ROYAL COMMISSION ON THE DONALD MARSHALL, JR. PROSECUTION

FINAL BRIEF ON BEHALF OF

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MACINTYRE FINAL SUBMISSION

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MACINTYRE FINAL SUBMISSION

I. POLICE DUTIES, OBLIGATIONS, AND RESPONSIBILITIES

(a) At Law

1. The Act to Incorporate the City of Sydney, S.N.S. 1903, c. 174, s. 334 provided, and continues to provide, that the duties of police in the City are as follows:

> The police force shall be charged with the duty of preserving the peace and order of the city, the preventing of robberies and other crimes and offences, the apprehension of all offenders, and generally have all the powers and privileges, and be liable to all the duties and responsibilities which belong by law to policemen, constables, and special constables duly appointed.

2. The "apprehension of all offenders" entails a or duty and responsibility to investigate and detect crime, to pursue the investigation of crime, and to come to reasonable and probable conclusions with respect to the commission of crime. Beyond the development of those reasonable and probable grounds, the duties, responsibilities and obligations with respect to the enforcement of law fall to the Courts and the processes of the Courts rather than the police.

3. From the moment the suggestion is made to any police officer that a crime has been committed, it is his duty to cause an investigation to be carried out to determine whether in fact there are reasonable and probable grounds to believe that a

crime was committed - whether the police officer does this himself, with others, or by others:

> I think it is quite clear today and well settled law, that it is lawful for police officers to act on hearsay, for how else could police officers effectively carry out their duty! In this case the identity of the person calling was either not made or not recorded and not remembered. However, the call was clearly identified as being made from D. & J. Motors Limited, a long, well-known and reputed firm of the City of Saint John. Emphasis to the information passed on was added by the second call again originating from the same place. The plaintiffs were reported to have been carrying a gun and no doubt reference was made to a hold-up. With such an accumulation of circumstances I can well imagine the outcry of society if the police defendants had refused to act and it had turned out that the plaintiffs or some of them had in fact been later identified as some of the bank robbers of the Halifax incident or even if it had been thought that they were. Even disregarding the Halifax incident, if we are to have law and order and if we are to allow our police force to protect us, we have to recognize that it was their plain duty, statutory or at common law, to act on such information. It must be recognized that in a limited number of cases, such alarm will turn out to be false or irrevalent but how is one to tell before he has carried out an investigation? It is my belief that inconvenience of this nature is but a token of a price to pay for meaningful and effective police protection. I do not believe that it would be reasonable, justifiable or wise to place too great restrictions and too much refinement on the exercise of individual policemen reactions and judgments when they are called upon to act with dispatch if their action is to be effective at all. (Emphasis added).

Augustine et al. v. City of Saint John and Stewart et al. (1976), 16 N.B.R. (2d) 160, at p. 174 (N.B.S.C., Q.B.).

Once an officer has embarked upon an investigation, it is up to the officer to pursue that investigation diligently, taking into account all the information available to him or her:

> For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all the information available to him. He is entitled to disregard only what he has good reason for believing not reliable....
>
> For the purposes of the case at bar...It is sufficient to say that this was an unpardonable and unjustifiable error, which proved to be extremely prejudicial to appellant since it is obvious that, had it not been for the reprehensible manoeuvering and testifying of the officers, Chartier could not and should never have been charged. Without this there was a complete lack of evidence against him; the only two witnesses called to identify him had said they were unable to do so owing to the grey hair they had observed on the assailant's head and could not see on Chartier.... (Emphasis added).
>
> Chartier v. Attorney General for Quebec (1979), 27 N.R. 1, at pp. 26-27 (S.C.C.).

Similarly, as Mr. Justice Pratte, dissenting, stated:

> ...the Police Force continued with the investigation which had been begun by the Municipal Police, to find Dumont's attacker. A number of individuals were suspected; a number of inquiries were made; finally, the Police Force dismissed all the other suspects and decided they should question Chartier. Although the investigation may not have been perfect, I do not see how it is possible to regard as faulty the actions of the Police Force in this stage. It can of course be said,

> in the light of subsequent events, that since Chartier was not the attacker, the Police Force was wrong to suspect him; but the fact that it may have committed an error of judgment does not make its action a delict or quasi-delict. The Police Force commits no fault when it decides to question someone whom it believes, even wrongly, is in a position to provide useful information on the circumstances surrounding the commission of a crime.
> (Emphasis added).
>
> Chartier v. Attorney General for Quebec, supra, at p. 58.

4. After entering upon an investigation, and considering all of the evidence available, rejecting only that which is clearly unreliable, if reasonable and probable grounds exist a suspect may be charged. What then constitute reasonable and probable grounds?:

> The test is not to be applied in a vacuum but in the light of the facts, as they existed, in that moment of time as comprehended by an ordinary man..... The process of thought of an ordinary man would, I think, be somewhat as follows:....[The facts of that particular case are set out].
>
> Surely, such a thought process is not unreasonable. To seek a higher standard of judgment is to fetter unduly those persons charged with the duty of law enforcement. Men of good-will in a free society, do not require compliance with standards of perfection. All they ask is that those persons given authority to detain them act fairly, honestly and not capriciously or arbitrarily.
>
> Ozolins v. Harling and Kristensen, [1975] 5 W.W.R. 121, at pp. 125-126 (B.C.S.C.).

Or, as was stated in another case:

> I believe the test to be applied is whether the facts relied upon by the officers were such as to create a reasonable suspicion in the mind of a reasonable man that the person arrested was the person described in the warrant. That test, adapted to the facts of this case, is the test, as I understand it, described in Kennedy v. Tomlinson (1959), 126 C.C.C. 175 at 206-207...., in giving the meaning of 'reasonable and probable grounds' in ss. 25 (1) and 435 (a) of the Criminal Code.
>
> Fletcher v. Collins, [1968] 2 O.R. 618, 10 Cr. L.Q. 463, [1969] 2 C.C.C. 297, 70 D.L.R. (2d) 183, at p. 625 O.R.

And in Archibald v. McLarren et al. (1892), 21 S.C.R. 588 at p. 594:

> If a police officer in the position of the appellant is not warranted in acting without further inquiry on such information as he receives from a woman who had been an inmate of a suspected house, as Alice Dale had been, his efforts to perform his duty in the suppression of such places would obviously be fruitless....On the whole I do not see how the appellant, if he had omitted to act as he did on the Statement of Alice Dale, could have justified himself before his superior officer if he had been charged with neglect of duty.

English authorities have been to the same effect:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accusor, to the conclusion that the person charged was probably guilty of the crime imputed.
>
> Herniman v. Smith, [1938] 1 All E.R., at

p. 8.

5. When a person has been charged, or is apparently committing an offence, the policeman's final duty in putting the matter before the Courts is to apprehend the person who reasonably and probably is believed to have committed the offence:

> e.g., R. v. Biron, [1976] 2 S.C.R. 56, 30 C.R.N.S. 109, 23 C.C.C. (2d) 513, 59 D.L.R. (3d) 409.

Reference is appropriately had to the Criminal Code, R.S.C. 1970, c. C-34, s. 25, 449-457, from this point forward as all dealing with the accused person becomes governed by statutes applied by judicial officers.

(b) Investigations Generally

6. The Courts rarely have occasion to comment upon the difficulties which may be encountered on the investigative side of the criminal justice system. This is obviously because the Courts are primarily concerned with specific questions about the guilt or innocence of a particular individual given the evidence called by the Crown in that case. However, a useful starting point for consideration of the process of police investigation as understood in 1971 is the case of R. v. Lalonde (1971), 5 C.C.C. (2d) 168 (Ont. H.C.J.). Mr. Justice Haines stated at pp. 170-172:

> [After describing the events leading up to the stabbing] Lalonde with his knife waded in. He chased Martin and Hodgson out and around the house, stabbed Hodgson on the front lawn, and Hodgson ran to the opposite side of the street where he fell

on the pavement and died. Lalonde stabbed Martin who collapsed on the verandah. Then things changed dramatically. Almost everyone flees. The lights are put out. Cars are seen driving out of the parking lot in haste. Lalonde and Cathy leave by a rear lane, Lalonde throwing his knife away as he fled and then went into hiding for a few days. Cathy went to the hospital. The police arrived within five minutes only to find the deceased Hodgson lying on the road and Martin in an unconscious condition on the verandah of No. 83. The only people left appeared to be one Guy Michaud who at the trial proudly boasted that he had drunk two quarts of Ballantines whiskey. He was too drunk to flee. The other was the frightened baby-sitter, Colleen Levert. It was to this dark and abandoned scene the police arrived. Stabbings are not new in precinct No. 21. There are forty to sixty each year. The problem confronting police was exceedingly difficult. During the trial counsel mentioned several times that the area was one where the residents do not co-operate with the police and many live in a subculture where they enforce their own rules. The first police officers to arrive had only minutes to inquire as to possible witnesses and to make the briefest notes. There was no time to question thoroughly to ascertain the truth, experience taught them they were not apt to get it anyway. They had to get Martin and Hodgson to the hospital. The homicide squad arrived shortly afterwards and commenced that slow and painstaking operation of collecting bits and pieces of evidence of unknown value, and more important, the questioning of countless people who might be of help. Some of these witnesses had been drinking, others suffered from remarkable lapses of memory, and to quote the admissions of some of the witnesses "we never tell the truth to the police anyway". Doubtless in some cultures the policeman is the natural enemy. Out of this confusing and conflicting mass of material, the police

can only make the briefest notes and later dictate summaries and suggestions for the guidance of other officers. Witnesses professing ignorance may later grudgingly admit facts on discovering the police are possessed of additional information, with the result one witness may tell a variety of stories. Others such as Cathy Stewart may give a signed statement and then get into the witness box and swear some portions of it were a tissue of lies, or again while in the police station afterwards do her best to signal the drunken Michaud to say nothing. While I will return to this later, I pause here to draw attention to the problems in police investigation. The facts discoverable on investigation may be horribly confusing, the witnesses frequently untruthful, deliberately forgetful, or worse still, misleading. Some will be shielding others. Different stories may be told to different officers, especially when one considers that in a large metropolitan area, the police teams work in shifts, and often on the same case for days. Since they may be required to work on several cases at the same time, they are unable to follow one case through to its conclusion without interruption. Their records, if kept fully and accurately, must be replete with misinformation gleaned from unco-operative citizens. Finally from the spurious is sorted out the apparently trustworthy and a prosecution is launched. And it must always be remembered that the Crown must present the case with the witnesses and materials available. Accused, victims and witnesses may belong to the same subculture and the informer may live in fear of retaliation. A trial is not a faithful reconstruction of the events as if recorded on some giant television screen. It is an historical recall of that part of the events to which witnesses may be found and presented in an intensely adversary system where the object is quantum of proof. Truth may be only incidental.

7. In his Criminal Procedure Manual, 2d ed, The Carswell Company Limited (Toronto: 1956), A.E. Popple explained at pp. 2-3 that:

> A "Criminal Investigation" has for its object the collection of "facts" to "prove" the crime. These "facts" are divisible into three main groups: (1) Direct; (2) Circumstantial; and (3) Real. Those which are "direct" are obtained from a witness who actually perceived those facts with his own senses. "Circumstantial" facts are those which are deduced from "other facts". "Real" facts are "material objects".....
>
> Facts and Circumstances - you will notice that we speak only of "facts". In law these are known as "facts probative" - facts which "prove". For it must not be forgotten at all times during the investigation that only those "facts" which are "relevant" and "admissible" will be accepted by the court. All else will be excluded. "Facts" must be distinguished from "supposition". Every criminal investigation passes through several "phases" before the final case is made out against the accused. The investigator may be compelled by reason of the peculiar circumstances of the case to use most if not all of the following: (1) Suspicion; (2) Supposition; (3) Deduction; (4) Inference; and (5) Evidence (proof). While it may be permissible (though not always advisable) to use all of these on the "investigation" it will be found that upon the "trial" of the accused only the last named - "evidence (proof)" - will be permitted the investigator in court to prove his case.

