I N D E X

INTRODUCTION

1. The purpose of this brief is to outline the position of the Royal Canadian Mounted Police on the evidence. It also contains the submissions of the Correctional Service of Canada and the National Parole Board. To the extent possible, the issues will be addressed chronologically. This brief outlines the activities of Royal Canadian Mounted Police officers and members from the time shortly after the stabbing death of Sandford Seale and during the murder investigation conducted by the Sydney Police Department; and thereafter:

(i) the review conducted by S/Insp. E. A. Marshall in November, 1971;

(ii) the activities of Constable Gary Green in 1974, and Corporal Eugene Cole in 1975;

(iii) the re-investigation of the murder by Staff Sergeant Harry Wheaton and Corporal James Carroll in 1982, which resulted in the release of Donald Marshall, Jr. from penitentiary; the Reference by the Honourable Jean Chretien, the Minister of Justice, on June 16, 1982, to the Nova Scotia Court of Appeal; and the conviction of Roy Newman Ebsary for the murder of Sandford Seale; and

PART I

INVOLVEMENT OF R.C.M.P. MEMBERS IN THE INITIAL MURDER INVESTIGATION

3. The death of Sandford Seale occurred within the limits of the City of Sydney. Hence, the Sydney Police Department was the investigating police agency. There was, however, a minor involvement by members of the R.C.M.P. (Sydney Subdivision), whose roles are discussed below.

A. IDENTIFICATION SERVICES

4. At the time of Sandy Seale's death in May, 1971, John Ryan was the N.C.O. in charge of the R.C.M.P. Identification Section in Sydney, Nova Scotia. At this time, the Sydney Police Department did not have its own identification section. Consequently, the R.C.M.P. made its identification services available to the Sydney Police Department whenever requested. In fact, the R.C.M.P. Identification Section had an "on call system" for evenings and weekends to ensure there was an identification officer available at all times. (Transcripts, evidence of John Ryan, Vol. 7, p. 1267; and evidence of John MacIntyre, Vol. 32, pp. 5868-69)

5. When Corporal Ryan learned of the fatal stabbing in Wentworth Park, he telephoned the Sydney Police Department and offered his services. Detective Sergeant John MacIntyre told him that his services were not required at that time. In fact, Corporal Ryan's services were not utilized until August, 1971, when he went to Wentworth Park during the daytime with Detectives Urquhart and MacIntyre. Under their instructions, he took a series of photographs at the park following a general walk around. (Transcripts, evidence of John Ryan, Vol. 7, pp. 1258, 1262-63; and evidence of John MacIntyre, Vol. 32, pp. 5936-7)

6. Staff Sergeant Ryan also gave evidence of the importance of the attendance of an identification officer at a crime scene at the earliest possible time. Among other things, an identification officer can help preserve the crime scene, record lighting conditions, check soft ground for footwear impressions, and take necessary measurements. (Transcript, Vol. 7, p. 1260)

B. G.I.S. SERVICES

7. In May, 1971, Inspector Joseph Terrance Ryan and Staff Sergeant Murray Wood were constables stationed with the Sydney R.C.M.P., General Investigation Section. They both testified at the Inquiry as to their knowledge of the 1971 murder

investigation, as well as police investigative practices at a crime scene and the importance of post mortem examinations.

8. Staff Sergeant Wood's notes were tendered as Exhibit 40. They show that on May 29, 1971, the morning following the stabbing, Wood was in conversation with Sydney Police Constable Edward McNeil and Detective MacIntyre and noted the "feeling at this time Marshall was responsible and incident happened as a result of argument between both Seale and Marshall". The following day, Wood was in discussion with Constables McNeil and Young of the Sydney Police Department, both of whom were of the opinion that Marshall was responsible. (Transcript, evidence of Murray Wood, Vol. 10, pp. 1803 and 1807)

9. On their own initiative, Murray Wood and Terrance Ryan conducted some surveillance on a grey-haired man who was driving a Volkswagon in Sydney on May 31, 1971. They also interviewed an informant; however, their efforts did not result in any evidence. Inspector Ryan, whose notebook was filed as Exhibit 41, also recalled travelling to New Waterford with John MacIntyre, at MacIntyre's request, on June 3, 1971, in search of a person who frequented Wentworth Park. Again, nothing came as a result of their visit to New Waterford. (Transcript, Vol. 11, p. 1861)

10. Inspector Ryan related the steps he felt a competent police officer called to the scene of a crime should follow:

> (1) render aid to the victim of the crime;
> (2) separate witnesses at the crime scene;
> (3) obtain names of witnesses;
> (4) notify superiors and seek assistance;
> (5) assign an investigator to go to the hospital and stay with the victim to ascertain the seriousness of the injury and obtain a statement, if possible;
> (6) notify identification and police dog services;
> (7) get the clothing of the victim;
> (8) if the resources are available, separate the witnesses and get enough information to see who was there first, and to get their statements as soon as possible before they have an opportunity to talk to anyone else; and
> (9) if the crime occurred in a residential area, conduct door-to-door interviews with residents within the first couple of days.
> (Transcript, Vol. 11, p. 1862-63)

11. Neither Inspector Ryan nor Staff Sergeant Wood recalled the telex sent from Sydney Subdivision to "H" Division,

Maritime Crime Index Section (M.C.I.S.), on May 30, 1971. The telex was sent a few hours after Sandy Seale's death at the Sydney City Hospital. The telex identified Donald Marshall as "possibly the person responsible". Maritime Crime Index Section was requested to check their records for an individual matching the description given by Donald Marshall of the assailant; namely, "an unknown male approx. 5'8" to 6' tall, grey hair, approx. 50 yrs.". (Reference, Exhibit 16, p. 90) The telex is obviously important because it indicates that Donald Marshall was the prime suspect very early in the investigation. It confirms the note made by Wood concerning the Sydney Police Department's suspicion of Donald Marshall. While its authorship is unknown, the most plausible explanation for such a telex is that the R.C.M.P. obtained particulars from someone within the Sydney Police Department in order to check the crime index system to offer to the Sydney Police Department whatever information or assistance it might contain.

12. No response to the telex to M.C.I.S. was located. Both Inspector Ryan and Superintendent Don Scott explained how the Maritime Crime Index Section operated in 1971. (Reference, Transcripts, Vol. 11, p. 1867-68; Vol. 51, pp. 9339-9342) Superintendent Scott was responsible for implementing the Maritime crime index system. Superintendent Scott explained that the system was dependent upon local police departments providing information to it concerning their investigations.

Therefore, Roy Ebsary's conviction in April, 1970, for an offence involving possession of a concealed butcher knife would have been entered in the M.C.I.S. system had the Sydney Police Department completed the modus operandi portion of the fingerprint form or if they had sent a report to the Crime Index Section. (Transcript, Vol. 51, p. 9342)

13. Detective John MacIntyre testified that, while he was aware of the M.C.I.S., the crime information held by the Sydney Police Department was not usually fed into the Maritime Crime Index Section. (Transcript, Vol. 32, pp. 5866-67)

14. The modus operandi portion of Mr. Ebsary's April, 1970, fingerprint sheet was not completed by the Sydney Police. (Exhibit 121)

15. Even in the event that the Sydney Police Department sent Ebsary's 1970 conviction for carrying a concealed weapon to the Maritime Crime Index Section, the description of the grey haired man in the telex made the chance of a positive identification remote. The telex refers to the unknown male with grey hair as approximately 5'8" to 6' and approximately 50 years of age. According to the fingerprint sheet prepared by Detective Urquhart upon Ebsary's conviction of possession of a concealed weapon in April, 1970, Mr. Ebsary was only 5'2" tall.

(Reference, Exhibit 121) Furthermore, Mr. Ebsary was almost 59 years of age in May, 1971.

C. BADDECK R.C.M.P.

16. On June 4, 1971, Constable Stan Clark was stationed at the Baddeck Detachment of the R.C.M.P. A copy of the entries made in his notebook for June 4, 1971, was marked as Exhibit 87. On that day, Detectives MacIntyre and Urquhart asked for Constable Clark's assistance in arresting Donald Marshall, Jr. for the murder of Sandford Seale. Constable Clark was asked to render the assistance because he was familiar with the area. His notes indicate that Detective MacIntyre told him of Donald Marshall's story that on the night of the stabbing, he had been walking in the park with Sandy Seale when they were assaulted by two men, one of whom had white hair. Corporal Clark also testified that after Detectives MacIntyre and Urquhart arrested and handcuffed Donald Marshall, he began to sob and said "I did not do it". Clark entered this observation in his notebook. He had no further involvement in the Donald Marshall case. (Transcript, Vol. 38, pp. 7005-10)

PART II

NOVEMBER, 1971
R.C.M.P. MANDATE AND RESULTS

17. The 1971 review by S/Insp. E. A. Marshall was triggered by James William MacNeil's statement to Sydney police on November 15, 1971, following Donald Marshall's conviction. James MacNeil told the Sydney Police that Roy Ebsary had stabbed Sandy Seale. (Reference, Exhibit 16, p. 176-178) In 1971, E.A. Marshall's position was that of Detective Inspector directly accountable to the Criminal Investigation Branch officer (C.I.B.O.) for "H" Division. The C.I.B.O. at the time was Superintendent Donald Wardrop.

18. In assessing S/Insp. Marshall's review, it is essential to view it in the light of his mandate. With respect, this issue is not addressed in Commission Counsel's brief. It is submitted that his mandate was not to re-open the entire murder investigation, but rather to check out James MacNeil's story to see if it might be true. If at the conclusion of this review, S/Insp. Marshall believed some credence should be given to the statement, a further and more exhaustive investigation of the murder would have followed.

19. S/Insp. Marshall's recollection of his instructions from Superintendent Wardrop, the C.I.B.O., was that he was told by Wardrop:

> "...I want you to go to Sydney, go down to Sydney, and determine if there's any substance to this man's allegations." (Transcripts, Vol. 30, p. 5606; see also Vol. 30, p. 5609; and Vol. 31, p. 5787)

Had his mandate been to re-investigate the murder, E.A. Marshall testified that he would have taken a team of investigators to Sydney. (Reference, Transcript, Vol. 30, p. 5609) While Assistant Commissioner D. J. Wardrop (retired) testified that he recalled having issued a broader mandate to S/Insp. Marshall, it is significant that Wardrop was never critical of his investigator's work. (Reference, Transcript, evidence of D.J. Wardrop, Vol. 37, pp. 6740, and 6745) It would have been apparent to Superintendent Wardrop, on even a casual reading of S/Insp. Marshall's report, that there had not been a full re-investigation of the murder. Superintendent Wardrop testified that he received the report. (Transcript, Vol. 37, p. 6760)

20. More significant to the consideration of S/Insp. Marshall's mandate, is the evidence of His Honour Judge Robert Anderson, who at the relevant time was the Director (Criminal) of the Department of the Attorney General. Judge Anderson is the individual who initiated the R.C.M.P. review in November

1971, when he learned of James MacNeil's statement from either Lou Matheson or D. C. MacNeil. Judge Anderson said as follows in response to questioning from David Orsborn:

> Q. "I understand, sir. What did you want the R.C.M.P. to do?"
>
> A. " Well, my recollection is that they wanted to find out whether this person who was making this admission was telling the truth. There was some question about his stability and I don't know whether...it seems to me I recall that there might have been a case a couple of years prior to that where someone had done something similar and it proved to be someone trying to...seeking attention and they were wondering if this was the same sort of thing. That's my recollection of it. And the R.C.M.P. were requested to do a polygraph."
>
> Q. "They were requested by."
>
> A. "The Attorney General's Department."
>
> Q. "To do a polygraph."
>
> A. "And I thought that the...it's my recollection, as faint as it may be, is that the...that was discussed with the prosecutor and it was one of his, you know, it was his idea too."
>
> Q. "Discussed with the prosecutor during your earlier telephone conversations."
>
> A. "Well, sometime before the police were requested to do it."
>
> Q. "Did you request the R.C.M.P. to do anything more than a polygraph?"
>
> A. "Not that I can recall."

