNeil as "a Jekyll and Hyde insofar as sociability and court--a court man" [26/4846].

Matheson phoned Robert Anderson, Director-Criminal in the A.G.'s Dept., about MacNeil coming forward, and in addition to suggesting a polygraph, "mentioned about whether investigations should be done by another department" [27/5019-20], i.e. it apparently was not MacIntyre that first got RCMP into reinvestigation. Very shortly afterwards RCMP Insp. Al Marshall arrived. Anderson knew about MacNeil and Ebsary prior to Marshall's appeal but did nothing to communicate this to defence lawyers [27/5031; 28/5171].

RCMP Inspector Alan Marshall, in carrying out his review in 1971 of Jimmy MacNeil's story that Roy Ebsary was the real killer, admitted that useful and reliable information could have been had from the Indian community at Membertou, yet he contacted no one and instead relied exclusively on sources connected to the police in one way or another [A. Marshall 31/5783].

Staff Wheaton testified concerning Chief MacIntyre: "I can recall general impressions that I received from the Chief in relation to Indians and I don't think he particularly cared for Indian people" [42/7687]. And later: "[T]he Chief [MacIntyre] displayed some bigotry toward whites, blacks and natives, or people who didn't agree with him" [42/7688]. "[T]he

impression that I was left with [was] that he [John MacIntyre] did not like Indians and his attitudes were somewhat bigoted" [47/8604]. John MacIntyre was also spreading the story to Wheaton that "the Negro community was going to take out their vengeance on the Indians and the Indians were going to take out their vengeance on the whites who were lying against Marshall" [Wheaton 43/7884]. John MacIntyre, in relation to asking Dr. Virick to get a blood sample from Marshall, dismissed the possibility saying: "Those brown-skinned fellows stick together" [Wheaton 47/8597].

Staff Wheaton supports the view that John MacIntyre used Indians as a foil to explain difficulties he encountered when pressed by Wheaton. At 47/8603:

"Q. What I'm suggesting to you is that what, in fact, happened is that when you pressured John MacIntyre about problems in the investigation, problems with Chant, problems with Pratico, he would talk about Indians.

A. That was one of the things he would come up with, yes, sir.

Q. Thank you. And one of the other things that he continually talked about was Indians taking out vengeance against whites for lying against Marshall.

A. Yes, sir."

Attorney General Giffin apparently said at the annual RCMP regimental dinner at the Oak Island Inn that he didn't understand why the press was making all the fuss over the Marshall case [Wheaton 43/7937]. Mr. Giffin engaged in "approximately five to ten minutes of slapstick comedy in reference to the Marshall case", for example, "One of the senior members of

my Department often compares the Marshall case to being the longest running show since 'Bonanza'" [Wheaton 43/7938].

Staff Wheaton "had many discussions with Donald C. MacNeil" and was left with the "feeling from Donald C. MacNeil . . . that he didn't particularly care for Indians" [Wheaton 47/8593].

Judge Robert Anderson, formerly Director-Criminal in the Attorney-General's Dept. was asked about a statement he made to Felix Cacchione when Cacchione visited him in the capacity of Marshall's lawyer. Anderson was asked by Commission Counsel if he said to Cacchione: "Felix, don't get your balls caught in a vice over an Indian". Anderson replied that "it sounds like something I might say" and accepted that Cacchione's recollection was truthful and accurate [Anderson 50/9155]. In explaining the comment Anderson dug himself in deeper because his exchange with Commission Counsel at 50/9156 makes it clear that he even felt as he testified in front of this Commission that it was acceptable, in an effort to refer to the "type of person" Marshall was, and to his "personality" and "reputation", to simply refer to the fact Marshall was an Indian. Commission counsel asks: "Why would you pick on the word 'Indian'?" and Anderson answers: "Well, it was my understanding that Mr. Marshall was an Indian".