8. Silberman in Criminal Violence: Criminal Justice (1980) at p. 293, as quoted in Cohen, "The Investigation of Offences and Police Powers" from Criminal Justice, The Carswell Company Limited (Toronto: 1982), at p. 19, identified three

factors as standing out in relation to how the police generally catch the perpetrator of an offence:

> (1) The heavily reactive nature of policing - specifically, the degree to which police depend on the people they police for knowledge of who the criminal is and where he can be found, as well as for knowledge that a crime has been committed;
>
> (2) The haphazard nature of criminal investigation, and the larger role played by accident and chance, as well as by the offender's own bungling, in the apprehension of criminal suspects;
>
> (3) The variety of ways in which traditional police organization and attitudes inhibit effective use of what information is available about criminals and crime.

It followed, according to Cohen, at pp. 2-3:

> Nevertheless, the police have always sought out and expected public cooperation in the investigation of crime. In 1969 the Ouimet Committee observed that "the police cannot <u>effectively</u> carry out their duties with respect to law enforcement unless they have the support and confidence of the public", and this citizen cooperation is not only necessary for effective law enforcement, but disrespect for the police creates a climate which is conducive to crime. Without the ability to discover the facts of a crime by asking questions of persons from whom it was thought that useful information might be obtained the police would be paralyzed.

9. Finally, the comment of Assistant Commissioner W. H. Kelly of the Royal Canadian Mounted Police in <u>Crime and Its Treatment in Canada</u>, MacMillan of Canada (Toronto: 1965), at p. 126 is appropriate:

> Besides striving for a competent police force, the general public is duty bound to support the police actively in their day-to-day operations. People often hesitate to give information or other assistance to the police, unless they can do so anonymously, usually either because they wish to avoid an appearance in court with its attendant waste of time and the possibility of undesirable publicity, or because they are afraid of appearing to be disloyal to their fellow citizens. Sometimes they fear retribution. Any such disinclination to assist the police actively, however, indicates a lack of awareness of the responsibility of the general public to help preserve law and order.

10. The anatomy of a criminal investigation can not be assessed in the abstract, but at each point must be assessed within the context of the facts then known, understood or suspected to exist. A criminal investigation is not, and in 1971 was not, a purely scientific enterprise. Indeed, intuition is sometimes as necessary and ultimately as useful as the discovery of a murder weapon. Investigations do not lend themselves to an analysis of perfection or non-perfection. Criminal investigations must be assessed on the basis of whether there is a reasonable basis in the evidence ultimately gathered for the charge which is laid and pursued.

(c) Interviewing Witnesses Generally

11. The Ouimet Report of the Canadian Committee on Corrections (1969) made the point at p. 49 that:

> In the investigation of the commission or alleged commission of an offence, a police officer is entitled to question any person, whether or not the person is suspected, in an endeavour to obtain

> information with respect to the offence. While the police officer may question, he has no power to compel answers. There is no doubt, however, that a police officer by reason of his position and his right to arrest in certain circumstances, has a power (factual but not legal) to exert very great psychological pressure to obtain answers.

To similar import is Mr. Justice Channell's comment in R. v. Knight and Thayre (1905), 21 T.L.R. 310; 20 Cox C.C. 711 that:

> It is, I think, clear, that a police officer, or anyone whose duty it is to inquire into alleged offences may question persons likely to be able to give him information, and that, whether he suspects him or not, provided that he has not already made up his mind to take him into custody.

or, as the so-called "Judges' Rules" from Britain provide as the first rule:

> When a peace officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons whether suspected or not, from whom he thinks useful information can be obtained. (As quoted in Honsberger, J., "The Power of Arrest and the Duties and Rights of Citizens and Police" in Law Society of Upper Canada Special Lectures 1963, at p. 7).

12. In his special lecture with respect to the powers of arrest and the duties and rights of citizens and police, John Honsberger in Law Society of Upper Canada Special Lectures 1963, supra, at pp. 12-13 stated that:

> I have spoken of the legal right of a person to remain silent. There is, however, a strong moral duty on an innocent person to assist the police by

> giving all the information in his power and anyone who is guilty must appear to accept the same duty if he is to be thought innocent. Seneca, the Roman philosopher, who died in A.D. 65 wrote, "He who does not prevent crime when he can encourages it." In our own times and in our own courts, Mr. Justice Riddell once said it is the moral duty of every citizen to do his part in having the law obeyed.

In fact, Mr. Justice Riddell stated in R. v. L. (1922), 38 C.C.C. 242, at p. 247 (Ont. S.C.) that:

> It is, of course, elementary that it is the moral duty of every citizen to do his part in having the law obeyed - no one has any moral right to oppose the operation of any law, however much he may disapprove of it - there is a constitutional method of repealing obnoxious laws; but, so long as a law is on the statute book, it must be obeyed by every law-abiding man.
>
> This consideration does not at all conclude the case - there are many moral duties of which the law takes no cognisance, and many acts there are to be deplored, perhaps reprobated, which cannot be punished.

13. It is respectfully submitted that two things must be recognized as given before an assessment of the investigation of the murder of Sandy Seale can properly begin. First, it is recognized to be in the nature of questioning by police of private citizens that some of these private citizens may well find the process intimidating. At the same time the citizen is impelled by a moral obligation to assist such official interlocutors to the extent that they feel it possible. Where moral compulsion breaks down the entitlement and duty on the part

of the authorities to question remains, as will the inherent pressure of the situation. The authorities, without some omniscience as to the moral hold that a particular citizen has upon himself, are open to being misled and misdirected unknowingly.

14. It is respectfully submitted that this is the foundation upon which any assessment of specific activities of particular individuals in this matter must take place. To the extent that other legal obligations or legal permissiveness intervene, a standard will be established against which the conduct of particular individuals may be measured. It is these standards as they existed in 1971 which are relevant in assessing the conduct of particular individuals at that time. The extent that those standards themselves are found to have been inadequate then, and remain inadequate today, should be the key to this Commission's role. The actions of individuals in 1971 should not be judged retrospectively by the standards of 1988.

II. THE ALLEGATIONS

(a) Objectives of this Commission

15. This Royal Commission was constituted by Order in Council dated October 28, 1986:

> ...to inquire into, report your findings, and make recommendations to the Governor in Council respecting the investigation of the death of Sandford William Seale on the 28th-29th day of May, A.D., 1971; the charging and prosecution of Donald Marshall Jr., with that death; the subsequent conviction and sentencing of Donald Marshall Jr., for the non-capital murder of Sandford William Seale for which he was subsequently found to be not guilty; and such other related matters which the Commissioners consider relevant to the inquiry;....

As this Honourable Commission noted on May 12, 1987:

> In order to make meaningful recommendations to the Government, the Commission must, of necessity, review the actual circumstances of the Donald Marshall case....
>
> Bringing out the facts will give the Commission an understanding of what happened. But that is only a beginning. It is not enough to examine minutely one incident, and from that to expect to suggest changes within a complex system of administration of justice. In order to develop meaningful recommendations, the most important part of our mandate, all contributing or potential contributing factors must be carefully reviewed within the context of the current state of the administration of justice in Nova Scotia. It will be necessary to examine...the relationship between prosecutors, defence counsel and the police (both Provincial and R.C.M.P.), who makes decisions to prosecute and how and on what basis these

> decisions are made, the organization of police forces in Nova Scotia and how they interact with the communities they police.
>
> Standing has been granted to the Black United Front and the Union of Nova Scotia Indians. Both of these groups state that minorities in the Province are not treated fairly or equitably by the justice system, and suggest that racism and discrimination may have contributed to the conviction of Donald Marshall, Jr. These charges must be investigated and examined to determine if these factors play any part in the administration of justice in Nova Scotia. It should be apparent, therefore, that the activities of individual people, and of various authorities are to be reviewed and questioned, and that extremely important public issues will be considered by the Commission.
>
> On the basis of understanding what happened to Donald Marshall, Jr. and after having analyzed the present functioning of the criminal justice system in Nova Scotia, we will make recommendations for the future which are designed to increase the confidence of all Nova Scotians in the system of administration of justice.
> (Emphasis added)

16. This Honourable Commission granted standing and funding to counsel on behalf of former Sydney City Police Chief John F. MacIntyre on the basis that, given the focus and scope of the Commission, it would be in the public interest to have John MacIntyre's personal interests represented. It is respectfully submitted that in the context of the public hearings conducted in 1987 and 1988 that such personal representation of John F. MacIntyre was appropriate so that those witnesses who chose to

cast aspersions, blame or simple abuse upon John F. MacIntyre could be confronted and challenged in an adversarial manner. It was appropriate to permit such separate representation because, as this Commission indicated on May 12, 1987:

> In order that they can properly fulfil their role, commission counsel will not assume the position of advocates for any particular point of view. To the extent therefore, that any party wishes to press a particular point of view, or adopt an adversarial position with another party, this must be done through his/her own counsel.
> (Emphasis added).

17. It is respectfully submitted, on the basis of what has been stated as to the focus of this Commission, that recommendations will not be forthcoming from this Commission about or reflecting specifically upon the conduct of specific individuals within the context of the Donald Marshall, Jr. prosecution and subsequent prosecution of Roy Newman Ebsary. To repeat what this Commission has already stated:

> On the basis of understanding what happened to Donald Marshall, Jr. and after having analyzed the present functioning of the criminal justice system in Nova Scotia, we will make recommendations for the future which are designed to increase the confidence of all Nova Scotians in the system of administration of justice.
> (Emphasis added).

It is respectfully submitted that any recommendations of this Commission would therefore be institutional and structural rather than individual in impact. This view appeared more generally in the comments by the Commissioners as the hearings progressed. On

numerous occasions it was stated that hopefully the Commission hearings would be the last time that the witness would have to deal in a public way with the circumstances of the Donald Marshall, Jr. case (e.g., T. v. 4, p. 640).

18. It is respectfully submitted that this is the appropriate approach for this Commission within the Canadian constitutional structure. Unlike the Order in Council considered in Keable v. Attorney General of Canada et al., [1979] 1 S.C.R. 218, this Commission's terms of reference did not specifically allege any criminal conduct on the part of any individual or group. However, it is recognized that the Province of Nova Scotia did have authority to establish a Commission charged with investigating the functioning of law enforcement. As Mr. Justice Estey wrote in Keable v. Attorney General of Canada et al., supra, at pp. 254-255:

> The investigation of the incidence of crime or the profile and characteristics of crime in a province, or the investigation of the operation of provincial agencies in the field of law enforcement, are quite different things from the investigation of a precisely defined event or series of events with a view to criminal prosecution. The first category may involve the investigation of crime generally and may be undertaken by the invocation of the provincial inquiry statutes. The second category entails the investigation of specific crime, the procedure for which has been established by Parliament and may not be circumvented by provincial action under the general inquiry legislation any more than the substantive principles of criminal law may be so circumvented.
>
> The only room left for debate is where

> the line between the two shall be drawn. The difficulty in ascertaining and describing this line is matched by the importance of doing so. (Emphasis added).

Mr. Justice Estey continued at p. 258 with words which appear to be apt in respect of this Honourable Commission:

> Where, as I believe the case to be here, the substance of the provincial action is predominantly and essentially an inquiry into some aspect of the criminal law and the operations of provincial and municipal police forces in the Province, and not a mere prelude to prosecution by the Province of specific criminal activities, the provincial action is authorized under s. 92 (14). (Emphasis added).

Where the mandate of this Inquiry did not even allege criminal conduct, the drawing of the line should be more clearly discernible.

19. It is respectfully submitted that this Commission has never expressed any intention of permitting its public hearing process, nor its deliberations and conclusions, to be a "prelude to prosecution by the Province of specific criminal activities", even if the suggestion of such were thought to exist. This Commission was not established as a vehicle to wreck havoc upon the lives of individuals. This Commission has been forward-looking throughout, directed toward institutional and structural improvements to the administration of justice.