> **Q. "Is it fair to say, Your Honour, and please correct me if I'm wrong, that the Department of Attorney General was simply then asking the R.C.M.P. to do no more that assess Mr. MacNeil?"**
>
> **A. "Yes. Well, to investigate the possibility of his telling the truth or not telling the truth."** (emphasis added)
>
> (Transcript, Vol. 50, pp. 9140-1)

21. Robert Anderson's evidence that the Attorney General only requested the R.C.M.P. to perform a polygraph examination is consistent with the evidence of Lou Matheson, the assistant prosecutor, who testified that he called Robert Anderson to see "...if he could get us a polygraph instrument..." to enable a polygraph test of Mr. Ebsary and Mr. MacNeil. He also conveyed his doubts about Mr. MacNeil to Robert Anderson. (Transcript, Vol. 27, pp. 5019-20)

22. Finally, on this point, it is noteworthy that the local prosecutor, D. C. MacNeil, was briefed by S/Insp. Marshall at the conclusion of his review, but prior to the drafting of the report. D. C. MacNeil expressed no concern that E. A. Marshall had done less than what was expected. (Transcript, evidence of E. A. Marshall, Vol. 31, p. 5788)

23. While S/Insp. Marshall's review was not a re-investigation of the murder, it was more than a mere polygraph examination of James MacNeil and Roy Ebsary. The report itself

demonstrates that he and Sergeant McKinley, deceased, (Sydney Subdivision G.I.S.) interviewed James MacNeil, he examined the witness statements given him by Detective Sergeant John MacIntyre, he reviewed some of the exhibits, and he visited the crime scene. (Reference, Exhibit 16, pp. 204-209) He also reviewed transcripts of evidence given at the Preliminary hearing, and spoke with the prosecutor, D.C. MacNeil. (Reference, Transcript, Vol. 30, pp. 5613, 5619, and 5787-8) With respect, objection is taken to Commission Counsel's submission at pages 10, 82, and 85 of their brief that S./Insp. Marshall accepted the polygraph as the sole determining factor of the truthfulness of Ebsary and James MacNeil's statements. While Marshall did respond affirmatively to such a question from Commission Counsel (Reference, Transcript, Vol. 30, p. 5647) his preceding evidence (Reference, Transcript, Vol. 30, pp. 5644-6) as well as his positive steps already noted in this paragraph, demonstrate that his conclusions were based on a much broader review of the circumstances.

24. It was not unreasonable, given the mandate, for S/Insp. Marshall to have considered the opinions of Detective Sergeant John MacIntyre. The two of them had worked together in the past and Marshall thought MacIntyre to be a hard working and dedicated investigator. There was no reason in November, 1971, to doubt that John MacIntyre would give E. A. Marshall anything less than all the relevant statements and material from the

Sydney Police Department files. S/Insp. Marshall had no reason to believe that MacIntyre would pressure young witnesses into giving statements that were untrue. Detective MacIntyre had been the chief investigator in the Sandy Seale slaying. When James MacNeil came forward on November 15, 1971, MacIntyre had not objected to the R.C.M.P. becoming involved at the Attorney General's direction. Nothing in those circumstances would have alerted S/Insp. Marshall or changed his initial assessment of MacIntyre, based on joint experience, that he was a "very dedicated policeman" and "reliable". (Reference, Transcript, Vol. 30, p. 5602) S/Insp. Marshall was not the only person who held this view of John MacIntyre. Assistant Crown prosecutor, Lou Matheson, felt the same way. (Transcript, evidence of Lou Matheson, Vol. 27, pp. 5101-02)

25. Retired Detective MacIntyre testified that he thinks he gave the entire Sydney Police Department file to S/Insp. Marshall. At Volume 34, page 6305, of the Transcript, he said "...from what I can remember, I think I gave him the whole file. The Marshall file and the Ebsary file." On the other hand, S/Insp. Marshall recalled meeting with a John MacIntyre who was confident he had the right man and who already had a dossier of papers prepared for him. When John MacIntyre gave him the dossier, E. A. Marshall recalls him saying "...these are the crucial pieces of evidence adduced by witnesses surrounding the eye witness accounts of the murder" (emphasis added).

(Reference, Transcript, Vol. 30, pp. 5615, and 5611) E. A. Marshall's recollection is consistent with the approach adopted by Detective MacIntyre when he again dealt with the R.C.M.P. on this murder investigation in 1982.

26. It is regrettable that S/Insp. Marshall did not uncover the truth in November, 1971. In understanding why the truth was not discovered, a number of facts are important:

(a) The narrowness of his mandate.

(b) Both John MacIntyre and Lou Matheson, both of whom spoke to James MacNeil on November 17, 1971, had their reservations about him. In fact, Lou Matheson thought someone had put him up to it. (Transcripts, evidence of John MacIntyre, Vol. 33, p. 6000; and Vol. 34, p. 6315; Exhibit 15, p. 188; and evidence of Lou Matheson, Vol. 27, p. 5013)

(c) Prior to Donald Marshall's conviction, John MacIntyre had been concerned that there had been attempts by Donald Marshall or his friends to influence or intimidate witnesses. While E. A. Marshall could not specifically recall whether or not MacIntyre told him of these concerns, it is most probable that this would have been mentioned in November, 1971. Indeed, it is highly unlikely that John MacIntyre would have overlooked so important a matter when he briefed E. A. Marshall.

(Transcripts, evidence of John MacIntyre, Vol. 33, p. 6194; and evidence of E. A. Marshall, Vol. 31, p. 5796)

(d) Mary Ebsary and her son, Greg, were interviewed by the Sydney police on November 17 and they denied James MacNeil's story. Detective Norm MacAskill told Lou Matheson that Mrs. Ebsary was the anchor of the Ebsary household and would not be a party to a coverup of Roy Ebsary's part in the death of Sandy Seale. (Transcript, Evidence of Lou Matheson, Vol. 27, p. 5018)

(e) S/Insp. Marshall believed from what he was told by John MacIntyre that there had not been any opportunity for the two eyewitnesses, John Pratico and Maynard Chant, to have met and collaborated prior to giving their respective statements to the police. (Transcript, evidence of E. A. Marshall, Vol. 31, p. 5795; Exhibit 16, p. 206)

(f) The eyewitnesses, Chant and Pratico, had testified at the preliminary, before the Grand Jury, and at trial. Their evidence was subjected to cross-examination by respected defence counsel and apparently accepted by a jury. To believe that Chant and Pratico would have told E. A. Marshall the truth if he had interviewed them presupposes that they were prepared as early as November, 1971, to tell the truth. Since years would pass before they came forward and consistently told the

truth about not having witnessed the stabbing, it is speculative to conclude that S/Insp. Marshall, a policeman, would have uncovered the truth from them mere weeks after they had testified at the trial. (Transcripts, evidence of E. A. Marshall, Vol. 30, p. 5634, and Vol. 31, pp. 5794-5)

(g) S/Insp. Marshall believed that Donald Marshall was given the opportunity to take a polygraph examination, but had refused. (Transcripts, evidence of E. A. Marshall, Vol. 30, p. 5657; and evidence of Eugene Smith, Vol. 37, p. 6911)

(h) Neither S/Insp. Marshall nor Sergeant McKinley found James MacNeil to be a reliable person in November, 1971. Furthermore, in his interview with Corporal Eugene Smith on November 23, 1971, James MacNeil

> "...on a number of occasions was quite ready to admit that he was lying and that he was only 'joking' when he said that EBSARY had stabbed SEAL." (sic)

Corporal Smith therefore concluded that MacNeil's mind was open to any suggestion. (Reference, Exhibit 16, p. 203; Transcript, evidence of Eugene Smith, Vol. 37, p. 6891) When the very person whose story E.A. Marshall was asked to check out said he was lying, it is understandable that the Detective Inspector concluded as he did in this case.

27. It is submitted that it was not unreasonable, given the foregoing facts and his mandate, that S/Insp. Marshall concluded that the polygraph results on Ebsary were accurate and that James MacNeil was lying.

28. Both S/Insp. Marshall and Corporal Smith were aware that the polygraph was only an aid to the investigator. (Transcripts, evidence of E. A. Marshall, Vol 30, p. 5641, and evidence of Eugene Smith, Vol. 37, pp. 6843-4)

29. Corporal Eugene Smith was a properly qualified and trained polygraph operator. There is nothing in his evidence or on the record to suggest that he did not follow prescribed procedures. Corporal Smith was also recognized to be a skilled investigator. (Transcript, evidence of E. A. Marshall, Vol. 31, p. 5795)

30. During the proceedings, there was some uncertainty whether a copy of S/Insp. Marshall's report was forwarded to the Attorney General's Department. The Attorney General's file containing the 1971 police reports was destroyed upon the expiration of the six year retention period. (Reference, Exhibit 33, pp. 331-2) Certainly, the normal routing procedures for such a report would include sending a copy to the Director (Criminal) since the request originated from him. (Reference, Transcript, evidence of E. A. Marshall, Vol. 31, p. 5792) The

C.I.B.O., Superintendent Wardrop, felt certain the report was given to either Robert Anderson or his successor, Gordon Gale. (Reference, Transcript, Vol. 37, p. 6761) S/Insp. Marshall met with the prosecutor, D. C. MacNeil, before he left Sydney and orally briefed him on his conclusions, which he in turn passed on by telephone to his department in Halifax. (Reference, Transcript, evidence of E. A. Marshall, Vol. 30, pp. 5652-3) Finally, Robert Anderson said he at least knew the results of the review and that he would expect that the report would come to his office from the R.C.M.P. (Transcript, Vol. 50, p. 9148)

31. In the final analysis, the evidence of James MacNeil is something that the Crown ought to have disclosed to the defence quite independently of the results of S/Insp. Marshall's review. It was not for the police to be the only assessors of the significance and impact of James MacNeil's statement of November 15, 1971, upon Donald Marshall's guilt. Disclosure would have enabled either the Crown or defence, or both, to have made an application to the Court of Appeal in 1971 to call new evidence. The duty upon the Crown in such a case is both clear and unequivocal. It is also a duty that has been acknowledged by the following present or former officials of the Department of the Attorney General:

(a) Milton Veniot, who argued the conviction appeal (Transcript, Vol. 38, p. 7063);

(b) Robert Anderson, former Director (Criminal) (Transcript, Vol. 50, p.9145);

(c) Innis MacLeod, the Deputy Attorney General of Nova Scotia from July, 1969, until September, 1972 (Transcript, Vol. 39, p.7345);

(d) the Honourable Ron Giffin, former Attorney General of Nova Scotia (Transcript, Vol. 59, p. 10670)

(e) the Honourable Harry How, former Attorney General of Nova Scotia and Chief Judge of the Provincial Magistrates Court (Transcript, Vol. 61, p. 11022);

(f) Frank Edwards, Crown Prosecutor, Sydney, Nova Scotia (Transcripts, Vol. 65, p. 11702; Vol. 69, pp. 12290-91);

(g) Gordon Coles, former Deputy Attorney General, who was somewhat less certain of the extent of the Crown's obligation than the other witnesses (Transcript, Vol. 77, p. 13696); and

(h) Gordon Gale, presently the Director (Criminal) (Transcript, Vol. 75, pp. 13344-13345).