Judge Cacchione testified that Robert Anderson did in fact make such a statement. When pressed as to the exact words, Cacchione volunteered the following:

A. "Felix, don't put your balls in a vice over an Indian". Could have been, "Felix, don't put your fuckin' balls in a vice over an

Indian". Or, "Felix, don't put your balls in a vice over a fuckin' Indian".

Q. Yes. It was the latter way that I had understood it.

A. It may have been that way, sir" [65/11673].

Cacchione suggested he rather than Anderson could have embellished with the descriptive term in front of "Indian", but certainly "it was an emotional issue" without question received and understood by Cacchione as a very racist remark, not as a joke and not, as Anderson suggested, just Anderson looking out for Cacchione's interests as a private practitioner [65/11674]. When Anderson referred to not doing this for "an Indian", Cacchione understood the remark as not being about Marshall as a person but as being about "Indians in general" and "the Indian community as a whole" [65/11676]. As to what Cacchione understood Anderson was attempting to convey it was that by working on Marshall's behalf, Cacchione would jam himself in a corner so as to shut doors behind him or ahead of him that lay in his career path. When asked about shutting doors in his career path, Cacchione replied:

A. Don't make enemies in the Attorney General's Department that may prevent you from getting access to files. Don't have yourself viewed by members of the judiciary as being unpopular or getting out on a limb or anything like that. Anything that would interfere with my career.

Q. Is it fair to say, then, that he was warning you that there might be repercussions as a result of your strong advocacy on behalf of Mr. Marshall?

A. That's what I got from it [65/11675].

. . .

Q. . . . [w]hat he was saying to you is that the nature of our political society is such that you might be facing repercussions in your career.

A. That's fair to say [65/11676].

Judge Felix Cacchione was in a position to observe the reaction of the justice system to Marshall's plight. The Province did not display a sense of sympathy or responsiveness and instead played "hard ball" [Cacchione 65/11664-65]. No one in the administration of justice came to Marshall's assistance. Cacchione testified that one of the factors that led the system to be unresponsive was Mr. Marshall's race. If Marshall had been a prominent white Nova Scotian he would have been treated differently and the matter would have been handled differently, Cacchione said [65/11666].

Sydney Constable Leo Mroz told Felix Cacchione that John MacIntyre was known by his men as being a racist and particularly so towards Indians and blacks [Cacchione 65/11669].

Stephen Aronson believes that the fact Junior Marshall was an Indian influenced what happened to him. If Marshall had "been a person other than an Indian, perhaps there would have been a greater amount of time and effort spent both on the part of the police and others in the system" [56/10326-27; 10329], " , . . others in the law enforcement system . . . perhaps the Crown or other actors, perhaps would have taken it in my view more seriously" [56/10329].

Eva Gould was asked about John MacIntyre. She said: "He didn't like us so we didn't have too much dealing with him because the impression was always, 'I don't need you to do my work . . . . [I]f I was trying to get . . . some information . . . to try and help the native person better understand what was happening to them, it was as if, 'It's none of your business to be here. I don't have to give you this information' . . . He's one person that . . . even the name always scared me because of the, like he put on a big, I don't know if it was a big air or what, but he would come across as like you were going to be in trouble any minute for talking to him . . . [I]t was always intimidating to me. I was always very scared" [73/13048-50]. To others around the courtroom and lobby "it just seemed like the way he was presenting himself was a little more acceptable and presentable and more polite" [73/13051].

Eva Gould had an amazing and extremely creditable memory. When asked about Donald C. MacNeil she said that with him, in dealing with Natives, "there was not as much courtesy, not as much respect, and it was almost as if, 'Get this over with and get you out of my way. You're just a nuisance and a bother, the whole works of you". He dealt that way with the courtworkers like Ms. Gould as well as Native defendants [73/13015].