20. It is respectfully submitted that this Commission recognized in defining its focus and the objectives of its recommendations that it would not be appropriate to express

conclusions about individuals and their activities with respect to this matter which could be seen to constitute conclusions or postulations about criminal or civil liability. As was indicated in Re Nelles et al. and Grange et al. (1984), 9 D.L.R. (4th) 79, at p. 86 (Ont. C.A.):

> While the constitutional validity of the Order in Council is not in issue in this Court, it may be that it would have been vulnerable to question had the limitation not been imposed on the commissioner that he not express any conclusions as to civil or criminal responsibility. This inquiry should not be permitted to become that which it could not have legally been constituted to be, an inquiry to determine who was civilly or criminally responsible for the death of the children or, in the circumstances of this case in lay language simply: who killed the children?

21. This Honourable Commission ought, we respectfully submit, to be astute to not permit its conclusions to be considered as determinative pronouncements about legal obligations which may be thought to exist between parties. Speculation or opinions about such possible conclusions ought to be permitted to await decisions based upon different rules of evidence, different tests of relevance, different collections of witnesses and, with respect, different decision-makers in different fora.

22. At the same time it is respectfully submitted that it is open to this Commission, having heard more extensive and wide-ranging evidence than would ever be permitted in a Court of Law, to express conclusions which deny substance to certain

allegations publicly aired during the Commission hearings. The process followed in these Commission hearings has quite properly been to avoid many of the trappings that the public tends to associate with the administration of justice. With rare exceptions, the Commission has ensured the greatest possible public access to the information and evidence which this Commission will consider in inquiring into the public administration of justice in Nova Scotia. It is respectfully submitted that few, if any, stones have been unturned in the interest of keeping the public as informed as possible, and in allowing individuals to testify who had complaints to make about this particular case. Thus, it is respectfully submitted that if in such an environment of unrestricted openness as to the nature of evidence heard and publicly disclosed there is found to be no reliable substance to an allegation against a particular individual, it would be incumbent upon this Commission to express that view and finally satisfy any lingering public concern about a particular individual's conduct.

(b) Nature of allegations against John F. MacIntyre

23. Turning to John F. MacIntyre personally, what in substance are the allegations which have been made against him personally, and in his capacity as a Detective, Deputy Chief, and later Chief of Police in Sydney, Nova Scotia? It is respectfully submitted that the allegations which have been made against John F. MacIntyre generally fall under 19 headings, according to the following list which attempts to adhere to a chronological

schedule:

- Initial Investigation

- Failure to:

(a) Commence investigation as soon as the stabbing was reported to him;

(b) Invite or accept the assistance of the R.C.M.P. in properly commencing the initial investigation;

(c) Take steps to preserve the scene when he did assume control of the investigation;

(d) Obtain real evidence at the earliest opportunity;

(e) Actively consult with patrol officers as to specific knowledge;

(f) Review criminal files to determine suspects with a modus operandi of a knife;

(g) Discover Roy Newman Ebsary or James William MacNeil;

(h) Interview young persons in the presence of a parent or other responsible adult;

(i) Direct the conducting of an autopsy;

- and:

(j) Drawing a conclusion as to Donald Marshall's guilt without any evidentiary justification;

(k) Conducting of interviews with young persons involving prompting, threats, intimidation, and even physical violence for the purpose of influencing their evidence;

(l) Failures to disclose and misrepresentations to representatives of the defence with respect to material which could have been of assistance to the defence; and including failures to

disclose to the Crown.

1971 Reinvestigation

Failure to:

(m) Interview Donna Ebsary;

(n) Disclose information received during the reinvestigation to representatives of the accused.

1974 Revinvestigation

Failure to:

(o) Pursue offer of David Ratchford to interview Donna Ebsary.

1971-1982

Failure to:

(p) Permit, and aggressive opposition to, leaves of absence for Donald Marshall, Jr. while in prison.

1982 Reinvestigation

Failures to:

(q) Co-operate with, misdirection and obstruction of, R.C.M.P. reinvestigation in 1982.

1987 Commission Hearings

(r) Perjury before the Royal Commission hearings in December, 1987.

Generally

(s) General racial prejudice affecting the conduct of his tasks as a law enforcement officer;

24. Although the Rules of Procedure of this Royal Commission permit submissions to be made by those with standing

on any issue of concern to the Inquiry, the submissions by counsel on behalf of John F. MacIntyre will be restricted to those allegations which have been made against him personally by witnesses as well as in the documentary evidence filed with this Commission.

25. It is important to note that John F. MacIntyre from the appointment of this Commission and throughout the hearings and even at the end of this Commission's final recommendation must be presumed innocent of any criminal wrongdoing alleged by witnesses or counsel against him:

> Criminal Code, R.S.C. 1970, c. C-34, s. 5
>
> Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B of the Canada Act, 1982 (U.K.), c. 11.
>
> Woolmington v. D.P.P., [1935] A.C. 462 (H.L.)

It is also appropriate to consider as a general principle affecting all of John MacIntyre's conduct, the following provision of the Criminal Code, supra:

> s. 25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> ...
>
> (b) as a peace officer or public officer,
>
> ...
>
> (d) by virtue of his office,
>
> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using

as much force as is necessary for that purpose.

III. CREDIBILITY

26. - In the course of this Brief comment will be made at various points with respect to the credibility or lack of credibility of particular evidence given before this Commission. Those particular instances where a decision with respect to credibility needs to be made are best assessed within the context of the events to which they relate. However, it should be stated that the vast majority of situations involve no question of credibility as between the various witnesses, which will allow the Commissioners to deal directly with the heart of the issues raised by the facts which have appeared.

27. Some general remarks about credibility are, however, in order here. Unlike the position put forward by some counsel at different times, and some witnesses at different times, decisions made with respect to the credibility of one particular witness over another in relation to a specific event does not ipso facto result in a finding that the witness whose evidence was not preferred was lying or indeed intentionally misleading this Commission.

28. Various factors of course go into an assessment of the credibility of particular witnesses. Before this Commission perhaps the most important issue to consider is the passage of sixteen or seventeen years since the events which prompted this whole matter:

> Remembrance of things past is often an elusive pursuit. The details of an untoward incident happening to an individual will tend to be etched in his

> mind in a clear and uncluttered manner. A more occupational experience, however, tends to quickly merge with many similar experiences and create more difficulty in total recollection. There is also the situation where material facts have taken place in an emotionally-charged atmosphere and where the cause and effect of a sequence of facts are difficult to establish. It is no wonder therefore that a court, in determining what really happened in the course of a specified event is faced with conflicting evidence, confused recollection or memory loss. Such is the problem before me in determining the circumstances surrounding the execution of the search warrant and in putting to the test the conduct of the agents throughout.
>
> The several witnesses heard in evidence are evenly balanced between two sides of the issue and none of them can be said to be truly disinterested. Yet, I should make it clear that none of these witnesses lacks credibility and I should hope that any findings I am called upon to make will not impugn on their honesty and on their conscious attempts to tell the facts as they perceived them and as they remembered them.

Lord v. Canada (1987), 14 F.T.R. 9, at p. 10 (F.C.T.D.).

29. An historical touchstone with respect to credibility in criminal matters is R. v. Covert (1916), 28 C.C.C. 25 (Alta. S.C., A.D.), at p. 37 where Mr. Justice Beck stated that:

> ...In my opinion it cannot be said without limitation that a Judge can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled: -
>
> (1) That the statements of the witness are not in themselves improbable or unreasonable;

> (2) That there is no contradiction of them;
>
> (3) That the credibility of the witness has not been attacked by evidence against his character;
>
> (4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and
>
> (5) That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.

However, Mr. Justice Estey in White v. The King (1947), 89 C.C.C. 148, at p. 151 had occasion to discuss the Covert decision as follows:

> The issue of credibility is one of fact and cannot be determined by following a set of rules that it is suggested have the force of law and, insofar as the language of Mr. Justice Beck may be so construed, it cannot be supported upon the authorities. Anglin J. (later Chief Justice) in speaking of credibility stated: "By that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory - in a word, the trustworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence". Raymond v. Bosanquet Tp., (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460.
>
> The foregoing is a general statement and does not purport to be exhaustive. Eminent Judges have from time to time indicated certain guides that have been of the greatest assistance but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in

> which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his power to observe, his capacity to remember and his accuracy and statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

30. There are some special factors which this Commission may wish to consider in determining the credibility of particular witnesses in the process of coming to some conclusion about the most reliable theory of events in particular instances. The first is with respect to the character of some of the witnesses as demonstrated by their involvement in particular events. It is respectfully submitted that there are examples before this Commission of individuals where the following comment of the Ontario Court of Appeal in R. v. Cole (1980), 53 C.C.C. (2d) 269, at p. 280 is appropriate:

> In this case there is neither an allegation of self-interest nor an allegation that Ramsford Spalding had a serious criminal record. On the other hand, there are, in my opinion, circumstances which required the trial Judge to give special emphasis to the need for care in determining the weight to be given to what this man said. After all, on the witness' own admission, he went about armed with a concealed handgun. He remained at this affair knowing that the appellant was there armed. He believed that the appellant was intent on killing him when the

> appellant purportedly made a gesture to indicate his intention. He admitedly lied to the police about his gun and perhaps intended to mislead them, given some of the things he said. He has left this country and will not face the man he accuses of murdering his brother.
>
> It was an important aspect of the defence that this man's credibility was doubtful at best and quite aside from the submission now under consideration it should have been emphasized to the jury for that reason. However, in the special circumstances of the case, it is my respectful view that the learned trial Judge ought to have cautioned the jury against relying on such a witness's evidence without giving it the gravest consideration.

It is respectfully submitted that this is not so much a statement of a principle of law but something which good, ordinary common sense indicates as a necessity with respect to particular witnesses.

31. The matter of criminal records came up from time to time at these Commission hearings. Some criminal records have in fact been introduced. Depending upon the reaction of the witness whose alleged criminal record is put to him or her, evidence as to previous convictions may have more than one effect on credibility. One effect was described in R. v. Gonzague (1983), 4 C.C.C. (3d) 505, at pp. 509-510 (Ont. C.A.) as follows:

> Mr. Girones, for the appellant, contended that the jury as a result of the judge's charge may have been left with the impression that Charbonneau's credibility remained unimpaired because he had truthfully acknowledged his criminal record. The trial judge's view of the limited use that prior convictions have on the issue of credibility was not

> correct. The theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial trustworthiness of the witness: see R. v. Stratton (1978), 42 C.C.C. (2d) 449 at p. 461....The purpose of cross-examination of a witness with respect to prior convictions is to permit an inference that his moral disposition is such that his oath is not to be relied upon.

This is so whether the record is serious, as it was in Gonzague, supra, or whether it consists in a small number of convictions for "petty theft" as in R. v. Tuckey, Baynham and Walsh (1985), 20 C.C.C. (3d) 502, at p. 507 (Ont. C.A.). Of course the effect may be different on the finder of fact.

32. The second impact which examination about a criminal record may have on credibility occurs where a witness denies, refuses, or only reluctantly admits a prior record. This may quickly overshadow any effect that admission of the offences themselves may have had. As was explained in Morris v. The Queen (1978), 43 C.C.C. (2d) 129, at p. 152 (S.C.C.):

> Cross-examination as to prior convictions is not directly aimed at establishing the falsity of the witness's evidence; it is rather designed to lay down a factual basis - prior convictions - from which the inference may subsequently be drawn that the witness's credibility is suspect and that his evidence ought not to be believed because of his misconduct in circumstances totally unrelated to those of the case in which he is giving evidence. The evidentiary value of such cross-examination is therefore surely inferential.
>
> By comparison, where the cross-

> examination is directed at eliciting from the witness answers that are contrary to his evidence-in-chief, the attack on credibility is no longer based on an inference of unreliability of the witness, but on the actual proof of the witness's unreliability in the case itself, as established by the contradiction between the various portions of his evidence. This type of cross-examination is essential if the search for truth is ever to be successful. Cross-examination would become pointless if it were not available to attempt to prove the falsity of the evidence given in chief....
>
> In Stirland v. Director of Public Prosecutions, [1944] A.C. 315, the proposition was laid down by the Lord Chancellor, Viscount Simon at p. 326, that the accused "may...be cross-examined as to any of the evidence he has given in chief, including statements concerning his good record, with a view to testing his veracity or accuracy or to showing that he is not entitled to be believed on his oath"....I have therefore no reservation that the rule enunciated in Stirland is a correct statement of the law as it exists here.