32. Malachi Jones, then senior solicitor with the Department of the Attorney General, wrote a memo on March 23, 1961, outlining the law pertaining to disclosure as it ought to be applied in Nova Scotia. (Reference, Exhibit 81) He referred to the two English cases of **Baksh v. The Queen**, [1958] A.C. 167 (J.C.P.C.), which dealt with the Crown's failure to give defence counsel a witness statement which varied from oral testimony, and **Mahadeo v. R.**, [1936] 2 All E.R. 813 (J.C.P.C.). Mr. Jones quite properly concluded that "...the Crown must either introduce evidence which is material to the charge whether for or against the Crown or else make the same available to the defence."

33. The obligation upon the Crown to disclose to the defence the existence of a witness, is an issue distinct from that of whether or not the Crown should call that witness. In the latter situation, the Crown has a discretion, but it may not hold from disclosure evidence which would assist the defence. [**Lemay v. The Queen** (1951), 102 C.C.C. 1 (SCC)]

34. In **R. v. Doiron** (1985), 19 C.C.C. (3d) 350 at 363 (N.S.C.A.), a case dealing with the disclosure of witness

statements, the court noted "...the overriding obligation on the part of counsel for the Crown to inform the defence of evidence which may be helpful to an accused." Similarly, the British Columbia Court of Appeal in **Cunliffe and Bledsoe v. Law Society of British Columbia** (1984), 40 C.R. (3d) 67 referred to the duty expected by the law society that Crown counsel will advise defence in a timely fashion of existing witnesses.

35. While in hindsight it is regrettable that S/Insp. Marshall's review in 1971 did not uncover the truth, it is respectfully submitted that it was the Crown's failure to disclose the James MacNeil statement which was of fundamental importance in the series of events that resulted in the Nova Scotia Court of Appeal upholding Donald Marshall, Jr.'s conviction in 1971.

PART III

INVOLVEMENT OF R.C.M.P. MEMBERS IN 1974 AND 1975

A. GARY GREEN - 1974

36. In 1974, David Ratchford operated a martial arts school in Sydney. Donna Ebsary confided in Ratchford that she believed her father was responsible for the death of

Sandy Seale. In his evidence before the Inquiry, Ratchford said that he took Donna Ebsary to the Sydney Police Department in the Spring of 1974, where they attempted to explain their concerns to Detective William Urquhart. However, his March 29, 1982, statement indicates he telephoned Detective Urquhart. (Reference, Exhibit 74, also Transcript, evidence of David Ratchford, Vol. 24, p. 4510) In either event, when Detective Urquhart indicated the case was closed, Ratchford said he called his friend, Gary Green, who was a constable with the Sydney detachment of the R.C.M.P. (Transcript, Vol. 24, pp. 4402-5)

37. Gary Green, when called to testify, said that he recommended to David Ratchford that Ratchford take Donna Ebsary to the Sydney Police Department. He believed this occurred in the autumn of 1974. When Constable Green learned they were dissatisfied with the results of their contact with Detective Urquhart, he went himself to see Detective Urquhart to pass along Donna Ebsary's information. Detective Urquhart told Constable Green that Donna was a disgruntled young lady who had just left home. He also told Constable Green that the R.C.M.P. had earlier re-opened the investigation. Green confirmed that fact by speaking to one of the members of the Sydney Subdivision General Investigation Section. When he satisfied himself that Roy Ebsary had been checked in 1971, he had done all that was asked of him and he passed his information to David Ratchford. (Transcript, Vol. 38, pp. 7084-7095)

B. EUGENE COLE - 1975

38. In September, 1975, R.C.M.P. Sergeant Eugene Cole was a Corporal employed with the Sydney Subdivision G.I.S. Relevant portions of his notebook for September 29, October 1, and October 3, 1975, were marked as Exhibit 96. Sergeant Cole does not recall what initiated his inquiries, and he has no independent recollection of the matter other than what appears in his notebook. (Transcript, Vol. 39, pp. 7227, and 7233)

39. On September 29, 1975, Corporal Cole spoke with John MacIntyre who told him that Roy Ebsary had been given a lie detector test and was not involved in the murder. (Transcript, Vol. 39, p. 7228)

40. On October 1, Corporal Cole made some inquiries concerning the Seale murder, and he read the "Ebsary file" on October 3, among duties pertaining to other matters. (Transcript, Vol. 39, pp. 7227-32)

41. John MacIntyre was unable to shed any more light on the nature and purpose of Eugene Cole's inquiries. (Transcript, Vol. 35, pp. 6495-98; 6580-84)

42. In any event, no re-investigation of the murder appears to have been ordered or undertaken at this time.

PART IV

INVOLVEMENT OF R.C.M.P. MEMBERS IN 1982

A. THE RE-INVESTIGATION

43. By letter dated January 26, 1982, Stephen Aronson, a Dartmouth lawyer, wrote to Chief John MacIntyre requesting the Sydney Police to look into "Mitchell Bayne's" (sic) story that Roy Ebsary had committed the 1971 murder of Sandford Seale. (Exhibit 19, p. 1; Exhibit 99, p. 22)

44. On receipt of Aronson's letter, Chief MacIntyre contacted R.C.M.P. Superintendent Doug Christen (retired). He next contacted Eugene Smith, the R.C.M.P. member who conducted the polygraph tests in 1971. Mr. Smith wrote Chief MacIntyre on February 2, 1982, giving details of the polygraph tests. (Exhibit 19, pp. 3-4; Transcript, evidence of John MacIntyre, Vol. 34, p. 6321)

45. A meeting took place early on February 3, 1982, between Inspector Don Scott, then the Officer Commanding, Sydney Sub-division, Frank Edwards, the local Crown prosecutor, and John MacIntyre. There is some difference in the testimony as to how long the meeting lasted. Chief MacIntyre testified that the meeting lasted two to two and one-half hours. Superintendent Scott recalled it lasting at least an hour and Mr. Edwards testified that the meeting lasted "a half hour to 45 minutes".

(Transcripts, Vol. 34, p. 6349; Vol. 50, p. 9206; and Vol. 65, pp. 11713-14)

46. It was agreed at this meeting that the R.C.M.P. would investigate the matter. (Transcripts, evidence of Frank Edwards, Vol. 65, p. 11717; and evidence of Don Scott, Vol. 50, p. 9205)

47. Superintendent Scott testified that Chief MacIntyre gave him some statements at the meeting of February 3, and that he did not ask for the entire file. (Reference, Transcripts, Vol. 50, pp. 9206-9207; also evidence of John MacIntyre, Vol. 34, p. 6350) MacIntyre did not give or offer the entire file at this time. (Exhibit 88; also evidence of John MacIntyre, Vol. 34, p. 6352)

48. Scott asked Staff Sergeant Harry Wheaton, the plainclothes co-ordinator for Cape Breton Island, to go and meet Chief MacIntyre prior to looking into the allegations. He thought that Staff Sergeant Wheaton would go check out the story and that would be the end of it. Likewise, Frank Edwards came away from the meeting feeling rather skeptical about the whole thing and thinking that perhaps Chief MacIntyre was over-reacting to the letter he had received from Stephen Aronson. (Transcripts, evidence of Don Scott, Vol. 50, pp. 9206-8; and evidence of Frank Edwards, Vol. 65, p. 11718)

49. Almost immediately, Staff Sergeant Wheaton commenced his investigation. He involved Corporal James Carroll as his assistant throughout the investigation. The following is a list of the basic investigative steps taken by the R.C.M.P.:

(1) On February 4, 1982, Wheaton saw MacIntyre and received a general briefing from him. Wheaton testified that MacIntyre did not mention Patricia Harriss' name. (Reference, Transcript, Vol. 41, p. 7520) Wheaton believed that the R.C.M.P. had received all the statements from the Sydney Police Department files. He asked MacIntyre for all his documentation and MacIntyre told him that he had it all. (Reference, Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7520-1, 7523, and 7541) In his first major report, Wheaton wrote that MacIntyre had turned over all statements to Scott and Edwards. (Reference, Exhibit 19, p. 21, par. 3) Wheaton further testified that MacIntyre told him how he went to the park one night and, after walking around, concluded how the crime had occurred. Wheaton further testified that MacIntyre never mentioned Robert Patterson. Patterson was the individual who was in Wentworth Park on the night of the stabbing and referred to in the statements of Donald Marshall, Jr., and Patricia Harriss. (Transcript, Vol. 41, pp. 7516, 7520, and 7546)

(2) On February 4, 1982, Staff Sergeant Wheaton spoke with Detective Corporal Woodburn of the Sydney City Police. (Exhibit 99, pp. 7 and 12)

(3) Within days of their first involvement, the two R.C.M.P. investigators read the transcripts of the 1971 trial and preliminary. (Transcript, evidence of Jim Carroll, Vol. 47, p. 8717; Exhibit 99, p. 11, para. 10)

(4) Early in the investigation, Wheaton conducted a criminal records check for Ebsary and discovered that he had a record for carrying a concealed weapon. (Transcript, evidence of Harry Wheaton, Vol. 41, p. 7527; also Exhibit 18, p. 34)

(5) Almost immediately Wheaton conducted street interviews in the Ebsary neighbourhood. (Transcript, evidence of Harry Wheaton, Vol. 41, p. 7528)

(6) Sometime prior to February 8, 1982, Staff Sergeant Wheaton met with Mary Ebsary and learned that Roy Ebsary was a bizarre character who wore medals, was bisexual, and had a fetish for knives. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7529, and 7531; and Exhibit 99, pp. 1 and 13)

(7) On February 8, 1982, Staff Sergeant Wheaton interviewed James William MacNeil. During this interview, MacNeil used the

same words; namely, "dig man dig", that he had used in November, 1971, to describe the incident in the park to the Sydney Police. (Exhibit 99, p. 13, para. 15, and p. 42; also Transcript, evidence of Harry Wheaton, Vol. 41, p. 7531)

(8) On February 9, 1982, Staff Sergeant Wheaton and Corporal Carroll travelled to Pictou, to interview Mitchell Sarson. Initially, Staff Sergeant Wheaton and Corporal Carroll interviewed Sergeant Cole at the Pictou R.C.M.P. detachment to get some general background information concerning Mr. Sarson. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7535-36; Exhibit 99, pp. 45-46)

(9) Staff Sergeant Wheaton attempted unsuccessfully to locate Bobby Patterson. (Transcript, evidence of Harry Wheaton, Vol. 41, p. 7544; Exhibit 99, p. 10, para. 7)

(10) On February 11, 1982, Wheaton and Carroll met with Stephen Aronson. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7550-51; Exhibit 104)

(11) On February 11, 1982, Staff Sergeant Wheaton and Corporal Carroll went to Louisbourg and met Maynard Chant at the fish plant. They had a brief discussion with him at that time, and Chant then indicated that he wished them to return to his

home at a later time. (Exhibit 104; Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7556-57)

(12) The officers interviewed Mrs. Pratico on the morning of February 15, 1982. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7552-53; Exhibit 99, p. 14, para. 19)

(13) On February 16, 1982, Staff Sergeant Wheaton and Corporal Carroll returned to Louisbourg and obtained a statement from Maynard Chant. (Transcripts, evidence of Jim Carroll, Vol. 48, pp. 8744-56, and evidence of Harry Wheaton, Vol. 41, pp. 7556-9; and Exhibit 104; and Exhibit 99, pp. 47-48)