4. Tentative Recommendations (For Discussion Purposes)

A preface to the proposals that follow was effectively provided by the former Attorney General of Nova Scotia and present cabinet minister Ronald Giffin. He testified that he in that capacity represented the Government of Nova Scotia in the extensive constitutional discussions on the

entrenchment of a right to self-government for aboriginal peoples. As he learned about those issues he concluded that "the approach that carries with it the most hope for improving the condition of native peoples in our country is the pursuit of the development of self-government . . . . that is the approach that holds the greatest promise" [59/10732]. Both Nova Scotia, and Mr. Giffin personally, supported entrenching aboriginal self-government in some form in the Constitution [59/10733]. Self-government is a concept that should, in Mr. Giffin's view, apply as well to the criminal justice system [59/10733]. This "has to include control over the administration of justice" [59/10734]. One ultimate result would be the administration of justice in Indian hands on Indian reserves [59/10734].

The Union of Nova Scotia Indians proposes:

1. A Micmac Tribal Justice System should be created. This should be a full service system providing police, prosecution, defence, counselling, adjudication of guilt, imposition of sentence/disposition, enforcement of penalties, prisons, parole and aftercare. In the interim the Micmac may see fit to make use of existing non-Indian institutions. In the long term the Micmac system may be part of and coordinated with other Indian justice systems in Canada.

2. The jurisdiction of the Micmac Tribal Justice System should be exclusive with respect to:

   (i) all activities occurring on reserves;

(ii) activities off reserve involving Indian actors and Indian victims.

3. The Micmac Tribal Justice System should also have jurisdiction, in the event of an Indian accused (and non-Indian victim) concerning an off-reserve activity:

(i) to determine judicially if there is sufficient credible evidence to put the Indian accused to trial in a non-Indian court (a form of preliminary determination);

(ii) to obtain non-Indian police information and to investigate independently or in cooperation with non-Indian police an alleged offence;

(iii) to provide para-legal and legal assistance and counselling to the Indian accused and his/her family and community;

(iv) to provide translation services;

(v) to advise a non-Indian court in the deposition of the Indian defendant if a conviction is entered;

(vi) to participate in corrections and other elements of custodial care if disposition involves non-Indian correction centres or institutions.

4. In the interim before a Micmac Tribal Justice System is operative, the following steps should be immediately taken:

(i) non-Indian justice personnel dealing with Indians should receive training with respect to Indian culture and other special

considerations in dealing with Indians. In so far as reasonable, the non-Indian justice personnel dealing with Indians should be specialized to that function. For example, the same lawyer from a given Legal Aid office, with the confidence of the pertinent Micmac community, might defend all Indian accused. Or the same probation officer might handle all the Indian clients handled by his/her office.

(ii) with respect to all on-reserve offences, the provincial court should sit on that reserve.

(iii) with respect to all off-reserve offences involving Indian accused, arraignments, preliminary inquiries, and sentencing should all take place on the reserve on which the accused resides. Thus, only the actual trial should be held off-reserve, and this only to provide to the non-Indian victim and family the assurance of an unbiased trial. In the event of offences without an obvious victim, e.g., refusing the breathalyzer where no accident has occurred, the trial, if at the provincial court level, should be held on-reserve.

(iv) a Micmac para-legal/counselling/courtworker service should be immediately created on a province-wide basis. This service could eventually be incorporated into the Micmac Tribal Justice System.

(v) each reserve community should be asked to form a group of advisors (likely elders) to assist the court in the disposition/sentencing of a resident of that reserve and to

assist probation/parole officers in pre-sentence reports and in release/aftercare decisions.

(vi) the Micmac should be provided with funding to hire several investigators, whose task it would be to gather information on the alleged offence by an Indian accused and to provide that information to the Defence and to Micmac community leaders.

5. Steps must be taken to avoid any possibility of bias by juries when dealing with Indian accused or Indian victims. Juries are very unlikely to include Indians in Nova Scotia. Two possibilities for correcting this problem are:

   1. to insist that jury panels contain a sufficient number of Micmacs to make the inclusion of some on the final jury a realistic possibility (enough so preemptory challenges will not eliminate all?);
   2. to provide Indians with the option to elect trial by a judge of the Supreme Court alone (without a jury).

All of which is respectfully submitted by

Bruce H. Wildsmith
Counsel, Union of Nova Scotia Indians