33. Finally, there may well be special situations created by conflicts in the evidence before this Commission where the question of belief or disbelief must be asked and answered in stark terms. Mr. Justice Aylesworth in R. v. Lundrigan, Monteith and Knightly (1971), 4 C.C.C. (2d) 285 (Ont. C.A.) spoke for a unanimous Court in a case where the Crown evidence was that there had been a break and enter of a dwelling-house by the three accused and one other, while the Defence case was that the police had simply made it all up. The trial Judge told the jury in that case:

> Well, ladies and gentleman, I don't think there is anything further that I can usefully add. This is a straight question of credibility. - Whether you believe the police officers, or whether you believe the witnesses called for the accused.

Mr. Justice Aylesworth commented at pp. 286-287:

> Ordinarily, such a blunt mis-statement would lead to a new trial but in this case we do not think it has that effect. In the first place, the issue, and the main issue, throughout this trial was the position taken by the appellants, perhaps other than the appellant Knightly, that the story of the participation of these appellants in the house breaking was a complete fabrication by the police officers; that the police officers were lying when, for instance, they not only placed these people in, or in the vicinity of, the house in question but deposed as to statements respectively made to the police, some of them in the presence of each other, and in the case of Lundrigan, one statement not in the presence of Monteith, and when I said some of them in the presence of each other I meant Monteith and Lundrigan. Knightly's appeal necessarily falls to be dealt with in a different category and I shall refer to that appeal later.
>
> Again, the evidence of the officers is put directly in issue as a fabrication with respect to mud which it was said was found on the shoes of the accused Monteith and Lundrigan and the comparison of the mud so found with the mud at or around the house in question. Moreover, it was a theory of the defence that the wallet and papers of one of the appellants said by the police to have been found in a car parked near the premises in question, had been "planted" there.
>
> The whole trend of the case, as I say, was an attack upon the evidence of the police officers as a complete fabrication

> and a falsity throughout so far as it went to tie the accused appellants Monteith and Lundrigan into the offence. When that is considered, and we have considered it carefully, and when one considers all of the charge, the charge as a whole, including what was said on the re-charge to the jury, we conclude that on the special facts of this case the jury could not have been misled with respect to the question of reasonable doubt extending to the accused persons.

34. It is respectfully submitted that those situations are rare in these Commission hearings where this kind of credibility analysis will be required. This Commission will want to consider who accuses whom of lying, and who simply disagrees with the recollection of a contrary witness. Few counsel felt it necessary to frame the issues in such stark terms. It is respectfully submitted that counsel and witnesses who accuse others of lying, of fabricating evidence, and of intentionally misleading this Commission, ought to be prepared to have the evidence upon which they wish to establish this fact scrutinized minutely - and be prepared to have it rejected in the event that this Commission finds that such evidence admits of doubts.

IV. THE FACTS

INTRODUCTION

35. We now propose to review the allegations made against John F. MacIntyre in light of the existing evidence. In the process of reviewing each issue the salient points of evidence will be examined, and where there is an apparent conflict as to the facts our review will be based on all relevant witnesses on that point. Sworn and unsworn statements made other than before this Commission will also be considered. Where there is a clear conflict in the evidence, we will conclude our treatment of each allegation by proposing what appears to be the most reliable theory of the facts for this Commission to adopt. That theory will be placed in the context of any applicable legal principles. We submit that once those matters have been addressed, the appropriate conclusions or recommendations will be evident to the Commissioners.

A. Failure to Commence Investigation as soon as the Stabbing was Reported to Him.

The Call-Out

36. Michael Bernard "Red" MacDonald became a Detective Sergeant in 1970 (T. v. 9, p. 1613) and was on duty as the detective on Friday, May 28, 1971 (T. v. 9, p. 1627). As the practice was in the Detective Division of the Sydney City Police force at that time, the single individual working the late shift would be on call to deal with matters arising between midnight and 8:00 in the morning when the next shift was scheduled to begin work (e.g., T. v. 9, pp. 1627-8). "Red" Michael MacDonald received a call from the Desk Sergeant Len MacGillivary at about 12:10 a.m., May 29, 1971, at home (Notes, Exhibit 38). MacDonald was advised that there had been a stabbing in Wentworth Park and that the victim was at the Sydney City Hospital (T. v. 9, p. 1628).

37. Upon arriving at the Hospital MacDonald was not permitted to speak with Sandy Seale, but did speak with Donald Marshall, Jr., and saw Maynard Chant (T. v. 9, pp. 1630, 1631ff, 1637). At this time "Red" MacDonald did not have an idea of the seriousness of the incident with which he had to deal (T. v. 9, pp. 1630-1631) - a position inconsistent with the statement allegedly taken from him by Staff Sergeant Harry Wheaton (Exhibit 99 - R. v. 34, p. 95). Chant and "Red" MacDonald may have had their conversation at about 2:00 a.m. at the City Hospital, according to "Red" MacDonald's evidence at the original trial in 1971 (e.g., Exhibit 12 - R. v. 12, p. 185). "Red" MacDonald

remained at the hospital until close to 3:00 a.m. (T. v. 10, p. 1651). Sandy Seale was about in the middle of his first operation at this time (Exhibit 22 - R. v. 24, p. 22; Exhibit 16 - R. v. 16, p. 159).

Advising John MacIntyre

38. Harry Wheaton took a statement from "Red" MacDonald on May 11, 1982 in which "Red" MacDonald is alleged to have said:

> I phoned John MacIntyre who was the Sgt. of Detectives and told him what was happening that I thought we had a murder on our hands. I asked him if he would come out and he refused. I reported this to the Chief of Police, Gordon MacLeod. (Exhibit 99, - R. v. 34, p. 95).

Harry Wheaton testified, in supplementing this written statement, that "Red" MacDonald had telephoned John MacIntyre to request assistance and that MacIntyre refused to provide it. Wheaton says "Red" MacDonald contacted the then Sydney City Police Chief Gordon MacLeod who, at some point, went with "Red" MacDonald to John MacIntyre's house. According to Wheaton, Macleod threatened MacIntyre that if he did not come out to work on the case and thus adhere to his duty, the Chief might consider firing him (T. v. 43, pp. 7851ff).

39. Some support for some of Wheaton's assertions exists in "Red" MacDonald's CBC Discovery evidence (Exhibit 12, - R. v. 12, pp. 194-197) but it is evidence that "Red" MacDonald did not adopt when testifying under oath before this Commission (T. v. 9, pp. 1639-1641). This evidence indicated that Sergeant MacGillivary and MacDonald had called John MacIntyre to come out

"and he didn't come out, or he wouldn't come out" - and "he [MacIntyre] didn't tell me why". Also on Discovery MacDonald testified that a conference between Chief Gordon MacLeod, himself and Sergeant Len MacGillivary was held that night. The matter of the stabbing investigation was "put...on hold until the morning and see what would happen". However, "Red" MacDonald also said on the Discovery that he did not meet face to face with Chief Gordon MacLeod that night.

40. "Red" MacDonald's version of events as given at the Commission hearings was that he at no time made any telephone call to John MacIntyre on the night of the stabbing, nor did he request that John MacIntyre be called (T. v. 10, pp. 1651-1652). "Red" MacDonald had no personal knowledge that Sergeant MacGillivary called Sergeant MacIntyre, although MacGillivary apparently indicated to MacDonald that MacIntyre had been notified. The evidence only permits one to speculate as to what may have been said between MacGillivary and MacIntyre if such a call was made. Chief of Police Gordon MacLeod would have been advised by MacGillivary of the situation as part of the regular procedure when a serious crime was committed. As to the contents of that conversation we also have nothing more than speculation (T. v. 10, pp. 1653-1654). "Red" MacDonald did go to Chief MacLeod's home to report in person a little after 3:00 a.m., at which time "Red" MacDonald was told to "wrap it up until eight o'clock". "Red" MacDonald did not discuss with the Chief the fact that Sergeant MacIntyre had not come out (T. v. 10, pp.

1654-1655). Indeed, "Red" MacDonald was not surprised that MacIntyre did not come out that night, and under the circumstances would not have expected him to be out (T. v. 10, p. 1655).

41. John F. MacIntyre himself testified that he received one telephone call, and that call came from "Red" MacDonald on his way to the hospital (T. v. 32, pp. 5908, 5910). This call came sometime after midnight. John MacIntyre had gone to bed early because he was not feeling well. MacDonald gave MacIntyre to understand that two people had been stabbed in an altercation with someone else, and that these two had gone to the hospital (T. v. 32, p. 5909). MacIntyre thinks that the Seale and Marshall names were mentioned. MacIntyre did not know Seale was unconscious. MacIntyre assumed that MacDonald was at the police station (T. v. 32, p. 5910). MacIntyre told MacDonald to investigate the scene and obtain any evidence as well as names "and to go as far as he could that night, and if he wanted to call me back later, to call me." (T. v. 32, p. 5911). MacIntyre was confident to leave it in the hands of MacDonald who had patrolmen available to assist him. MacIntyre fielded no other calls that night (T. v. 32, p. 5911-5912).

The Reliable Theory

42. It is respectfully submitted that this Commission should find that the most probable scenario had "Red" MacDonald being called out at 12:10 a.m. contemporaneously with police notification of the stabbing. "Red" MacDonald immediately

advised MacIntyre of the reason he had been called out and then, without requesting MacIntyre's assistance, went to the hospital to determine the seriousness of the matter. "Red" MacDonald remained at the hospital until approximately 3:00 a.m., returning to the Police Station and receiving advice that MacLeod wished to speak with MacDonald. MacDonald then proceeded to speak with MacLeod in person, reporting the facts as they were understood and being advised to leave the matter for MacIntyre who would be in Saturday morning. "Red" MacDonald did not know the seriousness of the injuries at this time (T. v. 9, pp. 1630-1631).

43. The call to MacIntyre most likely occurred prior to any responsible officer attending at the hospital. MacIntyre himself therefore could not have known whether either Marshall or Seale's wounds were being adjuged superficial, serious, or life-threatening. Even if MacDonald had to have a sense of the nature of Seale's injuries at 3:00 a.m. when Seale was still in surgery, neither he nor anyone else bothered to inform MacIntyre.

44. This scenario is consistent not only with the entire tone of "Red" MacDonald's evidence before this Commission, but is also consistent with the evidence from the initial trial. Evidence at that time indicated that John MacIntyre dispatched officers early Saturday morning to search the Park - thus being on the job and taking direction of the investigation (T. v. 10, pp. 1670-74). MacIntyre was not waiting around at home to be threatened by Gordon MacLeod as late as Saturday

afternoon, as Wheaton postulated (T. v. 43, p. 7851). This version, we suggest, is also indirectly confirmed by the fact that there is no evidence of any threat or even expression of concern by Chief MacLeod about some supposed failure by John MacIntyre to adhere to duties. According to the evidence of the then Deputy Chief Norman D. MacAskill (T. v. 17, p. 3027) and City Solicitor Michael Whalley (T. v. 62, p. 11128-30), such action by MacLeod would have become known. The reliable inference therefore is that there was no threat or concern. Even if there was discussion between MacIntyre and MacLeod, Wheaton's own version is that "Red" MacDonald did not actually hear any of the alleged discussion. Any suggestion as to dereliction of duty or a threat to fire comes only from Wheaton himself.

45. In all the circumstances, it is respectfully submitted that no reliable evidence suggests any reason for John MacIntyre to have been expected to come out on the night of the stabbing. The evidence only takes this Commission so far as to indicate that John MacIntyre was informed shortly after midnight on May 29, 1971 that there had been a stabbing of two individuals in Wentworth Park, and that John MacIntyre was on the job early Saturday morning to pursue the investigation. Thus, it is respectfully submitted that the first allegation of failure of duty against John MacIntyre cannot be maintained.