(14) In the continuing sequence of their investigation, Staff Sergeant Wheaton and Corporal Carroll travelled to Dorchester, New Brunswick, on February 18, 1982. While in Dorchester, a partial statement was taken from Donald Marshall. The statement was not completed as there was a prison incident going on at the time and the guards felt it was not prudent for Mr. Marshall to be seen with police members. (Exhibit 101; Transcripts, evidence of Harry Wheaton, Vol. 41, p. 7562; and evidence of Jim Carroll, Vol. 48, p. 8768)

(15) Following the return from Dorchester on February 18, 1982, Staff Sergeant Wheaton met with Doctor Mian on

February 19, 1982, and took a statement from him. Doctor Mian was the psychiatrist who had treated John Pratico. (Exhibit 99, p. 49; Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7567-7568)

(16) On February 22, 1982, Staff Sergeant Wheaton and Corporal Carroll met with Roy Ebsary at the Sydney R.C.M.P. building. (Reference, Exhibit 99, p. 17; Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7570, 7575, 7576, and 7577) After the initial meeting, Roy Ebsary called back and asked for Corporal Carroll to come see him. During this telephone conversation, Ebsary admitted to having stabbed Mr. Seale. Corporal Carroll then went to the Ebsary residence and met with Roy Ebsary who told him that "it was self defence" and that he had done it with a small pen knife. (Exhibit 104; also Exhibit 99, pp. 1-2, and 17)

(17) The following day, February 23, 1982, Staff Sergeant Wheaton and Corporal Carroll attended at Ebsary's residence and took a statement from him. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7574, 7579, and 7581; also Exhibit 103)

(18) The two officers arranged for Ebsary to meet with Mr. and Mrs. Marshall at the Sydney Subdivision on February 23, 1982. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7583-85)

(19) Also, on February 23, 1982, Staff Sergeant Wheaton and Corporal Carroll met with Crown prosecutor, Frank Edwards, at his office. (Transcript, evidence of Harry Wheaton, Vol. 41, p. 7586; also Exhibit 17, p. 3)

(20) On February 25, 1982, Corporal Carroll took a statement from John Pratico. (Exhibit 99, pp. 50-51; and Exhibit 104)

(21) On February 26, 1982, Inspector Scott briefed Chief MacIntyre concerning the investigation to date. The Chief read the recent Pratico and Chant statements. He did not avail himself of this opportunity to produce the partial statement by Patricia Harriss. (Transcripts, evidence of Harry Wheaton, Vol. 41, pp. 7594-96; evidence of Don Scott, Vol. 50, pp. 9225-26, 9235, 9246-8; Exhibit 99, pp. 18-19)

(22) On March 1, 1982, Inspector Scott went again to MacIntyre's office and obtained more statements. (Transcript, evidence of Don Scott, Vol. 50, pp. 9231-34)

(23) On March 1, 1982, Staff Sergeant Wheaton interviewed Patricia Harriss and took a statement. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7604-06; Exhibit 99, p. 54)

(24) After Staff Sergeant Wheaton's interview of Patricia Harriss, she was interviewed by Crown prosecutor, Frank Edwards.

Staff Sergeant Wheaton was present during this interview. (Transcript, evidence of Harry Wheaton, Vol. 41, p. 7612; Exhibit 17, p. 5)

(25) On March 2, 1982, Staff Sergeant Wheaton interviewed Terry Gushue and took a statement from him. Gushue had been with Patricia Harriss at the park in 1971. Staff Sergeant Wheaton found Mr. Gushue to be a reluctant witness who was possibly drinking at the time of the interview. A short statement was obtained. (Exhibit 99, p. 55; Exhibit 20, p. 12; Exhibit 21, p. 141; and Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7613-7616)

(26) On the very same day, March 2, 1982, Staff Sergeant Wheaton interviewed and took a statement from Wayne Magee. Wayne Magee had been the Chief of Police in Louisbourg in June, 1971, when Maynard Chant was interviewed. Mr. Magee's statement is set out in Exhibit 99 at page 87. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7616-7619)

(27) On March 4, 1982, Staff Sergeant Wheaton interviewed and took a joint statement from Mary and Gregory Ebsary. (Reference, Exhibit 99, p. 41; Transcript, evidence of Harry Wheaton, Vol. 41, p. 7619) While at the Ebsary residence Wheaton obtained some knives. The R.C.M.P. crime detection laboratory was able to determine that fibres on one of the

knives were consistent with fibres from the jackets of Sandy Seale and Donald Marshall. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7621-24; and Exhibit 99, p. 129)

(28) On March 9, 1982, Staff Sergeant Wheaton and Corporal Carroll again travelled to Dorchester Penitentiary. The officers interviewed Marshall and took a warned statement. (Exhibit 99, pp. 52-53; Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7632-35; Exhibit 104; Exhibit 114)

(29) On March 17, 1982, Staff Sergeant Wheaton met with former assistant prosecutor, Lou Matheson, in Port Hawkesbury and had a brief discussion concerning the 1971 trial. (Transcript, evidence of Harry Wheaton, Vol. 41, pp. 7648-49)

(30) Sometime during March, 1982, Staff Sergeant Wheaton spoke with Mr. Rosenblum who had been Mr. Marshall's chief counsel in 1971. (Transcript, evidence of Harry Wheaton, Vol. 41, p. 7651)

(31) On March 29, 1982, Staff Sergeant Wheaton met with David Ratchford and obtained a statement from him. (Exhibit 99, p. 68; Transcript, evidence of Harry Wheaton, Vol. 42, pp. 7660-61, and 7664)

(32) On April 2, 1982, Staff Sergeant Wheaton interviewed Roy Ebsary's daughter, Donna. (Transcript Vol. 42, p. 7661)

(33) On February 26, 1982, and April 5, 1982, Inspector Scott briefed Chief MacIntyre of the new developments of their investigation. (Transcripts, evidence of Harry Wheaton, Vol. 42, pp. 7672-73; and evidence of Don Scott, Vol. 50, pp. 9245-7; Exhibit 99, pp. 18, and 67)

(34) On April 21, 1982, Corporal Carroll and Constable Doug Hyde took a statement from Lawrence Burke. (Exhibit 99, p. 86)

(35) Staff Sergeant Wheaton took a statement from Donna Ebsary on April 17, 1982. (Exhibit 99, pp. 78-80; Transcript, evidence of Harry Wheaton, Vol. 42, p. 7723)

(36) Maynard Chant and his mother were interviewed by Corporal Carroll and Constable Hyde on April 20, 1982. (Transcript Vol. 42, p. 7736; Exhibit 99, pp. 81-85)

(37) John Burke was interviewed by Corporal Carroll and Constable Hyde on April 21, 1982, and a statement was obtained. (Transcript, evidence of Jim Carroll, Vol. 48, p. 8836; Exhibit 99, p. 86)

(38) On April 22, 1982, Doctor Virick was interviewed by Corporal Carroll and Constable Hyde. Doctor Virick was the physician who treated Donald Marshall for his knife wound. (Exhibit 99, p. 75)

(39) On April 27, 1982, Corporal Carroll and Staff Sergeant Wheaton interviewed Mrs. Pratico. (Transcript, evidence of Jim Carroll, Vol. 48, p. 8850; Exhibit 104)

(40) On May 11, 1982, Staff Sergeant Wheaton and Corporal Carroll went to the Sydney Police Station and Corporal Carroll took a statement from Sergeant Michael Bernard MacDonald, Gerald Taylor, Corporal John Johnson, Corporal Fred LeMoine, and Inspector Richard Walsh. (Transcript, evidence of Jim Carroll, Vol. 48, pp. 8850-51; Exhibit 99, pp. 92-96, and 102)

(41) On May 12, 1982, Corporal Carroll and Sergeant Wheaton went to St. John's, Newfoundland, to take a statement from Robert McLean. (Transcript, evidence of Jim Carroll, Vol. 48, pp. 8854-55; also Exhibit 99, p. 107)

(42) On May 19, 1982, Corporal Carroll interviewed and took statements from Sydney Police Sergeant Frank MacKenzie and Constable Leo Mroz. (Exhibit 99, pp. 97, 98-99)

(43) On May 20, 1982, Staff Sergeant Wheaton interviewed Sydney Police Sergeant John Mullowney. (Reference, Exhibit 99, p. 101) Corporal Carroll took a statement from Sydney Police Corporal Howard Dean. (Exhibit 99, p. 100)

(44) The investigators prepared reports dated February 25, 1982; March 22, 1982; April 6, 1982; April 7, 1982; April 19, 1982; May 20, 1982. (Reference, Exhibit 99, pp. 9-18, 58, 64, 72, 73, and 88) These reports were forwarded by the investigators to their superiors and on to the Attorney General's Department. The combined report ("Red Book") was sent to the Attorney General's Department on May 10, 1982. (Exhibit 19, p. 115)

50. It is submitted that a competent, detailed, and full investigation was conducted over a time period of a little more than two months concerning events which had occurred ten years earlier. The investigation provided sufficient evidence to warrant a Reference to the Nova Scotia Court of Appeal which resulted in the acquittal of Donald Marshall, Jr.

B. THE TESTIMONY CONCERNING THE MEETING INVOLVING MACINTYRE, WHEATON, AND HERB DAVIES

51. Counsel agree that Commission Counsel have referred to the basic relevant evidence surrounding the testimony of Staff Sergeant Wheaton and Corporal Herb Davies that John MacIntyre dropped the first statement of Patricia Harriss to the floor on April 26, 1982, and John MacIntyre's denial. It is submitted that Staff Sergeant Wheaton and Corporal Davies were both credible witnesses who were adamant that the paper dropping event occurred. (Transcripts, evidence of Harry Wheaton, Vol. 42, pp. 7704-19, and 8410; Vol. 46, pp. 8489-92; Exhibit 109; and evidence of Herb Davies, Vol. 47, pp. 8645-55)

52. Inspector Scott testified that Staff Sergeant Wheaton told him about the incident. (Transcript, evidence of Don Scott, Vol. 51, pp. 9320-21)

53. In their brief, Commission Counsel refer to counsel Bruce Outhouse's cross-examination of Frank Edwards wherein it is asserted that there are errors in Mr. Edwards' notes as to the dates on which certain events occurred. (Reference, p. 107 of Commission Counsel's brief) Corporal Carroll also testified as to the unreliability of an entry in Mr. Edwards' notes for February 21, 1982. (Transcript, Vol. 48, pp. 8779-80; Exhibit 104)

C. THE R.C.M.P. AND THE SYDNEY POLICE DEPARTMENT 1982

54. At page 97 and pages 145-46 of their brief, Commission Counsel refer to Gordon Gale's suggestion that the investigation be held in abeyance and state that there was reluctance on the part of the R.C.M.P. to conduct an investigation of John MacIntyre and the Sydney Police Department in 1982.

55. The R.C.M.P. officers and members involved in the investigation believed their mandate was to re-investigate the Marshall conviction and obtain evidence concerning Roy Ebsary's guilt. They believed they needed direction to conduct an investigation of MacIntyre or the Sydney Police either because of previous investigations where such direction was given or because of the question of their jurisdiction generally. (Transcripts, evidence of Harry Wheaton, Vol. 41, p. 7507, and pp. 7600-02; Vol. 42, pp. 7666-67, 7677-78, and 7702; evidence of Don Scott, Vol. 50, pp. 9210-11, 9224, 9288-94, 9298, and 9935-36; Vol. 51, p. 9353; evidence of Doug Christen, Vol. 54, pp. 9929, 9939, 9341, and 9982-85)

56. Harry Wheaton, the R.C.M.P. investigator, and Crown Prosecutor, Frank Edwards, believed Mr. Gale wanted the investigation of Chief MacIntyre and the Sydney Police to be held in abeyance. (Transcripts, evidence of Harry Wheaton,

Vol. 42, pp. 7676-7701; Exhibit 99, pp. 88-89; evidence of Gordon Coles, Vol. 78, pp. 13858, and 13954; evidence of Frank Edwards, Vol. 66, pp. 11797-98; Vol. 68, pp. 12139-40; Vol. 69, pp. 12324-25)

57. It is submitted that it was reasonable for the R.C.M.P. to accept bona fide advice that an inquiry into the activities of the Sydney Police should come after the Marshall and Ebsary matters had been through the Court system. (Transcripts, evidence of Gordon Gale, Vol.76, pp. 13539-41, 13549, and 13590; evidence of Doug Christen, Vol. 54, pp. 9914, 9917, 9928-29, 9941-45, 9951-52, and 9973-75; Exhibit 20, p. 4; evidence of Don Scott, Vol. 50, pp. 9279-80; evidence of Gordon Coles, Vol. 78, pp. 13857-58, and 13954; evidence of Frank Edwards, Vol. 68, p. 12140; Vol. 66, pp. 11797-98; evidence of Ron Giffin, Vol. 58, p. 10603; evidence of Harry How, Vol. 60, pp. 10797-98; Vol. 61, p. 10974)

58. The Attorney General's Department had various options to consider for investigating the 1971 Sydney Police activities. Their options included:

(i) constituting a Royal Commission of Inquiry;

(ii) calling an inquiry under the **Nova Scotia Police Act**; or

(iii) requesting an investigation by either another municipal police department or the R.C.M.P. (Transcripts, evidence of Don Scott, Vol. 51, pp. 9355-56; evidence of Gordon Gale, Vol. 76, p. 13528; Vol. 75, pp. 13323-24; evidence of Gordon Coles, Vol. 78, pp. 13828, and 13894-96)

59. The R.C.M.P. did not receive further advice from the Attorney General's Department concerning investigation of the Sydney Police. (Exhibit 20, p. 4; Transcripts, evidence of Gordon Gale, Vol. 76, p. 13589; evidence of Don Scott, Vol. 51, p. 9315; Exhibit 99, pp. 109, and 113)

PART V

CORRECTIONAL SERVICE OF CANADA AND NATIONAL PAROLE BOARD

60. Counsel agree that Commission Counsel's comments about Mr. Marshall's parole accurately reflect the evidence which is before the Commission.

61. The following references to Mr. Marshall's parole eligibility and parole are added for the Commissioners easy reference.

62. Mr. Marshall was admitted to Dorchester Penitentiary on June 20, 1972. He was eligible for parole as follows:

(i) for temporary absences (TLA's), eligibility would commence on June 20, 1975;

(ii) for day parole, eligibility would commence on June 4, 1978; and

(iii) for full parole, eligibility would commence on June 4, 1981. (Exhibit 112, pp. 2 and 120)

63. Mr. Marshall was granted day parole in late June, 1978, approximately three weeks after his eligibility date. (Exhibit 112, pp. 113 and 116)

64. Mr. Marshall received Temporary Absence (TLA) for swimming as early as October or November of 1975. (Exhibit 112, pp. 14-15, and 80)

65. By August 12, 1980, Mr. Marshall had received as many as 35 escorted TLA's, mainly for local sports programs. (Exhibit 112, p. 147)

PART VI

EXAMINATION OF THE JUSTICE SYSTEM IN NOVA SCOTIA

A. GENERAL REMARKS

66. At the conclusion of the "Marshall" phase of the inquiry on June 28, 1988, Chief Commissioner Hickman observed that "...this detailed examination of the experience of one individual has raised questions about the impartiality of treatment afforded by the justice system to all individuals, be they black, Indian, white, unknown or well known". (Reference, Transcript Vol. 82, p. 14474) To assist in its examination of the justice system in Nova Scotia, and to make meaningful recommendations, the learned Chief Commissioner indicated it would be necessary to examine how the system responds in a variety of situations and thus "...to determine whether or not these relationships [between police, prosecutors, and the Attorney General] are such that impartial treatment of all individuals is assured". (Reference, Transcript, Vol. 82, pp. 14475-6) Consequently, two investigations involving prominent citizens of this province; namely, Roland J. Thornhill and Billy Joe MacLean, were the subject of the final phase of the Inquiry in September, 1988. In keeping with the mandate and authority of the Inquiry, "...the purpose of this whole exercise is to ascertain what practices are followed, have been followed, by the Attorney General's Department in the Province of Nova Scotia when dealing with investigations carried out by the police".

(per Chief Commissioner Hickman, Transcript, Vol. 84, p. 14791, emphasis added)

67. In keeping with the aforementioned object and scope, the R.C.M.P. proposes to examine the evidence tendered during the Inquiry in each of these two cases as it touches upon the R.C.M.P. However, it is important to initially set out some principles related to the right to commence criminal proceedings by way of prosecution and the discretion associated with it.

68. By virtue of s. 455 of the **Criminal Code** R.S.C. 1970, c. C-34, **anyone** who "on reasonable and probable grounds, believes that a person has committed an indictable offence **may** lay an information in writing".

69. In **Attorney General of Quebec v. Lechasseur et al.** (1981) 63 C.C.C. (2d) 301, the Supreme Court of Canada held provincial provisions of the **Youth Protection Act** inoperative because they conflicted with the **Juvenile Delinquents Act** and with Section 455 of the **Criminal Code**. The provincial legislation in question provided that where any person had reasonable cause to believe a child committed an offence, the director of youth protection was seized with the case before the institution of any judicial proceedings. Laskin, C.J.C., as he then was, ruled that it was "uncontestable" that s. 455 was

within federal competence as an exercise of power in relation to the criminal law, including procedure.

70. The right to lay an information is one vested in the individual citizen. As Laskin C.J.C., said at 63 C.C.C. (2d) 307 of **Lechasseur**, section 455 "reflects a fundamental precept in the right of an ordinary citizen, the victim of a criminal offence, to lay an information against the offender".

71. The power to prosecute is discretionary. In his speech in the House of Commons in 1951, Sir Hartley Shawcross said:

> It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject to prosecution. Indeed the very first regulations under which the Director of Public Prosecutions worked provided that he should...prosecute wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration. (H.C. Debates, Vol. 483, col. 681, Jan. 29, 1951)

In **The Attorney General, Politics and the Public Interest**, J. Ll. J. Edwards said that these views continue to represent the proper theory of criminal prosecution. Professor Edwards reviewed the various considerations that constitute the public interest and concluded that it is impractical to lay "...down hard and fast rules that will confer a high degree of

predictability as to the result of their application. The very nature of discretionary authority requires resistance to any attempt to develop rigid rules that cannot encompass every possible contingency." (p. 426, also reference generally chapter 13, "Discretionary Factors in the Decision to Prosecute" pp. 403-442; also **R. v. Commissioners of Police of the Metropolis, Ex p. Blackburn** [1968] 2 Q.B. 118 (C.A.) per Denning M.R. at 135-139)

72. The Board of Commissioners of Police of Metropolitan Toronto came to similar conclusions respecting the difficulty of precisely defining how a discretionary power ought to be exercised. Philip C. Stenning in a study paper prepared in 1981 for the Law Reform Commission of Canada entitled **Legal Status of The Police (Criminal Law Series)** quoted from the Toronto inquiry as follows at page 128:

> The question of when, by whom, and under what circumstances, a decision not to prosecute is proper exercise of discretionary power, can never be satisfactorily defined in precise terms. Any attempt to lay down rules so that discretion could be exercised in a uniform manner does not seem to offer any hope that suspicions of its improper use would never arise in the future. Indeed, if some such rule was in existence, it could actually discourage the use of quite proper discretion under some circumstances. (p. 92 - Emphasis added)
>
> Noting that such discretion had in fact been exercised by officers at various levels of the force (up to the level of deputy chief) in

relation to the cases it had inquired into, the board concluded that:

> Criticizing a judgment must not be interpreted as a restriction on the ability of and the need at times for senior officers to use their judgment and their discretion. As long as it is exercised impartially, fairly, and with reason, it should not be discouraged. (Ibid.)

73. Within the R.C.M.P., as well as other police organizations, the responsibility for the ultimate exercise of the discretion must frequently rest with senior officers in difficult, important, or highly sensitive cases. The Commissioner of the R.C.M.P., as the "chief constable", is the person who must finally answer for the decisions of his officers and the deployment of his policing resources. (References: **Wool v. The Queen and Nixon** (1981), 28 C.L.Q. 162 (F.C.T.D.); **R. v. Commissioner of Police of the Metropolis, ex parte Blackburn**, supra, par. 71; Edwards, **The Attorney General, Politics and the Public Interest**, supra, par. 71, at pp. 404-5; Stenning, **Legal Status of The Police** supra, par. 72, at pp. 128-130)

74. While the responsibility for the institution of proceedings by way of prosecution is primarily vested in the police officer who conducts a criminal investigation, a mature exercise of the responsibility often dictates consultation and co-operation between the police and the law officers of the Crown. In an address to the 73rd Annual Conference of the

Canadian Association of Chiefs of Police, the Honourable R. Roy McMurtry, then Attorney General of Ontario, said:

> "In a proper working relationship between two professionals who have mutual confidence in each other's professional skills and judgment, it should be fairly rare that any question should arise as to who has the final decision to initiate or not to initiate criminal proceedings.
>
> The Criminal Code specified that only for a handful of offences is the consent of the attorney general required before a prosecution can be launched. The oath by which a prosecution is commenced is the oath of the officer who swears the information, and not the oath of the crown law officer who advises the officer as to the law. And the fundamental principle here is that no one can tell an officer to take an oath which violates his conscience and no one can tell an officer to refrain from taking an oath which he is satisfied reflects a true state of facts.
>
> Crown counsel are, of course, available for consultation during an investigation and prior to the laying of a charge. They should be available when an officer is deciding whether to lay a charge or which one of a number of possible charges should be laid. This kind of consultation must be encouraged as a great number of potential problems can be and in fact are avoided by timely consultation between crown attorneys and police in those cases where some legal question really does need to be addressed at an early stage. This is particularly so in complex and involved cases or highly specialized types of prosecutions.
>
> The law officers of the crown in fact have a duty to advise as to the law relating to a contemplated prosecution. The crown law officers also have a similar duty to advise whether it is in the public interest that a prosecution be commenced. And of course, once a charge has been laid the law officers of the

> crown, as officers of the court, must maintain direction of the course of the prosecution.
>
> But it is often overlooked by the public that no government, no attorney general, no crown law officer, has any power to direct any police officer that the officer must swear his oath upon an information for an alleged offence. (**R.C.M.P. Gazette** (1979), Vol. 41, No. 12, p. 5)

75. A Peace Officer, "...as a matter of police organization, ...must act on the advice and often on the instructions of his superior officers and the legal department". (**Glinsky v. McIver**, [1962] 1 All E. R. 696 at 701 per Viscount Simonds; also at 708 [Lord Radcliffe] and 710 [Lord Denning])

76. The need for consultation between and among the police and Crown law officers to which the Honourable Roy McMurtry referred is underscored by the legal and contractual framework within which the R.C.M.P. work.

77. In provinces in which the R.C.M.P. provide provincial policing services, the Force enjoys a relationship with the provincial Attorney General in which he and his department provide legal advice and assume responsibility for proceedings by way of prosecution relating to violations of the Criminal Code in which the R.C.M.P. conduct the investigations.