Conclusion

46. Should John MacIntyre have taken the initiative to come on duty and assume control of the investigation at

midnight? MacIntyre did have experience investigating the previous apparent homicide in Sydney, generally referred to as the "Seto" case. In hindsight, it was recognized that "Red" Mike MacDonald could have pressed it harder and, also, as a detective "...pressed with the Chief, perhaps, as My Lord said, for him to to come out to the scene and to get some help" (T. v. 43, p. 7862). See also: (T. v. 43, pp. 7862-7865). People in the area around the time of the stabbing were not identified. Statements were not taken from individuals who later became important parties (Marshall and Chant). The scene was not preserved in that vital time between removing the body at approximately midnight until investigators were able to conduct a thorough search the next morning shortly after 8:30 a.m. A police service dog was not acquired for tracing scents.

47. At the same time, the investigation at that point was not in the hands of a rookie police officer. "Red" MacDonald in 1971 had twenty-four years' service as a police officer in the City. There is no evidence that "Red" MacDonald's ability to function effectively as a police officer when under pressure had ever been tested previously such that his associates and superiors would have been aware of the fact that he would not get the basic jobs done. When one considers the fact that "Red" MacDonald did not even make himself aware of the nature and extent of the injuries to Seale, which might then have been communicated to MacDonald's associates and superiors, one cannot reasonably, even in hindsight, say that this was clearly a case

where the head detective ought to have come out to assist. However, John MacIntyre said that he would have been prepared to come out if he had been fully apprised of Seale's essentially deathly condition (T. v. 32, p. 5913). This Commission should, we submit, reject as unfounded any assertion that John MacIntyre should have come out to assist given the circumstances known and communicated at that time.

B. Failure to Invite or Accept the Assistance of the R.C.M.P. in Properly Commencing the Investigation

48. Certain questioning and evidence in the first month of the Commission hearings suggested that a major weakness in John MacIntyre's investigation of the Seale stabbing was his failure to invite or accept assistance from the R.C.M.P. during his initial investigation. The significance of the fact that this criticism was never made by Staff Sergeant Harry Wheaton in material filed with this Commission (Exhibits 19, 20, and 99 - R. v. 19, 20 and 34), perhaps indicates how undeterminative this failure was - if there was indeed failure. Wheaton may fairly be regarded as the witness who was most critical of MacIntyre's handling of this case to appear before the Commission. If something was not noted as a failure in procedure by him, perhaps any alleged failure is really only a difference in judgment.

49. In 1971 the R.C.M.P. Sydney General Investigation Section (G.I.S.) was comprised of three officers: David Murray Wood, Joseph Terrance Ryan and Sergeant McKinley (T. v. 10, p. 1849). This Commission heard from Ryan and Wood. In addition, the Sydney Detachment of the R.C.M.P. in 1971 had three identification officers, one of whom was John Leon Ryan. He also testified before this Commission. The Sydney Detachment of the R.C.M.P. had no jurisdiction over the City of Sydney (T. v. 10, p. 1798), and although the R.C.M.P. would often offer assistance to the City of Sydney Police - particularly in view of the lack of any identification services in the Sydney Police Force at that

time (T. v. 7, pp. 1258, 1267) - the general view held by the R.C.M.P. of the Sydney City Force was that:

> They seemed to be able to handle their own and we would continue to offer assistance though. (T. v. 10, p. 1797).

50. The identification services which John Leon Ryan was capable of providing involved photographic services, the examination of crime scenes for fingerprints, the making of plans and sketch drawings and "other related duties" (T. v. 7, p. 1258). Nighttime photography could have been employed (T. v. 7, p. 1274). Any search of the crime scene would include searches for hair and fibre material, footwear impressions, and articles left behind in the commission of an offence (T. v. 7, p. 1274).

The Standard According to the RCMP Witnesses

51. It was the unanimous opinion of Officers Wood, and the two Ryans, that in a situation where someone had been stabbed, was unconscious or in a state of shock, with intestines protruding from the wound, a serious crime would be involved and it would be a priority to do the following:

> (i) Arrange immediate medical assistance for the victim;
>
> (ii) Secure the scene, separating or removing people, preserving evidence, and taking names of witnesses and any persons present;
>
> (iii) Bring in as much assistance as possible, assigning an investigator to attend at the hospital and remain with the victim;
>
> (iv) Notify the Identification Section to take photographs and search for evidence including the possible use of a police

service dog.

— (T. v. 11, pp. 1862-1864).

Officer Wood elaborated upon the concept of preserving the scene by suggesting that the scene ought to have been cordoned off upon the arrival of the Sydney City Police until a search of the area was possible (T. v. 10, p. 1828).

52. In addition to these immediate activities, the officers agreed that it was necessary to seize clothing worn by the victim as soon as possible. In the event that things were not "coming together then there would be canvassing of the area and a number of leads to be followed up as they were developed." (T. v. 10, p. 1815). This door-to-door canvass where crimes occurred in residential areas would be done within the following day or two or three days after the incident (T. v. 11, pp. 1865-1866).

Manpower Deployment

53. In his evidence John MacIntyre explained that he was confident to leave the stabbing in the hands of "Red" MacDonald on the basis that MacDonald would use his own efforts and could call upon patrolmen, some of whom had significant years of experience (T. v. 32, p. 5912, 5914). Doubtless this could have included calling upon the R.C.M.P. for extra manpower as well. It cannot be suggested that MacIntyre's confidence in MacDonald was entirely or knowingly misplaced. It appears from the evidence of some of the Sydney Police patrolmen that after attending to Seale and Marshall's medical needs they went looking

for individuals fitting the description given by Donald Marshall, Jr. The patrolmen investigated the wharves, hotels, and all night restaurants in Sydney (e.g. T. v. 7, pp. 1128-1129, 1170-1171). It is respectfully submitted that these were appropriate tasks for patrolmen to perform - though certainly not exclusively. Seale had been removed from the scene immediately to receive medical attention. "Red" MacDonald did attend at the City Hospital and attempted to remain with the victim, but was dissuaded by medical personnel (T. v. 9, p. 1628). Thus, Sydney Police officers did see to at least the first and part of the third tasks which were essential according to R.C.M.P. officers who were active in 1971 in Sydney.

Investigating the Scene

54. When John F. MacIntyre came on duty on Saturday morning, May 29, 1971, it was clear that many of these immediate tasks which the R.C.M.P. witnesses suggested as appropriate had not been done. However, John MacIntyre could not undo that fact. As a result of things not done the night and early morning before, it was no longer possible to separate or identify people and witnesses present or in the area at the time of the stabbing. That was a task which, because of its nature, must have been done by the first officers on the scene or else remain undone. Despite John MacIntyre's concise direction to "Red" MacDonald (T. v. 32, p. 5911) "to look at the scene and to complete - to do his investigation there and to pick up any evidence and to get the names of anybody he could and to go as

far as he could that night", those tasks were not performed. John MacIntyre cannot be faulted for the failure in these tasks by the officers on duty.

55. The value of some tasks, which could have been performed later but were not, was materially lessened anyway by the fact that they were not done immediately - such as cordoning off and securing the scene, the tracking of the alleged assailants through the use of a police service dog (which may or may not have been available), as well as any location searches for hair and fibre material or footwear impressions.

56. While we will deal with the issues arising from the treatment of the crime scene in more detail later, it will serve as a useful example here. If cordoning off Crescent Street was a viable option on Saturday morning, and Norman D. MacAskill appeared to be unpersuaded in his evidence that it was a viable option (T. v. 17, pp. 3030-3033), its purpose was lost in any event. The Park and Crescent Street appear to have been entirely unattended from shortly after midnight until at least 8:30 a.m. Not having been searched or secured immediately, there was no integrity to this crime scene. Cordoning off the scene in the morning would not restore integrity to the scene. It would be reasonable to conclude that any evidence discoverable in the nature of hair and fibre material or footwear impressions in the cordoned area would be so non-specific that it would defy reason to make any attempt to connect the product of such a search with the commission of the offence involved.

57. John MacIntyre's first priority on the Saturday morning was to order a search of the Park area, including Crescent Street, for articles which may have been left behind in the commission the offence. A kleenex with blood on it was found as a result. However, the connective problems suggested above in relation to the failure to cordon off the scene simply demonstrated themselves. It has never been shown that this bloodied kleenex had any connection with the stabbing, or aftermath of the stabbing, of Sandy Seale. We can speculate that that kleenex stanched Marshall's wound, but the kleenex actually remains an exhibit which is of entirely unproven relevance.

58. It is respectfully submitted that on consideration of the apparent failures to secure and cordon off the scene, or employ tracking dogs, or to conduct a hair/fibre/footprint search - all tasks which the R.C.M.P. Officers suggested were necessary to properly commence a criminal investigation - none are attributable to John MacIntyre. Instead, responsibility for those errors of performance or judgment must rest with others. The value of efforts that were undertaken at John MacIntyre's direction, such as the Saturday Park and Crescent Street search, were considerably lessened by the failure of the police on duty the previous shift to maintain the integrity of the scene. John MacIntyre neither created nor exacerbated these initial problems. Instead, they were the context within which he had to commence and pursue the investigation. Any failure by MacIntyre to cordon off the scene, arrange for a microscopic search or use

tracking dogs, any of which may be found to be failures by this Commission, would, we submit, be of trifling significance given the failures which preceded them.

Door-to-Door Canvass

59. As indicated above, the suggestion was made by more than one R.C.M.P. witness that a door-to-door canvass be conducted if things were not otherwise "coming together". This canvass tool would be usefully considered within the following day or two or three days after the incident (T. v. 11, pp. 1865-1866). Douglas Wright suggested that if a crime occurred in a populated residential area, it would be appropriate and prudent to interview the various people living in that area by a door-to-door canvass as soon as possible (T. v. 28, pp. 5260-5261). During this door-to-door canvass the description of the alleged perpetrator should have been used (T. v. 28, pp. 5286-5287). Harry Wheaton concurred that this kind of canvass would have been appropriate as "one of the first things you do", involving teams of two officers in a blocked off area (T. v. 43, p. 7863-7864). Douglas Wright refused to say that the failure to do such a canvass would be a demonstration of incompetence (T. v. 28, p. 5287).

60. John MacIntyre agreed that it was standard practice to do a door-to-door canvass in a residential area. While there was no systematic approach to residents of Crescent Street (which could have been done and probably should have been done), John MacIntyre himself did go door-to-door (T. v. 32, pp. 5973-5975)

in that area. John MacIntyre had grown up on Crescent Street and knew all of the residents. MacIntyre specifically recalled speaking with Mr. and Mrs. V.W. Campbell and the MacQueens, but believes somebody else spoke to Doucette (T. v. 32, p. 5974). Marvel Mattson was known to be involved in any event and prepared his own statement (T. v. 4, pp. 738-739). Wheaton himself was of the view from discussions with John MacIntyre and a review of the documentation from 1971 that "numerous neighbourhood inquiries were conducted" (T. v. 41, p. 7543; Exhibit 99 - R. V. 34, p. 10).

61. In the course of the hearings it appeared to be the position of counsel for Donald Marshall, Jr. that a door-to-door search would have discovered Roy Ebsary who lived, according to counsel for Donald Marshall, Jr., "two blocks away" (T. v. 28, p. 5285). The maps introduced before this Commission show that the Ebsary home in 1971 was about 1/4 mile from the crime scene (Exhibit 22), by the most direct route. The area between the two points is heavily populated. No witness, except Staff Sergeant Harry Wheaton in a rather off-hand way (T. v. 43, pp. 7878-7879), suggested that a door-to door canvass would have come close to Ebsary's home. Wheaton says he would have liked to have between six and ten men in five teams of two (T. v. 43, p. 7879). In his words that would be "convenient", but there is nothing before this Commission to demonstrate that that would have been either reasonable or successful. Therefore, this allegation of failure must be taken to be unsupportable.

Identification Services

62. There is no evidence of any contact between the R.C.M.P. Identification Services and the Sydney City Police until probably Monday, May 31, 1971 (T. v. 7, p. 1258-1259). John Leon Ryan made the initiative to contact the Sydney City Police Detectives. Ryan was told by either MacIntyre or William Urquhart, that Ryan's services were not required "at this time" (T. v. 7, p. 1259). Some time in early August John Leon Ryan received a request from either the Crown Prosecutor, Donald C. MacNeil, or John MacIntyre, to take photographs at Wentworth Park. These photographs would have been taken at most ten days prior to August 24, 1971, and the service completed on August 24, 1971 (T. v. 7, pp. 1261, 1264, 1269-1270; and Exhibit 16 - R. v. 16, p. 96). These photographs in the Wentworth Park area were taken both under direction from MacIntyre and William Urquhart and also on the basis of Ryan's own experience (T. v. 7, pp. 1262-1264).