78. In cases of special importance, of unusual complexity, of particular sensitivity, or of uncertain legal principles, it

is natural and proper that police officials will seek, and Crown law officers will provide, advice on a wide variety of aspects in relation to cases under investigation. In each of: the Donald Marshall 1982 re-investigation, the Roland Thornhill case, and the Billy Joe MacLean prosecution, one or more of the foregoing factors existed meriting consultation at a senior level. Such consultation would have ensured that proper principles were applied and knowledgeable advice given. Police acting in good faith ought not to be criticized for seeking and accepting advice from the law officers of the Crown, at whatever level, nor should law officers hesitate to give advice, so long as the advice is not given for improper or corrupt reasons.

79. It is submitted that a review of the facts in both the Thornhill and MacLean cases demonstrates that the R.C.M.P. acted in good faith in dealing with the facts of the cases and in responding to the advice and action of the Department of the Attorney General and properly fulfilled its public duty.

B. THE ROLAND THORNHILL CASE

80. In the Thornhill case, the evidence consisted essentially of the following:

(i) an agreed Statement of Facts (Exhibit 163):

(ii) documentation from the relevant portion of the files of the Department of the Attorney General and the R.C.M.P. (Exhibit 165, 166, and 167); and

(iii) the testimony of three former ranking R.C.M.P. officers and five senior officials of the Department of the Attorney General.

81. The documentary exhibits were selected by Commission counsel following full disclosure to them by both the Attorney General and the R.C.M.P. of all information and documents in their respective files as well as access to any departmental representatives Commission Counsel wished to interview. (Transcript, Vol. 83, p. 14495)

82. As an aid to the interpretation of the R.C.M.P. documentation, a chart of the individuals within the organization of the R.C.M.P. in November, 1980, whose names appear therein, is set out below. The names of those persons who testified at the Inquiry appear in bold type.

Commissioner Robert Simmonds

Deputy Commissioner (Operations)
Ray Quintal

Director of Criminal Investigations, (D.C.I.)
Assistant Commissioner Thomas Venner

Assistant Director of Criminal Investigations,
Federal (A.D.C.I. Federal)
C. Supt. Riddell

"C" DIRECTORATE (Headquarters)	HEADQUARTERS	"H" DIVISION
S/Sgt. Jay (Directorate of Investigation)	Supt. Roy, Officer in Charge, Commercial Crime Branch(OIC, CCB)	**C. Supt. Hugh Feagan** Commanding Officer
	Insp. Kozij Officer in Charge Commercial Crime Branch, Operations (O.I.C., C.C.B. Op.)	Supt. Christen Officer in Charge of Criminal Investigations Branch, (CIBO)
	Insp. McConnell Officer in Charge Commercial Crime Branch, Personnel & Administration (O.I.C., CCB, P&A)	Insp. M.J. McInnis (A.C.I.B.O.)
	S/Sgt. Dillabaugh NCO i/c C.C.B. Government Frauds	Insp. Blue, Officer in Charge, Commercial Crime Section (O.I.C., C.C.S.)
	Sgt. Pratt Commercial Crime Branch	Sgt. Joop Plomp Commercial Crime Section
		Cpl. Cyril House Commercial Crime Section (Investigator)

83. The Thornhill investigation got underway in April, 1980, when the Premier of Nova Scotia was reported to have said that Roland Thornhill's bank loans were settled after he had been appointed to the Executive Council (Reference, Transcript, evidence of C. Supt. Feagan, Vol. 83, p. 14504; and Exhibit 165, p. 8). Prior to April, there had been only casual inquiries by the R.C.M.P., prompted by rumours which had been circulating. The inquiries had failed to establish when the settlement had been reached in relation to Mr. Thornhill's appointment to cabinet. In any event, no formal complaint had been filed nor had any request been made to commence an investigation. (Transcript, evidence of C. Supt. Feagan, Vol. 83, pp. 14506, and 14617-20)

84. It is unclear from the documentation whether the investigation was initiated by a request from Gordon Gale, Director (Criminal) of the Department of the Attorney General (Reference, Exhibit 165, p. 7) on April 10, 1980, or as a result of an internal R.C.M.P. decision based on the Premier's statement which then prompted Chief Superintendent Feagan and Inspector McInnis to meet with Gordon Gale on April 10, 1980. (Reference, Exhibit 165, p. 8) In either event, there was a willingness on the part of both the R.C.M.P. and Gordon Gale, of the Department of the Attorney General, that there should be a complete police investigation.

85. During the course of the investigation, a controversy arose when the investigator, Corporal Cyril House consulted local Crown prosecutor, Kevin Burke. Burke was assigned to the file by the Chief Prosecuting Officer for Halifax County, David Thomas, at the request of the R.C.M.P. Mr. Burke was one of the most experienced prosecutors in the field of commercial crime. (Reference, Transcripts, evidence of Martin Herschorn, Vol. 85, pp. 14973-4; evidence of David Thomas, Vol. 84, pp. 14878 and 14898) When the Deputy Attorney General, Mr. Gordon Coles, learned of this fact, he directed Mr. Gordon Gale to get in touch with the R.C.M.P. As a result, Mr. Gordon Gale contacted the R.C.M.P. on July 24, 1980, to express his "extreme displeasure" that a local Crown prosecutor had been consulted. He wrote to Chief Superintendent Feagan on July 25, 1980, instructing that there was to be no further contact with prosecutors until the investigation was complete and the report submitted to the Department. (Exhibit 166, **Agreed Statement of Facts**, par. 14 and 15; Exhibit 167, pp. 12 and 18)

86. The R.C.M.P. submits that prior to July 25, 1980, there were no specific instructions concerning access to the local prosecutors by Mr. Gordon Gale or by anyone within the Department of the Attorney General. Chief Superintendent Feagan testified in Volume 83 of the transcripts, at page 14508, that "...I can't recall them saying not to use Crown counsel as we normally did for advice during the investigation". (Reference,

also, Exhibit 165, memo of Inspector McInnis at p. 12; and memo of Superintendent Christen at p. 20) While there may have been an instruction to forward the report to Mr. Gordon Gale or Mr. Coles, such an instruction would not imply that there should be no communication with a prosecutor. (Reference, Transcript, evidence of Martin Herschorn, Vol. 85, p. 14967) Contrary to what may have been the impression created by Mr. Coles' press release on November 6, 1980, (Reference, Exhibit 165, p. 58) there was no general practice of referring major or complex criminal investigations to a senior counsel in headquarters before consulting a prosecutor. Such reference to a senior counsel occurred, if at all, on an ad hoc basis. (Reference, Transcripts, evidence of Chief Superintendent Feagan, Vol. 83, pp. 14545 and 14590-5; evidence of D/Commissioner Quintal, Vol. 84, p. 14712; evidence of David Thomas, Vol. 84, p. 14888) This was the only case in Chief Superintendent Feagan's experience in Nova Scotia where such an arrangement was indicated. He testified that he had heard of some other cases, both inside and outside the realm of cases involving political allegations or political figures. (Transcript, Vol. 83, p. 14624)

87. Chief Superintendent Feagan testified that there is considerable value for investigators to have access to local prosecutors. He also expressed that view in his letter of December 30, 1980, to Mr. Coles. (Transcript, Vol. 83, pp. 14511, and 14622; Exhibit 165, pp. 104-5; also, address of

R.R. McMurtry to 73rd Annual Conference of the Canadian Association of Chiefs of Police, supra, par. 74)

88. In any event, the final report from the R.C.M.P. was forwarded to Mr. Gordon Gale by Chief Superintendent Feagan on September 11, 1980. (Reference, Exhibit 165, p. 24) It recommended **inter alia** that there existed a prima facie case under s. 110(1)(c) of the **Criminal Code** and requested a prosecutor be appointed for consultation. (Exhibit 164, paragraph 17)

89. The reply came by way of a covering letter from Mr. Coles dated October 29, 1980, enclosing his memorandum to the Attorney General as well as a press release that was to be issued that afternoon to the effect that there was no evidence to warrant the laying of charges in the matter. (Exhibit 165, pp. 39 and 43)

90. It is submitted that this public action without meaningful advance notice prevented consultation or discussion of the case between the police and law officers of the Crown. It did not, however, prevent the police from independently determining whether or not an information ought to be laid.

91. In his evidence before the Inquiry, Mr. Herschorn agreed that by taking a public position it was more difficult

for the Attorney General and his officials to then change their minds. (Reference, Transcript Vol. 85, p. 14970) Chief Superintendent Feagan thought the press release an unusual way to communicate with the R.C.M.P. and was concerned that the Department of the Attorney General was purporting to direct that no charge would be laid. (Transcript Vol. 83, pp. 14517-8)

92. It is significant, however, that despite the press release, the R.C.M.P. proceeded to review the case following the prescribed channels within the Force. The press release led directly to the November 5, 1980, meeting at headquarters. (Reference, Transcript, evidence of Deputy Commissioner Quintal, Vol. 84, p. 14731) As Chief Superintendent Feagan testified at Vol. 83, pages 14526-7:

> "We decided that the route to follow now, the only alternative we had was to go to my commissioner in Ottawa, which is general policy that when there's a disagreement or a difference of opinion between a commanding officer of a division of the force, a province, that is, with the Attorney General's Department, the Attorney General or his Deputy, that the proper procedure then is to go to our higher level, who is the Commissioner, to help iron out the matter."

93. Commissioner Simmonds (retired) pointed out the value and importance of this independent review process which took place at headquarters under the direction of Deputy Commissioner Ray Quintal. The former Commissioner had insisted that there be

a review of the matter so that it would be totally removed from any local concerns or perceived pressures. He testified:

> "...it provided for an opportunity for a review by very experienced policemen, totally apart from the local scene. And, you know, if there is a value to the way the policing is done through these contracts, that's one of them. Because if there is local heat, which can happen, you know, or perceptions of it can develop, there is another mechanism one step back by police to review it with very senior and experienced people and come to decisions." (Transcript, Vol. 86, pp. 15217, and 15235-6)

94. A review, however, is more than just one meeting. It is submitted that the meeting of November 5, 1980, attended by investigators and officers from both "H" Division and Headquarters was not intended to be a conclusive meeting. (Reference, Transcript, evidence of Commissioner Simmonds, Vol. 86, pp. 15228 and 15247) The minutes of the meeting held on November 5, are found in Exhibit 165 beginning at page 55. While the minutes do accurately reflect the nature of the meeting, it is important to note that Deputy Commissioner Quintal in all probability did not receive a copy of the minutes following the meeting. His name or position does not appear in the transit slip which accompanied the draft of the minutes which was circulated to many of those from headquarters who were present. (Reference, Exhibit 165, p. 47) Further, Deputy Commissioner Quintal testified that he did not recall seeing the minutes. (Transcript, Vol. 84, p. 14735)

95. It was a clear consensus of the meeting that there was a strong case against Mr. Thornhill, and that Chief Superintendent Feagan should tell the Attorney General's Department that such was his view in order to get a reaction to take back to headquarters. No decision was made at this meeting to lay a charge. (Reference, Transcript, evidence of Deputy Commissioner Quintal, Vol. 84, pp. 14742-3; and 14751-2) Had such a decision been taken, Deputy Commissioner Quintal testified that he would have so indicated by way of written direction to Chief Superintendent Feagan. Furthermore, Chief Superintendent Feagan testified in explaining the conclusions of the November meeting that appear at page 57 of Exhibit 165, that conclusion number three relating to informing the Attorney General of the intention to proceed with a charge, followed conclusion number two which was to request the Attorney General to reconsider his opinion. In Chief Superintendent Feagan's words, at Volume 83, page 14543, "...if we decided in the final analysis to lay a charge in spite of the Attorney General saying no, well, then we would advise him in writing before we did so.".

96. The actions taken by the officers of "H" Division following the November meeting also are indicative that no firm decision had been made in November to lay a charge. If such a decision had been taken, presumably a charge would have been laid before receipt of Deputy Commissioner Quintal's instruction

of December 17, 1980. Chief Superintendent Feagan's memorandum of November 19, 1980, to Assistant Commissioner Venner, in Exhibit 165, pages 79-80, further demonstrates that no decision was taken to lay a charge at the November 5, 1980 meeting. In that memorandum Chief Superintendent Feagan related the results of his meeting with Attorney General How and Deputy Attorney General Coles as well as the dilemma facing the police "provided we do have sufficient evidence to lay a charge". In his concluding sentence, Chief Superintendent Feagan sought Assistant Commissioner Venner's direction in this regard on an urgent basis. This statement also demonstrates that no decision had been made to proceed with a charge.

97. The review process was one undertaken by Deputy Commissioner Quintal with the assistance of the Director of Criminal Investigations, Assistant Commissioner Thomas Venner. The meeting on November 5, provided an opportunity for the investigators and senior officers both at headquarters and in "H" Division to provide their input. Both Quintal and Venner were, in the words of former Commissioner Simmonds, "...very experienced policemen that had themselves done a lot of investigative work before they got into those offices and they would review the work, ask questions and come to conclusions.". (Reference, Transcript, Vol. 86, p. 15230) While there is no hint of any direct contact by any individual within the Department of the Attorney General of Nova Scotia with either

Quintal or Venner, Assistant Commissioner Venner's memorandum of June 10, 1980, at page 11 of Exhibit 165, affords a glimpse at his character and integrity. In that memorandum to Deputy Commissioner Quintal, Venner asserted the importance of the police directing the conduct of investigations and the need to stress that in the strongest terms to the provincial Attorneys General.

98. Following the November 5, meeting, staff work was completed at headquarters, communication took place between "H" Division and headquarters, and Venner prepared a draft which was reviewed by Quintal. Quintal also completely reviewed the file. Deputy Commissioner Quintal was, quite properly, not prepared to base a decision on "two or three hours...[of]...briefing on a complex investigation". (Reference, Transcript, Vol. 84, p. 14776; see also, evidence of Deputy Commissioner Quintal, Transcript Vol. 84, pp. 14775, 14856; and Exhibit 165, p. 93, first paragraph of letter from Quintal to Feagan on December 17, 1980)

99. It does not matter whether there is agreement with the reasons given by Deputy Commissioner Quintal in his letter of December 17, 1980, in which he directed Chief Superintendent Feagan that there would be no charge against Thornhill. What is important is that the proper process was followed within the R.C.M.P. and that the process was free of improper external

influences. It is submitted that there is no evidence whatsoever that there was any extraneous influence. Indeed, the evidence is to the contrary.

100. It would have been wrong for Deputy Commissioner Quintal to have directed that a charge be laid against Roland Thornhill merely to demonstrate to Mr. Coles that the police have the ultimate right to lay a charge.

101. Deputy Commissioner Quintal's decision was based upon his review of the file and his assessment of the strengths and weaknesses of the case. Although Deputy Commissioner Quintal acknowledged that there was evidence which would support a charge, his decision to exercise a discretion not to lay a charge was neither unusual nor based on Thornhill's political connections. In Deputy Commissioner Quintal's view, one could not reject legal advice lightly. (Transcript Vol. 84, pp. 14745-6)

102. Deputy Commissioner Quintal did not accept the Deputy Attorney General's view of the intent required by section 110(1)(c) of the **Criminal Code**. (Reference, Transcript, Vol. 84, pp. 14783-4; and Exhibit 165, p. 94) While Quintal was concerned with the problems involving the Division's working relationship with the Attorney General should the police proceed with a charge, that was not the basis on which a decision was

made. Rather the decision not to lay the charge was based on Quintal's view that it seemed "very unlikely...that a jury of twelve, no matter how instructed, would ever unanimously agree that a conviction was appropriate". (Exhibit 165, p. 96; see also, Transcripts, evidence of Chief Superintendent Feagan, Vol. 83, p. 14655; and evidence of Deputy Commissioner Quintal, Vol. 84, pp. 14801 and 14845-6)

103. Significantly, Quintal testified in Vol. 84, at page 14793, as follows:

> "If I had been convinced that we could have obtained a conviction, I would have gone ahead regardless of the consequences."

104. In Quintal's view, there were many problems with the strength of the case. The arrangement was one which was not unusual given the fragile nature of Thornhill's financial circumstances. Given his belief that two of the banks were in the process of writing off the debt entirely, Quintal thought that there was merit to the view that bankruptcy may have been cheaper for Thornhill. (Reference, Transcript, evidence of Deputy Commissioner Quintal, Vol. 84, pp. 14745; 14788-9; 14814-5; 14818-9) The effect of bankruptcy upon a political career is highly speculative. He further was of the view that it would have been an act of bad faith for the police, having failed to establish a case under section 110(1)(c) of the Code to have

then turned the focus of the investigation against Thornhill into other areas, particularly given the absence of a complainant. (Transcript, Vol. 84, p. 14798-9; Exhibit 165, p. 96)

105. There are a number of factors which a police officer may consider in varying degrees in determining whether or not to exercise a discretion. Chief Superintendent Feagan identified some of those factors as including the impact of a prosecution upon an accused person, potential defenses that may be raised and the likelihood of a conviction. (Transcript, Vol. 83, p. 14688, also Edwards, **The Attorney General, Politics, and the Public Interest**, supra, para. 71)

106. It is the process by which the discretion is exercised that is important. Former Commissioner Simmonds aptly described it as follows:

> "...There may be different views with respect to the quality of the decision, but the process was followed properly. And as far as I can see, there was absolutely no influence brought, improper influence brought into that process excepting, as you say, in the background there was always the knowledge that the Attorney General had already taken a position. So it was real. It was there. But that would not really affect officers like Venner and Quintal in coming to a judgment on the quality of the case. I mean I'm quite sure of that, but you'd better hear that from them." (Transcript, Vol. 86, p. 15242)

107. The evidence is unequivocal. There was no communication between representatives of the Department of the Attorney General of Nova Scotia and the two R.C.M.P. officers at headquarters who had the responsibility for conducting the review of the Thornhill file. (Reference, Transcript, evidence of Deputy Commissioner Quintal, Vol. 84, pp. 14807 and 14859) Commissioner Simmonds was not briefed on the outcome of the review and the reasons for the decision until December 23, 1980. (Reference, Transcript, evidence of Commissioner Simmonds, Vol. 86, p. 15220; and Exhibit 167) Commissioner Simmonds had his first contact with the Honourable Harry How, the Attorney General of Nova Scotia, on this matter well after the decision was taken. That occurred on January 29, 1981, when they met at a conference at the University of British Columbia. The Attorney General asked the Commissioner at that time if he would provide him with a letter outlining the outcome of the review. Commissioner Simmonds used the opportunity to point out that as a matter of principle the police have the right to lay a charge independent of any legal advice received and that a charge might well have been laid in this case had the outcome of the independent review carried on at headquarters been different. (Transcript, evidence of Commissioner Simmonds, Vol. 86, p. 15243; Exhibit 165, pp. 117-8)

108. There is nothing in the record to suggest that the renegotiation of the provincial policing contract had any

bearing in the ultimate decision. (Transcript, evidence of Chief Superintendent Feagan, Vol. 83, pp. 14551 and 14634-5)

109. The internal memoranda from Thomas Venner to Inspector Kozij (Reference, Exhibit 165, p. 119) and to Chief Superintendent Feagan (Reference, Exhibit 165, p. 115) are further testimony to the R.C.M.P. position that they would have proceeded with a charge had their view of the facts been different. As Venner pointed out to Kozij, the:

> "...R.C.M.P. decided not to proceed. It happens that in this particular case, that was the same course of action preferred by the A. G. But it might not have been nor might the two positions coincide the next time this comes up. The decision was made based on the evidence and lack of it".

110. It is abundantly clear from the evidence of former Commissioner Simmonds that both Quintal and Venner had the confidence of their Commissioner and that they would also have had his support had they come to a different conclusion upon the review.

111. It is idle to speculate what would have been the result had Mr. Coles not issued a press release and had Chief Superintendent Feagan not referred the matter to his headquarters. The outcome might then have depended upon the opinions of the local prosecutor. (Reference, Transcript,

evidence of Chief Superintendent Feagan, Vol. 83, p. 14516) It is, however, submitted that the observations of former Commissioner Simmonds to Commission Counsel are appropriate:

> "Draw a lesson from this case. When cases of this nature come along that are very sensitive, and politically sensitive, for goodness sakes don't take it outside the normal realm of handling cases whether he's a politician or a plumber. Deal with the Crown in the usual way and just let it proceed. Because the perceptions of bad motives suddenly arise when it's handled in a different way." (Transcript, Vol. 86, p. 15253)

C. THE BILLY JOE MACLEAN CASE

112. On October 21, 1983, Mr. Arnold Sarty, the Auditor General, contacted the R.C.M.P. and requested a meeting with Inspector K. J. Blue (retired) then the Officer in Charge of the Commercial Crime Section, Halifax. This meeting was held on October 26, 1983, and attended by Auditor General Arnold Sarty, Deputy Auditor General Paul Cormier, Inspector Blue, Staff Sergeant Walt Leigh, and other members of the Auditor General's staff. The Auditor General's staff had prepared three packages outlining suspected expense claim irregularities of certain M.L.A.'s. (Exhibit 173, pp. 12-14)

113. From the outset, Staff Sergeant Leigh's report indicates that there was uncertainty among the Auditor General's staff whether the Auditor General "should make a formal request for investigation to the police, the Speaker of the House, or the Attorney General". (Reference, Exhibit 173, p. 14) This may be due in part to the fact that expense accounts of M.L.A.'s are monitored by the Speaker's office for compliance with regulations, appropriate supporting documentation, and are then approved for payment. (Transcript, evidence of Paul Cormier, Vol. 87, p. 15341)

114. Superintendent Richard MacGibbon was uncertain how to proceed in this unique matter, given the involvement of the Speaker's office, and the possibility of certain privileges and immunities attached to that office. He testified as follows:

> "I was equally aware at that, following the briefing by Blue that there was some problem with the documentation. The documentation had come from the Speaker's office. It had been given to us on a confidential basis by the Auditor General. I considered that what we were, at that time that we were being consulted by the Auditor General. And I instructed, and when I became aware that there was a meeting due in two days hence, I directed that I wanted to attend that meeting." (Transcripts, Vol. 87, pp. 15419; also Vol. 87, pp. 15421-3)

115. Not unreasonably, Superintendent MacGibbon and Inspector Ken Blue recommended to the Auditor General and his deputy on

October 28, 1983, that the matter of the M.L.A. expense claims be brought to the attention of the Attorney General. (Exhibit 173, p. 17; and Transcript, evidence of Richard MacGibbon, Vol. 87, pp. 15420-22)

116. On November 22, 1983, the Attorney General's office became involved when a meeting took place between officials from the Auditor General's office, the Department of the Attorney General, and the Royal Canadian Mounted Police. It is clear from the testimony and other evidence noted below of those individuals who attended the meeting, that it was a conclusion of this meeting that the Deputy Attorney General, Gordon Coles, would review the Auditor General's file and the law and advise the R.C.M.P. if his research disclosed any irregularity meriting a criminal investigation.