63. There can be no doubt that an early opportunity to obtain the assistance of the R.C.M.P. in an area where the Sydney Police had no expertise - photography - was missed. However, the optimal time for scene photography to have occurred would have been on the early morning of Saturday, May 29, 1971, as part of an initial comprehensive investigation of the crime scene. Like most cases, this is not one where it would have ever been possible to use photographs as proof of what the scene looked like from various vantage points at the time when the stabbing

was committed. Other reasonable considerations affecting the importance of photographs in this particular case would have been:

> (a) Public familiarity with a public location within handy viewing distance of the County Court House;
>
> (b) Inability to fairly place photographs within the context of a narrative of events which would depict what the police or the Crown would allege as the theory of events, as may occur when a narrative witness statement is obtained shortly after the event;
>
> (c) As a result of the passage of time during the early growing season of the year photographs by day or by night could be misleading as to actual lighting of the area of the offence at the time when the offence appeared to have occurred.

It is respectfully submitted that nothing of probative value pointing towards the innocence or guilt of any particular person would have been gained through day or nighttime photography. The purpose of the photographs in the expected subsequent criminal litigation would have been merely to provide a pictorial narrative or locator of events supplementing oral testimony.

64. It must be remembered that the admissibility of a photograph continues to depend upon oral testimony that the photograph is a fair and accurate representation of what it purports to show at the time when the photograph was taken. A photograph is in this respect a "shorthand" evidence. The admissibility of photographs in criminal trials can be traced back to R. v. Tolson (1864), 4 F. & F. 103; 176 E.R. 488 (N.P.)

where Mr. Justice Willes explained to a jury:

> The photograph was admissible because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents; and, therefore is, in reality, only another species of the evidence which persons give of identity, when they speak merely from memory.

This decision was referred to in the modern statement of the rule with respect to photographs made in R. v. Creemer and Cormier, [1968] 1 C.C.C. 14, 1 C.R.N.S. 146, 53 M.P.R. 1 (N.S.S.C., A.D.), and which in turn has now been taken to provide a guiding principle with respect to the introduction of videotape: R. v. Leaney and Rawlinson (1987), 38 C.C.C. (3d) 263 (Alta. C.A.).

65. It is respectfully submitted that to the extent there was any failure to make use of photographic services of the R.C.M.P., the weight of this failure must be considered exceedingly slight within the context of what it could have added to the investigation or proof of any case - whether against Donald Marshall, Jr. or Roy Newman Ebsary. The redundancy of photographs in dealing with this particular kind of crime is perhaps most demonstrably shown by the fact that this Honourable Commission itself has made no resort to photographic exhibits of the scene of the offence despite the fact that opportunities have twice existed during the mandate of this Commission to have photographs taken in that area on the twenty-eighth night or last Friday night of May. Donald C. MacNeil apparently decided that the photographs which were eventually taken would be unhelpful at

trial.

66. John MacIntyre made a judgment at one point not to obtain photographs at that point in time. It is a judgment which, in the circumstances, should not be criticized. Neither law nor practice requires the introduction of photographs in a criminal case. Photographs which may tend to be misleading or not fairly representative of the crime scene should not be used. There is insufficient cogent evidence to decide that John MacIntyre's judgment was wrong.

67. The suggestion was made in cross-examination of Douglas Wright by counsel for Donald Marshall, Jr., that "no measurements were made of the scene and no arrangements were made for any to be made" (T. v. 28, p. 5281). The further suggestion was made by this counsel that no measurements were made of any blood markings or drippings at the scene or where they might be (T. v. 28, p. 5282). With respect to the latter point, no witness at any time in the progress of this matter has suggested that there were any blood markings or drippings at the scene to measure. As to the suggestion that no measurements were made at the scene and no arrangements were made for any, this is a wrong statement. One might suppose that the allegation is made because the R.C.M.P. Identification Services were capable of making plans, sketch drawings, and performing other related duties (T. v. 7, p. 1258), but were not asked to do so.

68. The City of Sydney itself had in its employ an experienced Land Surveyor by the name of Carl MacDonald who

prepared a scale survey plan of a portion of Wentworth Park bounded by Crescent Street, George Street and Byng Avenue, Bentinck Street, and Argyle Street (Exhibit 1 - R. v. 1, pp. 120, 121). MacDonald began the survey on June 9 and completed the plan on June 15, 1971 (Exhibit 1 - R. v. 1, p. 126). This plan was used from time to time through the Preliminary Hearing and Trial of the case against Donald Marshall, Jr. This Commission relied upon this same surveyor to do a similar plan for purposes of these Commission hearings, and no challenge was mounted to the accuracy or adequacy of either plan. John MacIntyre testified that it was on his direction that Carl MacDonald prepared the 1971 plan (T. v. 32, p. 5971). A simple plan drawing of the scene such as MacDonald prepared avoids prejudgment of the evidence, as would occur if alleged incidents of human contact or activity were represented or located on it. There is no basis for alleging error on the part of John MacIntyre in having the City Surveyor prepare a plan rather than the R.C.M.P. Identification Services.

Securing Exhibits

69. A proper investigation of course included seizing and examining clothing worn by the victim at the time of the stabbing, as well as other available clothing which reasonably could assist in the investigation of the crime. Sandy Seale's clothing was removed at the hospital by, among others, the now Chief of Police in Sydney, Richard Walsh. This clothing was taken home by Sandy Seale's parents, and ultimately collected

from them on June 3, 1971, by "Red" MacDonald. Similarly, Donald Marshall, Jr. 's jacket, borrowed from Roy Gould the day before the incident, was obtained from Roy Gould on June 2, 1971, by "Red" MacDonald.

70. These pieces of clothing and their contents should never have been surrendered by the police on duty the night of the stabbing but the integrity and continuity of the condition of these exhibits was never challenged. Appropriate examination of all exhibits was carried out by the R.C.M.P. Crime Laboratory at Sackville, New Brunswick. It is respectfully suggested that any delay in securing these exhibits was of no effect on the ultimate prosecution of this case. John MacIntyre directed that the appropriate steps be taken to secure this evidence and he cannot be criticized for his efforts here. We will deal with the integrity of the physical exhibits in more detail below.

Initiatives by John MacIntyre

71. In addition to these areas where it has, we suggest, been wrongly alleged that John MacIntyre failed to invite or accept the assistance of the R.C.M.P., there were areas where John MacIntyre did indeed invite and encourage assistance from the R.C.M.P. in the initial investigation of this case. Joseph Terrance Ryan and David Murray Wood were partners in G.I.S. (T. v. 11, p. 1858). Although not on duty on Saturday, May 29, 1971, Wood did have occasion to go to the office that day and also visited the Sydney City Police Station. Wood received a description of the alleged perpetrators of the Seale stabbing,

and offered information about a butcher knife case in which the R.C.M.P. had recently been involved (T. v. 10, pp. 1821, 1806, 1830; see also Exhibit 40). Wood was also in contact with the Sydney City Police on Sunday, May 30, 1971 - but at that time it does not appear that he had any contact with John MacIntyre (T. v. 10, p. 1807).

72. Wood has no independent recollection of matters other than as appear in his notes (Exhibit 40) but these notes were acknowledged to demonstrate an interest in, and reporting of, a light blue Volkswagen on Monday, May 31, 1971, to the Sydney City Police: advising the Sydney City Police on Tuesday, June 1, 1971 about "three young lads who found a knife case"; and the delivery of a photograph to Detective MacIntyre on Thursday, June 3, 1971 (Exhibit 40). In addition, Wood testified that he would have taken the facts supplied to him by the Sydney Police and had contacts with his own sources and informants - "but they weren't that helpful" (T. v. 10, pp. 1822-1823). This involvement of Murray Wood in the initial 1971 investigation was consistent with the relationship between the Sydney G.I.S. and Sydney's City Police which, in Joseph Terrance Ryan's words, was a relationship that was "on an exchange of information basis...continually on a need-to-know basis" (T. v. 11, p. 1856).

73. Joseph Terrance Ryan first became involved in the Seale murder investigation on Monday, May 31, 1971. On that date, according to his notes (Exhibit 41), he also identified a light blue Volkswagen, and referred to an attempt to locate a

white Volkswagen. Ryan attempted to contact an informant about the Seale case with Wood on June 3, 1971, and indeed took a patrol to New Waterford with John MacIntyre on that date in an attempt to contact sources of information. Nothing surfaced as a result of the visit to New Waterford, but Ryan specifically recalls actually going to at least one residence there in search of information for John MacIntyre (T. v. 11, pp. 1857-1858, 1881; Exhibit 41).

Conclusion

74. It is respectfully submitted that it would be absolutely incorrect on the facts to suggest that John MacIntyre failed to invite or accept assistance from the R.C.M.P. in properly commencing this investigation. Instead, it appears that the evidence supports the view that assistance was sought and given in accordance with the developed practice between the Sydney G.I.S. and City Police - "continually on a need-to-know basis" (T. v. 11, p. 1856).

C. Failure to Take Steps to Preserve the Scene When He Did Assume Control of the Investigation

The Nature of the Scene

75. Wentworth Park lies in the centre of the City of Sydney, containing three ponds as well as grassy areas, and a number of trees and bushes. At one end, Wentworth Park is bounded by a bandshell, and at the other by Kings' Road and Sydney Harbour. The section of the Park east of Bentinck Street to the Bandshell is the area of relevance in this matter. On the north side of this part of Wentworth Park lies Byng Avenue with residential housing, and George Street with some commercial development. The southern edge of this part of the Park is bounded by Crescent Street where more residential housing is located. This area, according to maps introduced at the Commission hearings (Exhibit 22) comprises approximately 300,000 square feet (or approximately 28,000 square meters). Cutting diagonally through the Park area under discussion on a level track bed are the tracks of the Canadian National Railway. This is the scene which, it is alleged, John MacIntyre and the Sydney Police ought to have secured.

76. The evidence before this Commission is that Wentworth Park attracted a great deal of activity. Former R.C.M.P. officer and Sydney City Police Commissioner Marvel Mattson lived on Byng Avenue and testified that there were "always a few things happening" at the Park. This involved general hanging around, drinking, and scraps or fights (T. v. 4, pp. 747-750). Other witnesses confirmed from their own activity

over the years that the Park area was a place for young people to "hang around" (T. v. 4, p. 703; v. 18, p. 3121, 3191, 3273; v. 23, pp. 4130, 4302) with drinking on the weekends (T. v. 18, pp. 3123-3124, 3191-3192; v. 23, p. 4305). Mary Csernyik indicated that the Park was the scene of some conflict, and although she was not forthcoming about it (T. v. 18, p. 3283) others were (T. v. 4, pp. 701-703; v. 23, pp. 4303-4304). There was also some indication that "hanging around" took place after midnight (T. v. 18, pp. 3278, 3339).

77. On the particular night of the stabbing this Commission has evidence that there was a fair amount of traffic on Byng Avenue (T. v. 4, p. 737). There was no one else on Crescent Street when Seale was first discovered by Scott MacKay and Debbie MacPherson (Timmins) (T. v. 4, pp. 673-674). Scott MacKay left the scene, and then returned with two others at the same time as a car arrived (T. v. 4, pp. 646-647, 675). Some people started to gather around Seale at this point (T. v. 4, 678-679). Shortly thereafter police cars arrived from Argyle and Bentinck Street (T. v. 4, pp. 649-650, 679). By this time about twenty to twenty-five people were milling around the scene, "...a lot of people" which the police officers were unsuccessful in keeping away from the area of the body (T. v. 4, pp. 651, 664-665). Into this confusion an ambulance arrived and took Seale away.