117. Inspector Ken Blue noted in his Continuation Report of November 22, 1983:

> "Mr. Gordon Gale and Mr. Cole, (sic) of the Attorney General's Department, had been briefed by Mr. Sarty and Mr. Cormier prior to our arrival. Mr. Coles indicated that he wished to review provincial statutes involved and review some of the copy material presented and his Department would advise at a date the course of action they would recommend." (Exhibit 173, p. 21)

118. The then Deputy Auditor General Paul Cormier testified:

> "As I recall the decision, the course of action to be followed subsequent to the meeting was that the Attorney General's Department would take it under advisement, be in contact with the R.C.M.P., and decide what action should be taken." (Transcript, Vol. 87, p. 15355; see also Exhibit 173, p. 8)

119. Chief Superintendent MacGibbon said:

> "I was informed by Mr. Coles that he had been briefed by the Auditor General, and I use that at large because I don't recall who specifically he mentioned. And he concluded his comments with that he had all that he required. He would take the matter under advisement, and I'm not quoting, I'm paraphrasing. And that he would like to look at some of the Regulations and some of the Statues. (sic) And that when he was finished he would be in touch with us and I understood that to mean the RCMP. (Transcript, Vol. 87, pp. 15426-7)

120. Mr. Coles said on direct examination at Volume 88, page 15572:

> "We took the material back and we were going to look at it and see whether there was anything irregular and if so, if there were irregularities whether or not they were actionable, whether there was any wrongdoing involved. And if there was wrongdoing involved, of course, then we would have presumably asked for an investigation."

and later at page 15582, of Volume 88, he testified as follows:

> "No, I had no expectations that there was anything required of us to go to the RCMP. We will look at it, and consider it, and if there was a nec...in our opinion a basis for an investigation, then we would have asked the RCMP police for an investigation. That's the way I would have thought."

121. Gordon Gale testified in relation to this meeting of November 22, 1983, that:

> "...[Mr. Coles] felt it was a matter that the Auditor General should first discuss with him and then the, that he would then make the decision as to whether or not there is a case in which the R.C.M.P. should be consulted." (Transcript, Vol. 88, p. 15715)

122. While he did not attend the November meeting, the Honourable Ronald Giffin, the Attorney General, was quoted to have said the following during a press conference a year later:

> "The decision which we had to make in the attorney general's department was whether or not this matter ought to be referred to the RCMP for an investigation. When we completed our review of the matter we were satisfied with the explanations given and there was nothing that had to be turned over to the RCMP. The allegation which Mr. Cameron made was that I as Attorney General had intervened and stopped a RCMP investigation in progress, that allegation is totally untrue." (Exhibit 176, p. 6, emphasis added)

123. Doubt also existed about the legal basis of the regulations under which M.L.A.'s were reimbursed for their

expenses. In the March 31, 1984, report of the Auditor General, the following item appeared:

> "In the March 31, 1983, Report of the Auditor General, there was a brief article noting that a review of the expenses of the members of the House of Assembly, Members of the Executive Council, Deputy Ministers, and ministerial assistants had been carried out. This article concluded "...there were serious inadequacies in the House of Assembly Act, the Executive Council Act, and the accompanying regulations, relating to expense allowances for Members of the House and Executive Council. These inadequacies relating to voids, contradictions, overlaps, and other deficiencies have made it extremely difficult in many cases, to be certain of the intent of the legislation. The possibilities for misinterpretation and error also posed problems for the claimants and those responsible for the approval of expense claims." (Exhibit 173, p. 6)

124. Superintendent MacGibbon was well aware of this difficulty with the regulations. He testified that in March or April, 1984, Gordon Gale explained to him that the regulations were not proper regulations of the Government of Nova Scotia, but rather were guidelines or club rules. (Transcripts, Vol. 87, p. 15449; see also evidence of Richard MacGibbon, Vol. 87, pp. 15436-7)

125. The law pertaining to the privileges of M.L.A.'s and the Speaker was sufficiently uncertain and complex, and the facts of the case sufficiently sensitive, that it was not unreasonable for Superintendent MacGibbon to seek legal advice from the

Attorney General of Nova Scotia. (Reference, **Glinsky v. McIver**, supra, par. 75; address of Roy McMurtry, supra, para. 74) The extent of House privileges and immunities has been the subject of judicial consideration in this country and abroad. (References: see **Re Clark et al v. Attorney General of Canada** (1978), 81 D.L.R. (3d) 33 (Ont. High Ct.) for a treatise on the history of Parliamentary privileges and immunities; Erskine May, **Treatise on the Law, Privileges, Proceedings and Usage of Parliament**, 19th ed. (1976); **House of Assembly Act**, R.S.N.S., 1967, c. 128, ss. 29-35)

126. In the months following November, 1983, the Department of the Attorney General carried out its review of the expense claims in consultation with the Auditor General and the Speaker of the House of Assembly. The R.C.M.P. was not invited to participate in this consultation and did not receive the correspondence it generated. Nor did the Department of the Attorney General provide advice or guidance to the R.C.M.P. pertaining to possible criminal conduct by any of the M.L.A.'s in question. Mr. Coles' assertion in his memorandum of April 18, 1984, to the Attorney General that he communicated his opinion that the irregularities were accounting rather than criminal to the R.C.M.P. is incorrect. The R.C.M.P. was not so advised until November 5, 1984, when it received a copy of Attorney General Giffin's letter dated April 18, 1984, addressed to the Speaker. (Transcripts, evidence of Gordon Gale, Vol. 88,

pp. 15730-1; evidence of Richard MacGibbon, Vol. 87, pp. 15458-9; evidence of Gordon Coles, Vol. 88, p. 15609; evidence of Ron Giffin, Vol. 89, p. 15853; Vol. 88, p. 15549; and Exhibit 173, pp. 35-39)

127. In addition to waiting for the Deputy Attorney General's advice in this matter, Superintendent MacGibbon was awaiting receipt of the Auditor General's report due in the legislature in early 1984. (Reference, Transcript, evidence of Richard MacGibbon, Vol. 87, pp. 15435-5) Unfortunately, the Auditor General was unable to report in a detailed way on the irregularities he found in several M.L.A.'s expense accounts until his 1984 report issued April 3, 1985. (Exhibit 173, pp. 6-11, and 45)

128. Staff Sergeant Leigh's Continuation Report of March 28, 1984, provides further confirmation that the R.C.M.P. were expecting this report before determining whether an investigation was necessary. He wrote:

> "Instructions were to be awaited from the Department of the A.G. re a police investigation. To date, instructions have not been received and the C.I.B.O. is aware of the situation. The file will remain open pending release of the "Report of the Auditor General, March 31, 1984," and the "Public Account" for the Province"." (refer Exhibit 173, p. 25)

129. The passage of time pending receipt of both advice from the Attorney General and the report of the Auditor General did not jeopardize the success of any investigation the police might take. Superintendent MacGibbon had assurance that the evidence was secure in the Speaker's office. (Transcript, evidence of Richard MacGibbon, Vol. 87, p. 15435)

130. Chief Superintendent MacGibbon testified that he would not have ignored the matter once the Auditor General had reported his findings to the House of Assembly on April 3, 1985. (Transcript, Vol. 87, pp. 15463-4)

131. Approximately three weeks after the release of the Auditor General's report, the Leader of the Opposition, the Honourable Vincent MacLean formally requested an investigation of the expense claims of Billy Joe MacLean. (Exhibit 173, p. 46)

132. Once the Auditor General had filed his report and the police had received a formal complaint, the R.C.M.P. independently initiated a criminal investigation which resulted in nine criminal counts being laid against Billy Joe MacLean for the irregularities in his expense claims. Mr. MacLean subsequently entered guilty pleas to four of the counts.

133. In conclusion, it is submitted that it was prudent for the R.C.M.P. to have consulted the Department of the Attorney General for advice in this matter involving considerable complexity.

CONCLUSION

134. In summary, the R.C.M.P. respectfully makes the following submissions:

(A) The assistance of policemen such as John Ryan, Murray Wood, and Terrance Ryan during the murder investigation by the Sydney Police Department in 1971 reflected a spirit of co-operation and professionalism.

(B)(i) The mandate given to S/Insp. E. A. Marshall in November, 1971, was to use the polygraph to check out the statement of James MacNeil that Roy Ebsary had stabbed Sandford Seale.

(ii) S/Insp. E. A. Marshall did not rely upon the polygraph examination of James MacNeil and Roy Ebsary as the sole determining factor of the truthfulness of James MacNeil, nor was his review done incompetently.

(iii) The Crown's failure to disclose to the defence the November 15, 1971, statement of James MacNeil was a most serious omission.

(C)(i) The 1982 re-investigation by R.C.M.P. Staff Sergeant Harry Wheaton and Corporal James Carroll was conducted

professionally and expeditiously and resulted: (a) in Donald Marshall's release from penitentiary; (b) the Reference to the Nova Scotia Court of Appeal, pursuant to which his conviction was quashed; and (c) the conviction of Roy Newman Ebsary for Sandford Seale's murder.

(ii) Staff Sergeant Harry Wheaton and Crown prosecutor Frank Edwards believed that Gordon Gale wanted the questioning or investigation of Chief John MacIntyre, Detective William Urquhart, and the Sydney police held in abeyance.

(iii) Under all the circumstances as disclosed in the evidence, postponing such an investigation was reasonable.

(D) It is reasonable for the police to consult law officers of the Crown in cases that are unique, complex, important or sensitive, and also for the police to act upon that advice so long as it is not given for an improper or corrupt purpose.

(E)(i) In the Thornhill case, Deputy Commissioner Quintal conducted an independent review on behalf of the Commissioner of the R.C.M.P. and he concluded, on the facts, that a charge ought not to be laid.

(ii) If Deputy Commissioner Quintal had concluded otherwise, he would have instructed the Commanding Officer "H" Division to lay a charge against Mr. Thornhill, regardless of the expressed wishes of the Deputy Attorney General, Gordon Coles, to the contrary.

(F)(i) In the Billy Joe MacLean case, the law pertaining to the privileges of M.L.A.'s and the Office of the Speaker was sufficiently uncertain and complex, and the facts of the case sufficiently sensitive, that it was reasonable and appropriate for Superintendent MacGibbon to seek and await both legal advice from the Department of the Attorney General, and the concluding report of the Auditor General to the provincial House of Assembly.

(ii) Shortly after the filing of the Auditor General's report and the receipt of a complaint, the R.C.M.P. independently conducted a full investigation into Billy Joe MacLean's expense claims, which investigation resulted in nine criminal counts being laid against him.

(G) The evidence does not support the conclusion urged by Commission Counsel of a lack of independent initiative or of any other unacceptable practice by the R.C.M.P.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Halifax, Nova Scotia, this 28th day of October, 1988.

JAMES D. BISSELL

A. R. PRINGLE

Counsel for the ROYAL CANADIAN MOUNTED POLICE, the CORRECTIONAL SERVICE OF CANADA, and the NATIONAL PAROLE BOARD

APPENDIX "A"

LIST OF AUTHORITIES

Paragraph

14. **Glinsky v. McIver**, [1962] 1 All E.R. 696 (H.L.) 75, 125

15. **Clark et al v. Attorney General of Canada** (1978), 81 D.L.R. (3d) 33 (Ont. High Ct.) 125

16. **House of Assembly Act**, R.S.N.S. 1967, c 128, ss. 29-35 125