78. Richard Walsh, a constable in 1971, was unable to indicate whether or not there was anyone around at the time when

he arrived on the scene of the stabbing (T. v. 7, p. 1295). Howard Dean could not recall seeing any other persons in the area of the stabbing besides Marshall and Seale (T. v. 9, p. 1527). However, another police officer, John Mullowney, was working at the St. Joseph's Dance on George Street on the night of the stabbing and indicated to this Commission that there would have been two to three hundred teenagers over the age of 15 at such a dance (though he could not recall May 28, 1971 in particular) (T. v. 9, pp. 1553-1555). The dance got out at roughly midnight (T. v. 9, p. 1557). Several individual witnesses testified before this Commission about particular individuals seen in the Park at or about the time of the stabbing, indicating that there had been significant activity in Wentworth Park around the time of the stabbing. The scene was, therefore, never really in a state of being undisturbed. One can infer from the habitual use of the Park referred to in the evidence of a number of witnesses that there was activity in the Park and on Crescent Street between midnight and 8:45 a.m. on May 29, 1971, which could have disturbed the crime scene.

79. One logical and observed result of this presence of numerous people in the Park on Friday/Saturday, May 28/29, 1971, was that there was a significant amount of debris in the Park area on Saturday morning. Police officer John Mullowney testified at the Preliminary Inquiry on July 5, 1971 about the bloodied kleenex found on the lawn of 130 Crescent Street, but acknowledged the existence of:

> ...other debris, paper and kleenex also all through the other side of the park, on the grounds and garbage boxes. (Exhibit 1 - R. v. 1, p. 68)

and upon the trial elaborated as follows:

> Q. And I suppose all over the park grounds there was lots of debris?
>
> A. Yes sir.
>
> Q. Kleenex tissue, napkins, empty pop bottles, empty liquor bottles?
>
> A. In the park area, yes.
>
> Q. All over the place?
>
> A. Not on this particular lawn.
>
> Q. No, I'm coming to the lawn. What you say is you found a piece of kleenex which you identified on the lawn in front of 130 Crescent Street?
>
> A. Yes sir.
>
> (Exhibit 1 - R. v. 1, p. 213).

The Nature of the Search

80. Mullowney had gone to the Park to search particularly for a knife (T. v. 9, p. 1559). Three or four other officers were also detailed there - Constables Crawford, Wyman Young, and Fred LeMoine among them (T. v. 9, pp. 11567-1568, 1573). These officers were directed to do a thorough search by John MacIntyre (e.g., T. v. 9, p. 1588). It was a "foot and sight" search, but included various areas including the backyards of houses along Crescent Street (T. v. 9, pp. 1581, 1572). Mullowney was detailed to begin his search between approximately 8:30 a.m. and 8:45 a.m. (T. v. 9, p. 1589). Mullowney testified that he would have turned over the found kleenex to Detective

Sergeant "Red" MacDonald about dinnertime that day (T. v. 9, p. 1562), indicating at least a three hour search if his evidence is accepted on this point. However, it is the position on behalf of John MacIntyre that "Red" MacDonald was unavailable on the Saturday to receive exhibits or do anything else.

81. In addition to the ground search, John MacIntyre arranged for the draining of Wentworth Creek above the Argyle Street area two or three days after the incident - either Sunday or Monday. The creek did not get completely drained, but several officers searched the area by physically walking through the creek bed looking for "any physical evidence and primarily looking for a weapon". Nothing was found (T. v. 15, pp. 2632-2634). The creek bottom was full of silt and anything of the weight of a knife may have already sunk out of sight. Ed MacNeil, who participated in the search of the creek bed does not believe that that search had been completed when the creek reflooded as a result of the dam not remaining in place (T. v. 15, p. 2634). John MacIntyre's evidence about the creek search is to the same effect (T. v. 32, p. 5941; T. v. 33, p. 6030).

The Nature of an Appropriate Search

82. The failure of the initial officers on the scene, and the initial investigator responsible, to secure at least some of the area of the crime scene may be assessed with the benefit of hindsight. In short, was there anything which could have been found which was not? No theory of events as put forward in any trial or at this Commission suggested that the knife used to stab

Sandy Seale was left at the scene. No theory of events advanced at any trial or at this Commission suggested that any articles of any type belonging to Marshall, Seale, MacNeil or Ebsary were left at the scene. Therefore, it is submitted that nothing of identifiable relevance on the issue of who killed Seale or how he was killed could have been found.

83. One might suppose that a possibility exists that articles belonging to Roy Ebsary may have been found at the scene if the Commission is prepared to find the following as facts:

> (i) A robbery (by demand with threat of violence) was perpetrated by Sandy Seale and Donald Marshall, Jr. on Roy Ebsary;
>
> (ii) Roy Ebsary complied with the demand and threat made by Sandy Seale by turning over money, a watch, a ring, and a ring of keys which disappeared into Mr. Seale's pockets (T. v. 2, pp. 256-261);
>
> (iii) Rather than going into Seale's pockets these items fell to the ground at the crime scene;
>
> (iv) Those items could have been traced to Roy Ebsary.

It is respectfully submitted that insufficient evidence exists to justify these findings - particularly the third and fourth which are entirely speculative. Not a tittle of evidence exists for such findings.

84. Likewise, it is entirely speculative that "blood swabs" of the street or "vacuuming" Crescent Street and the surrounding grounds would have produced any evidence of specific relevance to this case. There has never been any suggestion that anyone other than Sandy Seale or Donald Marshall, Jr. bled at the

scene. To say that there was anything at the scene or elsewhere in Wentworth Park of a nature that could be discovered in even the most sophisticated search, which could then be traced to Roy Ebsary or Jimmy MacNeil, is entirely unfounded in evidence. For example, the suggestion could be made that "vacuuming" could produce hairs or fibres belonging to Ebsary and MacNeil which were jarred loose in the course of any wrestling which occurred involving either Ebsary or MacNeil. That would have resulted in unidentified hair and fibre samples - including those from other passers-by - being present at the scene. It would have provided no evidence as to when Ebsary and MacNeil were present, or even who Ebsary and MacNeil were. Given the admissions by Ebsary and MacNeil in November, 1971, the hair and fibre samples would have been redundant (Exhibit 16, - R. v. 16, pp. 176-190).

85. Knowing that the scene had lost any integrity which it may at one time have had, John MacIntyre directed the only truly appropriate search - a search for personal articles left behind in the commission of the offence. This would include a search for the weapon used or other materials capable of being specifically identified and associated with a particular person and crime. Those kinds of things are things which would have been as discoverable by a hand and foot search by Sydney City Police officers as by R.C.M.P. officers.

86. The legal context of gathering evidence for trial is also important here. The Courts have many times made clear their position with respect to non-specific exhibits which really

add nothing to the proof of a specific crime against a specific individual. For example, it was stated in R. v. Chan (1967), [1968] 1 C.C.C. 162, at pp. 163-164 (B.C.C.A.), in relation to a charge of murder, that:

> The crow-bar, ex. 11, was found by the police in some tall grass near Bergeron's home, after a statement by him. On it was found human blood group, group "O". The deceased's blood was group "O", but the significance of that is somewhat diminished by the fact it is the most common group, the incidence being about forty per cent in the occidental races and a little less in the oriental. The medical evidence was that ex. 11 was a kind of implement that could have caused the injuries found on the deceased....
>
> The respondent, when asked if the crow-bar (ex. 11) was his, said that he could not say. In response to the question, "It does look exactly like the crow-bar you did have?". He replied, "It does". A crow-bar is a common place tool, which usually has no obvious distinctive characteristics. Such commonplace articles may in use acquire some distinctive marks that an observant owner might notice; but if ex. 11 had any, they were not drawn to the respondent's attention when this question was put to him, or to ours on argument. Evidence that a commonplace tool bearing no distinctive mark is exactly similar to the one in question, in my respectful opinion is by itself no evidence at all that they are the same.

Thus, the crow-bar introduced into evidence added nothing to the case on the part of Crown or Defence because of its non-specific nature.

87. The issue of specific identification for exhibits and the ability to connect them with the crime which occurred is,

we submit, absolutely necessary. The Supreme Court of Canada, in Picken v. The King (1938), 69 C.C.C. 321, allowed the appeal by upholding the following view expressed by the dissenting Chief Justice of the British Columbia Court of Appeal on the issue of irrelevant evidence (1937), 69 C.C.C. 61, at p. 62:

> I regret to say that in my opinion there was no ground whatever for the admission of any of those articles except possibly, but very doubtfully the knitting needle and bicycle spoke there referred to. I say it with respect, it was unfortunate that the safe rule in criminal cases was not followed, i.e., that everything should be vigorously excluded unless it can be clearly said to have relevance to the case. It must be admitted that these articles had no relation whatever to the case (with the possible said exception) and in my opinion they tended unquestionably to confuse and prejudice the jury, and the more so seeing they were brought in as a result of two search warrants executed by the police. (Emphasis Added)

88. Relying upon the Picken decision, Mr. Justice Brooke (Justice Houlden concurring) discussed the introduction into evidence in a murder case of several articles of clothing from the deceased as well as other articles found in the laundry room of the accused's home, some with blood on them, in R. v. Burdick (1975), 27 C.C.C. (2d) 497 (Ont. C.A.) Mr. Justice Brooke stated at p. 511 that:

> Mr. Maloney contends that the learned trial Judge erred in admitting into evidence the gloves, the evidence of an expert of finding of a trace of human blood on one of the fingers thereof and that he also erred in admitting into evidence the towel and the evidence of experts of the finding of traces of blood

and semen thereon. Neither the towel nor the gloves were identified as belonging to any particular person and the blood and semen samples on the towel could not be related to any person.

No reference was made in the charge with respect to the towel and as to the gloves, the learned trial Judge said:

> There is one matter which I intended to mention to you and that is the gloves. The gloves were filed as exhibits here. These gloves came from the Burdick home. There is no evidence that they belong to the accused or were ever worn by him.

It was submitted that this was an insufficient direction in the circumstances.

Unless the gloves and the towel had some probative value relevant to one of the issues in this case, they were irrelevant and ought not to have been introduced into evidence. Similarly, the evidence of the analyst as to the finding of the traces of human blood and semen ought to have been excluded. In any event, if these things found their way into evidence by error, the jury should have been told in clear terms that they had no probative value so that the information was not simply left to be the subject of speculation. I asked myself to what issue were these things relevant in this case. What did they prove or tend to show? I cannot attribute to either any real evidentiary value, although no one said so to the jury. In my view, the evidence, having no nexus to the crime or to the accused, had no probative value and it was irrelevant and inadmissible: Picken...Further, I think the evidence was capable of being quite prejudicial for, without an explanation of the absence of real evidentiary worth, its speculative value is significant as linking the appellant to the offence through some sexual activity as the motive and suggesting that the killing

> took place in the appellant's house and the body was subsequently moved to the nearby field on that winter day. (Emphasis Added)

The improper admission of the evidence contributed to the necessity to order a new trial.

89. The admissibility of evidence which may be related to the particular crime in a circumstantial way is, we know, grudgingly acknowledged by the Courts. For example, in R. v. French (1977), 37 C.C.C. (2d) 201 (Ont. C.A.), aff'd on another ground 47 C.C.C. (2d) 411 (S.C.C.), the Crown chose to lead evidence about an unidentifiable blood drop on a Plymouth motor vehicle, and also of tire marks at the crime scene which corresponded to those of the Plymouth, but knowing that the particular kind of tires on the Plymouth were very common in the area. The Court made the following comment at p. 216:

> Another ground of appeal was that the evidence relating to tyre tracks and blood drops was inadmissible, or if admissible its prejudicial effect far outweighted its probative value. The evidence was certainly of little probative value but the inference sought to be drawn was reasonable, and the evidence was admissible. The trial Judge properly minimized the effect of the evidence by emphasizing how tenuous it was. He said with relation to the tyre marks: "...I would suggest to you that the evidence as to the marks is so vague and inconclusive as to be of little assistance to you...It seems to me that that evidence, which is circumstantial evidence of a possible presence of the Plymouth there that evening, is so weak, in the first place, as to be worth little weight, and in any event it is just as consistent with an explanation of some other vehicle being there, that you

> cannot attach much significance to it."
>
> With regard to the evidence of blood drops on the Plymouth, the trial Judge in his charge said this: "but again, I suggest to you that the evidence, taken by itself, is not very conclusive of anything", and "in my view, it is not very much to rely upon, or certainly not very much taken by itself, on which you can rest a conviction".
>
> These comments placed the evidence in a proper perspective and the objection to its admission is not well taken.

90. In addition to the question of connecting a particular article to the alleged offence and relating it to the narrative of the alleged offence given by a particular witness, there is an obligation upon the Crown to satisfy the trier of fact in any criminal case of the integrity of the exhibit - that the exhibit came from a particular source, and has not been so contaminated as to be worthless. In R. v. Andrade (1985), 18 C.C.C. (3d) 41, at pp. 61-62 (Ont. C.A.) Mr. Justice Martin explained that:

> Where the relevance of a particular item of evidence depends on whether it came from a particular source and there is conflicting evidence upon which the jury could find that the item came from the particular source upon which its relevancy depends, the jury must determine on the basis of the conflicting evidence whether the item came from that particular source. The trial judge is not empowered to weigh the conflicting evidence as to the source of the item and, on the basis of his finding, rule that the evidence with respect to that item is inadmissible. The issue as to the source of the item is for the jury if there is any evidence upon which they could find that the item came from the

> source on which its relevancy depends.
>
> ...
>
> Similarly, it was for the jury to decide if there was such a real possibility that the piece of knotted towel had been contaminated and that they should give no weight to Mr. Erickson's findings with respect to the hairs found on it. The trial judge placed before the jury in considerable detail the conflict in the evidence of Dr. Shoniker and Detective Van Dalen and strongly charged the jury that before they could act in any way on the evidence of similarity of hairs or fibres, they must be satisfied that the hair or fibre being compared had in fact the source attributed to it.....
>
> Similarly, whether the cardboard on which hairs of both the appellant and the deceased were found was seized from the appellant's van and whether the evidence with respect to the pieces of newspaper adhering to the blanket and the cardboard was fabricated were questions for the jury to decide.
>
> (Emphasis Added)

91. The authorities referred to in the previous paragraphs indicate that unless the potential exhibit can be connected with a particular individual, it adds nothing to the State's case against that or any other individual. If the article found can be connected with an individual, it is necessary to consider whether the exhibit relates at all to the particular crime involved directly or circumstantially. For example, it would not be particularly relevant to know that a footprint made by shoes similar to those owned by Roy Ebsary existed in the Park if the print was a common shape and size, if it was not known when the footprint had been made, or if no one

knew or could discover Roy Ebsary. The finding of a weapon could obviously have more specific relevance than the footprint to the specific crime charged or to be charged. Once such an objective appearance of relevance exists, then the exhibit's connection with the specific crime and a specific individual involved must be proven. It is therefore respectfully suggested within this legal context and any reasonable definition of the word "search", that the initial criterion in conducting a search must be whether there could be some apparent objective relevance to a particular article given the offence which occurred.

Conclusion

92. John MacIntyre directed a thorough search of the crime scene. That is an established fact. John MacIntyre's view as to how that thorough search would be best carried out in light of the lack of integrity of the scene itself can not be criticized. The officers knew that there had been a stabbing and thus were particularly searching for an article that could have been used as a stabbing weapon. Stabbing wounds produce blood, and it was reasonable for Constable John Mullowney to pick up a bloodied kleenex which he discovered. The existence of what appeared to be blood on this kleenex suggested some possible connection to the stabbing of the previous night. One could speculate that it could have added some corroboration to Marshall's testimony at the original trial about being wounded and receiving a kleenex to stanch the wound. No one will ever know if it was this kleenex, but it was possibly connected to a

stabbing crime. Nothing else of apparent objective relevance was found in the search, but that is no basis for concluding that the search was less than thorough.

93. The initial impression of a possible connection between the kleenex and the stabbing has never been confirmed but it indicates a very important fact about that Saturday morning search directed by John MacIntyre. Even though the scene of the crime had lost its integrity, MacIntyre's searchers were picking up anything which appeared to have some possible relevance to the previous night's stabbing. Otherwise, what independent value did the kleenex have? An alternative to the search directed by John MacIntyre would have been to simply collect every piece of debris in the Wentworth Park area and have it examined for a possible connection to this matter. It is respectfully submitted that that would not have been reasonable. That kind of examination may have been reasonable within a smaller area, which had been contaminated only by known persons at known times.

94. What the Sydney City Police did on Saturday morning, May 29, 1971, was reasonable in all the circumstances even though it only produced one exhibit which, when all is said and done, perhaps ought never to have been permitted in the trial of Donald Marshall, Jr., given the authorities referred to above. Therefore, we would suggest that this Commission ought to conclude that there was no carelessness or wilful failure on the part of John MacIntyre in relation to the matter of searching the crime scene. John MacIntyre directed that what was reasonable be

done, and it was.

D. Failure to Obtain Real Evidence at the Earliest Opportunity.

95. Real evidence in the form of physical objects or articles were gathered by the Sydney Police in relation to Sandy Seale's murder investigation, turned over to the R.C.M.P. Crime Laboratory, returned, and then offered into evidence upon the trial by the Crown. The criticism made of John MacIntyre's investigation with respect to real evidence was not only in his failure to secure real evidence from the crime scene, but also the failure to obtain the physical articles that were eventually introduced at trial, at the earliest opportunity. The first alleged failure has been dealt with in the previous section dealing with the search of the Wentworth Park area. This section deals with the handling of those items of real evidence which were secured elsewhere than at the Wentworth Park area: the yellow jacket, the brown coat, and the pair of blue jeans with blue belt.

The Yellow Windbreaker

96. Evidence at the Preliminary Hearing and the original trial indicated that Roy Gould loaned Donald Marshall, Jr. a yellow windbreaker with white stripes on the side on May 27, 1971, and which Donald Marshall, Jr. wore all day May 28, 1971, including when Roy Gould last saw him at approximately 9:30 p.m. on May 28, 1971. There were no rips or tears on the jacket at that time. Roy Gould next came into possession of the jacket on Wednesday, June 2, 1971, receiving it from Donald Marszhall,

Sr., and turning it over to Detective "Red" MacDonald of the Sydney Police. At that time the jacket had some bloodstains on it which Roy Gould had not known of before, and there was a rip on one of the sleeves (e.g., Exhibit 14 - R.v. 14, pp. 5-10). The jacket in question was identified by Donald Marshall, Sr. as having belonged to Roy Gould and being turned over to Mr. Gould from one of the closets in the Marshall home sometime during the week of May 31-June 4, 1971 (Exhibit 1 - R.v. 1, pp. 18-18). At Trial in 1971 Donald Marshall, Sr. indicated that the jacket so identified was in the same condition as it was when turned over to Mr. Gould (Exhibit 1 - Revised R. v. 1, p. [52-53 trial transcript]). Donald Marshall, Jr., was identified at the Preliminary Hearing and Trial as wearing a yellow jacket (R. v. 12, pp. 13, 19, and 21; 219), and indeed this was admitted by Marshall (Exhibit 2 - R. v. 2, pp. 7, 32-33).

97. Detective "Red" MacDonald received the yellow jacket from Roy Gould on June 2, 1971 and secured it until June 16, 1971 when he turned it over to A.J. Evers at the Crime Laboratory in Sackville, New Brunswick (Exhibit 12 - R. v. 12, p. 173; Exhibit 16 - R. v. 16, p. 92). "Red" MacDonald's statements at the Preliminary Inquiry that he received the jacket on June 22, 1971 appear to be mis-statements of what actually occurred in light of the statement taken from Roy Gould on June 7, 1971 at which time the police were already obviously in possession of the jacket in question (Exhibit 14 - R. v. 14, p. 3). "Red" MacDonald corrected his evidence at Trial (Exhibit 12 - R. v. 12,

pp. 171, 173).

Sandy Seale's Clothing

98. Also introduced in evidence at trial were a brown coat and a pair of men's blue jeans with a blue belt. On the night of the stabbing Richard Walsh, Brian Doucette, Leo Curry, and Dr. Naqvi undressed Seale at the hospital (Exhibit 1 - R. v. 1, p. 49; T. v. 7, p. 1299). Richard Walsh did not search this clothing, and no one else appears to have done so either (T. v. 9, pp. 1470-1471). The Record before this Commission indicates that Oscar Seale obtained trousers, boots, and the brown jacket belonging to and having been worn by his son that night. Oscar Seale took them to his home and gave them to his wife, who kept them in her possession until they were turned over to "Red" MacDonald (Exhibit 1 - Revised R. v. 1, pp. [Trial Transcript pp. 72-73]). At the 1971 trial "Red" MacDonald indicated that he had obtained the brown coat and "a pair of overalls" from Mrs. Seale on June 3, 1971. Those articles were kept in his possession until he turned them over to the Crime Laboratory at Sackville, New Brunswick (Exhibit 1 - Revised R. v. 1, pp. [Trial Transcript 54-55]). Counsel for Donald Marshall, Jr. in 1971 did not at any time question the continuity and integrity of these exhibits. Commission Counsel did question John MacIntyre on the continuity issue, but called no evidence to suggest contamination of these exhibits (T. v. 32, pp. 5972-5973).

Expert Examination of the Exhibits

99. It is evident from documents on file with the

Commission (Exhibit 16 - R. v. 16, pp. 92-95) that having been received on June 16, 1971 at the Crime Laboratory of the R.C.M.P., the yellow jacket and brown coat were examined for the presence of any "fresh" appearing cuts or tears, as well as for the presence of human blood. The blue jeans and the facial tissue were also examined at the Crime Laboratory for the presence of human blood. The exhibits were retained by the R.C.M.P. (Exhibit 16 - R. v. 16, p. 94) until the Preliminary Hearing at which time they were made exhibits (Exhibit 1 - R. v. 1, p. 61).

Conclusion

100. It is acknowledged that it may have provided more assurances of an uncontaminated group of exhibits if Sandy Seale's clothing and Donald Marshall, Jr.'s jacket had been secured by "Red" MacDonald at the Sydney City Hospital on the morning of May 29, 1971 rather than five or six days later. However, from then until now no evidentiary suggestion had ever been made on the part of anyone that Seale's clothing as turned over to "Red" MacDonald was any different than it had been at the time when "Red" MacDonald came in contact with Marshall and Seale at the Sydney City Hospital on the morning of May 29, 1971. With respect to the yellow jacket, no suggestion has ever been made that the five or six day delay inhibited the determination of the blood type of the blood spots on the yellow jacket and whether these relate to the Seale stabbing incident. It was only at Trial where evidence came out as to the source of some of the

cuts or rips on the yellow jacket, and the fact that they were not related to the slash or stab which Marshall himself had suffered. Marshall's evidence about the cuts to the jacket in 1971 made them irrelevant to the crime and thus did not need to be believed or disbelieved by the jury (Exhibit 2 - R. v. 2, pp. 32-33). Marshall's 1971 testimony on the point was given support at these Commission Hearings by Tom Christmas (T. v. 23, pp. 4161-4162). Any failure in 1971 to relate jacket cuts to a time after the alleged offence could only have assisted Marshall's credibility about a knife attack which, we suggest, was an appropriate reason for the Defence not to have questioned continuity of the exhibit at all in 1971.

101. The authenticity or integrity of these exhibits which were introduced at Trial in 1971 was really a matter of weight. There was no question about the source of the articles of clothing themselves. The only issues were with respect to the weight to be attached to them and their relevance to the guilt or innocence of Donald Marshall, Jr. No suggestion was made at any time that the articles of clothing were proof of anything other than as they appeared. The clothing could assist in the area of identification of Marshall for any purpose. Seale's clothing could provide evidence of consistency with a sudden attack rather than a stabbing after a struggle in which the clothing might have been newly stretched, torn or cut. Thus, it is respectfully submitted that upon a reasonable assessment of the real evidence secured and introduced into evidence, no real or reasonable

complaint can be made about John MacIntyre's conduct or approach. As one might conclude with respect to Harry Wheaton's seizure of Roy Ebsary's knives in 1982, it is not <u>when</u> exhibits are seized, but rather the <u>consistency of their condition</u> from the time of the alleged offence.